

NO. 43280-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant,

v.

WILLIAM L.E. DUSSAULT and JANE DOE DUSSAULT, husband and wife, and the marital community composed thereof; BARBARA J. BYRAM and JOHN DOE BYRAM, wife and husband, and the marital community composed thereof; YEVGENY JACK BERNER and JANE DOE BERNER, husband and wife, and the marital community composed thereof; WILLIAM L. E. DUSSAULT, PS, a Washington professional service corporation; the DUSSAULT LAW GROUP, a Washington corporation; RICHARD MICHAEL McMENAMIN and SHARI L. McMENAMIN, husband and wife, and the marital community composed thereof; MCMENAMIN & MCMENAMIN PS, a Washington professional service corporation; ANDREA DAVY (fka ANDREA RODGERS) and JOHN DOE DAVY, husband and wife, and the marital community composed thereof; and WELLS FARGO BANK, N.A., a foreign corporation

Respondents.

REPLY BRIEF OF APPELLANT
RACHEL MARGUERITE ANDERSON (corrected)

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TABLE OF CONTENTS

	Page
I. REPLY TO BRIEF OF WELLS FARGO BANK.....	1
A. Reply to Introduction.....	1
B. Reply to Counter-statement of Issues on Appeal.....	3
C. Reply to Counter-statement of the Case.....	3
D. Reply to statement of Standard of Review.....	6
E. Reply to Argument.....	6
1. Rachel’s statements are not supported by the record and are irrelevant to this appeal.....	6
2. Rachel’s claims are barred as a matter of law.....	11
A. The Trustees’ Accounting Act.....	11
B. The Terms of the Trust Agreement.....	16
C. The Doctrine of <i>Res Judicata</i>	18
3. Wells Fargo did not breach fiduciary duties owed to Rachel.....	20
A. Wells Fargo did not breach any duty in relation to the TAC... ..	20
B. The Trust Agreement gave Wells Fargo discretion to own and retain various property.....	22
4. Trustee fees.....	25
5. Attorney fees and costs on appeal.....	26
II. REPLY TO BRIEF OF DUSSAULT.....	26
A. Reply to Introduction.....	26

B.	Reply to Issues Presented for Review.....	26
C.	Reply to Statement of the Case.....	27
D.	Reply to Argument.....	30
1.	Rachel failed to preserve arguments below and fails to address other on appeal.....	30
2.	Rachel failed to address several key issues in her brief.....	31
3.	Rachel is collaterally estopped by failure to appeal a judgment purportedly dismissing Andrea.....	32
4.	Dussault owed no duty to Rachel.....	33
5.	The Trustee’s (sic) Accounting Act bars Rachel’s lawsuit.....	35
6.	Rachel’s failure to address other issues.....	35
7.	Attorney fees.....	35
III.	REPLY TO BRIEF OF McMENAMIN.....	36
IV.	CONCLUSION.....	38

TABLE OF AUTHORITIES

Cases – Washington

<i>Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 516, 799 P.2d 250 (1990).....	5, 6
<i>Barovic v. Pemberton</i> , 128 Wn. App. 196, 114 P.3d 1230 (2005).....	12, 13
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 199, 381 P.2d. 966 (1963).....	6
<i>Bates v. Bowles White & Co.</i> , 56 Wn.2d 374, 353P.2d 663 (1960).....	6
<i>Farrell v. Mentzer</i> , 102 Wash. 629, 632, 174 Pac. 482 (1918).....	12
<i>In re Guardianship of Karan</i> , 110 Wn. App. 76, 80-81, 38 P 3d 396 (Div. 3 2002).....	3
<i>In re Guardianship of Matthews</i> , 156 Wn. App. 201, 232 P.3d 1140 (2010).....	14
<i>Scott v. Pac. W. Mountain Resort</i> , 119 Wn.2d 484, 502-03, 834 P.2d.6 (1992).....	6, 20, 25
<i>State ex. rel. Bond v. State</i> , 62 Wn.2d 487, 491-92, 383 P.2d.288 (1963).	20, 25
<i>Trask v. Butler</i> , 123 Wash. 2d 835, 872 P.2d 1080 (1994)	26, 33, 34
<i>Tucker v. Brown</i> , 20 Wn. 2d 740, 768, 150 P.2d 604 (1944).....	22
<i>Woodley v. Myers Capital Corporation</i> , 67 Wash. App. 328, at 337, 835 P.2d 239 (Div. I 1992).....	20

Statutes

RCW 11.96A.150.....	26
RCW 11.96A.160.....	14, 15
RCW 11.106.010.....	12, 13
RCW 11.106.050.....	14

RCW 11.106.060.....	12,14,15
RCW 11.106.070.....	12
RCW 11.106.080.....	12, 15
RCW 11.106.090.....	12

Rules

CR 60	30
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I. REPLY TO BRIEF OF WELLS FARGO BANK

A. Reply to Introduction.

In its reply brief, Wells Fargo Bank, N.A. (“Wells Fargo”) claims the facts set forth by Appellant Rachel Marguerite Anderson (formerly Rodgers, born July 25, 1990 and hereinafter “Rachel”) in her opening brief are irrelevant because a number of statements are wholly unsupported in the record below and that none of the facts presented in her brief (is) material to the disposition of her claim against Wells Fargo. Wells Fargo brief at 2. Although the trial court stated no basis for its granting of the three Respondents’ collective motions for summary judgment, Wells Fargo contends the court below, in reaching its decision to grant summary judgment, found no dispute existed with respect to these facts:

(1) Wells Fargo regularly submitted accounts which were approved by the court without challenge by Rachel,

(2) all the expenditures from the Trust now objected to by Rachel were authorized by and in accordance with the authority of the Trust Advisory Committee (“TAC”), and

(3) the August 25, 1997 Trust Agreement (“the Trust Agreement”) expressly authorized Wells Fargo to exercise its discretion in retaining unproductive real property. Wells Fargo brief at 2-3.

Finally, Wells Fargo contends Rachel failed to submit competent testimony setting forth specific facts, as opposed to general conclusions, to establish that there were genuine issues of material facts in dispute. Wells Fargo brief at 3.

Contrary to what Wells Fargo has stated in the introduction to its brief, Rachel never disputed any of those three (3) facts. Wells Fargo has simply misstated what issues are in dispute.

The claims Rachel has brought in this action are based upon common law breaches of legal and fiduciary duties owed to Rachel, as the intended beneficiary of the Trust, by Wells Fargo as trustee of the Trust, by Richard Michael McMEnamin, Esq. and his firm (“McMenamin”) as a member of the TAC, and by William L. E. Dussault, Esq. and his firm (“Dussault), as Wells Fargo’s lawyer who, as discussed below, was obligated to act on behalf of Rachel as a non-client, which claims arose from the respondents’ joint and separate acts and omissions in carrying out their clearly stated responsibilities under the Trust Agreement and in accordance with the statutes and case law of this state.

