No. 43280-3-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

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

Appellant,

v.

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

Respondents.

RESPONSE BRIEF OF WELLS FARGO BANK, N.A.

James R. Hennessey, WSBA # 14376
Julia K. Doyle, WSBA #43993
SMITH & HENNESSEY, PLLC
316 Occidental Avenue So., Suite 500
Seattle, WA 98104
206-292-1770

pm 8/3/12

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I. INTRODUCTION

This action arises out of a special needs Trust established for the benefit of appellant Rachel Marguerite Anderson (formerly Rachel M. Rodgers) ("Anderson") in 1997. The Trust Agreement for The Rachel Marguerite Rodgers Trust ("Trust Agreement") was created pursuant to a minor's settlement of tort claims and was approved by the Clallam County Superior Court. Wells Fargo Bank, N.A. ("Wells Fargo") was appointed Trustee within the original Trust document.

On July 22, 2011, Anderson filed a complaint in Clallam County Superior Court, alleging, *inter alia*, that Wells Fargo breached its fiduciary duties as Trustee by allowing items and services to be purchased for Anderson's benefit. These items included a vehicle to be used to transport Anderson to medical appointments, computers and software to aid in her education and development, recreation and care for her pet, entertainment, and real property where Anderson resided and which was later sold with a sizeable profit realized by the Trust.

On January 26, 2012, Wells Fargo filed a motion for summary judgment, requesting that the Court dismiss Anderson's claims against it on the grounds that they are barred by the Trustees' Accounting Act, RCW 11.106, *et seq.*, the express language of the Trust Agreement, and the *res judicata* doctrine. CP 143-166. On February 28, 2012, the trial

court granted Wells Fargo's motion and entered summary judgment in favor of Wells Fargo. CP 020-22.

On appeal, Anderson contends that the trial court erroneously granted summary judgment in favor of Wells Fargo because she has presented "substantial evidence on all elements of her claim." App. Br. at 15. In her appellate brief, Anderson sets forth a multitude of facts, which she contends adequately support her claim of breach of fiduciary duty by Wells Fargo. However, all of these "facts" are irrelevant for two reasons. First, Anderson's brief contains a number of statements that are wholly unsupported in the record below, and thus cannot be considered on appeal. Second, none of the facts presented in Anderson's brief are material to the disposition of her claim against Wells Fargo in this matter.

As demonstrated below, the trial court correctly granted Wells Fargo's motion for summary judgment because no dispute exists with respect to the following material facts: (1) Wells Fargo regularly submitted accounting reports that all were approved by the Court in the absence of a timely challenge by Anderson or her guardian(s); (2) all of the purchases at issue were authorized by the Trust Advisory Committee ("TAC"), which had sole and absolute discretionary authority over such purchases, and (3) the Trust Agreement expressly authorized Wells Fargo to retain "without liability for so doing any property, real or personal,

productive or unproductive" as it may decide in its discretion.

Anderson claims that by producing "substantial evidence on all elements of her claims," she has "met her burden" under the standard of review for a trial court's summary judgment decision. App. Br. at 15. This is plainly incorrect, as the standard for summary judgment is whether a genuine issue of material fact is in dispute." CR 56(c); see also Kesinger v. Logan, 113 Wn. 2d 320, 325, 779 P.2d 263, 266 (1989). The party opposing summary judgment must submit "competent testimony setting forth specific facts, as opposed to general conclusions...." Thompson v. Everett Clinic, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). Merely producing "substantial" evidence is not the same as producing "material" or "relevant" evidence, which Anderson has entirely failed to do.

Consequently, Wells Fargo respectfully submits that the trial court's entry of summary judgment was proper and should be affirmed because no material facts are in dispute and Wells Fargo is entitled to judgment as matter of law.

II. COUNTER-STATEMENT OF ISSUES ON APPEAL

The dispositive issue in this case is whether Anderson's claim against Wells Fargo is independently barred by the Trustees' Accounting Act, the Trust Agreement, and/or the *res judicata* doctrine. Whether or not Anderson has presented sufficient evidence to support the elements of

her claim of breach of fiduciary duty against Wells Fargo (which she has not) is irrelevant for purposes of this appeal.

