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SUPREME COURT OF THE STATE OF WASHINGTON

No. 43280-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Petitioner,

v.

WILLIAM L.E. DUSSAULT, et al.,

Respondents.

RESPONDENTS' RICHARD MICHAEL MCMENAMIN, SHARI L.
MCMENAMIN AND MCMENAMIN & MCMENAMIN PS
SUPPLEMENTAL BRIEF PURSUANT TO RAP 13.7(d)

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I. INTRODUCTION

Respondents Richard Michael McMenamin, Shari L. McMenamin and McMenamin & McMenamin PS (collectively, “McMenamin”), by and through their counsel, Betts Patterson & Mines, P.S., respectfully submit this Supplemental Brief pursuant to RAP 13.7(d). McMenamin also joins in the Supplemental Briefs filed by Respondents William E. Dussault and Jane Doe Dussault (“Dussault”) and Wells Fargo Bank, N.A. (“Wells Fargo”).

In *Anderson v. Dussault et al.*, 177 Wn. App. 79, 310 P.3d 854 (2013), the Court of Appeals properly affirmed summary judgment in favor of McMenamin. This Court should affirm the Court of Appeals’ opinion because it correctly held that the Trustees’ Accounting Act (“TAA”), RCW 11.106 et al., bars the Petitioner’s claims against the Respondents.

In her Petition for Review, Petitioner contends that her claims are not barred because the TAA requires that guardians ad litem be appointed for trust accountings, which did not occur in her case. The Petitioner is incorrect.

Contrary to the Petitioner’s contention, the TAA only requires that the appointment of guardians ad litem be governed by the Trust and Estate Dispute Resolution Act (“TEDRA”), RCW 11.96A et al. Under TEDRA,

the appointment of guardians ad litem is discretionary by motion of the Court or by application of a party. It is not required.

The Petitioner further contends that, because she did not have a guardian ad litem, her interests as a minor were not represented and she could not, among other things, object to or challenge the proposed disbursements from her Trust. These contentions are inaccurate.

As discussed more fully herein, the Petitioner's interests were represented by the discretion of the TAC, by Wells Fargo as the sole Trustee after the TAC dissolved and by the trial court's approval of all of the trust accountings authorizing disbursements from the Trust. In addition, the Petitioner has provided no evidence that McMenamain abused his discretion in recommending that disbursements be made for her benefit, nor has she provided any evidence that the disbursements were not used in conjunction with the terms of the Trust Agreement or in accordance with the representations made to the trial court. Indeed, the funds were used precisely for which the trial court approved them.

The Petitioner's claims are therefore barred.

II. SUPPLEMENTAL ARGUMENT

A. The Petitioner Misinterprets the TAA

1. The TAA mandates that the appointment of guardians ad litem are governed by TEDRA

The Petitioner maintains that guardians ad litem are required under the TAA. As the Court of Appeals correctly held, the TAA does not require such an appointment. Rather, the TAA mandates that the appointment of guardians ad litem be governed by TEDRA: “the court shall appoint guardians ad litem as provided in RCW 11.96A.160 [TEDRA] . . .” RCW 11.106.060. TEDRA provides that:

The court, upon its own motion or upon request of one or more of the parties, at any stage of a judicial proceeding . . . *may* appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person.

RCW 11.96A.160(1).

A plain reading of the TAA demonstrates that the appointment of guardians ad litem is governed by TEDRA. Under the TEDRA, a guardian ad litem *may* be appointed in either of the two following ways: (1) upon the court’s own motion or (2) upon the request of one of the parties. RCW 11.96A.160(1) . Nowhere in the TEDRA is it required that a guardian ad litem be appointed.

The TAA further states that the court may allow representatives to be appointed under additional provisions of the TEDRA, “if a guardian . . . has not been appointed.” RCW 11.106.050) (citing to RCW 11.96A.120 and RCW 11.96A.250). If the appointment of guardians ad litem were required as the Petitioner contends, then the TEDRA provisions with respect to the appointment of representatives “if a guardian . . . has not been appointed” would be superfluous. RCW 11.96A.120(f).¹

Based on the foregoing, the appointment of a guardian ad litem is discretionary under the TEDRA. Specifically, a guardian ad litem appointment exists at the will of the court. *See In re Guardianship of Matthews*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010) (citing to RCW 11.96A.160)for the proposition that it is the trial court’s duty to ensure that the interests of the incapacitated person are protected).