As discussed in detail below, the facts set forth in the lay and expert declarations submitted by Rachel, in opposition to the summary judgment motions, presented specific facts and competent evidence (as opposed to general conclusions), which were un-rebutted by any lay or expert

declarations offered by respondents. Rachel's evidence demonstrated the existence of genuine issues of material facts upon which reasonable minds could differ. All such facts are to be viewed, and every reasonable inference therefrom is to be indulged, in a light most favorable to Rachel as the non-moving party. *In re Guardianship of Karan*, 110 Wn. App. 76, 80-81, 38 P 3d 396 (Div. 3 2002)

B. Reply to Counter-statement of the Issues on Appeal.

The trial court did not disclose the basis upon which summary judgment was granted to respondents. The issues on appeal are whether Rachel, in her complaint for breach of legal and fiduciary duties, has demonstrated the existence of a genuine issue of material fact to warrant submission of her case to a jury and whether her claims against respondents are barred by the Trustees' Accounting Act (the "TAA"), the language of the Trust Agreement, the Doctrine of *Res Judicata*, or some other basis asserted by Respondents.

C. Reply to Counter-statement of the Case.

In its brief, Wells Fargo claims the Trust properly disbursed funds to (i) purchase, insure, and maintain a motor vehicle to be used to transport Rachel to medical appointments, (ii) to pay Andrea to transport Rachel to those appointments, (iii) to purchase a partial interest in real property in Sequim for \$33,000 to be used as a residence for Rachel, (iv) to purchase

computer equipment, software, and internet access, (v) to pay \$1,500 in miscellaneous family-related expenses, and (vi) to pay the fees of the trustee and its lawyer. Wells Fargo brief at 5-7.

In response, Rachel set forth a different set of facts to support the elements of her causes of action against respondents. To establish her claims for breach of legal and fiduciary duties, Rachel filed declarations evidencing

(1) the use of Trust funds to purchase the motor vehicle by Andrea was misrepresented, the purchase benefitted Andrea and excused her basic parental support obligation, and the sporty vehicle (falsely reported as a minivan) was not used for Rachel's benefit. CP 56-62, 123-133, 134-137;

(2) the use of Trust funds to purchase the computer hardware, software, and internet access by Andrea was misrepresented, the purchases benefitted Andrea and excused her basic parental support obligation, and these assets were not used for Rachel's benefit (*id*);

(3) the use of \$33,000 of the Trust fund in June of 2000 by Andrea to purchase a 31% interest in real estate titled solely in the name of Andrea's short-term paramour, Joe Lancaster, where Rachel only briefly resided, was misrepresented, the purchase benefitted Andrea and excused her basic parental support obligation, and resulted in a loss of any Trust

investment earnings on that amount for a period in excess of four (4) years (the property was not sold and proceeds restored to the Trust until February 9, 2005. CP 396). CP 56-62, 123-133

(4) the multiple payments to Andrea from the Trust fund in the amount of \$100 each for transportation of Rachel to medical appointments which never took place directly benefitted Andrea and excused her basic parental support obligation CP 56-62, 123-133, 134-137

(5) the use of \$1,500 for “birthday” gifts, home remodeling, and other expenditures by Andrea was misrepresented, the expenditures benefitted Andrea and excused her basic parental support obligation, and such expenditures were not used for Rachel’s benefit (*id*); and

(6) the expenditure of Trust funds for excessive trustee and attorney fees which did not benefit Rachel. Rachel’s opening brief at 8-12, CP 480-482.¹

Clearly, these contrary positions represent an exposition of disputed facts upon which the outcome of the litigation depends and create genuine issues of material fact whether the respondents complied with their legal and fiduciary obligations under the Trust Agreement and applicable law.

Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

¹ Neither Wells Fargo nor Dussault submitted independent evidence their respective trustee and attorney fees were reasonable or otherwise presented competent evidence to contradict Wolfe’s opinion such fees were excessive for the services performed.

D. Reply to statement of Standard of Review.

The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a *strict* standard." *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d.6 (1992) (emphasis supplied). Allegations in pleadings submitted by Rachel, the non-moving party, must be taken as true. *State ex. rel. Bond v. State*, 62 Wn.2d 487, 491-92, 383 P.2d.288 (1963) ("*Bond*"). Doubts regarding the existence of a genuine issue of material fact are to be resolved in favor of Rachel, the non-moving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of fact exists to avoid a useless trial, not to resolve any factual issues on their merits. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d. 966 (1963). The summary judgment procedure may not be used to "try" a particular issue of fact; issues of fact must be determined at trial. *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353P.2d 663 (1960).

E. Reply to Argument.

1. Rachel's statements are not supported by the record and are irrelevant to this appeal.

Wells Fargo claims Rachel failed to properly cite the record regarding Rachel's factual claim Andrea had unfettered and un-monitored control of the Trust's bank account and checkbook without any scrutiny by Wells Fargo. Wells Fargo brief at 10. Wells Fargo is incorrect. Rachel provided citations to her own declaration (CP 58-60), to Rachel's accountant expert, R. Duane Wolfe, CPA ("Wolfe") (CP 128-129, 133), and to the declaration of Andrea's mother (Rachel's grandmother), Janet Aiken (CP 136), all setting forth numerous instances of Andrea's use/misuse of Trust funds without monitoring or scrutiny by Wells Fargo, the inference being that if Wells Fargo had had actual prior knowledge Andrea was going to use Trust funds for the purchases she made (which undeniably benefitted her), Wells Fargo and McMenamin would have clearly realized all such expenditures were contrary to the provisions of the Trust Agreement and the specific TAC "protocol" for considering and approving each Trust expenditure prior to any distribution by Wells Fargo (CP 493-494). Each of the expenditures described in the declarations cited in Rachel's opening brief clearly reflect a direct or indirect benefit to Andrea, thus triggering this TAC protocol for considering and approving each Trust expenditure which prohibited Andrea from participating in any vote to approve the expenditure and, because of Andrea's disqualification

as a TAC member, Wells Fargo automatically became the other voting member along with McMEnamin. (*id.*)

In its brief, Wells Fargo claims Rachel misstated the provisions of the Trust Agreement with respect to Wells Fargo's duty to monitor payments from the Trust to ensure all such payments go to the benefit of Rachel. Wells Fargo brief at 10-11. Wells Fargo is incorrect. Paragraph II (c) of the Trust Agreement states that the Trust funds shall not be used to fulfill the basic support obligation of Rachel's parents. (CP 483). Moreover, paragraph II (d) of the Trust Agreement clearly states that "all payments from this Trust which do go to the benefit of (Rachel) shall be direct payments to the person or persons who supply either goods or services to (Rachel) at the (TAC's) direction. (*id.*) The logical inference is Wells Fargo, the only entity with authority to make any payment from the Trust, "had a duty to monitor the payments from the Trust to ensure all such payments go to the benefit of Rachel." Rachel's opening brief at 10.

