No. 89788-3
SUPREME COURT OF
THE STATE OF WASHINGTON

No. 43280-3
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RACHEL MARGUERITE ANDERSON (formerly RACHEL M. RODGERS), an individual

Petitioner,

v.

WILLIAM L.E. DUSSAULT, et al.

Respondents.

WELLS FARGO BANK, N.A.'S RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND INTRODUCTION

Wells Fargo Bank, N.A., by and through its counsel Smith & Hennessey PLLC, respectfully requests that this Court deny the Petition for Review of the October 1, 2013 Court of Appeals opinion in Anderson v. Dussault, 310 P.3d 854 (Wash. App. 2013). This decision upheld summary judgment in favor of Wells Fargo and its co-defendants on the grounds that Petitioner's claims are barred by the Trustees Accounting Act ("TAA"), RCW 11.106.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. The TAA bars any challenge by a trust beneficiary, including a minor, of trust distributions reflected in a trust accounting statement after the accounting statement has been approved by the Court and absent a timely challenge of that approval. Appointment of a guardian ad litem during TAA proceedings is in the court's discretion and is not mandatory under the TAA or the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A.

The trust instrument at issue and the doctrine of res judicata also independently bar Petitioner's claims, which lack merit in the first instance, because Wells Fargo did not breach its fiduciary duties.

2. By enacting RCW 11.96A.150(1), the legislature vested the Court of Appeals with discretion to award attorneys' fees to any party from any other party or from the trust assets, for any reason the Court "deems to be relevant and appropriate." The Court of Appeals properly exercised its discretion in awarding to Wells Fargo its attorneys' fees on appeal.

III. STATEMENT OF THE CASE

In 1997, Petitioner became a beneficiary of a special needs trust, and Wells Fargo became the trustee. Under the trust's terms, Wells Fargo had no authority over trust distributions—that authority was vested in the Trust Advisory Committee ("TAC"), comprised of Petitioner's then-attorney Richard McMenamin and her mother Andrea Davy. Between 2000 and 2006, pursuant to the TAA, the Superior Court reviewed and approved multiple trust accountings detailing distributions and expenditures of the trust. (CP 209-282.) Petitioner's interests during these proceedings were represented by her mother and natural guardian, Ms. Davy, with whom Petitioner resided during the majority of the existence of the trust. (CP 498.) No appeals were taken from the court's decrees.

On July 22, 2011, Petitioner brought this action, claiming that certain trust distributions and expenses incurred between 1998 and 2003 (which were reflected in the trust accounting statements long ago approved by the Court) were improper. (CP 470-504.) Wells Fargo and its co-defendants moved for summary judgment, arguing in part that Petitioner's claims were barred by the TAA and by the terms of the trust agreement. (CP 143-166.) Wells Fargo also argued that it did not breach its fiduciary duties. (Id.) The trial court granted summary judgment in favor of all defendants, and the Petitioner timely appealed. (CP 510-13.) On October 1, 2013, Division II of the Court of Appeals affirmed the Superior Court's summary judgment order.

IV. ARGUMENT

A. Appellant Should Not Be Permitted To Rely on Documents Which Are Not In the Record.

RAP 10.3(a)(8) provides that a party submitting an appellate brief may submit an appendix thereto. However, such an appendix "may not include materials not contained in the record on review without permission from the appellate court, except as provided in Rule 10.4(c)." RAP 10.3(a)(8). RAP 10.4(c) permits submission of the text of "a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like."

Petitioner has appended to her brief a copy of a letter dated November 11, 1983 from Kenneth Schubert, Jr., with excerpts from an enclosure that appears to be a draft version of Engrossed Substitute House Bill No. 1213 (collectively, the "Schubert Letter"). Petitioner's appendix oversteps the bounds of RAP 10.3(a)(8) and RAP 10.4(c). The Schubert Letter is not in itself the text of "a statute, rule, regulation, ... or the like." It is an unauthenticated document not in the court record, which is being introduced now for the truth of the statements made therein – specifically, Petitioner's assertion that the 1984 amendments to RCW 11.106.060 were made "for uniformity of procedure." (Pet. Br. at 9.) Such an appendix is outside the scope of RAP 10.4(c) and RAP 10.3(a)(8) and the Court of Appeals has not granted permission to supplement the record with the

Schubert Letter.[1] Wells Fargo respectfully submits that the Court should strike the Schubert Letter and any reference thereto from the record.