III. COUNTER-STATEMENT OF THE CASE

The Trust at issue in this case was created in 1997 as part of a settlement, after Anderson was kicked in the face by a horse at the age of six. CP 476-77. Anderson sustained major injuries and was rendered "severely disabled." Id. The Clallam County Superior Court approved the Trust Agreement, which was designed to provide Anderson with "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] over and above the benefits she otherwise receives as a result of her disabilities from any local, state or federal government or from any other private or public or non-profit organizations, and over and above the basic support provided by her parents." CP 481-82.

Wells Fargo was appointed as the Trustee, with "sole responsibility for management and investment of the corpus and income of th[e] Trust." CP 480. Under the Trust Agreement, Wells Fargo was expressly entitled to "compensat[ion] for its services in accordance with its regular fee

schedule or any negotiated reduction thereof, subject to the annual review and approval of the Court ..." CP 494. At all times relevant hereto, the fees charged for administration of the Trust were at or below Wells Fargo's published fee schedule. CP 168. Wells Fargo actually utilized a discounted fee rate from March of 2003 through the present time as a courtesy to Anderson. CP 168.

The Trust Agreement also established the TAC, which consisted of Richard McMenamin, the attorney who represented Anderson in the underlying action, and Anderson's mother, Andrea Davey (formerly Andrea Rodgers) ("Andrea" or "Ms. Davey"). CP 488. These individuals were chosen to serve on the TAC specifically because of their "knowledge and experience in assisting persons with disabilities and their personal interest in Anderson." CP 480.

Between September 1998 and August 1999, at the direction of the TAC, the Trust disbursed funds to purchase, license and insure a 1997 Mercury Tracer. CP 211. The vehicle was to be used to transport Anderson to and from medical appointments. CP 287. Its purchase was approved by the TAC, in part because the family had limited resources and could not adequately provide for Anderson's needs. Id. During the same time period, also at the direction of the TAC, the Trust also funded medical transportation and vacation expenses for Anderson. Id. All of

these disbursements, as well as professional fees, including the fees of the Trustee and the Trust's attorneys, were detailed in the Trustee's accounting report dated January 19, 2000, which was prepared and filed by William L.E. Dussault, P.S. (hereinafter, "the Dussault Firm") on behalf of the Trust. CP 209-13. On January 25, 2000, the Clallam County Superior Court issued an order approving this report. CP 214.

In or about 2000, the Trust purchased a partial interest in real property located in Sequim, Washington for $33,000. CP 230. At the time the home was purchased, the Trust held a 31% interest in the property. Id. The home initially was used as Anderson's primary residence. CP 230, 239. However, shortly thereafter, Anderson and her mother moved out. CP 239. The home later was prepared for sale and listed with a real estate agent. CP 230. In February of 2005, the Trust sold its interest in the home for $49,135, realizing a profit on its original $33,000 investment. CP 256.

Between 2000 and 2001, at the direction of the TAC, the Trust also disbursed funds for the purchase of computer equipment, travel expenses for Anderson to attend physician appointments, and vehicle expenses. CP 215-18. The Court's order dated February 12, 2001, approved the Trustee's report dated January 15, 2001, which included all of these items

and professional fees, including the fees of the Trustee and the Trust's attorneys. CP 219.

Between 2001 and 2003, at the TAC's direction, the Trust funded the purchase of additional computer software and supplies, recreation and pet care expenses in the sum of $1,500, travel expenses, and vehicle insurance premiums. CP 229-31. The Trustee's report dated December 4, 2002, included discussion of and requested the Court's approval relating to all of these items, including payment of fees incurred by the Trustee and the Trust's attorneys. Id. The Court's order dated July 11, 2003, approved the December 4, 2002 Trustee report. CP 235-36.

In or about August of 2001, Anderson's biological father and grandmother, through their attorney Mr. Carl L. Gay—Anderson's counsel in the instant action—sent a letter to the Dussault Firm, criticizing certain aspects relating to the Trust's administration. CP 220-21. The letter challenged the same purchases that Anderson contests in the instant action, namely, the purchase, licensing and/or insurance of the Mercury Tracer, the computer equipment, travel, vacation and pet care expenses and purchase of real property. Id. The Dussault Firm responded to Mr. Gay's letter and attempted to resolve Mr. Gay's concerns. CP 207. Subsequently, on or about December 6, 2002, the Dussault Firm filed its next accounting report with the Court, and forwarded a copy of the report

to Mr. Gay. CP 207, 228-33, 234. A notice of hearing was issued to all concerned, including Mr. Gay. CP 234. At the hearing on June 24, 2003, the Court approved the report. CP 207, 235-36. At the TAC's request, the Court also approved the dissolution of the TAC, and directed the Trustee to "carry out all of the duties of the TAC under the terms of the Trust Agreement." Id.