It is Wells Fargo who misstates the provisions of the Trust Agreement. Wells Fargo brief at 11 (last sentence of first paragraph). Contrary to Wells Fargo's statement that "Until the TAC was dissolved in June of 2003, Wells Fargo's role as Trustee was limited by the Trust Agreement 'to investment and management of the Trust Estate,' " (citing CP 488), Wells Fargo irrefutably had an active, hands-on role to serve as a

member of the TAC in conjunction with voting on each and every one of the expenditures proposed by Andrea. Those expenditures are now challenged by Rachel because, pursuant to the specific TAC protocol, since Andrea stood to benefit directly or indirectly by all the challenged expenditures, Andrea became disqualified to serve on the TAC and Wells Fargo automatically became a voting member of the TAC in accordance with paragraph IV (i) of the Trust (CP 493-494). Wells Fargo's statement that it was "never a member of the TAC" (Wells Fargo brief at 11) is directly contrary to the unambiguous language of the Trust Agreement (see paragraph IV (i) (ii) – yes, it is confusing, but that is the way Dussault drafted it – at page 19 of the Trust Agreement). CP 494

In her opening brief, Rachel states that prior to McMenamin's resignation from the TAC in 2002, "there had been improper trust fund withdrawals, distributions, and other losses which directly or indirectly benefitted Andrea...". Wells Fargo claims this statement is a "conclusory, unsupported and argumentative statement" and is "inappropriate in the recitation of the facts and should be disregarded by the Court." Wells Fargo brief at 12. However, Rachel's statement in her opening brief properly cites the declaration of CPA expert Wolfe (CP 132). In presenting its motion for summary judgment to the trial court, Wells Fargo offered no independent expert testimony to contradict Wolfe's conclusion.

Wells Fargo next asserts Rachel improperly now claims that the expenditures she disputes are not supported by “any records of approval by the (TAC)”. Wells Fargo brief at 12. In support of their summary judgment motions, neither Wells Fargo, McMenamin, nor Dussault offered any records to document approval of the TAC’s actions to approve the challenged expenditures.²

The trial court record would reflect that counsel for Rachel raised this point during the February 24, 2012 oral argument before Judge Roof. At the conclusion of counsel’s argument, Judge Roof queried all counsel whether any minutes or other records were kept of the TAC meetings. Counsel for all respondents advised the court that no such records were kept or maintained. The logical inference to be drawn therefrom, consistent with the conclusion set forth in Rachel’s opening brief, is that no minutes or other records were ever created or maintained with regard to decisions made at TAC meetings because, contrary to the mandatory meeting requirement of the Trust Agreement, no meetings of the TAC were ever, in fact, held and that Andrea merely made her own spending decisions and used the Trust checkbook in her possession in order to purchase what she wanted with the Trust funds.

² Moreover, in his declaration, Wolfe stated he found no records documenting the TAC’s compliance with the Trust Agreement protocol for meeting, discussing, and approving expenditures of Trust funds and addressing conflicts of interest in voting by TAC members. CP 126-132.

Wells Fargo next claims Rachel received notice of “withdrawals, distributions, and losses from (her) trust fund” by virtue of Wells Fargo providing quarterly statements to Andrea, Rachel’s mother, as a TAC member. Wells Fargo brief at 12-13. It is not easy to comprehend how Wells Fargo can make the claim Andrea was acting on behalf of Rachel and in her best interests. Wells Fargo brief at 13, footnote 1. The facts are clear and un-rebutted (by Andrea or by any of the respondents) that Andrea repeatedly accessed the Trust funds for her personal benefit. (CP 56-62, 123-133, 134-137)

Finally, Wells Fargo sets forth objections apparently based upon “surprise” claiming (i) lack of notice of the factual basis of Rachel’s claim until February of 2012, (ii) hearsay, and (iii) a challenge to Wolfe’s expert opinion. Wells Fargo brief at 14. Wells Fargo’s objections are not well-taken. Wolfe’s opinion letter was attached as Exhibit 2 to Rachel’s complaint, served on Wells Fargo in July of 2011. In the court below, Wells Fargo failed to interpose any objection to any of Rachel’s supportive declarations on the ground of hearsay. As previously stated above, Wells Fargo offered no independent expert testimony to refute Wolfe’s opinion.

2. Rachel’s claims are barred as a matter of law.

A. The Trustees’ Accounting Act.

Wells Fargo argues Rachel's claims are barred as a matter of law by the TAA (chapter 11.106 RCW) because Rachel³ failed to timely challenge the accountings Wells Fargo filed and which were approved by the trial court. Wells Fargo brief at 15 ff. Wells Fargo contends Rachel had thirty (30) days following each of the trial court's approval of the accountings to file a notice of appeal, under RCW 11.106.090, as a party in interest.⁴ Wells Fargo brief at 16-17.

In support of its argument, Wells Fargo relies upon RCW 11.106.070 to .090 and the case of *Barovic v. Pemberton*, 128 Wn. App. 196, 114 P.3d 1230 (2005). However, by its own terms, the TAA does not apply to this case because Rachel's Trust is outside the scope of RCW 11.106.010 and the *Barovic* case is inapplicable as discussed below.

The TAA applies to all trusts unless specifically excluded. RCW 11.106.010. The TAA is, however, limited in its scope to "express" trusts (i.e. a trust intentionally created by a person (the trustor) by which that person entrusts his or her property (the trust estate) to an independent third party (the trustee) for the benefit of a third party (the beneficiary). see *Farrell v. Mentzer*, 102 Wash. 629, 632, 174 Pac. 482 (1918). The TAA specifically excludes from its scope any trust "created by a judgment or

³ In 2003, the final year of accounting for which Rachel now presents a challenge, she had not yet attained the age of 12 years (CP 57).

⁴ As a 12 year old child, Rachel would not have been legally competent to even file a notice of appeal with the trial court.

decree of a superior court *when not sitting in probate.*” RCW 11.106.010 (emphasis supplied).

The *Barovic* case clearly involved a trust within the scope of the TAA because the trust in that case was an intentionally created express testamentary trust, established under a decedent’s will, but which was created by a superior court “sitting in probate” when the trial court appointed the trustee. *Barovic* at 198. However, as noted above, the TAA does not apply to trusts created by a superior court when *not* sitting in probate”. RCW 11.106.010. (emphasis supplied).

