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,

vs.

WILLIAM L.E. DUSSAULT, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
THE HONORABLE JAY B. ROOF

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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FILED IN COA ON DECEMBER 27, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATUTES

RULES AND REGULATIONS

FEDERAL CONSTITUTION

WASHINGTON CONSTITUTION

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Rachel Anderson was the plaintiff in the trial court and the appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioner seeks review of Division Two's published decision in *Anderson v. Dussault*, ___ Wn. App. ___, 310 P.3d 854 (2013). Citations in this petition are to the numbered paragraphs in the copy of the Court of Appeals' opinion attached as Appendix A. The Court of Appeals denied petitioner's timely motion for reconsideration on November 27, 2013. The order is Appendix B to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Trustees' Accounting Act (TAA), RCW ch. 11.106, bars a minor beneficiary's claims for breach of fiduciary duty 30 days after any trust accounting has been judicially approved, even when no guardian ad litem was appointed for the minor, as required by RCW 11.106.060, and as required by RCW 11.96A.070(4) to prevent the tolling of the statute of limitations on a minor's claims under the Trust and Estate Dispute Resolution Act (TEDRA), RCW ch. 11.96A?

2. Whether it is "equitable" to require the sole beneficiary of a trust to pay the appellate attorney fees of fiduciaries whose management of the trust she in "good faith" challenged, raising "legitimate concerns," under the TEDRA fee statute, RCW 11.96A.150(1)?

IV. STATEMENT OF THE CASE

These facts are taken from the Court of Appeals' opinion, as supplemented by the record on summary judgment:

A. The trial court dismissed petitioner's suit alleging breaches of fiduciary duty in managing a trust established for her benefit while she was a minor.

In November 1996, shortly after her sixth birthday, petitioner Rachel Anderson suffered severe injuries when a horse kicked her in the face. (Op. ¶ 3) To pursue tort claims on her behalf, Rachel's family retained attorney Richard McMenamin, who in turn hired attorney William Dussault to prepare a trust for any settlement proceeds. (Op. ¶ 3) Rachel's claim was settled for $300,000, and a trust established on August 25, 1997, solely for Rachel's benefit. (Op. ¶¶ 3-6, n.5) The trust appointed Wells Fargo as a compensated trustee, and established a "trust advisory committee" ("TAC") of McMenamin and Rachel's mother Andrea Davey. (Op. ¶ 4) The trust gave the TAC discretion to determine

"when and if [Rachel] needs regular and extra supportive services," and allowed the TAC to "purchas[e] those services and items which promote the beneficiary's happiness, welfare and development." (Op. ¶¶ 4-5)

The trust required Wells Fargo as trustee to "make an annual statement of transactions and assets concerning all financial and investment activity undertaken on behalf of the Trust." (Op. ¶ 5) Wells Fargo hired Dussault to prepare its annual accountings detailing investment activities and trust disbursements. (Op. ¶ 6) After the superior court approved Dussault's first two accountings, filed January 25, 2000, and February 12, 2001 (Op. ¶ 6), an attorney hired by Rachel's father and grandmother wrote to Davey, Dussault, Wells Fargo, and McMenamin, expressing concerns about expenditures that were being made from the trust by and to Davey. (Op. ¶ 7) McMenamin thereafter resigned from the TAC. (Op. ¶ 9) Dussault denied any impropriety in the accountings, and proposed that the TAC be dissolved and Wells Fargo assume the TAC's functions. (Op. ¶ 10) In 2003 the superior court dissolved the TAC, assigned Wells Fargo as trustee, and then approved four additional trust accountings, through 2009, without ever appointing a guardian ad litem for Rachel. (Op. ¶¶ 10-11)

On July 22, 2011, Rachel, now age 20, filed a complaint against Davey, McMenamin, Dussault, and Wells Fargo. (Op. ¶ 12) Rachel alleged malpractice and breaches of fiduciary duty including misuse of trust funds (Op. ¶ 12; CP 58-60, 62, 68-71, 117-18, 128-29, 131, 135-36), submitting fictitious requests for reimbursement (CP 58-60, 62, 68-71, 117-18), using trust funds to buy an interest in real property, owned by Davey's former boyfriend, for which the trust did not receive rent (Op. ¶ 12; CP 60-61, 68, 70, 118-20), and excessive and unjustified trustee fees. (Op. ¶ 12; CP 62, 71, 120-21)

The trial court dismissed Rachel's claims on summary judgment, on the grounds that accountings approved by the trial court while Rachel was a minor immunized the defendants from any liability for breach of fiduciary duty. (Op. ¶¶ 2, 13) Recognizing that Rachel had raised "legitimate concerns" about management of her trust in her complaint, the trial court denied the fiduciaries' requests for awards of attorney fees under RCW 11.96A.150(1).

B. In a case of first impression, Division Two held that petitioner's claims for breach of fiduciary duty while she was a minor were barred even though a guardian ad litem had never been appointed to protect her interests.

On Rachel's appeal, Division Two affirmed summary judgment dismissing her claims in a published decision. (Op. ¶ 2)

The Court of Appeals held that Rachel's claims were barred by the Trustees' Accounting Act ("TAA"), RCW ch. 11.106. (Op. ¶¶ 2, 18-27) The court reasoned that Rachel's claims for breach of fiduciary duty were barred by RCW 11.106.080, which states that a court decree approving an accounting under RCW 11.106.070 is "final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust." (Op. ¶ 21)

In a holding of first impression, the court rejected Rachel's argument that she was not bound by accountings approved while she was a minor because she was not represented by a guardian ad litem, despite the requirement of RCW 11.106.060 that "[t]he court *shall* appoint guardians ad litem as provided in RCW 11.96A.160." (emphasis added) The sole case relied on by Division Two for its decision, *Barovic v. Pemberton*, 128 Wn. App. 196, 114 P.3d 1230 (2005) (Op. ¶ 21), involves neither a minor beneficiary nor the interplay between the TAA, RCW 11.106.060, and TEDRA, RCW

11.96A.160.[1] Division Two also ordered Rachel to pay Dussault's and Wells Fargo's attorney's fees under RCW 11.96A.150, on the grounds her claims against them "lack merit." (Op. ¶ 29)

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Trust Estate and Dispute Resolution Act (TEDRA) governs the courts' "full and ample power and authority" under RCW ti. 11 over "[a]ll trusts and trust matters." RCW 11.96A.020. The TEDRA statute of limitations, RCW 11.96A.070(1)(a), provides that "[a] beneficiary of an express trust may not commence a proceeding against a trustee for breach of trust more than three years after the date [of] a report . . . [that] adequately disclosed the existence of a potential claim for breach of trust." Incorporating the general tolling statute, RCW 4.16.190, RCW 11.96A.070(4) tolls the running of this statute of limitation if a minor beneficiary is not represented by a guardian ad litem. This Court should grant review and reverse Division Two's published decision abrogating these provisions of the TEDRA statute of limitations and barring any claim for breach of fiduciary duty by a minor beneficiary 30 days

[1] The *Barovic* opinion also notes that the claimant in that case, who sought to challenge the allocation of payments between the income and principal accounts of a testamentary trust, made no claim for and presented no evidence of a breach of fiduciary duty. 128 Wn. App. at 202, n. 7.

after judicial approval of any interim trust accounting even if a guardian ad litem has not been appointed as required by the Trustees' Accounting Act (TAA), RCW 11.106.060.

A. Division Two's published decision raises issues of significant public interest and violates a minor's due process rights. (RAP 13.4(b)(3), (4))

This Court should accept review because Division Two's published decision would allow a trustee to immunize itself from a claim of breach of fiduciary duties under TEDRA by submitting accounts for trial court approval under the TAA, RCW ch. 11.106, without doing anything to ensure that a beneficiary under a legal disability has a representative with the authority and responsibility to review and challenge its accounts. Nothing in the language or legislative history of either TEDRA or the TAA suggests that the Legislature intended that a trustee could immunize itself from a minor's claims for breach of fiduciary duty by submitting an accounting for judicial approval without also ensuring that the minor had a guardian ad litem to represent her interests.

The TAA provides a mechanism for court approval of trust accountings. Under the Act, an unappealed decree approving an accounting "shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and

unascertained beneficiaries . . .". RCW 11.106.080. When the Legislature first enacted the TAA in 1951, it unequivocally required the appointment of a representative for a minor beneficiary before the court could determine the propriety of a trustee's accounting:

> Upon or before the return date any beneficiary of the trust may file his written objections or exceptions to the account filed or to any action of the trustee or trustees set forth therein. *The court* ***shall*** *appoint either the legal guardian of a beneficiary, or a guardian ad litem to represent the interests of any such beneficiary who is an infant* or of unsound mind or otherwise legally incompetent ... and such beneficiary shall be bound by any action taken by such representative.