Between 2004 and 2006, Wells Fargo, through the Trust's attorneys, continued to file Trust accounting reports with the Clallam County Superior Court, which the Court approved. CP 207. No appeals were taken from any of the Court's orders approving the accounting reports.

In or about November of 2009, the Dussault Firm forwarded a copy of the next proposed report directly to Anderson, who had by that time reached the age of majority. CP 207. Anderson did not raise any objections to the contents of the proposed report, and it was approved by the Court on December 4, 2009. Id.

On July 22, 2011, approximately one and a half years later, Anderson filed a complaint for breach of fiduciary duty and legal malpractice against Wells Fargo, Richard McMenamin, the Dussault Firm, and Andrea Davey. CP 470-504. On February 28, 2012, the trial court

granted summary judgment in favor of defendants, which Anderson hereby appealed. CP 020-23.

IV. STANDARD OF REVIEW

Summary judgment is reviewed de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The appellate court will consider the same evidence that the trial court considered on summary judgment. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is affirmed when the pleadings, affidavits, depositions, and admissions fail to show a genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id.; CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Id.

V. ARGUMENT

A. The Facts Cited By Anderson Are Not Supported By The Record And Are Irrelevant To This Appeal.

1) Anderson's Statements Are Not Supported By The Record.

The Rules of Appellate Procedure require Appellant's brief to include a Statement of the Case, setting forth "[a] fair statement of the facts and procedure relevant to the issues presented for review, **without**

argument. Reference to the record must be included for each factual statement." RAP 10.3(5) (emphasis added). Under Washington law, contentions in the brief will be disregarded where they are not supported by references to the record. Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, 19 P.3d 1081 (2001); Bruce v. Bruce, 48 Wn.2d 229, 292 P.2d 1060 (1956).

In her appellate brief, Anderson makes several factual statements that are unsupported by the record. In each such instance, Anderson fails to provide a proper citation or any citation at all to the record, in violation of RAP 10.3.

Most egregiously, Anderson contends that Andrea was entrusted with un-monitored control of the Trust's bank account and checkbook and made payments using that checkbook without any scrutiny by Wells Fargo. App. Br. at 11 fn. 4 (citing CP 58-60, 136), 27 (no citation provided), and 29 (no citation provided). None of these statements are supported by the record, including the portions of the Clerk's Papers cited by Anderson—her own declaration and the declaration of her grandmother, submitted in opposition to Wells Fargo's motion for summary judgment.

In addition, in her Statement of the Case, Anderson contends that "[a]s trustee, Wells Fargo had a duty to monitor the payments from the

trust to ensure all such payments go to the benefit of Anderson." App. Br. at 7 (citing CP 483). To support this argumentative statement, Anderson cites to page 8 of the Trust Agreement, which contains no such language. CP 483. To the contrary, the Trust Agreement expressly provides that the TAC "shall be solely responsible for deciding what discretionary distributions shall be made from the Trust." CP 488. Until the TAC was dissolved in June of 2003, Wells Fargo's role as Trustee was limited by the Trust Agreement to "investment and management of the Trust estate." Id.

Anderson also states that when a TAC member was disqualified from discussing and ineligible to vote on a proposed distribution from the Trust fund, then Trustee Wells Fargo expressly became a member of the Trust Advisory Committee for the purposes of casting the deciding vote. App. Br. at 8 (citing CP 494) and 12 (no citation provided). Anderson cites the Trust Agreement, page 19 for this proposition. The portion of the Trust Agreement cited by Anderson provides that, under certain circumstances, the Trustee shall be called upon to cast the deciding vote on a specific proposed distribution. CP 494. The Trust Agreement does not provide that Wells Fargo can automatically become a member of the TAC, and Wells Fargo was never a member of the TAC.

Furthermore, Anderson's brief states that Andrea Davey "had been deemed ineligible to vote by Wells Fargo and McMenamin." App. Br. at 12. This is simply false, and certainly unsupported by the record or any citation thereto by Anderson.

Anderson's Statement of the Case also states that prior to Richard McMenamin's resignation from the TAC in 2002, "there had been improper trust fund withdrawals, distributions, and other losses which directly or indirectly benefitted Andrea...." App. Br. at 11. Under RAP 10.3, such a conclusory, unsupported and argumentative statement is inappropriate in the recitation of facts and should be disregarded by the Court.