Rachel’s trust is *not* an intentionally created express trust. Neither Wells Fargo, McMenamin, nor Dussault “created” Rachel’s trust, because none of them contributed or entrusted any property to be held and administered in accordance with the terms of the Trust Agreement. Rachel was not a party to or otherwise participated in creation of the Trust Agreement (she was barely 7 years old at the time of its creation). CP 476. The Trust Agreement was established in a proceeding for approval of the settlement obtained in her personal injury action and therefore the Trust was “created by a judgment or decree of asuperior court when not sitting in probate” and thus not subject to the TAA. RCW 11.106.010. CP 476. Accordingly, Rachel’s claims against the respondents are not barred

by virtue of her failure (as a pre-teen) to appeal the accountings approved by the trial court in accordance with the procedure established by the TAA.

Even if this Court should determine the TAA applies to the Trust Agreement, a trial court's approval of a trustee's report is not binding on a minor beneficiary for which a guardian *ad litem* ("GAL") was not appointed to act on her behalf. RCW 11.106.060. Under the framework of the TAA, before a trial court can consider a petition to settle the accounting of the trustee in accordance with RCW 11.106.050, the court is **mandated** to appoint a GAL to represent the interests of a minor or an incapacitated person. RCW 11.106.060 and 11.96A.160 (1) (emphasis supplied). These two statutes are easily harmonized under the TAA. Their joint purpose is to direct that a court cannot hold a hearing to approve a trustee's account until an unrepresented minor beneficiary of the trust has first been provided with an effective representative to protect her interests at the hearing. This is consistent with the policy of this state that it is the trial court's duty to ensure the interests of the real party in interest (in this case Rachel) are protected. See *In re Guardianship of Matthews*, 156 Wn. App. 201, 232 P.3d 1140 (2010).

Although the respondents may attempt to point out that the appointment of a GAL under RCW 11.96A.160 (1) is *discretionary* ("The court...*may* appoint a (GAL)"...), it would be an incorrect and tortured

reading of these two statutes to say that RCW 11.106.060 unquestionably requires a mandatory appointment of a GAL but the addition of a reference in RCW 11.160.060 to RCW 11.96A.160 somehow reduces the mandatory GAL appointment to a discretionary appointment whereby a court could, in exercising its discretion, instead decline to appoint a GAL. A proper reconciliation of these statutes is that the reference in RCW 11.160.060 to RCW 11.96A.160 (in its entirety, not just to subsection (1)) is to provide the court with the necessary guidance surrounding for whom and under what circumstances a GAL must be appointed for purposes of a hearing on the petition to settle the trustee's account.

In view of the mandate of RCW 11.106.060 to appoint a GAL and the failure of any of the respondents to secure a GAL for Rachel, RCW 11.106.080 cannot operate as a bar to Rachel's claims against the respondents and that statute cannot form the basis for the trial court's grant of summary judgment. This is consistent with our cultural sense of fundamental fairness and due process that no person (especially a child) should be bound by any judicial action where that person was never provided with any meaningful notice and opportunity to participate and have her position presented to the court. One must step back and, in looking at RCW 11.160.080, ask a fundamental question: did the legislature truly intend that a court's approval of a trustee's report which,

if objectively examined, showed the trustee (and its surrogates) violated the terms of the trust, should be permanently binding upon a minor or incapacitated beneficiary where her interest was not represented in conjunction with the court proceeding which approved the accounting? One must conclude such was not the intent of the legislature.

But what is particularly egregious in this case is that all the respondents were made aware of the concerns of Rachel's grandmother and her father (Ken Chace III) that Andrea had repeatedly expended Rachel's Trust funds in a manner which directly or indirectly benefitted Andrea to the detriment of Rachel and the trust funds which were to ensure her lifetime care. These concerns were expressed in letters written to Wells Fargo, McMenamin, Dussault, and Andrea by Carl Gay and yet not one of these parties sought the appointment of a GAL for Rachel. CP 68-71. Rather, following receipt of these letters, Dussault took action to have Rachel's court file sealed, thus prohibiting further scrutiny by those who clearly had Rachel's best interest at heart. CP 73

B. The Terms of the Trust Agreement.

Wells Fargo argues Rachel's claims are barred as a matter of law by the terms of the Trust Agreement because she failed to timely object to the trustee's periodic account statements. Wells Fargo brief at 19 ff. To support its argument, Wells Fargo points to paragraph IV (h) of the Trust

Agreement which (i) requires the trustee to make an annual statement of transactions and assets, (ii) requires a copy of said statement to be delivered to Rachel, and (iii) provides that if Rachel (or a parent of Rachel) fails to object to an account statement within 30 days of receipt thereof, such failure to object shall operate as a full discharge of the trustee by Rachel as to all transactions set forth in such annual statement. CP 493.

Prior to November 30, 2009 (after she attained the age of majority⁵), Rachel was never provided with a copy of the trustee's annual statement and thus could not even assert any objection. CP 347. As soon as Rachel's father and grandmother became aware of improper financial distributions under the Trust Agreement, they interposed an objection, through the letters sent by Carl Gay, well prior to the trial court's approval of the trustee's 2002 annual statement on July 11, 2003 (CP 68 and 347). It is preposterous for Wells Fargo to claim that Andrea was acting as Rachel's "notice agent" for purposes of receiving and objecting to the trustee's annual statement, in view of Andrea's blatant pattern of improper self-dealing contrary to Rachel's best interests. But the most straightforward basis for debunking Wells Fargo's claim the terms of the Trust Agreement independently bar Rachel's claims is that Rachel was never a party to the Trust Agreement and, therefore, there is no enforceable

⁵ In her action for breach of legal and fiduciary duties, Rachel is not raising any objection to any expenditure or investment of her Trust funds after she became an adult.

contractual basis upon which she can be bound by its terms, including the provision giving her 30 days to file an objection to the trustee's annual statement.

C. The Doctrine of *Res Judicata*.

Wells Fargo argues Rachel's claims are barred under the doctrine of *Res Judicata* on the basis that Rachel's father and grandmother, through their engagement of Carl Gay to write letters, somehow rises to the level of a separate superior court lawsuit which meets all the elements of that doctrine. Wells Fargo brief at 22 ff. This argument is flawed in that the court proceeding to review and approve the trustee's 2002 annual statements was not an adversarial proceeding in which Rachel participated as a litigant (she was under the age of 13 at the time). As previously stated herein, Rachel's current lawsuit is not an action seeking to undo the court's serial approvals of Wells Fargo's annual statements prior to Rachel becoming an adult, so there is no element of unity to establish claim preclusion. As also stated above, Rachel does not dispute the historical fact that Andrea (admittedly contrary to the TAC protocol) made the distributions and expenditures as reported by the trustee. During that period, Rachel's underlying claims against the respondents for breach of legal and fiduciary duties were being quietly tolled under the applicable statutes of limitations.