The trial court properly exercised its discretion in not appointing a guardian ad litem in this case, and Petitioner has not alleged or provided any evidence to demonstrate otherwise. As there was no indication that

¹ See also RCW 11.96A.250), which states that:

(1)(a) Any party or the parent of a minor or unborn party may petition the court for the appointment of a special representative to represent a party: (i) Who is a minor; (ii) who is incapacitated without an appointed guardian of his or her estate; (iii) who is yet unborn or unascertained; or (iv) whose identity or address is unknown.

Ms. Davey was unfit to act as the Petitioner's Trustee or natural guardian, the trial court necessarily deemed the Petitioner's interests adequately represented. (CP at 45-55) Similarly, the purpose of the Trust Agreement itself was to protect the Petitioner's interests which was achieved by making Wells Fargo the Trustee and establishing the TAC until it dissolved in 2003.² In addition, Dussault prepared the annual reports on behalf of the Petitioner and the trial court approved all of those reports. This representation, coupled with the trial court's judicial oversight, negated any necessity for a guardian ad litem.

2. Judicial determinations are final under the TAA

Under the TAA, a trustee must submit routine reports to the court for approval, and when the court approves the report, the decree is final and binding on all interested parties, including those who are incapacitated or otherwise not *sui juris*. RCW 11.106.060-080). Specifically, the TAA states that, "[t]he decree rendered under RCW 11.106.070) shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust subject only to the right of appeal under RCW 11.106.090)." RCW

² The Petitioner incorrectly asserts that McMenamin resigned when he was purportedly confronted with Ms. Davey's misfeasance. (Reply at 14) This is not true or supported by the record. McMenamin resigned from the TAC "when it became apparent that there were ongoing problems with the disgruntled non-custodian parent ([Anderson's] father)." (Op. at ¶ 9; CP at 288)

11.106.080.) As the court stated in *Barovic v. Pemberton*, 128 Wn. App. 196, 201, 114 P.3d 1230 (2005), “the statutory language is unambiguous.”³

In this case, the record establishes that McMenamain properly exercised his discretion under the TAC regarding disbursements made from the Trust and that trial court approved all of those disbursements. Although the Petitioner contends that she could not challenge the disbursements without a guardian ad litem before they were judicially approved (Reply at 3), she has failed to demonstrate how the judicial oversight of each intermediate accounting submitted to, and approved by, the court provided her inadequate protection. (Op. at ¶ 27) The reports therefore became “final, conclusive, and binding” upon the Petitioner, and she is precluded from contesting the court’s prior determination. RCW 11.106.080).

Notwithstanding, the Petitioner claims that the Respondents should not be allowed to immunize themselves from liability under the TAA by submitting accountings for approval. (Reply at 2) The Petitioner is misguided. Contrary to her assertion, Respondents do not immunize themselves from liability under the TAA by submitting accountings for approval. The TAA only precludes liability after accountings have been

³ This is also consistent with the RESTATEMENT (SECOND) OF JUDGMENTS § 35 (1982).

approved by the court. RCW 11.106.080). Once approved, the accountings become final and binding. *Id.*)

B. The Petitioner Misrepresents the Facts

The Petitioner claims that the accountings approved of Ms. Davey's use of the trust funds for her own benefit. (Reply at 3) This is incorrect. The accountings did not approve anything. Rather, the accountings recommended that certain disbursements be made from the Trust. It was the trial court that approved the recommended disbursements.

Through all of the annual reports, the Respondents recommended to the court that funds be disbursed from the Trust for the purchase of certain items such as a computer, car, real estate, travel, professional fees and taxes. (CP at 345, App. 1-11) These expenditures were related to the Petitioner's disability and supplemental to her parents' basic support obligations. More importantly, the expenditures were recommended and approved because the family had limited resources and could not adequately provide for the Petitioner's needs. (CP at 285 et seq.)