Laws of 1951, ch. 226, § 6 (emphasis added and removed), *codified as* RCW 11.106.060.[2] Thus, the TAA bars challenges to trust accountings by a minor beneficiary only if a guardian ad litem is representing the minor's interests in proceedings under the statute.

The Court of Appeals reasoned that the TAA nevertheless barred Rachel's claims because RCW 11.106.060 now incorporates the procedure for appointing a guardian ad litem in TEDRA, RCW 11.96A.160. (Op. ¶ 26) In 1984, the Legislature amended RCW 11.106.060 to require that a court appoint a guardian ad litem

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[2] This provision was originally codified as RCW 30.30.060, but was renumbered as RCW 11.106.060 in 1984. Laws of 1984, ch. 149, § 127.

under the procedure "provided in RCW 11.96.180" (now RCW 11.96A.160). Laws of 1984, ch. 149, § 133 ("The court *shall appoint* guardians ad litem as provided in RCW 11.96.180 . . . .") (emphasis added).

RCW 11.96A.160 states that the court "may" appoint a guardian ad litem in any action involving a trust or estate. Division Two reasoned that use of the word "may" in RCW 11.96A.160, standing alone, made the continuing requirement in RCW 11.106.060 that the court "shall" appoint a guardian ad litem discretionary, and that Rachel was bound by trust accountings approved during her minority under RCW 11.106.080 even though no guardian ad litem was ever appointed to represent her interests.

The Legislature's purpose for incorporating the procedure in current RCW 11.96A.160 in RCW 11.106.060 was to create "uniformity of procedure." RCW 11.96A.010; *see* Kenneth Schubert, November 11, 1983 Letter to WSBA Office of Legislative Affairs (attaching ESHB 1213/Laws of 1984, ch. 149, as annotated by WSBA Trust Task Force) (on file, Washington State Archives, legislature history for ESHB 1213). (Appendix C) Creating "uniformity of procedure" is a far cry from allowing a trustee to forever bar a minor's claims for breach of fiduciary duty by

submitting an accounting that the minor cannot challenge. Had the Legislature intended that an unrepresented minor's claims be barred under the TAA, it would have amended RCW 11.106.060 to state that the court "may" appoint a guardian ad litem, before approving an accounting, rather than continuing to require that a guardian ad litem "shall" be appointed under the statute.

Trustees are not entitled to the benefit of RCW 11.106.080's bar on claims when they failed to comply with RCW 11.106.060's requirement that a guardian ad litem *shall* be appointed for minor beneficiaries. Indeed, nothing in the TAA or TEDRA suggests that the use of the word "may" in RCW 11.96A.160 was intended to abrogate the tolling of any statute of limitations if a guardian ad litem is not appointed. The Court of Appeals could have easily harmonized the statutes by reading RCW 11.96A.160 to provide the *procedure* for appointment of a guardian ad litem *required* under RCW 11.106.060.[3] Instead, the Court of Appeals' decision ignores

[3] *See, e.g., Custody of Brown*, 77 Wn. App. 350, 354-55, 890 P.2d 1080 (1995). In *Brown,* the Court of Appeals held that the Uniform Parentage Act's incorporation of the discretionary procedure for appointing a guardian ad litem in the Dissolution Act, RCW ch. 26.09, did not negate the affirmative requirement to appoint a guardian ad litem under the Uniform Parentage Act, former RCW 26.26.090(1). The Court of Appeals' decision in this case also conflicts with *Brown.* RAP 13.4(b)(2).

TEDRA's own tolling statute, RCW 11.96A.070(4), which also tolls a minor's claims *unless* a guardian ad litem has been appointed.

This Court has barred minors from bringing a cause of action for injuries incurred during minority only when some other party not under a legal disability held the right to assert the claim, *e.g.*, the personal representative of a deceased parent's estate. *See Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007); *Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 680 P.2d 58 (1984). In both *Atchison* and *Huntington,* this Court held that the limitations period on a decedent's wrongful death claim was not tolled during the minority of a decedent's beneficiary because the personal representative of the decedent's estate, not the minor beneficiary, held the right to assert the claim. *Atchison* and *Huntington* likewise support tolling of Rachel's claim here, because unlike the minors in those cases, Rachel had no one to formally protect her rights here, as contemplated by RCW 11.96A.070(4) and RCW 11.106.060.

This Court should accept review because Division Two's published decision raises an issue of substantial public interest about the ability of trustees to immunize themselves from liability for breach of fiduciary duty under TEDRA and the TAA. If allowed

to stand, Division Two's published decision violates "[t]he fundamental requirement of due process" protected by both the Washington (art. I, § 3) and Federal Constitutions (amend. XIV, § 1) – "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *City of Redmond v. Moore,* 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and the state constitutional right of access to courts under Article I, Section 10, and the privileges and immunities clause of Article I, Section 12. *See Unruh v. Cacchiotti,* 172 Wn.2d 98, 111 n. 9, ¶ 25, 257 P.3d 631 (2011) (quoting *Gilbert v. Sacred Heart Med. Ctr.,* 127 Wn.2d 370, 378, 900 P.2d 552 (1995) in noting that "categorical elimination of tolling for minors" would give rise to "'compelling' constitutional challenges").

The Court of Appeals relied on RCW 11.96A.160, a statute empowering a court to protect the interests of a minor beneficiary by appointing a guardian ad litem, to deprive petitioner of that very protection. This Court should accept review under RAP 13.4(b)(3) and (4) because its decision presents an issue of substantial public interest and conflicts with the Washington and Federal Constitutions.

B. Division Two's published decision conflicts with this Court's decisions rejecting any implicit repeal of RCW 4.16.190, which tolls the statute of limitations on a claim while a party is a minor. (RAP 13.4(b)(1))

This Court also should grant review under RAP 13.4(b)(1) because Division Two's published decision conflicts with this Court's decisions consistently protecting "the right of every citizen to seek redress for injuries sustained during minority," and as a consequence rejecting any interpretation of a statute that would *sub silentio* and by implication abrogate that right. *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 377, 900 P.2d 552 (1995); *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989).

In *Gilbert*, this Court held that an amendment to the medical malpractice statute of limitations, RCW 4.16.350, imputing a parent's knowledge to a minor, did not eliminate the tolling of a minor's claims under RCW 4.16.190, which provides that "if a person . . . be at the time the cause of action accrued . . . under the age of eighteen years . . . the time of such disability shall not be a part of the time limited for the commencement of action." Recognizing that "implicit repeal of statutes is strongly disfavored," this Court reasoned that because the amendment to the medical malpractice statute of limitations did not "expressly repeal the

operation of the tolling statute, RCW 4.16.190" it must harmonize the statutes and interpret the amendment "in such a way that the integrity of the tolling statute is preserved rather than destroyed." *Gilbert*, 127 Wn.2d at 375. This Court had earlier held in *Merrigan* that the 8-year statute of repose for medical malpractice claims in RCW 4.16.350 likewise did not eliminate tolling for minors. 112 Wn.2d at 716.[4]

Division Two's published decision conflicts with *Gilbert* and *Merrigan* by failing to maintain the protection for minors granted by RCW 11.106.060, which provides that "[t]he court *shall* appoint guardians ad litem" in actions for accountings under the TAA. Division Two's published decision also conflicts with this Court's decisions holding that statutes must be interpreted "in pari materia, considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create

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[4] In 2006, the Legislature amended RCW 4.16.190 and added subsection (2) to provide that tolling does not apply to the time limitations for commencement of a medical malpractice action in RCW 4.16.350. Laws of 2006, ch. 8, § 303. The enactment does not affect this Court's reasoning in *Gilbert* and *Merrigan*. This Court held that the amendment of RCW 4.16.190(2) did not apply retroactively in *Unruh v. Cacchiotti*, 172 Wn.2d 98, 111, ¶ 25, 257 P.2d 631 (2011).

a unified whole." *Diaz v. State*, 175 Wn.2d 457, 466, ¶ 18, 285 P.3d 873 (2012). This Court should accept review under RAP 13.4(b)(1).

C. Division Two's published decision imposing fees on a trust beneficiary for a good faith challenge to management of her trust conflicts with decades of Washington law. (RAP 13.4(b)(1))

Finally, this Court should accept review under RAP 13.4(b)(1), (2) and (4) because Division Two's published decision imposing fees against Rachel, the sole beneficiary of a trust who in "good faith" raised "legitimate concerns" about the management of her trust while she was a minor, conflicts with established Washington law, and would wrongly discourage beneficiaries from protecting their interests under TEDRA.