However, what can only be characterized as perplexing is the claim of Wells Fargo that *Res Judicata* bars Rachel's present lawsuit because her father and grandmother "raised the same issues" through Mr. Gay's letters, even though the letters were never filed with the court, Mr. Gay never filed a notice of appearance, and neither Mr. Gay, Rachel, nor her father or grandmother ever appeared in any courtroom at any hearing. CP 66-67, 88-89. Evidently (in the opinion of Wells Fargo), these unfiled letters constituted the equivalent of a summons and complaint and the court's subsequent approval of the trustee's annual statements amount to a final judgment on the "claims" raised in those letters.

With regard to the claim of Wells Fargo that Rachel was, for *Res Judicata* purposes, "in privity" with her father and grandmother, such could not be the case as privity entails a contractual relationship and, as previously stated, at all times material Rachel was under the age of 13 and lacked legal competence to enter into a contract with anyone. For privity to have existed in the "prior action" (the court's consideration of the trustee's 2002 annual statement) in a manner which now bars Rachel's present lawsuit, Rachel's father and grandmother would have had to (i) succeed to Rachel's interest in her current claims against respondents, (ii) controlled the prior action, and (iii) Rachel would have had to actively and adequately represent her father's and her grandmother's interest in the prior action.

Woodley v. Myers Capital Corporation, 67 Wash. App. 328, at 337, 835 P.2d 239 (Div. I 1992). None of these elements is present in this case. There is no basis to conclude that Rachel's pending lawsuit is barred by the doctrine of *Res Judicata*.

3. Wells Fargo did not breach fiduciary duties owed to Rachel.

A. Wells Fargo did not breach any duty in relation to the TAC.

Wells Fargo argues it did not breach any duty in relation to the TAC and that 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 the state of Washington. Wells Fargo brief at 27. Wells Fargo further claims that all the expenditures to which Rachel now objects were the result of decisions made by the TAC. Wells Fargo brief at 28.

Wells Fargo claims that all the challenged purchases were consistent with the Trust Agreement because they met Rachel's needs for education, socialization, entertainment, and transportation, leading to a "more comfortable" life for Rachel. Wells Fargo brief at 28. But the declarations submitted on Rachel's behalf in opposition to the summary judgment motions contest, in specific detail, each such claim and present a picture (which this Court must presume is a true picture under *Bond* at 491-492) that the challenged purchases benefitted Andrea and not Rachel, that many purported Trust expenses were fictitious ("phantom"), were merely a

means for Andrea to easily access cash in Rachel's Trust fund, or were spent on the family "home" well after Rachel moved to her father's house. CP 56-62, 123-133, and 134-137. None of the respondents has offered any declaration from any party or person based upon personal knowledge which either disproved Rachel's supportive declarations or presented contrary evidence sufficient to create material factual disputes.

What Wells Fargo has failed to address in its brief is the argument presented in Rachel's opening brief that Wells Fargo's role went beyond general trustee powers related to the financial management and investment of the Trust estate. Even if Wells Fargo refused to concede Andrea was unilaterally writing checks on the Trust bank account without any proper compliance with the TAC protocol (CP 493-494), upon receipt of Mr. Gay's August 27, 2001 letter, Wells Fargo was charged with knowing that the TAC protocol was not being followed under the letter and spirit of the Trust Agreement. Wells Fargo knew (its legal counsel, Dussault, had drafted the Trust Agreement) its role was now automatically expanded to include being a voting member of the TAC and thus responsible, along with McMenammin, for considering and approving all trust expenditures. (*id.*). Yet Wells Fargo took no steps to carry out this duty or to timely remedy the misappropriations of Trust funds which had occurred. A trustee has a duty to administer the trust in the interest of the beneficiary.

Tucker v. Brown, 20 Wn. 2d 740, 768, 150 P.2d 604 (1944). Wells Fargo was not entitled to a summary judgment dismissing Rachel's claim for its breach of fiduciary duties.

B. The Trust Agreement gave Wells Fargo discretion to own and retain various property.

Rachel does not dispute Wells Fargo had discretion to own and retain property in accordance with the guidelines set out in the Trust Agreement. However, the question presented by Rachael's claim for breach of fiduciary duties is whether Wells Fargo's exercise of discretion in owning and retaining property was reasonable or whether it was inconsistent with and in violation of a trustee's fiduciary duties. see *People's Nat. Bank of Seattle v. Jarvis* and the other cases cited by Wells Fargo at page 30 of its brief. In support of its argument that Wells Fargo's exercise of discretion in owning and retaining trust assets was reasonable, it offers the expenditure, challenged by Rachel, of \$33,000 to purchase a 31% interest in a parcel of Sequim residential real property ("the Sequim property"). Wells Fargo brief at 30 ff.

If the evidence Rachel submitted in opposition to Wells Fargo's summary judgment motion clearly and convincingly established the existence of a genuine issue of material fact with regard to the Sequim property and whether Wells Fargo's exercise of discretion in owning and retaining it was reasonable, then Wells Fargo was not entitled to its

summary judgment dismissing Rachel's claims. The evidence Rachel produced on the issue of whether Wells Fargo's exercise of discretion was reasonable was as follows:

1. In June of 2000, Andrea wrote a check on the Trust bank account for \$33,000 and these funds were used by Andrea's paramour, Joe Lancaster, to acquire title in his sole name to purchase the Sequim property. CP 356-357, 360, 363-364, 366, 370, 379-380, 387-388, 396, 405, and 407;

2. No records exist which documented any TAC action to consider and approve this expenditure or to consider whether such an expenditure directly or indirectly benefitted Andrea (CP 130);

3. In August of 2001, slightly more than one year after Andrea wrote the \$33,000 check, Wells Fargo was notified in a letter from Carl Gay that Trust funds were used to acquire the Sequim property with no title reference to ownership of any interest therein by the Trust (CP 68);

4. In August of 2002, one year later, Lancaster conveyed a 31% interest in the Sequim property to Wells Fargo as trustee. See CP citations under paragraph 1 above;

5. During the majority of time the Trust owned the Sequim property, Rachel did not reside in that house or receive any benefit from the Sequim property, although funds from her Trust were used to remodel and

improve the Sequim property and to pay a portion of the real property taxes (CP 129-130); and

6. Neither Andrea nor Lancaster paid any rent or otherwise provided any consideration to the Trust and the Trust received no return on its investment of \$33,000 in June of 2000 until the Sequim property was sold in February of 2005 (43 months later) and the trust realized net sale proceeds of \$46,686 (less real property taxes paid from June 2000 to February 2005). CP 129-131, 396. This amounted to an economic loss to the Trust in excess of \$20,000. CP 68-69 and 129-131. There was no evidence proving any fire and other casualty insurance was in place to protect the Trust's interest in the Sequim property. If Lancaster had died, been sued, filed bankruptcy, was subject to a divorce or related domestic proceeding, or was otherwise exposed to any third party claim, the Trust would have incurred significant expense to recover its investment in the Sequim property. For the Trust to have become a "co-tenant" with Lancaster (as claimed by Wells Fargo) without a proper lease or other document in place to define the respective rights, liabilities, and entitlements of the parties with respect to the Sequim property, further reflects a deficiency on the part of Wells Fargo in terms of reasonable exercise of its discretion in owning and retaining property.