Anderson also claims, for the first time on appeal, that the expenditures she disputes are not supported by "any records of approval by the Trust Advisory Committee." App. Br. at 27. This assertion is not cited nor is it supported anywhere in the record. In fact, there is no indication that Anderson made any attempt to obtain copies of such records. Furthermore, even if Anderson had tried to obtain such records and failed, she provides no authority for the proposition that the TAC was required to maintain such records.

Anderson also states that Dussault failed to provide her or anyone else on her behalf with notice of "withdrawals, distributions, and losses

from Anderson's trust fund." App. Br. at 12. Anderson again fails to support this assertion with any citation to the record. In fact, the record directly contradicts this statement, as each accounting report through 2003 explicitly states that the Trustee has provided quarterly statements to all TAC members. CP 209, 215, 228, 234. Thus, as a member of the TAC, Anderson's mother and natural guardian,[1] Andrea Davey, was provided with regular statements of the Trust fund's accounts on Anderson's behalf.

Self-serving statements in the appellate brief that were unsupported in the record are not to be considered on appeal. Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, 19 P.3d 1081 (2001). Accordingly, Wells Fargo respectfully submits that the above statements

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[1] Anderson's Brief implies, in passing, that she should have been provided with a guardian *ad litem*. App. Br. at 12. However, appointment of a guardian *ad litem* is within the discretion of the Court. RCW 11.96A.160 ("The court, upon its own motion or upon request of one or more of the parties, ... **may** appoint a guardian ad litem to represent the interests of a minor") (emphasis added); In re Guardianship of Matthews, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010). In fact, the trial court properly exercised its discretion in not appointing a guardian *ad litem* for Anderson because her interests were being represented by her natural guardian—her mother, Andrea. Washington courts have long recognized that a minor's mother, as a natural guardian, may represent the minor's interests in legal proceedings. Bartlett ex rel. Bartlett v. Rieger, 167 Wn. 2d 1018, 224 P.3d 773 (2010); Black v. Motel 6 Operating LP, 140 Wn. App. 1041 (2007); Hegel v. McMahon, 136 Wn. 2d 122, 960 P.2d 424 (1998); Sheimo v. Bengston, 64 Wn. App. 545, 825 P.2d 343 (1992). Throughout the Trust account approval proceedings, in the absence of any indication of unfitness, the Court deemed Anderson's interests adequately represented by her mother, and properly exercised its statutory discretion not to appoint a legal guardian in lieu of Anderson's natural guardian.

should be disregarded by this Court.[2]

2) To The Extent The Facts Cited By Anderson Are Supported In The Record, They Are Irrelevant To The Adjudication Of Appellant's Claim Against Wells Fargo, Which Is Barred As a Matter Of Law.

The vast majority of the purported facts cited by Anderson in her brief were brought to the attention of Wells Fargo and the Court for the first time in February of 2012, when they were referenced in Anderson's opposition to Wells Fargo's summary judgment motion. CP 041. Most of these assertions are inadmissible hearsay. However, even if these assertions were admissible and true, they are not material to the resolution of Anderson's claim against Wells Fargo.

Anderson points out that Wells Fargo did not offer any expert testimony to rebut the declaration submitted by Duane Wolfe, CPA, who documented Wells Fargo's alleged breaches and Anderson's alleged damages. App. Br. at 15. First, Mr. Wolfe's testimony is largely inadmissible because it contains legal opinions which Mr. Wolfe, as a CPA, is not qualified to supply. Second, to the extent Mr. Wolfe has itemized and valuated Anderson's alleged losses, none of the items documented by Mr. Wolfe are material to the disposition of Anderson's

[2] RAP 10.7 provides that this Court may, in its discretion, order Appellant's brief (1) "returned for correction or replacement within a specified time, (2) order the brief stricken from the files with leave to file a new brief within a specified time, or (3) accept the brief." RAP 10.7. The Court may also impose sanctions on a party or counsel who fails to comply with the Rules of Appellate Procedure. Id.

claim against Wells Fargo for the simple reason that such losses are barred as a matter of law.

As set forth in Section V(B), infra, Anderson's claim for breach of fiduciary duty against Wells Fargo is barred by one or more of the following: the TAA, the terms of the Trust Agreement and the doctrine of *res judicata*. Anderson's appellate brief does not address any of these three issues, despite the fact that Wells Fargo's motion for summary judgment was primarily predicated on them.