The Court of Appeals awarded fees to the trustees under TEDRA, RCW 11.96A.150(1), which authorizes fees "as the court determines to be equitable." Washington courts have never used RCW 11.96A.150(1) to impose a fee award on a party who brings a good faith claim regarding the administration of a trust or estate. *See, e.g., Estate of Wright*, 147 Wn. App. 674, 688, ¶ 31, 196 P.3d 1075 (2008) ("While we resolve the legal issues that Patterson raises in favor of the personal representative, those issues are not frivolous . . . . Accordingly . . . we decline the personal

representative's request for an attorney fee award."), *rev. denied*, 166 Wn.2d 1005 (2009).

Where Washington courts have imposed fees against a party personally under TEDRA it is almost always against a trustee or settlor of the trust, and they have done so because the party acted in bad faith or breached its fiduciary duties. *See, e.g., Estate of Jones*, 152 Wn.2d 1, 21, 93 P.3d 147 (2004) (imposing fees on personal representative because suit was "necessitated by his multiple breaches of fiduciary duty"), *rev. denied*, 164 Wn.2d 1011 (2008); *Foster v. Gilliam*, 165 Wn. App. 33, 48-49, 57-59, ¶¶ 16, 58-59, 268 P.3d 945 (2011) (awarding fees against cotrustee who breached fiduciary duties in numerous ways, including "personally accepting substantial distributions from the probate estate that should have been distributed to the" trust), *rev. denied*, 173 Wn.2d 1032 (2012); *Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, ¶ 32, 183 P.3d 317 (2008) (imposing fees on trustor who "acted in bad faith").

On the other hand, this Court has long recognized that the threat of an attorney's fee award should not discourage a beneficiary from bringing a disagreement about the administration of a trust before a court, *Monroe v. Winn*, 19 Wn.2d 462, 466, 142 P.2d 1022 (1943), and has refused to impose fees on claimants who

litigate in good faith. *See Estate of Mitchell,* 41 Wn.2d 326, 353, 249 P.2d 385 (1952) (refusing to impose fees on will contestants because they "acted in good faith and ... made a prima facie showing of probable cause for contesting the will"); *Estate of Eichler*, 102 Wash. 497, 500-01, 173 P. 435 (1918) ("[T]o penalize appellant for daring to ask an adjudication upon a subject-matter that in right and conscience is probably her own would be to do a great wrong, and tend to discourage the assertion of legitimate claims."); *see also In re Boris V. Korry Testamentary Marital Deduction Trust for Wife*, 56 Wn. App. 749, 756, 785 P.2d 484 (refusing to impose fees because court found "no evidence of bad faith"), *rev. denied*, 114 Wn.2d 1021 (1990); *Estate of Magee*, 55 Wn. App. 692, 696, 780 P.2d 269 (1989) (refusing to impose fees because appellant "exercised good faith in bringing this appeal, which involves justiciable issues not previously resolved by case law"). Division Two's published decision requiring Rachel to pay her trustees' fees conflicts with this longstanding precedent. (Op. ¶ 28-29)

Rachel had the right to bring a good faith challenge to practices she believed were malpractice, and that involved breaches of fiduciary duty, including misuse of trust funds (Op. ¶ 12; CP 58-

60, 62, 68-71, 117-18, 128-29, 131, 135-36), fictitious requests for reimbursement (CP 59-60, 62, 68-71, 117-18), the use of trust funds to buy an interest in a house that was titled in the name of Davey's former boyfriend and for which the trust did not receive rent (Op. ¶ 12; CP 60-61, 68, 70, 118-20), and excessive and unjustified trustee fees (Op. ¶ 12; CP 62, 71, 120-21). The trial court recognized that Rachel's challenge raised "legitimate concerns." On appeal, Rachel argued in good faith that RCW 11.106.060's requirement that "[t]he court *shall* appoint guardians ad litem as provided in RCW 11.96A.160" (emphasis added) meant what it says, and that she could not be bound by trust accountings approved during her minority without a guardian ad litem representing her interests – an issue no court had previously resolved before the Court of Appeals decision in this case. Rachel should not have been punished by a fee award for raising a previously unadjudicated question of trust law. *Magee*, 55 Wn. App. at 696; *Wright*, 147 Wn. App. at 681, ¶ 17; *see also Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (refusing to award fees under RCW 11.96A.150(1) "[g]iven the unique issues in this case"), *rev. denied*, 154 Wn.2d 1029 (2005).

Division Two's decision will discourage beneficiaries from bringing good faith challenges to the administration of trusts for fear of an attorney's fee award; no notion of "equity" supported subjecting Rachel to an award of attorney's fees on appeal. The Court of Appeals' award of fees conflicts with established Washington precedent refusing to impose attorney's fees on a beneficiary who brings a good faith challenge to the administration of her trust and this Court should accept review under RAP 13.4(b)(1), (2) and (4).

VI. CONCLUSION

This Court should grant review, reverse the Court of Appeals, and remand for resolution of Rachel's claims for malpractice and breach of fiduciary duty in the management of her trust during her minority. Rachel also renews her request for fees on appeal under RCW 11.96A.150 and RAP 18.1.

Dated this 27th day of December, 2013.

SMITH GOODFRIEND, P.S.

By: _____
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Ian C. Cairns
WSBA No. 43210

GREENAWAY GAY & TULLOCH

By: _____
Carl L. Gay
WSBA No. 9272

Attorneys for Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 27, 2013, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of December, 2013.

V. Vigoren

Victoria K. Vigoren

310 P.3d 854
Court of Appeals of Washington,
Division 2.

Rachel Marguerite ANDERSON
(formerly Rachel M. Rodgers), 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; and Wells Fargo Bank, N.A., a, foreign corporation, Respondents,
Andrea Davey (fka Andrea Rodgers) and John Doe Davey, husband and wife, and the marital community composed thereof, Defendants.

No. 43280–3–II. | Oct. 1, 2013.

Synopsis
Background: Trust beneficiary brought claims against members of trust advisory committee and trustee alleging breach of fiduciary duties and a claim against attorney for legal malpractice. The Clallam Superior Court, Jay Bryan Roof, J., granted defendants summary judgment. Beneficiary appealed.

Holdings: The Court of Appeals, Quinn–Brintnall, J., held that:

[1] trial court's approval of trustee's accounting precluded action by beneficiary for breach of fiduciary duty under the Trustees' Accounting Act, and

[2] attorney and trustee were entitled to attorney fees.

Affirmed.

West Headnotes (5)

[1] **Trusts**
Operation and effect of accounting
390 Trusts
390VI Accounting and Compensation of Trustee
390k331 Operation and effect of accounting
Under the Trustees' Accounting Act, after the trial court's decree validating the accuracy of trustee's accounting is final and the time to appeal expires, a complaining party in interest relinquishes his or her right to recover losses, even losses from willful or negligent breaches of trust. West's RCWA 11.106.070.

[2] **Trusts**
Nature and essentials of trusts
Trusts
Nature of resulting trust
Trusts
Nature of constructive trust
390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k1 Nature and essentials of trusts
390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 Nature of resulting trust
390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 Nature of constructive trust
Where a trust arises by an express contract or agreement between the parties, it is an "express trust," and under practically all authorities implied, constructive, and resulting trusts are those which do not arise out of a contract between the parties providing for the trust, but arise by operation of law.

[3] **Trusts**
Operation and effect of accounting

App. A

390 Trusts
390VI Accounting and Compensation of Trustee
390k331 Operation and effect of accounting
Express special needs trust fell within the scope of the Trustees' Accounting Act, and thus, trial court's approval of trustee's accounting precluded action by beneficiary seven years later for breach of fiduciary duty. West's RCWA 11.106.070, 11.106.080.

[4] **Infants**
Probate and trusts
Trusts
Operation and effect of accounting
211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1238 Necessity and Grounds in Particular Actions or Proceedings
211k1238(4) Probate and trusts
390 Trusts
390VI Accounting and Compensation of Trustee
390k331 Operation and effect of accounting
Trial court's final decree approving trustee's accounting for express special needs trust was binding on minor beneficiary, even though the court did not appoint a guardian ad litem to represent interests of beneficiary before approving accounting; under the plain language of the Trustees' Accounting Act, the trial court had discretion to appoint a guardian ad litem. West's RCWA 11.106.060, 11.106.070, 11.106.080.

[5] **Attorney and Client**
Damages and costs
Trusts
Costs
45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(4) Damages and costs
390 Trusts
390IV Management and Disposal of Trust Property
390k245 Actions Between, By, or Against Trustees
390k268 Costs
Beneficiary's claims against attorney and trustee for legal malpractice and breach of fiduciary duty were meritless, and thus, attorney and trustee were entitled to attorney fees from trust funds pursuant to the Trust and Estate Dispute Resolution Act (TEDRA). West's RCWA 11.96A.150(1); RAP 18.1.

Attorneys and Law Firms

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Opinion

QUINN-BRINTNALL, J.