The foregoing facts presented by Rachel, which must be taken as true (*Bond* at 491-92) and which were uncontroverted by any of the respondents in the trial court, clearly and convincingly established the existence of a genuine issue of material fact with regard to the Sequim property and whether Wells Fargo's exercise of discretion in owning and retaining it was reasonable. Wells Fargo was not entitled to its judgment dismissing Rachel's claims.

4. Trustee fees.

Rachel does not dispute Wells Fargo's entitlement to compensation under the Trust Agreement. However, she has produced uncontroverted independent expert testimony that the trustee fees charged by Wells Fargo were excessive (CP 131-132) and in her opening brief she addressed, as part of her cause of action against Wells Fargo for breach of fiduciary duties, her claim regarding the reasonableness of those fees and made appropriate citation to the record. Rachel's opening brief at pages 9-13. Rachel has again presented specific facts, which for purposes of Wells Fargo's summary judgment motions must be viewed in her favor and deemed to be true, which clearly demonstrate that a genuine issue of material fact exists relative to the reasonableness of trustee fees and whether the amount paid constituted a breach of a fiduciary duty.

5. Attorney fees and costs on appeal. This issue will abide the Court's substantive disposition of this appeal. If the Court affirms the decision of the trial court, this Court should adopt the analysis and finding of Judge Roof (which has not be appealed by Wells Fargo) whereby he concluded, exercising his discretion under RCW 11.96A.150, that it would be inequitable to award Wells Fargo any attorney fees and costs in this matter. CP 22.

II. REPLY TO BRIEF OF DUSSAULT

A. Reply to Introduction.

In the introduction to Dussault's brief, he claims "(Rachel) has now abandoned her claim that Dussault breached a fiduciary duty to her, but continues to claim that Dussault's actions fell below the standard of care to her." Dussault brief at 1. Rachel has never claim Dussault owed her any fiduciary duty but rather her claim was limited to one alleging Dussault, as legal counsel for Wells Fargo, had a duty to Rachel as a non-client based upon the multifactor balancing test laid out in *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994) ("*Trask*"). Rachel's brief at 17-23.

B. Reply to Issues Presented for Review.

While it is understandable Dussault would disagree with Rachel's characterization of the issues presented for appeal, Dussault's re-characterization of the issues is simply a vaguely disguised preface to the

arguments he later presents in his brief. In granting summary judgment motions, trial courts do not enter findings because the court concludes there are no material factual disputes. Thus it is inappropriate for Dussault to attempt to graft such findings onto the trial court's order and then claim they present issues to this Court.

C. Reply to Statement of the Case.

In discussing the trial court's ultimate approval of the trustee's two-year report, Dussault claims that on July 11, 2003, Judge Williams approved the two-year report "over Mr. Gay's objections". Dussault brief at 6. With all due respect, this is a blatant distortion of the truth and exposes a continuing attempt by the Respondents to perpetuate the deception that Rachel's father and grandmother appeared, intervened, or otherwise participated as litigants in the court hearing before Judge Williams concerning his consideration and approval of the trustee's two-year report.

It is important for the Court to understand the extremely limited involvement of Rachel's father and grandmother in this case, particularly in the context of the Court's consideration of the respondents' claim that Rachel's lawsuit is barred under the doctrine of *Res Judicata*. Set forth below are excerpts from pleadings filed by Rachel in opposition to the

summary judgment. None of the respondents provided any evidence or testimony to contradict the statements contained in these excerpts.

This is an excerpt from the February 12, 2012 DECLARATION OF CARL LLOYD GAY filed in the trial court on Rachel's behalf in opposition to the respondents motions for summary judgment:

3. Contrary to the briefs and declarations filed by defendants in support of their summary judgment motions, at no time did I appear in the original trust proceeding, cause number 97-4-00203-6. To the best of my knowledge, at no time did I appear at any hearing in that action and specifically I did not appear in front of a court commissioner and "complain" about actions by Wells Fargo Bank or others. Prior to a hearing on a petition to approve an annual report of the trustee, I received a notice of issue from Mr. Dussault's associate, Yevgeny Jack Berner. I went to the courthouse on the day of the hearing and met with Mr. Berner in the hallway outside the courtroom. I told him I did not believe Mr. Dussault had addressed and corrected the problems raised. Mr. Berner agreed to go into the courtroom and ask the court commissioner for a continuance so the matter could be re-set in front of Judge Williams. I was not present in any courtroom at any time on this matter. There were no "objections" presented to Judge Williams by me at any time nor was anything filed by me in the court file for cause number 97-4-00202-6 until I sought access to the court file in June of 2011 after I had been engaged by Rachel to pursue her claims.

4. When Rachel hired me, I sought access to the court file in cause number 97-4-00203-6 but learned from the clerk's office that the file had been sealed. I contacted Mr. Dussault to inquire whether he would stipulate to an order allowing the file to be unsealed for the purpose of my reviewing the seven volumes of the file and making copies. He would not so stipulate. It was then necessary for me to bring a motion and to obtain an order shortening time for it to be heard, in view of Rachel attaining the age of 21 years in a matter of weeks. I filed and served the motion and order on Mr. Dussault. Just prior to the date of the court hearing, Mr. Dussault's associate, Barbara Byram, gave me telephone authorization to approve the order on her behalf. (CP 66-67).

Additionally, this is an excerpt from the February 14, 2012 BRIEF OF PLAINTIFF IN OPPOSITION TO SUMMARY JUDGMENT MOTION filed in the trial court:

15. Contrary to the defendants' summary judgment motion, Carl Gay never filed an appearance in the original action (Clallam County cause number 97-4-00203-6) nor did he ever file anything with the court, make an appearance at any hearing, or otherwise present to the court any challenge to the defendants' actions. *Declaration of Carl Lloyd Gay*. In response to Carl Gay's letters, Mr. Dussault did not rectify the issues raised but, instead, the defendants "circled the wagons" and arranged for the sealing of the court file so neither Carl Gay nor Rachel nor anyone else could access the record. Mr. McMenemy resigned and Wells Fargo Bank got a court order to dissolve the Trust Advisory Committee. Although Mr. Dussault took prompt action to lock-up the court file and promised to resolve the inappropriate use of \$33,000 of Rachel's trust fund to purchase real property in the name of Andrea's boyfriend, it was not until five years later that those funds were actually recovered and restored to the trust. (CP 88-89).