The court approved the expenditures, and the Petitioner has provided no evidence that the funds were for anything other than the

specific purchases recommended to, and approved by, the court.⁴ As discussed supra, once approved by the court, the accountings became final and binding on the Petitioner. The TAA is clear in this regard. (Op. at ¶ 21)

C. The Petitioner Mistates the Plain Language of the Trust Agreement

1. The Trust Agreement bars the Petitioner's claims

Section IV(h) of the Trust Agreement specifically states:

The Trustee shall make an annual statement of transactions and assets concerning all financial and investment activity undertaken on behalf of the Trust. A copy of said statement shall be delivered to RACHEL MARGUERITE RODGERS, to any Court appointed personal representative acting on behalf of RACHEL MARGUERITE RODGERS, and to all Trust Advisory Committee members. 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

⁴ The Petitioner's allegations of misfeasance by Davey is therefore misplaced; there is no evidence that the funds were not used for the very specific purchases authorized by the court. Likewise, as the Court of Appeals correctly determined, the Petitioner never amended her complaint to allege fraud as required by CR 9(b) to support the allegations against Ms. Davey. (Op. at ¶ 14; CP at 141)

the beneficiary as to all transactions set forth
in such annual statement.

Trust Agreement, § IV(h) (Emphasis added).

In the Petitioner's Reply, she fails to cite to this complete provision of the Trust Agreement. Instead, she relies on only part of the provision for the contention that, "a parent[s] . . . failure . . . to object to an account statement . . ." should not apply to her because she did not have a guardian ad litem and because Ms. Davey [her mother] failed to object to the trust accountings. (Reply at 3) However, when read in full, this provision refers to, "**a parent**, legally appointed guardian, guardian ad litem, or other personal representative of the beneficiary." Trust Agreement, § IV(h) (Emphasis added). In this case, neither the Petitioner's mother nor her father objected to the trust accountings, nor did any other personal representative.⁵

**2. McMenamín's approval of the disbursements
was within his discretion under the Trust
Agreement**

The plain language of the Trust Agreement states that the TAC had "absolute and unfettered discretion" to determine whether the Petitioner needed extra supportive services and that discretion was "conclusive and

⁵ As observed by the Court of Appeals, no interested party objected to the annual reports, including the Petitioner's father and grandmother who were notified, but failed to appear, at the trial court hearing to approve those reports. (Op. at ¶ 10-11)

binding upon all persons.” (Trust Agreement, Section II (b)) When a trust gives the trustee discretion to carry out the trust’s objectives, a court may not control the trustee’s exercise of its discretion absent abuse. *Templeton v. Peoples Nat’l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986); accord RESTATEMENT (THIRD) OF TRUSTS § 87 (2007). As such, “a court will not interfere with a trustee’s exercise of a discretionary power ... when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee’s fiduciary duties.” RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. B.

As a member of the TAC, McMEnamin had broad authority to make decisions that benefitted the Petitioner, and she has failed to demonstrate that he abused his discretion in managing the Trust Agreement.⁶ Specifically, she has failed to provide any evidence that the Respondents or the court approved Ms. Davey’s use of the items purchased for her own benefit as she the Petitioner has alleged. The funds were used to purchase the very items that were approved by the court and allowed by the Trust Agreement.

⁶ Again, the Petitioner’s allegations against Ms. Davey have no bearing on the issue of whether McMEnamin as a co-trustee acted appropriately in approving expenditures under the express provisions of the Trust Agreement.

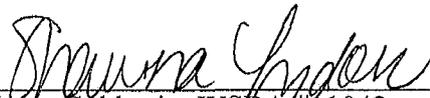
III. CONCLUSION

For the aforementioned reasons, the Petitioner's claims are barred.

This Court should therefore affirm the Court of Appeals' opinion.

RESPECTFULLY SUBMITTED this 2nd day of May, 2014.

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CERTIFICATE OF SERVICE

I, Laraine Green, hereby certify that I am over the age of eighteen,
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Attached is Respondents' Richard Michael McMenamin, Shari L. McMenamin and McMenamin & McMenamin P.S. Supplemental Brief Pursuant to RAP 13.7(d) Noted for June 24, 2014 at 1:30 p.m. with oral argument.

Counsel, we have deposited a hard copy of the Brief and the Certificate in today's outgoing mail VIA First Class Postage Prepaid at Seattle, Washington, directed to your respective offices.

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