B. The Petition For Review Should Be Rejected Because Division Two's Decision Is Consistent With Current Washington Law, the Washington and U.S. Constitutions, And the Public Interest.

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither the petition for review nor the decision from the Court of Appeals raise any issues that would satisfy one of these four conditions.

1. Division Two's Decision Properly Accords the Clear Language of RCW 11.106.060 And RCW 11.106.080 Their Plain Meaning, Which Precludes Petitioner From Re-Litigating Her Claims Over a Decade After the Court's Decree Became Final

RCW 11.106.080 provides that:

> [t]he decree rendered under RCW 11.106.070 shall be deemed **final, conclusive, and binding upon all parties interested including all incompetent, unborn, and unascertained beneficiaries**

[1] While Petitioner moved the Court of Appeals to supplement the record, and the Court granted that motion, that motion was limited the trial court's orders denying the requests by defendants Dussault and Wells Fargo for attorneys' fees below. See Motion To Supplement the Record.

> of the trust subject only to the right of appeal under RCW 11.106.090.

RCW 11.106.080 (emphasis added). RCW 11.106.060 provides that in trust accounting statement approval proceedings, "The court shall appoint guardians ad litem as provided in RCW 11.96A.160...." RCW 11.96A.160, in turn, provides that "the court ... may appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person..." and that such a guardian ad litem is "to be paid from the principal of the estate or trust whose beneficiaries are represented." RCW 11.96A.160 (emphasis added).

Petitioner contends that the language of RCW 11.106.060 somehow modifies RCW 11.106.080 such that its preclusive effect does not become activated unless a guardian ad litem is appointed to represent the interest of the "incompetent" beneficiaries. This argument is untenable. The plain language of the TAA clearly articulates its intended preclusive effect and the legislature's intent to vest the court with discretion to appoint a guardian ad litem.[2] The mandatory "shall" in RCW 11.106.060 merely means that the Court may not look to any authority other than RCW 11.96A.160 to justify an appointment of a guardian ad litem, and must follow its provisions for compensation of such a guardian.

[2] To the extent this Court elects to rely on the legislative history of the statutes at issue herein, the comment to RCW 11.96A.160 (formerly RCW 11.96.180), which Petitioner has omitted from her appendix, provides that "This section allows the court to appoint a guardian ad litem at any time ... to represent incompetent parties." Trust Task Force of the Real Property, Probate and Trust Section, Washington State Bar Association, COMMENTS ON THE 1984 REVISION OF THE WASHINGTON TRUST ACT at 1737, available at http://www.wsbarppt.com/ comments/tra85.pdf. The use of the term "allows" rather than "requires" or "mandates" clearly shows the permissive nature of RCW 11.96A.160.

It does not override the permissive, discretionary nature of RCW 11.96A.160(1) itself. Any other interpretation of RCW 11.106.060, including that offered by Petitioner, is implausible and contrary to the statute's plain language.

Petitioner argues that Division Two's decision "violates the fundamental requirement of due process." (Pet Br. at 12.) Notably, Petitioner focuses on Division Two's decision and does not argue that the TAA itself is unconstitutional (either on its face or as applied to her) or that any portion of it should be struck down. Nor could she make such an argument, since neither the claims bar of RCW 11.106.080 nor the discretionary appointment of a guardian ad litem under RCW 11.106.060 offends a trust beneficiary's due process rights because both statutes are rationally related to a legitimate state interest:[3] to permit a trustee to curtail its exposure to future claims by voluntarily initiating a judicial review of its activities, and afford the beneficiary adequate process and an opportunity to be heard.