¶ 1 Shortly before her 21st birthday, Rachel Anderson brought suit against a host of defendants she believed mismanaged the "special needs" trust established for her when she was injured as a minor.[1] In her complaint, Anderson alleged that the two members of the "trust advisory committee"—her mother Andrea Davey,[2] and attorney Richard McMenamin—and the trustee, Wells Fargo Bank, N.A., breached their fiduciary duties by approving trust disbursements contrary to the spirit of the trust. Anderson also alleged that William Dussault, the attorney hired by Wells Fargo to submit annual reports for court approval, committed legal malpractice.

¶ 2 McMenamin, Dussault, and Wells Fargo all moved for summary judgment, arguing, inter alia, that Anderson's claims were barred by the Trustees' Accounting Act, ch. 11.106 RCW, res judicata, or judicial estoppel. Alternatively, each defendant argued that the trust's express language allowed for the disbursements in question and Anderson's claims failed, as a matter of law, to establish breach of fiduciary or legal duties. Without explaining its rationale, the ***856** trial court granted summary judgment to McMenamin, Dussault, and Wells Fargo. Anderson now appeals, arguing that (1) the Trustees' Accounting Act does not apply to her trust and does not bar her claims, (2) neither res

judicata nor judicial estoppel bar her claims, (3) the terms of the trust do not bar her claims, and (4) she presented enough evidence concerning the disbursements in question to warrant surviving summary judgment in light of disputed material facts.[3] Because the Trustees' Accounting Act bars Anderson's claims, we affirm.

FACTS

BACKGROUND

¶ 3 In November 1996, shortly after her sixth birthday, Anderson (formerly "Rachel M. Rodgers") was kicked in the face by a horse. Anderson "sustained major skull and facial damage" from the injury, required extensive surgery, and suffered substantial "psychological and emotional impact." 3 Clerk's Papers (CP) at 477. Anderson's family hired attorney McMenamin to settle her case and to that end, McMenamin retained attorney Dussault to prepare a trust in which to place the settlement proceeds. The trust was designed to "supplement all other financial and service benefits to which [Anderson] might be eligible as a result of her disability." 3 CP at 478.

¶ 4 On August 25, 1997, Clallam County Superior Court approved the settlement agreement and the parties' creation of the "Rachel Marguerite Rodgers Trust."[4] The trust agreement made Wells Fargo the trustee and established a trust advisory committee ("TAC"), consisting of McMenamin and Davey. The agreement gave the TAC "absolute and unfettered discretion to determine when and if [Anderson] needs regular and extra supportive services." 3 CP at 482.

¶ 5 The explicit language of the trust agreement explained that the trust was designed to

> provide extra and supplemental medical, health, and nursing care, dental care, developmental services, support, maintenance, education, rehabilitation, therapies, devices, recreation, social opportunities, assistive devices, advocacy, legal services, respite care, personal attendant care, income and other tax liabilities, and consultant services for [Anderson]. To this end, the [TAC] may provide such resources and experiences as will contribute to and make the beneficiary's life as pleasant, comfortable and happy as feasible. Nothing herein shall preclude the [TAC] 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.

3 CP at 481–82. The agreement also provided that the "Trustee shall make an annual statement of transactions and assets concerning all financial and investment activity undertaken on behalf of the Trust" to be delivered to Anderson, any court-appointed representative of Anderson, and the members of the TAC. 3 CP at 493.

¶ 6 The trust was initially funded with settlement proceeds amounting to $187,160.66.[5] Wells Fargo hired Dussault to ***857** prepare its annual reports for court approval. Dussault filed his first report to the court on January 25, 2000. The first report detailed all investment activities and trust disbursements between the trust's establishment date (August 25, 1997) and August 31, 1999. Among other expenses, the report stated that trust funds were used for "vehicle expenses in the total of $14,159.98" including the "purchase of a 1997 Mercury Tracer." 2 CP at 351. The superior court approved the report in its entirety. Dussault submitted the second report on February 12, 2001, which covered "all financial activity" from September 1, 1999 through August 31, 2000. 2 CP at 356. This report stated that "[d]isbursements from the Trust were in the total amount of $41,461.86" and included the "purchase of real estate." 2 CP at 356. The superior court also approved this report in its entirety.

¶ 7 On August 27, 2001, attorney Carl Gay (who represents Anderson in the current matter) sent a letter to Davey, Dussault, Wells Fargo, and McMenamin. The letter stated, in part,

> This letter will advise that I represent Ken Chace III and Janet Gesualdi, respectively the biological father and maternal grandmother of [Anderson]. At their request, I have recently had the opportunity to review the court

> file in the referenced matter. Based upon a review of recent accountings filed with the court, my clients are concerned that [Anderson]'s trust funds have not been fully and properly invested and it would appear numerous disbursements of trust funds have been made in violation of the letter and spirit of the trust agreement. Improper distributions include use of trust funds to purchase real estate which purportedly is not held in the name of the trust, purchase of a vehicle (and payment of related expenses), and use of trust monies to discharge certain parental financial obligations which are the responsibility of [Anderson]'s mother.

2 CP at 360. The letter further stated that "[i]n the event these issues are not resolved to the satisfaction of my clients, they are prepared to file a petition to intervene in this matter and seek a more focused judicial scrutiny of the trustees' actions." 2 CP at 361.

¶ 8 Dussault responded to Gay's letter on September 6. He told Gay that the trust was "currently resolving" the issue of the "purchase of an interest in a residence" and that he would "provide you and your clients with additional information concerning the trust's interest in the real property in the near future."[6] 2 CP at 362. Dussault also pointed out that "[o]ther expense[s] were incurred for travel expenses specifically for [Anderson]'s doctors' appointments and for purchase of a computer and software for her." 2 CP at 362. Gay did not respond to this letter.

¶ 9 On' February 7, 2002, Dussault again wrote Gay explaining that he was "ready to present for approval the September 1, 2000 through August 31, 2001 Annual Report" to the superior court. 2 CP at 364. Dussault included a copy of the proposed report for Gay to examine. Gay responded five days later expressing concerns over (1) the purchase of real property; (2) reimbursement of "funds for expenses which would otherwise be considered the financial support obligation of the custodial parent," including computer costs, vehicle costs, and funds related to birthday presents; (3) certain attorney fees; and (4) trustees' fees. 2 CP at 366. Dussault delayed presenting the report for court approval while he "attempted to address Mr. Gay's concerns." 2 CP at 347. In July of 2002, McMenamin resigned from his voluntary position as a member of the TAC "when it became apparent that there were ongoing problems with the disgruntled non-custodian parent ([Anderson's] father)." 2 CP at 288.

¶ 10 On December 6, 2002, Dussault submitted a two-year report for approval by the superior court. The report covered all financial ***858** activity undertaken by the trust between September 2000 and August 2002. The report noted that the "members of the TAC wish to dissolve the TAC and have the trustee assume all the functions designated to [the] TAC pursuant to the terms of the Trust." 2 CP at 372. The parties, including Gay, were notified that the trial court would hold a hearing related to the trustee report on July 11, 2003. Neither Gay nor his clients, Anderson's father and grandmother, appeared at the hearing. At the hearing, after "having heard the presentation of counsel, [and] having considered the files and records" related to the report, the superior court approved Dussault's report. 2 CP at 375. Additionally, the superior court dissolved the TAC and assigned Wells Fargo as the trustee "to carry out all of the duties of the TAC under the terms of the Trust Agreement." 2 CP at 375. The trial court's approval of the report was not appealed.

¶ 11 From December 23, 2003 to December 4, 2009, the trial court approved four additional reports, none of which were objected to by any interested party. The last such report was approved by the superior court on December 4, 2009, when Anderson was 19 years old. The superior court requested that the next report be filed toward the end of 2011.

PROCEDURE

¶ 12 On July 22, 2011, a few days before her 21st birthday, Gay (now acting on Anderson's behalf) filed a complaint against Davey, McMenamin, Dussault, Wells Fargo, and others alleging "[t]he defendants, and each of them, failed to discharge their fiduciary and other legal duties to [Anderson] as the beneficiary of the trust." 3 CP at 474. Gay attached a letter from R. Duane Wolfe, a certified public accountant, to the complaint. Wolfe's letter stated that in his opinion, Anderson's trust should be reimbursed for (1) the cost of a vehicle purchased by the trust and used by Davey to drive Anderson to doctor's appointments, (2) costs associated with computer related expenses, (3) lost rental income from a house the trust purchased a partial interest in (where Anderson and Davey resided at one point), (4) $1,500 in reimbursements paid to Davey, and (5) certain trustee and

legal fees. With interest, Wolfe estimated that $56,873 should be restored to the trust.