Anderson does not dispute any of the facts that support Wells Fargo's argument that her claims are barred as a matter of law. Accordingly, the trial court's grant of summary judgment in favor of Wells Fargo was proper and should be affirmed.

B. The Trial Court Properly Granted Summary Judgment Because Anderson's Claims Against Wells Fargo Are Barred as a Matter of Law by the Trustees' Accounting Act, the Express Terms of the Trust Agreement And/Or the Doctrine of *Res Judicata*.

1) Anderson's Claims Are Barred By The Trustees' Accounting Act Because The Purchases At Issue Were Approved By The Court And No Timely Challenge Was Brought.

Anderson's claim against Wells Fargo is subject to the Washington Trustees' Accounting Act, RCW 11.106, *et seq.* (the "TAA").[3] The TAA

[3] Appellant apparently no longer disputes this legal truism, conceding in her brief that Wells Fargo and the Dussault Firm had an "obligation to produce an annual report." App. Br. at 29.

requires Trustees to provide Trust beneficiaries with regular accountings, and provides a mechanism for judicial review and approval of those accountings. Section 11.106.070 of the TAA states:

> [t]he 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 willful breaches of trust.

RCW 11.106.070 (emphasis added). The TAA further provides that

> [t]he decree rendered under RCW 11.106.070 shall be deemed **final, conclusive, and binding upon all parties interested including all incompetent, unborn, and unascertained beneficiaries** of the trust subject only to the right of appeal under RCW 11.106.090.

RCW 11.106.080 (emphasis added). Under RCW 11.106.090, a party in interest may appeal from a 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. Under RAP 5.2, generally, a notice of appeal must be filed in the trial court within "30 days after the entry of the

decision of the trial court that the party filing the notice wants reviewed." RAP 5.2.

Interpreting this language, the Washington Court of Appeals has unequivocally held that once an account has been approved by the court and the statutory period under RCW 11.106.090 has expired, the Trust beneficiary is precluded from contesting any matter within the subject account. See, e.g., Barovic v. Permberton, 128 Wn. App. 196, 114 P.3d 1230 (2005). The express and unambiguous language of the statute renders its preclusive effect applicable to beneficiaries who were incompetent, and even unborn, at the time of court approval of the account. RCW 11.106.080.

In Barovic v. Pemberton, supra, the Trustee inadvertently charged principal mortgage payments on Trust property against the Trust's income account. Between 1999 and 2004, the Trustee submitted annual accounts pursuant to the TAA. Barovic, 128 Wn. App. at 198. Each of these annual accounts was approved by the court, and the beneficiary did not appeal. Id. In 2004, the Trustee realized her error, filed a corrected account and reimbursed the Trust's income account. Id. at 199. The court approved the corrected account, but further ordered that the principal account credit the income account for $11,409.04 in interest. Id. The Trustee appealed on the grounds that previous accounts were approved by

the court and not appealed by the beneficiary, rendering them "final, conclusive and binding." Id. at 200. The appellate court agreed, holding that an appeal from the lower court's decree approving an annual account is the beneficiary's sole remedy, and that once the time to appeal expires, "the decree becomes irrefutable, requires submission, and cannot be altered or undone." Id. at 201.

In this case, as in Barovic, the Trust beneficiary seeks to undo court decrees approving annual accounts dating back to 2000.[4] Since no appeal was taken from these decrees, under RCW 11.106.090, these decrees are now final, irrefutable and cannot be altered or undone. Id.; see also In re Cooper's Estate, 39 Wn. 2d 407, 411, 235 P.2d 469, 471 (1951). Accordingly, Anderson's claim against Wells Fargo fails as a matter of law, and the trial court properly granted Wells Fargo's motion for summary judgment.

[4] Anderson disputes the funds expended on the purchase, licensing, maintenance and insurance of the vehicle which was to be used to transport her to and from medical appointments, and computer hardware and software intended for Anderson's education and entertainment. All of these purchases were made between 1998 and 2003 at the direction of the TAC, documented in the accounting reports filed with the court, and approved by order of the court. Anderson also disputes the purchase of real estate in or about 2000, and its subsequent sale in 2005, both of which also were court-approved.

2) Anderson's Claim Is Also Independently Barred By the Terms of the Trust Agreement Because No Timely Objection Was Raised to the Trustee's Account Statements Detailing the Subject Purchases.

Article IV (h) of the Trust Agreement provides as follows:

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

Trust Agreement, Art. IV (h) (emphasis added).