To the extent Petitioner relies on Schroeder v. Weighall, --- P.3d ---, 2014 WL 172665 (Wash. 2014), that decision is inapposite. In Schroeder, this Court struck down RCW 4.16.190(2)—a statute which

[3] Under Washington law, "acess to the courts is not recognized, of itself, as a fundamental right," and the proper standard of review under the due process clause of the Constitution is rational basis. Nielsen v. Washington State Dep't of Licensing, 209 P.3d 1221, 1227 (Wash. App. 2013).

excluded medical malpractice claims by minors from otherwise generally applicable claims tolling provisions—for violation of Article I, Section 12 of the Washington State Constitution. Here, Petitioner does not contend that RCW 11.106.060 and .080 offend Article 1, Section 12. Further, Division Two's decision does not conflict with Schroeder because the TAA's claims bar at issue in this case does not single out any class of persons for disparate treatment. On the contrary, the claims bar of RCW 11.106.080 is all-inclusive, applying to "all the parties interested including all incompetent, unborn, and unascertained beneficiaries." RCW 11.106.080 (emphasis added.) Conversely, the statute at issue in Schroeder affected only minors and failed "to eliminate tolling for other incompetent plaintiffs." Schroeder at *5. The Court found no reasonable ground for the statute's singling out of minors, and struck down the statute on that basis. Id. at *4-5.

Moreover, the Court noted in Schroeder that "compelling a defendant to answer a stale claim is a substantial wrong" and limiting such claims is an appropriate legislative aim. Id. at *4. Here, not only are the beneficiary's claims stale, but they also already have been adjudicated by the Superior Court. Adoption of the Petitioner's argument in this case would open the door to invalidating prior judgments in cases involving a minor that have been rendered without appointment of a guardian ad litem,

including in cases where the minor's interests were represented by a competent parent.

In addition, this Court noted in Schroeder that "minors generally do not constitute a semisuspect class" for equal protection purposes, and RCW 11.106.060 does not have a disparate impact on any subclass of minors because the court's power to appoint a guardian ad litem extends to all minors equally. The court's oversight of the trust accounting approval process affords ample protection to all trust beneficiaries, including all minors.

Petitioner's reliance on Gilbert v. Sacred Heart Medical Center, 127 Wn.2d 370, 900 P.2d 552 (1995) and Merrigan v. Epstein, 112 Wn.2d 709, 773 P.2d 78 (1989), is similarly misplaced. Division Two's decision in this case is in full accord with Merrigan and Gilbert. Gilbert in particular stands for the proposition that the court will not read into a statute any language that is not explicitly there, especially when the statute, as written, is unambiguous and can be harmonized with existing statutory provisions and purposes. Gilbert, 127 Wn.2d at 375. In both Gilbert and Merrigan,[4] the court set forth a well-reasoned analysis and application of the plain language of the statute at issue. Contrary to that approach, Petitioner argues that the TAA somehow obligates a trustee to

[4] Notably, in Merrigan, the minor claimant's mother was appointed as the guardian ad litem and acted in that capacity to represent the minor's interests.

"ensure that a beneficiary under a legal disability has a representative with the authority and responsibility to review and challenge its accounts." (Pet. Br. at 7.) The TAA contains no language which places such an obligation upon the trustee, and the court should not re-write the statute to impose such an obligation.

2. Washington Courts Do Not Look to Legislative History When the Statutory Language Is Unambiguous.

Under Washington law, "[i]f a statute's meaning is plain on its face, [courts] give effect to that plain meaning." State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Only if statutory language is ambiguous do we resort to aids of construction, including legislative history." Id. at 110–11. "When statutory language is unambiguous, we do not need to use interpretive tools such as legislative history." State v. Hirschfelder, 170 Wn.2d 536, 548, 242 P.3d 876 (2010).