¶ 13 McMenamin, Dussault, and Wells Fargo all brought motions for summary judgment. McMenamin argued that Anderson's claims were barred by the Trustees' Accounting Act,[7] res judicata, judicial estoppel, and the doctrine of judicial immunity. McMenamin also argued that if Anderson's claims were not barred, he acted in accord with the trust's express terms and, accordingly, Anderson could not establish breach of legal or fiduciary duties. Dussault argued that as the attorney hired by Wells Fargo solely to prepare annual reports for court approval, he had no legal or fiduciary duties to Anderson. Alternatively, Dussault argued that the Trustees' Accounting Act, res judicata, and judicial estoppel barred Anderson's claims. Wells Fargo argued that Anderson could not establish breach of fiduciary duties because it acted in accord with the trust's express terms. Wells Fargo also argued that the Trustees' Accounting Act and res judicata barred Anderson's claims.

¶ 14 In response to the summary judgment motions, Gay submitted declarations from Anderson, her father, and her maternal grandmother, all alleging that Davey periodically committed fraud in obtaining reimbursements from the trust.[8] Gay also submitted a declaration from an attorney opining on the standard of care owed by an "attorney representing a trustee for a minor beneficiary." 1 CP at 141. In addition, Gay argued in his reply brief that

> [t]his case presents factual disputes whether disbursements from [Anderson]'s trust ***859** fund benefitted [her], not [Davey] or others, in accordance with the trust agreement. There are factual disputes whether [Davey] and Mr. McMenamin fulfilled their fiduciary roles, as members of the [TAC], in ensuring [Anderson]'s trust funds were disbursed in accordance with the trust agreement or whether they were negligent in allowing those expenditures. There are factual disputes whether Wells Fargo Bank and its legal counsel fulfilled their fiduciary and legal duties, as trustee and lawyers, in ensuring [Anderson]'s trust funds were disbursed in accordance with the trust agreement. There are factual disputes whether [Anderson] has suffered a financial loss as a consequence of those duties being breached.
>
> 1 CP at 88. Gay also argued that the Trustees' Accounting Act did not apply to the trust, and that res judicata and judicial estoppel did not bar the claims.

¶ 15 On March 1, 2012, after considering the parties' briefing, declarations, other evidence, and oral argument, the trial court granted summary judgment to Wells Fargo, McMenamin, and Dussault. Anderson appeals the order granting summary judgment.

DISCUSSION

STANDARD OF REVIEW

¶ 16 We review a trial court's summary judgments de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wash.2d 510, 517, 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990).

¶ 17 In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See, e.g., LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The nonmoving party may not rest upon mere allegations or denials during this burden shifting process. *Hiatt v. Walker Chevrolet Co.*, 120 Wash.2d 57, *66*, 837 P.2d 618 (1992). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. In addition, we interpret statutes de novo. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 587, 90 P.3d 659 (2004).

TRUSTEES' ACCOUNTING ACT

¶ 18 Wells Fargo, Dussault, and McMenamin all argue that Washington's Trustees' Accounting Act bars Anderson's claims and, accordingly, the trial court's summary judgment

should be affirmed. Because the Trustees' Accounting Act applies to Anderson's "special needs" trust, we agree. Moreover, because this issue is dispositive, we do not address Anderson's remaining arguments.

¶ 19 Under ch. 11.106 RCW, Washington's Trustees' Accounting Act, a trustee like Wells Fargo may

> file in the superior court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:
>
> (1) The period covered by the account;
>
> (2) The total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;
>
> (3) An itemized statement of all principal funds received and disbursed during such period;
>
> ***860** (4) An itemized statement of all income received and disbursed during such period, unless waived;
>
> (5) The balance of such principal and income remaining at the close of such period and how invested;
>
> (6) The names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;
>
> (7) A description of any possible unborn or unascertained beneficiary and his or her interest in the trust fund.
>
> After the time for termination of the trust has arrived, the trustee or trustees may also file a final account in similar manner.

RCW 11.106.030.

¶ 20 If a trustee has filed such an intermediate accounting, the Act requires the superior court to determine the validity and accuracy of the accounting:

> Upon the return date or at some later date fixed by the court if so requested by one or more of the parties, the court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth in the account including the purchase, retention, and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the account or any part of it, and surcharging the trustee or trustees for all losses, if any, caused by negligent or wilful breaches of trust.

RCW 11.106.070.

[1] ¶ 21 And if the superior court enters such a decree, it "shall be deemed final, conclusive, and binding upon all the parties interested *including all incompetent,* unborn, and unascertained beneficiaries of the trust.". RCW 11.106.080 (emphasis added). As this court stated in *Barovic v. Pemberton,* 128 Wash.App. 196, 201, 114 P.3d 1230 (2005), "the statutory language is unambiguous." The trial court "must either approve or disapprove the accounting" and must surcharge the trustee for losses caused by negligence or willful breach. *Barovic,* 128 Wash.App. at 201, 114 P.3d 1230. However, after the trial court's decree is final and the time to appeal expires, a complaining party in interest relinquishes his or her right to recover losses, even losses from willful or negligent breaches of trust.[9] *Barovic,* 128 Wash.App. at 201–02, 114 P.3d 1230.

¶ 22 Here, Anderson admits that the court-approved report from December 23, 2003—a report filed and approved more than seven years before Anderson brought this lawsuit—involves "the final year of accounting for which [she] now presents a challenge." Reply Br. of Appellant at 12 n. 3. She fails to explain why the applicable statutes of limitations should have tolled during the years of her incompetency.[10] Instead, she argues ***861** that the Trustees' Accounting Act does not apply to her trust or, alternatively, that "a trial court's approval of a trustees' report is not binding on a minor beneficiary for which a guardian *ad litem* ('GAL') was not appointed." Reply Br. of Appellant at 14. Anderson misinterprets the Act in both instances.

[2] ¶ 23 At the time the superior court adjudicated Anderson's claim, the first section of the Act stated, in part, "This chapter does not apply to resulting trusts, constructive trusts [or] trusts created by judgment or decree of a federal court or of the superior court when not sitting

in probate."[11] Former RCW 11.106.010 (1985). As the Washington Supreme Court explained nearly 90 years ago,

> [W]here a trust arises by an express contract or agreement between the parties, it is an express trust, and under practically all authorities implied, constructive, and resulting trusts are those which do not arise out of a contract between the parties providing for the trust, but arise by operation of law.

In Re Weir's Estate, 134 Wash. 560, 566, 236 P. 285 (1925).

[3] ¶ 24 According to Anderson, the Act does not apply to her trust because her trust was created by "judgment or decree" of a superior court when not sitting in probate and, accordingly, is a resulting or constructive trust that has arisen by operation of law. We disagree. This assertion mischaracterizes the record. The superior court here did not "create" Anderson's trust by judgment or decree. Instead, it merely approved an *express* trust intentionally created by agreement of the parties to Anderson's original lawsuit.[12] And while no Washington court has previously addressed whether an express "special needs" trust falls within the scope of the Trustees' Accounting Act, Anderson provides no cogent argument for why the Act should not apply to such a trust. We hold that the Act applies.

[4] ¶ 25 Alternatively, Anderson argues that because the superior court failed to appoint a guardian ad litem to represent her interests, the court's final decrees approving each report are not binding on her. We disagree; nothing in the Act requires appointment of a guardian ad litem.

¶ 26 RCW 11.106.060 states that when a trustee seeks court approval of an intermediate accounting, "[t]he court shall appoint guardians ad litem as provided in RCW 11.96A.160." Anderson argues that this statute imparts to the trial court a mandatory duty to appoint a guardian ad litem based on the word "shall" in the opening clause of the statute. "We construe the meaning of a statute by reading it in its entirety." *Fed. Way Sch. Dist. No. 210 v. Vinson,* 172 Wash.2d 756, 765, 261 P.3d 145 (2011). A reasonable interpretation of a statute "must, at a minimum, account for all the words in [the] statute." *Five Corners Family Farmers v. State,* 173 Wash.2d 296, 312, 268 P.3d 892 (2011). Accordingly, a reasonable interpretation of RCW 11.106.060 requires determining what RCW 11.96A.160 provides. And contrary to Anderson's assertions of a mandatory duty, RCW 11.96A.160(1) states that

> [t]he court, upon its own motion or upon request of one or more of the parties, at any stage of a judicial proceeding or at any ***862** time in a nonjudicial resolution procedure, *may* appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person, person whose identity or address is unknown, or a designated class of persons who are not ascertained or are not in being. If not precluded by a conflict of interest, a guardian ad litem *may* be appointed to represent several persons or interests.

(Emphasis added.) Under the plain language of the statute, the trial court has the *discretion* to appoint a guardian ad litem—nothing in the statute (or the Trustees' Accounting Act) makes such an appointment mandatory.