Judge Williams was never provided with Mr. Gay's letter, although in presenting Wells Fargo's report, Dussault apparently advised Judge Williams that certain concerns had been raised. CP 376. The logical inference to be drawn is that Judge Williams relied upon Dussault's assurances that all objections raised by Rachel's family had been addressed or would be in the near future, and so the accounting was approved.

Dussault makes a further misstatement in his brief by contending that in addition to his motion for summary judgment, "the other defendants also moved for summary judgment of dismissal". Dussault brief at 8. Although Wells Fargo and McMenemy also moved for dismissal, at no time has Andrea ever sought dismissal of Rachel's claim against her. Judge Roof's February 28, 2012 ORDER ON MOTION granting summary judgment is expressly limited to Dussault, Wells Fargo, and McMenemy, and Judge Roof clearly did not include Andrea as one of the "identified"

defendants whose motions were being granted. CP 20-22. This is an important factual clarification for this Court to understand because later in Dussault's brief he claims he has "an additional reason" to support the trial court's decision because Rachel "has not appealed (Andrea's) dismissal" and thus is collaterally estopped from pursuing her claims as well as this appeal. Dussault brief at 13-16. As discussed below, Dussault's claim of collateral estoppel is fatally flawed.

D. Reply to Argument.

1. Rachel failed to preserve arguments below and fails to address others on appeal.

Dussault contends CR 60 applies and that Rachel's failure to bring a motion to set aside the court approvals of the trust accountings within one (1) year of her attaining adulthood constitutes a basis for upholding the trial court's grant of summary judgment. Dussault brief at 12. As discussed above, at no time has Rachel (who at the time was a pre-teen) sought to set aside the court approvals of the trust accountings because she does not dispute the fact that the trial court approved what Dussault and Wells Fargo reported to the court. Rachel's lawsuit is an independent cause of action against a lawyer and trust fiduciaries and presents claims which were tolled during her minority.

Dussault next complains that Rachel failed to respond in her brief to Dussault's theory that Wells Fargo was not entitled to rental income from the Sequim property. Dussault brief at 12. Rachel did respond. see Rachel's opening brief at 26-30.

Finally, Dussault claims Rachel failed to offer specific facts to support her challenges to Trust expenditures and to prove they were in violation of the Trust Agreement. Dussault brief at 12. Rachel did present evidence the challenged expenditures were not properly authorized. see Rachel's opening brief at 26-30.

2. Rachel failed to address several key issues in her brief.

Dussault states that Rachel's failure to address in her opening brief certain issues raised below by respondents now bars her from addressing them in her reply brief. Dussault brief at 13. Dussault misunderstands the obligation of an appellant.

In seeking reversal of a summary judgment, the non-moving has the burden of production to establish there are genuine issues of material fact with regard to all elements of her cause of action (in this case, an action for negligent breach of legal and fiduciary duties). Rachel did so in her opening brief. If an appellant shows she is entitled to present her case to a jury, it is the respondents who then have the burden of production to demonstrate that, notwithstanding appellant having established her right to

a trial, the appellant's case fails upon some other legal basis or theory. Rachel has, in this reply brief, responded to those legal theories.

3. Rachel is collaterally estopped by failure to appeal a judgment purportedly dismissing Andrea.

This is a non-issue. Andrea has not been properly dismissed from this action. Dussault's claim the May 4, 2012 judgment dismissing Andrea cannot be sustained. At most, the judgment contains an error potentially needing to be corrected *nunc pro tunc* should this Court reverse the order granting the summary judgment motions. Courts do not, *sua sponte*, dismiss defendants without any legal basis. Although Dussault may read the judgment as dismissing Andrea, there is nothing in the record to support that interpretation. Andrea never brought any motion seeking dismissal of Rachel's claim against her nor did Andrea join in any motion to dismiss submitted by any respondent(s). There is no trial court order of dismissal in favor of Andrea upon which a judgment dismissing her can rest. The trial court lacked any authority or basis to dismiss Andrea and there is nothing in the record to show that was even the trial court's intent. Moreover, this issue is moot. If this Court reverses in favor of Rachel, the judgment which Dussault claims dismisses Andrea will be stricken (since there will no longer be any order upon which it can be based) and Rachel's claims against all defendants will proceed. Andrea is effectively judgment-proof and so this matter will not proceed if the trial court is affirmed.

4. Dussault owed no duty to Rachel.

Dussault claims he does not come within the scope of *Trask* and its progeny and thus owed no duty to Rachel as a non-client. Dussault brief at 16 ff. Dussault claims his role was limited to preparing and presenting annual reports and that he never represented the TAC. Dussault brief at 16-17. Rachel agrees with Dussault that her claim revolves around her position the Trust was wrongly administered. *id.*

Dussault was the father of the Trust and the drafter of all its provisions. CP 286. He cannot deny that when he accepted his engagement as counsel to Wells Fargo, he recognized his handiwork and had intimate knowledge of all of the Trust's provisions which he created, including without limitation the precise protocol he crafted for consideration and approval of each and every proposal for expenditure of Trust funds by the TAC, the ethical strictures imposed on TAC members, and the obligation of Wells Fargo to become the other voting member of the TAC should there be any possibility a TAC action might be tainted. CP 493-494.

Dussault cannot hide behind a claim he was merely processing paperwork. Dussault was made aware of violations of the Trust by Wells Fargo, McMenamin, and Andrea⁶. He gave assurances to Carl Gay (and presumably to Judge Williams) that any shortcomings would be rectified,

⁶ Wolfe suggested that had Dussault performed detailed report preparation some of the challenged expenditures would have come to light. CP 131.

but he unquestionably failed to correct the violations and failed to obtain restoration of the misspent funds of the Trust. see Rachel's opening brief pages 17-24. Moreover, Dussault cannot claim ignorance that, upon recognizing the direct and indirect benefits Andrea was receiving from Trust expenditures (beginning with his preparation of the first annual trust accounting and well before the letters he received from Mr. Gay), he was unaware his client, Wells Fargo, had automatically (and, arguably, retroactively to Andrea's purchase of an expensive new Mercury Tracer, and not a minivan. CP 351) become a member of the TAC and bore responsibility, in light of the high standard of care owed by a trustee to a beneficiary, to stop the bleeding and restore the health of the Trust on behalf of and in the best interests of its beneficiary.

Dussault can likewise not deny he knew Rachel was the "intended" beneficiary of that trust under the *Trask* test and that the misdeeds by Andrea (for whom the other trustees, Wells Fargo and McMEnamin were responsible) were harmful to Rachel. In her opening brief, Rachel established that each of the other elements of the *Trask* multifactor test have been met. see Rachel's opening brief 20-24. The expert opinion of Gary Colley that Dussault breached his duties to Rachel under the *Trask* criteria was never even challenged, let alone controverted, by Dussault. Rachel has established both a factual and legal basis to be granted her day

in court, and the summary judgment in favor of Dussault should be reversed.