As discussed in Section IV.B.1, supra, the meaning of RCW 11.106.060 is plain on its face. The legislature properly exercised its power to limit trust actions by beneficiaries after judicial approval of a trust accounting, and authorized discretionary appointment of a guardian ad litem for minors. "The legislature's power to enact a statute is unrestrained except where it is prohibited by the statute and federal constitutions." Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 291, 174 P.3d 1142 (2007). Petitioner urges the Court to find an ambiguity where none exists, and to rewrite the language of RCW 11.106.060 to reflect its pre-1984 amendment state. Respectfully, this

Court should decline Petitioner's invitation and leave intact Division Two's decision which is in full accord with existing case law, Barovic v. Pemberton, 128 Wn. App. 196, 114 P.3d 1230 (2005), and reflects the legislature's plain directive to leave appointment of a guardian ad litem in the discretion of the court.

3. Even If the Language of RCW 11.106.060 Were Ambiguous, Which It Is Not, the Statute's Legislative History Does Not Support The Meaning Advocated by Petitioner.

To the extent the Court is willing to examine the Schubert Letter as evidence of legislative intent behind RCW 11.106.060, it does not support the statutory interpretation advocated by the Petitioner. Appointment of a guardian ad litem is discretionary under RCW 11.96A.160, and Petitioner does not argue otherwise. If the legislature incorporated the provisions of RCW 11.96A.160 into RCW 11.106.060 to create "uniformity of procedure," it intended proceedings under the TAA to follow the same procedural rules as proceedings under TEDRA. Since appointment of a guardian ad litem is discretionary under TEDRA (RCW 11.96A.160), so should it similarly be discretionary under the TAA. Petitioner's strained argument to the contrary would have this Court contravene the very legislative intent cited by Petitioner, and make appointment of a guardian ad litem mandatory in TAA proceedings, but leave it discretionary under TEDRA. To avoid such a fallacious result, Wells Fargo respectfully requests that this Court deny the Petition for Review.

C. Additional Issues Not Addressed By The Court of Appeals Also Support a Finding In Favor of Wells Fargo.

1. The Plain Language of the Trust Agreement Is An Additional, Independent Basis for Preclusion of Petitioner's Claims.

Article IV(h) of the Trust Agreement provides that

> The assent to the Trustee's annual statement by the beneficiary or, if the beneficiary is not of full age and legal capacity, by a parent, legally appointed guardian, guardian ad litem, or other personal representative of the beneficiary, or the failure of such person to object to an account statement within 30 days of receipt thereof, shall operate as a full discharge of the Trustee by the beneficiary as to all transactions set forth in such annual statement.

Trust Agreement, Art. IV(h) (emphasis added). As Petitioner's parent, natural guardian and a member of the TAC until 2003, Andrea Davey participated in the TAC's decisions regarding Trust distributions and was provided quarterly account statements by the Trustee. (CP 209, 215, 228, 234.) Ms. Davey never raised any objections to any of the Trustee's reports. Accordingly, under the express terms of the Trust Agreement, Petitioner, through her parent, has waived her right to bring the instant action, and the Petition for Review should be denied.

2. Petitioner's Claims Against Wells Fargo Also Are Barred by Res Judicata Because She Did Not Appeal the Order of Summary Judgment In Favor of Andrea Davy.

All of Petitioner's underlying claims against Wells Fargo are premised on the allegations that Wells Fargo failed to adequately oversee Ms. Davy's reimbursement and trust distribution requests. (Petitioner's

Opening Appellate Brief at 26.[5]) However, the trial court entered summary judgment in favor of Ms. Davy and Petitioner did not assign any error to that decision. (Id. at 3; CP 510-13.) Petitioner's claims against Ms. Davy for misappropriation of trust funds are now res judicata. Accordingly, any alleged liability by Wells Fargo arising out of or based upon Ms. Davy's alleged wrongful acts also are res judicata. Ensley v. Pitcher, 152 Wn. App. 891, 222 P.3d 99 (2009); Cunningham v. State, 61 Wn. App. 562, 811 P.2d 225 (1991); Fite v. Lee, 11 Wn. App. 21, 521 P.2d 964 (1974). Stated differently, if Ms. Davy has committed no wrongdoing vis-à-vis the trust, Wells Fargo as trustee could not have committed any wrongdoing in its alleged failure to adequately monitor Ms. Davy's actions.[6]

3. Even If Petitioner's Claims Were Not Barred, Which They Are, Wells Fargo Did Not Breach Its Fiduciary Duties To Petitioner.