¶ 27 Anderson fails to show how the trial court's final decrees approving each trust report should not be binding on her. Nor has Anderson explained how the judicial oversight of each intermediate accounting submitted to, and approved by, the superior court provided her inadequate notice or protection when she was incompetent to assess the performance of her own trust. We hold that the Trustees' Accounting Act bars Anderson's claims and the trial court properly granted Dussault, Wells Fargo, and McMenamin summary judgment. Moreover, because this issue is dispositive, we do not address the parties' other claims. We affirm the trial court.

ATTORNEY FEES

[5] ¶ 28 Dussault and Wells Fargo both request reasonable costs and attorney fees pursuant to RAP 18.1 and the Washington Trust and Estate Dispute Resolution Act ("TEDRA"), ch. 11.96A RCW. TEDRA provides,

> Either the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings ... to be paid in such amount and in such

> manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1).

¶ 29 As Anderson's claims against Dussault and Wells Fargo lack merit, we grant their request for costs and attorney fees in an amount to be determined by our commissioner. RAP 18.1(f).

We concur: JOHANSON, A.C.J., DALTON, J.P.T.

Footnotes

1 42 U.S.C. § 1396p(d)(4)(A) allows for the creation of "special needs" trusts for disabled individuals under the age of 65. Payments made from such a trust are not considered income and the trust corpus is not considered a resource available to the trust beneficiary (for purposes of taxation or social services eligibility) so long as "the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan." 42 U.S.C. § 1396p(d)(4)(A). Here, because both parties refer to the trust as a "special needs" trust, we do not analyze whether this trust in fact satisfies the stringent requirements of 42 U.S.C. § 1396p(d)(4)(A).

2 As explained more fully below, Davey (formerly "Andrea Rodgers") is not a party to this appeal.

3 On May 4, 2012, the trial court entered an order decreeing that Anderson's "claims are dismissed in their entirety with prejudice." Clerk's Papers (CP) at 512. Although Anderson characterizes the dismissal of claims against the defendants other than McMenamin, Dussault, and Wells Fargo—especially the dismissal of her claims against Davey—as "an error potentially needing to be corrected *nunc pro tunc*," the dismissal order itself appears clear on its face. Reply Br. of Appellant at 32. The order distinguishes "[t]hose defendants defending separately, Dussault, Wells Fargo and McMenamin" and awards them attorney fees; moreover, the order's caption states that it is a "Judgment for All Defendants." CP at 512. Anderson has not appealed the dismissal order.

4 Special Proceedings Rule (SPR) 98.16W normally governs approval of settlements involving minors. Anderson does not argue that the parties failed to follow the procedures of SPR 98.16W and, accordingly, we do not further address this issue.

5 The negotiated settlement was for $300,000. The funded amount constituted the remainder of the settlement after court-approved "costs, liens, subrogations, parents' claims, and attorney's fees." 3 CP at 476. According to the chart of Anderson's own expert, as of August 2007, before the trust started paying for Anderson's "post secondary education," the trust had a market value of $197,045.28. 1 CP at 26.

6 The trust later established its 31 percent interest in the real estate in question by statutory warranty deed. The home was sold in 2005 and, at that time, the Trust received $49,135, a net profit after closing costs of 26 percent.

7 The Trustees' Accounting Act, discussed more fully below, requires that after a court has either approved or disapproved of a submitted trust accounting, that decree is subject only to a right of appeal and when the time to appeal expires, the accounting becomes " 'final, conclusive, and binding' on all interested parties, even 'incompetent, unborn, and unascertained beneficiaries.' " *Barovic v. Pemberton*, 128 Wash.App. 196, 201, 114 P.3d 1230 (2005) (quoting RCW 11.106.080).

8 Anderson never amended her complaint to allege fraud as required by CR 9(b).

9 The Act states that "any party in interest may appeal" the decree rendered under RCW 11.106.070 "as in civil actions to the supreme court or the court of appeals of the state of Washington." RCW 11.106.090.

10 Indeed, under the plain language of the statute, the statute of limitations would not toll for an incompetent trust beneficiary like Anderson. *Waste Mgmt., of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994) ("[W]here a statute is unambiguous, we will determine the Legislature's intent from the language of the statute alone."). Anderson argues that her "underlying claims against the respondents for breach of legal and fiduciary duties were being quietly tolled under the applicable statutes of limitations" when discussing the doctrine of res judicata. Reply Br. of Appellant at 18. But she provides no citation to authority for this proposition and fails to explain which statutes of limitations are applicable to her claims.

The statutes of limitation for breach of fiduciary duty or legal malpractice claims are both three years. *See* RCW 11.96A.070(1)(a); *Huff v. Roach*, 125 Wash.App. 724, 729, 106 P.3d 268 (citing RCW 4.16.080(3)), review *denied*, 155 Wash.2d 1023, 126 P.3d 1279 (2005). Anderson appears to be arguing that a claim for breach of fiduciary duty or legal malpractice may be brought outside the framework of the Trustees' Accounting Act. In her reply brief she argues that her "current lawsuit is not an action seeking to undo the court's serial approvals of Wells Fargo's annual statements prior to [Anderson] becoming an adult." Reply Br.

of Appellant at 18. But this contention runs contrary to the purpose of the Act itself: establishing the finality of intermediate, court-approved trust accountings. Anderson has provided no authority for this unpersuasive argument.

11 During the pendency of this appeal, the legislature removed the phrase "trusts created by judgment or decree of a federal court or of the superior court when not sitting in probate" from RCW 11.106.010. Laws of 2013, ch. 272, § 25. Pursuant to section 28(2) of the same legislation, the amended version of RCW 11.106.010 applies only to "judicial proceedings concerning trusts commenced on or after January 1, 2013." LAWS OF 2013, ch. 272, § 28(2). As the superior court decided this case on March 1, 2012, the amended version of the statute is inapplicable to this case and we address the merits of Anderson's claim based on the former version of RCW 11.106.010.

12 Anderson's opening brief characterizes the court's approval of the trust in these same terms: "Respondent Richard McMenamin ... was hired by [Anderson's] family to pursue a personal injury claim against the owners of the horse and on August 25, 1997 ... the trial court *approved* a minor's settlement for [Anderson] in the amount of $300,000. CP 286. In conjunction therewith, the court also *approved* the establishment of a special needs trust." Br. of Appellant at 4 (emphasis added). Anderson only argues that the superior court "created" (rather than approved) her "special needs" trust in her reply brief in response to the defendants' claims that the Trustees' Accounting Act bars her claims.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RACHEL MARGUERITE ANDERSON (formerly RACHEL M. RODGERS),

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; and WELLS FARGO BANK, N.A., a foreign corporation,

Respondents,

ANDREA DAVEY (fka ANDREA RODGERS) and JOHN DOE DAVEY, husband and wife, and the marital community composed thereof,

Defendants.

No. 43280-3-II

ORDER GRANTING MOTION TO SUPPLEMENT THE RECORD AND DENYING MOTION FOR RECONSIDERATION

Appellant has moved for reconsideration of the published opinion filed on October 1, 2013, and to supplement the record in support of her motion for reconsideration. Upon consideration, it is hereby

No. 43280-3-II

ORDERED, that the motion to supplement the record is granted and the motion for reconsideration is denied.

DATED this 27th day of November, 2013.

Johanson, A.C.J.
ACTING CHIEF JUDGE

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PLEASE REPLY TO SEATTLE OFFICE

November 11, 1983

HAND DELIVERY

John S. Fattorini, Jr.
Office of Legislative Affairs
Washington State Bar Association
3rd floor, College Club Building
Seattle, WA 98104

Dear John:

I am very pleased to report to you that our enormously hard working committee has completely revised our draft of the trust bill which we enclose herewith for your delivery to the code reviser.

We have accepted nearly every suggestion from Bill Perry of the House Judiciary Committee. I will be sending him a copy of this bill in about a week with a detailed letter responding to each matter he raised and also returning his copy of the bill with tabs that show him the places where we did not accept his suggestion, and I assure you that those are very small in number.

We have accepted the suggestion of Dutch Hayner that professional service corporations limited to lawyers be allowed to be trustees. We have therefore made the necessary amendments in RCW 11.02.005 (14), RCW 11.36.010 and RCW 18.100.080 which you can read in the enclosed draft.

We have revised the standard of care for trustees in accordance with our agreement with the legislative leaders in RCW 11.99.020 to adopt the UPC standard of care. We have also revised the Allard provisions in RCW 11.99.140 in a very constructive and positive manner that satisfies the Attorney General's Office and also meets our commitments to the legislative leaders.

We have received the report of the Corporate Trustees Association and have reached agreement with them on all of their suggested changes.

We have had the bill reviewed by the C.P.A. Society of Washington, have answered all of the concerns raised by their representative, and we believe that their society will endorse the bill, but the procedure for that endorsement has not been completed yet.

We have received a number of detailed letters from our fellow lawyers and this draft reflects the changes in response to many letters. In particular, we have adopted all of the editorial changes suggested by Dan Reaugh. We still have approximately four letters from lawyers to complete. All lawyers who have written us will receive a detailed response and a copy of the draft of the bill. We hope to have all of the responses to the lawyers completed in the next several weeks.