5. The Trustee's (sic) Accounting Act bars Rachel's lawsuit.

Dussault offers no new or significant variation from the argument of Wells Fargo on this issue. see Rachel's reply regarding the TAA above at 11-16.

6. Rachel's failure to address other issues.

Rachel has also previously addressed these issues. see Rachel's reply set forth above at 16-20.

7. Attorney fees.

Contrary to Dussault's claim, this is not a case arising out of equity. Dussault brief at 30. This is an action at law for breach of fiduciary duties and legal malpractice. However, what is particularly revealing is that in arguing entitlement to fees on appeal, Dussault characterizes the actions of Rachel's father and grandmother (by arranging for the letter from Mr. Gay), as "interference" with his presentment of annual reports and having "caused a great expense" to the Trust. Dussault brief at 31.

Rather than interfering, Rachel's father and grandmother pointed out to Dussault numerous violations of the Trust. CP 68-69. That Dussault charged the Trust an enhanced fee of \$4,400 to deal with the "intermeddling" of Rachel's father and grandmother (Dussault brief at 8-9) certainly adds

weight to Rachel's claim the fees Dussault charged to her Trust were excessive.

Rachel seeks the same relief regarding Dussault's request for attorney fees and costs on appeal as she sought with regard to the request of Wells Fargo above.

III. REPLY TO BRIEF OF McMENAMIN

McMenamin offers no new or significant variation from the argument of Wells Fargo and Dussault on the issues presented in this appeal. Nevertheless, Rachel will address some of the points presented by McMenamin.

In his answer to paragraph 3.5 of Rachel's complaint (CP 474), McMenamin admitted he owed a fiduciary duty to Rachel as a member of the TAC. CP 467. In arguing that Rachel failed to establish that he breached any fiduciary duty he owed to her as the beneficiary of the Trust, McMenamin claims he cannot be liable for any decision of the TAC because Wells Fargo, upon Andrea becoming a disqualified member of the TAC, was "in essence the deciding vote on whether certain distributions were to be made from (Rachel's) Trust". McMenamin brief at 15. On the following page of his brief, McMenamin writes "Even more importantly, McMenamin's decisions with respect to the Trust were discretionary per its express terms. Thus, any indirect benefit to (Rachel's) mother cannot

amount to any breach of a fiduciary duty because of the TAC's discretion." McMEnamin brief at 16. This argument reveals a profound miscomprehension of the TAC protocol for approving expenditure proposals.

McMenamin further contends Rachel presented no evidence, expert or otherwise, that he breached the duty of care in managing her trust or that his alleged acts or omissions caused her any damage. McMEnamin brief at 15. He goes on to claim the Wolfe opinion letter does not "opine on the breach of any fiduciary duties or any damages caused therefrom" and that Rachel has not proved that she was damaged by his alleged negligence in managing her trust. McMEnamin brief at 15-16. This argument reflects a surprising disregard of the lay and expert declarations filed below and cited in Rachel's opening brief.

If McMEnamin had fulfilled his fiduciary duties as a TAC member, and complied with the TAC protocol, he would have realized that Andrea's proposal to spend \$33,000 of Trust funds to purchase a 31% interest in a residence to be titled solely in the name of Andrea's her then-boyfriend (Lancaster), and where Andrea would be co-habiting with him (with Rachel living elsewhere), constituted an expenditure which, at a minimum, would result in Andrea being indirectly benefitted. And he should have prevented

her from voting on that proposal and insisted Wells Fargo be “called upon to cast the deciding vote”. CP 494.

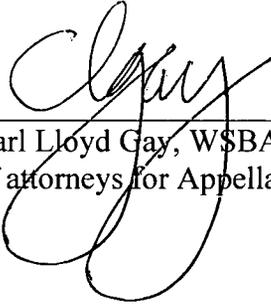
As in the case with Wells Fargo, Rachel has clearly and convincingly established the existence of a genuine issue of material fact with regard to the Sequim property (as well as to the other improper expenditures) and whether McMenamín’s exercise of discretion in approving that purchase was reasonable. McMenamín was not entitled to its judgment dismissing Rachel’s claims.

IV. CONCLUSION

Based upon the arguments set forth above, the trial court erred in granting the summary judgment motions of Wells Fargo, Dussault, and McMenamín, and that decision should be reversed.

RESPECTFULLY SUBMITTED this 29th day of October, 2012.

GREENAWAY GAY & TULLOCH

By: 

Carl Lloyd Gay, WSBA no. 9272
of attorneys for Appellant

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COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

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

Appellant,)

Case No.: 43280-3-II

vs.

PROOF OF SERVICE

2012 OCT 31 AM 11:53
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

WILLIAM L.E. DUSSAULT and JANE DOE)
DUSSAULT, husband and wife, and the)
marital community composed thereof;)
BARBARA J. BYRAM and JOHN DOE)
BYRAM, wife and husband, and the marital)
community composed thereof; YEVGENY)
JACK BERNER and JANE DOE BERNER,)
husband and wife, and the marital community)
composed thereof; WILLIAM L. E.)
DUSSAULT, PS, a Washington professional)
service corporation; the DUSSAULT LAW)
GROUP, a Washington corporation;)
RICHARD MICHAEL McMENAMIN and)
SHARI L. McMENAMIN, husband and wife,)
and the marital community composed thereof;)
MCMENAMIN & MCMENAMIN PS, a)
Washington professional service corporation;)
ANDREA DAVEY (fka ANDREA)
RODGERS) and JOHN DOE DAVEY,)
husband and wife, and the marital community)
composed thereof; and WELLS FARGO)
BANK, N.A., a foreign corporation)

Respondents.)

1 I hereby certify that on the 29th day of October, 2012, I served the foregoing REPLY BRIEF OF
2 APPELLANT RACHEL MARGUERITE ANDERSON (corrected) and this PROOF OF SERVICE on
3 the following persons/parties, at the following addresses, by First Class Mail:

4 Smith & Hennessey PLLC
5 James R. Hennessey, Esq.
6 316 Occidental Ave. South, Suite 500
7 Seattle, WA 98104

8 Betts Patterson Mines
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13 LEE • SMART
14 William L. Cameron, Esq.
15 1800 One Convention Place
16 701 Pike Street
17 Seattle, WA 98101-3929

18 Andrea Davy
19 61 Thompson Road
20 Sequim, WA 98382

21 I hereby declare under penalty of perjury under the laws of the State of Washington that
22 the foregoing is true and correct.

23 DATED this 29th day of October, 2012, at Port Angeles, Washington.

24 GREENAWAY GAY & TULLOCH

25 By: Leslie Hill
LESLIE HILL