Under Washington law, a Trustee has the duty to administer the Trust in the interest of the beneficiaries, and to adhere to the prudent investor rule in managing the Trust assets. Tucker v. Brown, 20 Wn. 2d 740, 768, 150 P.2d 604 (1944); In re Estate of Cooper, 81 Wn. App. 79, 913 P.2d 393 (1996). The Trust Agreement vests Wells Fargo, as trustee, with the power and authority granted under the laws of the State of Washington, "except as modified by this Trust instrument." (CP 490.)

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[5] Stating that Petitioner's claim against Wells Fargo is based on Wells Fargo's "lack of 'watchful eyes'" over Ms. Davy's alleged misuse of the trust fund.

[6] Wells Fargo so contends without waiver of its position that under the express terms of the trust, during the existence of the TAC Well Fargo had no authority to supervise Ms. Davy's actions.

Since its inception, the Trust's stated purpose was to provide Petitioner with "extra and supplemental medical, health, and nursing care, dental care, developmental services, **support, maintenance, education,** rehabilitation, therapies, **devices, recreation, social opportunities, assistive devices** ...." (CP 481) (emphasis added). Under the Trust Agreement, the TAC, not the Trustee, was given full authority to accomplish the stated goals, and was "solely responsible for determining what discretionary distributions shall be made from this Trust." (CP 488.) The TAC was authorized to "provide such resources and experiences as will contribute to and make the beneficiary's life as pleasant, comfortable and happy as feasible." (CP 482.) The Trust Agreement expressly provided that "**[n]othing herein shall preclude** the Trust Advisory Committee from purchasing those services and items which promote the beneficiary's **happiness, welfare and development, including but not limited to** vacation and recreation trips away from places of residence, expenses for a traveling companion if requested or necessary, **entertainment expenses, and transportation costs.**" (CP 482) (emphasis added). Further, the TAC had "absolute and unfettered discretion to determine when and if Anderson needs regular and extra supportive services as referred to in the paragraphs above." (Id.)

Under the Trust Agreement, Wells Fargo's authority as Trustee was limited to financial management and investment of the Trust estate, and general Trustee powers under the laws of Washington. (CP 488, 490.) In that regard, the Trust expressly provides that "Trust corpus may from time to time include property other than cash, including, but not limited to, ... real estate and other personal property." (CP 481.) As Trustee, Wells Fargo was expressly authorized to "acquire, borrow, invest, reinvest, sell for cash or on terms, convey, exchange, transfer, mortgage, pledge, rent, lease for any term and otherwise manage any part of the Trust estate." (CP 491.) Wells Fargo was expressly authorized to

> **retain, without liability for so doing** any property, **real or personal, productive or unproductive,** of whatsoever nature and wheresoever situated, and specifically including any business which the Trustee may receive in Trust herein from any source regardless of whether the particular property so retained be of a kind and quality which the Trustee would ordinarily purchase for trust accounts, ... and regardless of whether such property if retained should constitute a larger portion of the Trust estate than Trustee would ordinarily deem advisable or prudent.

(Id.) (emphasis added).

All of the purchases and distributions challenged by the Petitioner were expressly authorized under the Trust Agreement. All of them were intended to make Petitioner's life more comfortable and/or serve as an educational tool, a social opportunity, or, at a minimum, a source of entertainment. Moreover, it was the TAC, following its charge within the Trust Agreement, that authorized these purchases, and Wells Fargo as trustee had no authority to override the TAC's authorization. To the extent any of the purchases at issue constituted a financial investment, their purchase and retention also falls well within the Trust Agreement's broad authorization to purchase and "retain, **without liability for so doing** any property, real or personal, productive or unproductive..." (Id.) (emphasis added).