I am happy to report that we believe we are on track for the meeting with the Bar's Legislative Committee on December 2nd. Please let me know any earlier deadlines and procedures for submitting our materials to that committee.

Incidentally, I believe that Seth Armstrong has set an initial hearing for January 10th. Nearly all of the members of the Task Force go to the Miami Estate Planning Institute every year. That institute runs from January 9th to the 13th. This is a very important CLE function for all of us. Perhaps you could help us in having Seth schedule the first hearing either in the first week of January or the third week of January.

The committee has asked me to express our deep appreciation for your help in this process.

Very truly yours,

GARVEY, SCHUBERT, ADAMS & BARER

By
Kenneth L. Schubert, Jr.

KLS/b
Enclosure

cc: Trust Task Force Members
Roger Underwood

Section references are to
Engrossed Substitute House Bill No. 1213

INDEX OF NEW & CHANGED CHAPTERS

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
4.16.110(2)	Repealed 4.16.370(N)	Actions against personal representatives and trustees for breach of fiduciary duty	(JAC)
7.24.040	Repealed-See New 11.96.009	Declaratory Judgment	
11.02.005(2)	11.02.005(1)(R)	adds "Special representative" and defines Will	(KLS)
	11.02.005(8)(R)	Defines will	
	11.02.005(9)(R)	Defines codicil	
	11.02.005(14)(N)	Defines trustee	(JAC)
11.02.010	11.96.010 (R)	Jurisdiction in probate matters	(AHK)
11.02.020	11.96.020 (R)	Powers of courts when law inapplicable, insufficient, or doubtful	(AHK)
11.02.030	11.96.030 (R)	Exercise of powers -- orders writs, process, etc.	(AHK)
11.02.060	11.96.090 (R)	Power of clerk to fix dates of hearings	
11.12.250	11.12.250 (R)	Gifts by will to trusts	
	11.12.255 (N)	Incorporation by reference	(RAK)
	11.12.260 (N)	Separate writing identifying bequest of tangible personalty	(RAK)
	11.36.021 (N)	Trustees	
11.16.050	Repealed-See 11.96.030	Venue	(AHK)
11.28.240	11.28.240 (R)	Request for special notice of proceedings in probate	(KLS)
11.68.090	11.68.090 (R)	Powers of PR	(SF)

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
11.68.110	11.68.110 (R)	Declaration of Completion of Probate - Automatic Discharge	(BPF)
11.92.040	11.92.040 (R)	Duties of guardian or limited guardian in general	
	11.92.140 (N)	Gifts from Guardianship	(EOT)
11.92.150	11.92.150 (R)	Request for special notice of proceedings	(KLS)
Ch. 21.24	Ch. 11.93	Uniform Gifts to Minors Act	
21.24.010	11.93.010 (R)	Definitions	(VV)
21.24.020	11.93.020 (R)	Manner of making gift	(VV)
21.24.030	11.93.030 (R)	Effect of gift	(VV)
21.24.040	11.93.040 (R)	Duties and Powers of Custodian	(VV)
21.24.050	11.93.050	Custodian's expenses, compensation, bond, and liabilities	(VV)
21.24.060	11.93.060	Exemption of third persons from liability	
21.24.070	11.93.070	Resignation, death, or removal of custodian - bond - appointment of successor guardian	
21.24.080	11.93.080	Accounting by custodian	
21.24.100	11.93.900	Short title	
21.24.090	11.93.910	Construction 1959 c 202	
21.24.091	11.93.911	Construction 1967 ex.s. c 88	
	11.93.912 (N)	Construction -- 1984	(VV)
21.24.100	11.93.900	Short title	
21.24.900	11.93.920	Severability - 1959 c 202	
	RCW ch. 21.25 repealed	Gifts of realty to minors act	
	Ch. 11.94	Power of Attorney	
11.94.010	11.94.010	Designation - Authority	
11.94.020	11.94.020 (R)	Effect of death, disability or incompetence of principal	(JAC)
	11.94.030 (N)	Banking transactions	(JAC)
	11.94.040 (N)	Release from liability	(JAC)
	11.94.050 (N)	Exempted matters	(JAC)
	11.94.060 (N)	Homesteads	(JAC)

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
	Ch. 11.95	Powers of Appointment	
64.24.010	11.95.010 (R)	Releases	(RAK)
64.24.020	11.95.020 (R)	Partial releases	(RAK)
64.24.030	11.95.030 (R)	Form and substance - delivery	(RAK)
64.24.040	11.95.040 (R)	Effect on prior releases	(RAK)
64.24.050	11.95.050	Filing with Secretary of State	
	11.95.060 (N)	Exercise of powers of appointment	(RAK)
	11.95.070 (N)	Application	
	11.96	Dispute resolution	
11.02.010	11.96.009 (R)	Jurisdiction in probate and trust matters	(AHK)
11.02.020	11.96.020 (R)	Powers of courts when law inapplicable, insufficient, or doubtful	
11.02.030	11.96.030 (R)	Exercise of powers - orders, writs, process, etc.	
	11.96.040 (N)	Situs of trust	(EPF)
11.16.050	11.96.050 (R)	Venue - proceedings involving probate or trust	(AHK)
4.16.110(2)	11.96.060 (R)	Statutes of limitations - proceedings involving trusts and estates	(JAC)
7.24.040	11.96.070 (R)	Petition for judicial proceedings	(EOT & KLS)
	11.96.080 (N)	Hearing and form of notice	(EOT & KLS)
11.02.060	11.96.090 (R)	Power of clerk to fix dates of hearings	
	11.96.100 (N)	Notice for judicial proceeding	(EOT & KLS)
	11.96.110 (N)	Constructive notice	(EOT)
	11.96.120 (N)	Special notice	(EOT)
	11.96.130 (N)	Trial rules; judgments	(AHK)
	11.96.140 (N)	Costs; discretion to order payment by parties or from estate	(KLS)
30.30.120	11.96.150 (R)	Execution upon trust income or vested remainder	(JAC)
11.96.010	11.96.160	Appeals to Supreme Court or Court of Appeals	(CAS & KLS)
	11.96.170 (N)	Nonjudicial resolution of disputes	(CAS & KLS)
	11.96.180 (N)	Appointment of guardians ad litem	(EOT & KLS)

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
	Ch. 11.97 Effect of Trust Instrument		
30.90.020	11.97.010 (R)	Power of trustor -- trust provisions control chapter provisions	(RAK)
	11.97.900 (N)	Application of chapter	(RAK)
Ch. 30.99	Ch. 11.98 Trusts		
30.99.010	11.98.009	Application of chapter	
30.99.030	11.98.015 (R)	Exercise of powers by co-trustees	(RAK)
	11.98.019 (N)	Release of powers by co-trustee	(RAK)
30.99.040	11.98.029	Resignation of trustee	
30.99.050	11.98.039 (R)	Changing Trustee	
	11.98.045	Criteria for transfer of trust administration	(BPF)
	11.98.051	Non-judicial transfer of trust administration	(BPF)
	11.98.053	Judicial transfer of trust administration	(BPF)
30.99.060	11.98.060	Power of successor trustee	
	11.98.065 (N)	Change in form of corporate trustee	(DCL)
30.99.070	11.98.070 (R)	Power of trustee	(SF)
	11.98.080 (N)	Consolidation of trusts	(GAS)
30.99.080	11.98.090	Nonliability of third persons without knowledge of breach	
30.99.090	11.98.100	Nonliability for action or inaction based on lack of knowledge of events	
30.99.100	11.98.110 (R)	Contract and tort liability	(EOT & KLS)
11.98.010	11.98.130 (R)	Violation of rule against perpetuity	(RAK)
11.98.020	11.98.140 (R)	Distribution of assets and vesting of interest during period trust not invalid	(RAK)
11.98.030	11.98.150 (R)	Distribution of assets at expiration of period	(RAK)
11.98.040	11.98.160 (R)	Effective date of creation of trust	(KLS)
48.18.450	11.98.170	Trustee or custodian named as beneficiary	(RAK)
11.98.050	11.98.900	Application of chapter	
30.99.900	11.98.910	Severability	

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
30.99.910	11.98.920	Short title	
Ch. 30.24	11.100	Investment of trust funds	
30.24.010	11.100.010	Provisions of chapter to control	
30.24.015	11.100.015	Guardian, guardianships and funds are subject to chapter	
30.24.020	11.100.020 (R)	General specifications	(AHK)
30.24.080 repealed	11.100.023 (N)	Investments in certain enterprises	(EOT)
	11.100.025 (N)	Marital deduction interests	(DCL)
30.24.030	11.100.030	Investment in savings accounts -- Requirements	
30.24.035	11.100.035	Investments in securities of certain investment trusts	
30.24.037	11.100.037	Investment or distribution of funds held in fiduciary capacity -- Deposit in other departments authorized -- Collateral security required, exception	
30.24.040	11.100.040	Court may permit deviation from terms of trust instrument	
30.24.050	11.100.050	Scope of chapter	
30.24.060	11.100.060 (R)	Liability of a fiduciary holding trust property	(AHK)
30.24.070	11.100.070 (R)	Terms of trust instrument defining permitted investments	(RAK)
30.24.080	Repealed	Securities in default ineligible. See 11.99.021	
30.24.090	11.100.090 (R)	Dealings with self or affiliate	(PSB)
30.24.120	11.100.120 (R)	Investments in policies of life insurance	(AHK)
30.24.130	11.100.130	Person to whom power or authority to direct or control acts of trustee or investments of a trust are conferred deemed a fiduciary -- Liability	
	11.100.140 (N)	Notice and procedure for non-routine transactions	(AHK)
Ch. 30.28	Ch. 11.102	Common Trust Funds	
30.28.010	11.102.010	Funds authorized	

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
30.28.020	11.102.020	Accounting	
30.28.030	11.102.030	Applicability of chapter	
30.28.040	11.102.040	Interpretation	
30.28.050	11.102.050	Chapter designated "Uniform Common Trust Fund Act"	
Ch. 11.104	Ch. 11.104	Washington Principal and Income Act	(DCL)
	11.104.010 (R)	Definitions	"
	11.104.020 (R)	Duty of trustee as to receipts and expenditures	"
	11.104.030 (R)	Income--principal--charges	"
	11.104.040 (R)	When right to income arises --apportionment of income	"
	11.104.050 (R)	Income earned during administration of a decedent's estate	"
	11.104.060 (R)	Corporate distribution	"
	11.104.070 (R)	Bond premium and discount	"
	11.104.080 (R)	Trade, business and farming operations	"
	11.104.090 (R)	Disposition of natural resources	"
	11.104.100 (R)	Timber	"
	11.104.110 (R)	Other property subject to depletion	"
	11.104.120 (R)	Underproductive property	"
	11.104.130 (R)	Charges against income and principal	(DCL & RAK)
	11.104.900	Application of chapter	
	11.104.910	Short title	
	11.104.920	Severability--1971 c 74	
	11.104.930	Section headings not part of law	
	11.104.940	Effective date 1971 c 74	
Ch. 30.30	Ch. 11.106	Trustee's Accounting Act	
30.30.010	11.106.010	Scope of chapter -- exceptions	
30.30.020	11.106.020	Trustee's annual statement	
30.30.030	11.106.030	Intermediate and final accounts -- Contents -- Filing	
30.30.040	11.106.040 (R)	Account - Court may require petition	(KLS)

OLD	NEW (N) OR REVISED (R)		SUBJECT	AUTHOR
30.30.050	11.106.050	(R)	Account filed - return day	(KLS)
30.30.060	11.106.060	(R)	Account filed - objections - Representation of beneficiaries	(KLS)
30.30.070	11.106.070		Court to determine accuracy, validity - Decree	
30.30.080	11.106.080		Effect of decree	
	11.106.090		Appeal from decree	
30.30.100	11.106.100	(R)	Settlor may waive or increase accounting requirements - waiver by beneficiary	(RAK)
30.30.110	11.106.110	(R)	Waiver - how constituted	(RAK)
	Ch. 11.108		Distribution in Satisfaction of Certain Bequests	
	11.108.010	(N)	Definitions	(BPF)
	11.108.020	(N)	Marital deduction gift; compliance with federal law; intent	(BPF)
	11.108.030	(N)	Pecuniary bequests; valuation of assets if distribution other than money	(BPF)
	11.102.040	(N)	Construction of certain pre-September 12, 1981, marital deduction formula bequests	(BPF)
	11.102.050	(N)	Marital deduction gift in trust; applicable provisions	(BPF)
	11.102.060	(N)	Marital deduction gift; six months survivorship requirement	(BPF)
	11.108.900	(N)	Application of chapter	(BPF)
	Ch. 11.110		Charitable Trusts	
19.10.010	11.110.010		Purpose	
19.10.020	11.110.020		Definitions	
19.10.040	11.110.040		Information, documents and reports are public records	
19.10.050	11.110.050		Register of trustee	
19.10.060	11.110.060	(R)	Instrument establishing trust, inventory of assets, tax exempt status or claim, tax return to be filed	(MRS)
19.10.070	11.110.070		Reports of trustee, filing	
19.10.073	11.110.073		Reports of trustee, trustees exempt	

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
19.10.075	11.110.075	Trusts not exclusively charitable	
19.10.080	11.110.080	Court records to attorney general	
19.10.090	11.110.090	Uniformity with laws of other states	
19.10.100	11.110.100	Investigations by attorney general	
19.10.110	11.110.110	Order to appear -- Effect -- Enforcement -- Court review	
19.10.120	11.110.120 (R)	Compliance and proper trust administration	(MRS)
19.10.125	11.110.125	Violations -- Refusal to file reports, perform duties, etc.	
19.10.130	11.110.130	Violations -- Civil action	
19.10.140	11.110.140	Penalty	
19.10.200	11.110.200	Tax Reform Act of 1969, application to trusts	
19.10.210	11.110.210	Tax Reform Act of 1969, trust instruments, prohibiting provisions	
19.10.220	11.110.220	Tax Reform Act of 1969, trust instruments, provisions for distribution	
19.10.230	11.110.230	Tax Reform Act of 1969, rights, powers of courts, attorney general not impaired	
19.10.240	11.110.240	Tax Reform Act of 1969, references to federal code	
19.10.250	11.110.250	Tax Reform Act of 1969, new trust or amendment to existing trust	
19.10.260	11.110.260	Tax Reform Act of 1969, severability	
19.10.270	11.110.270	Tax Reform Act of 1969, not for profit corporations	
18.100.080	18.100.080 (R)	Professional service corporations as trustee or personal representative	(JAC)
	Ch. 25.04 General Partners		
25.04.020	25.04.020 (R)	Definition of terms	(BPF)
25.04.150	25.04.150 (R)	Nature of partner's liability	(BPF)
	64.28.040 (N)	Joint tenancy interests held by husband and wife	(RAK)
	11.120.010 (N)	Severability	

OLD	NEW (N) OR REVISED (R)	SUBJECT	AUTHOR
11.88.010	11.88.010	Authority to appoint	
11.88.040	11.88.040 (R)	Notice of hearing	

(Intervening Sections Omitted)

with the clerk of ~~said~~ the court on or before ~~such~~ the return day. [1955 c 33 §30.30.050. Prior: 1951 c 226 §5.]

Comment: Formerly RCW 30.30.050. These changes incorporate the judicial resolution procedures of chapter 11.96 RCW for uniformity of procedures.

Sec. 133 11.106.060 Account filed -- Objections -- Representation of beneficiaries. Upon or before the return day any beneficiary of the trust may file his written objections or exceptions to the account filed or to any action of the trustee or trustees set forth ~~therein~~ in the account. The court shall appoint ~~[either the legal]~~ guardians ad litem as provided in RCW 11.96.180 and the court may allow representatives to be appointed under RCW 11.96.170 and 11.96.110 to represent the persons listed in those sections. ~~[of a beneficiary, or a guardian ad litem to represent the interests of any such beneficiary who is an infant or incompetent or disabled to such an extent that he or she could not understand the accounting given, or who is yet unborn or unascertained, and such beneficiary shall be bound by any action taken by such representative. Every unborn or unascertained beneficiary shall be concluded by any action taken by the court for or against any living beneficiary of the same class or whose interests are similar to the interests of such unborn or unascertained beneficiary.]~~ [1977 ex.s. c 80 §31; 1955 c 33 §30.30.060. Prior: 1951 c 226 §6.]

Purpose -- Intent -- Severability -- 1977 ex.s. c 80; See notes following RCW 4.16.190.

Comment: Formerly RCW 30.30.060. These changes incorporate the judicial resolution procedures of chapter 11.96 RCW for uniformity of procedures.

Sec. 134 11.106.070 Court to determine accuracy, validity -- Decree. ~~At the same time~~ Upon the return date or at some later date fixed by the court if so requested by one or more of the parties, the court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth ~~therein~~ in the account including the purchase, retention and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the ~~same~~ account or any part ~~thereof~~ of it, and surcharging the trustee or trustees for all losses, if any, caused by negligent or wilful breaches of trust. [1955 c 33 §30.30.070. Prior: 1951 c 226 §7.]

Comment: Formerly RCW 30.30.070.

Sec. 135 11.106.080 Effect of decree. The decree ~~so~~ 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

Victoria Vigoren

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