Accordingly, there are no triable issues of material fact concerning Wells Fargo's compliance with its fiduciary obligations to Petitioner, and the trial court properly granted summary judgment to Wells Fargo.

D. Wells Fargo Is Entitled To An Award of Reasonable Costs and Attorneys' Fees Incurred on Appeal.

Division Two's decision to award Wells Fargo its attorneys' fees on appeal does not violate any existing law, Constitution or the public interest. Under TEDRA, the courts have clear discretion to award reasonable attorneys' fees and costs to any party in this action, and Washington courts frequently award attorneys' fees to parties in Trust and

estate disputes. RCW 11.96A.150; Bartlett v. Betlach, 136 Wn. App. 8, 146 P.3d 1235 (2006); Estate of Kvande v. Olsen, 74 Wn. App. 65, 871 P.2d 669 (1994); In re Irrevocable Trust of McKean, 144 Wn. App. 333, 183 P.3d 317 (2008); Matter of Estate of Cooper, 81 Wn. App. 79, 913 P.2d 393 (1996).

There simply is no support for Petitioner's assertion that TEDRA's grant of judicial discretion to award attorneys' fees would somehow discourage beneficiaries from protecting their interests. (Pet. Br. at 15.) On the contrary, beneficiaries have such a strong incentive to protect their interests that their desire to do so has the potential to offend good faith and existing law. The court's power to award attorneys' fees is aimed, in part, to temper that incentive and to make whole a defendant who was forced to expend significant time and money on a legal defense. See RCW 11.96A.150 (authorizing an award of attorneys' fees and costs to be paid "from the assets of the estate or trust involved in the proceedings.")

Here, Wells Fargo was not awarded attorneys' fees incurred at the trial level. (See Petitioner's Motion to Supplement the Record.) On appeal, however, Division Two found that Petitioner's claims against Wells Fargo "lack merit" and awarded Wells Fargo its attorneys' fees on appeal. Anderson, 310 P.3d at 862. Division Two's finding is supported by the Petitioner's claims in her Petition for Review. Whereas at trial and on appeal Petitioner argued that the TAA did not apply to her claims at all (id. at 861), she now contends that the TAA, namely, RCW 11.106.060, applies but that its purported provisions concerning appointment of a

guardian ad litem were not properly followed. Petitioner's abandonment of her previous legal position that the TAA does not apply is an admission that her claims below lacked merit. Thus, Division Two properly exercised its discretion in awarding Wells Fargo its attorneys' fees on appeal.

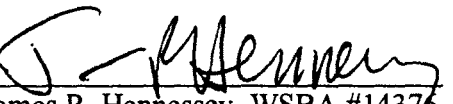
Under Washington law, a defendant who prevails on appeal in a case involving a trust dispute is entitled, in the Court's discretion, to an award of reasonable costs and attorneys' fees incurred on appeal. RAP 18.1; RCW 11.96A.150(1); Foster v. Gilliam, 165 Wn. App. 33, 58, 268 P.3d 945 (2011). Wells Fargo respectfully requests that the Court affirm Division Two's award of attorneys' fees on appeal and further exercise its own discretion to award Wells Fargo its expenses incurred in connection with the instant Petition.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 27th day of January, 2014.

SMITH & HENNESSEY, PLLC



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Attachments: Wells Fargo's Response to Petition for Review.pdf; Certificate of Service_Response to Petition for Review.pdf

Attached for filing with the Clerk's Office, please find Respondent, Wells Fargo Bank, N.A.'s Response to Petition for Review and Certificate of Service.

Case Name: Rachel Marguerite Anderson, Petitioner v. William L.E. Dussault, et al., Respondents
Case No. 89788-3

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