At the time the purchases at issue were authorized, Anderson was living with her mother, Andrea Davey. CP 498 ("During the majority of the existence of the trust, Anderson resided with her mother...."). As Anderson's natural guardian and a member of the TAC until 2003, Ms. Davey participated in the TAC's decisions regarding Trust distributions and was provided quarterly account statements by the Trustee. CP 209, 215, 228, 234. Ms. Davey never raised any objections to any of the Trustee's reports.

Anderson's biological father and grandmother have admitted that they did not have standing to object to the Trustee's accounting reports. CP 091. However, even if they did have standing, they did not raise their

objections until August 27, 2001. CP 220-21. By this time, the Court had long since approved the majority of the purchases and expenses contested in the instant action, including purchases of the vehicle, real estate, computer hardware and software, travel expenses and professional fees. CP 209-19.

Moreover, the Dussault Firm responded to Mr. Gay's letter, attempted to address his concerns, and provided Mr. Gay with a copy of its next accounting report, which was filed with the Court on or about December 6, 2002. CP 206, 228-33, 234. A notice of hearing was issued to all concerned, including Mr. Gay. CP 234. At the hearing on June 24, 2003, the Court approved the report. CP 207, 235-36.

The next three reports were filed and again approved by the Court for the years 2004 through 2006. CP 207.

On November 30, 2009, after Anderson reached the age of majority, the Dussault Firm forwarded a copy of the next annual report and petition for approval directly to Anderson. CP 207. Anderson raised no objections, and the Court approved the report on December 4, 2009. Id.

Accordingly, under the express terms of the Trust Agreement, Anderson and her parents have waived her right to bring the instant action

against Wells Fargo, and the trial court's summary judgment in favor of Wells Fargo in the action should be affirmed.

3) Anderson's Claim Is Also Barred By Res Judicata *Because The Court's Account Approval Proceedings And The Instant Action Are Identical With Respect To The Subject Matter, Claims, And The Identity And Quality Of The Person On Whose Behalf The Claims Were Brought.*

Under the doctrine of *res judicata*, a judgment, once entered, "operates as a resolution of the issues in the case, and the parties are precluded from re-litigating issues resolved by the court." 14A Tegland, Wash. Prac., Civil Procedure § 35.20 (Westlaw 2011). In order to have *res judicata* effect, a judicial determination must be final and on the merits, and the first and second proceedings must be identical with respect to (1) the subject matter; (2) the claim or cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (citing Loveridge v. Fred Meyer, Inc., 125 Wn. 2d 759, 763, 887 P.2d 898 (1995)).

The Washington Supreme Court has expressly held that an action seeking to undo a court approval of a Trustee account under the TAA is barred by *res judicata*. In re Cooper's Estate, 39 Wn. 2d 407, 411, 235 P.2d 469, 471 (1951). Similarly, in this case, the Court's decrees dating back to January of 2000, which approved the Trustee's annual accounts

under the TAA are *res judicata* with respect to Anderson's claim against Wells Fargo.

The finality of these prior decrees cannot reasonably be disputed, because it is expressly confirmed by the statute which authorizes them. See RCW 11.106.080 ("The decree rendered under RCW 11.106.070 shall be deemed final, conclusive, and binding upon all parties interested...."); see also In re Cooper's Estate, 39 Wn. 2d 407, 411, 235 P.2d 469, 471 (1951).

The account approval proceedings and the instant action also satisfy the four elements of *res judicata* because they are identical with respect to the subject matter, the claims, and the identity and quality of the person on whose behalf the claims were brought, *i.e.*, the Trust beneficiary.

First, the subject matter addressed by the Court in the Trustee's accounting approval proceedings is the same as the subject matter presently raised by Anderson. As set forth in Section III, supra, Court orders issued between January 2000 and July 2003 unequivocally approved each account statement submitted by Wells Fargo, which include disbursements for the purchase, licensing and insurance of a vehicle, the purchase of computer hardware and software, travel, recreational and pet care expenses, the purchase, subsequent preparation for sale and sale of

real property, and all professional fees, including the fees of the Trustee. Anderson's claims in the instant action raise the same subject matter—the vehicle, real estate, computer equipment, travel and recreation expenses, and professional fees.

Second, the claim or cause of action in this matter is identical to the claims which either were or should have been raised by Anderson's parent(s) on her behalf during the account approval proceedings. As set forth above, Anderson's mother failed to object to any of the Trustee's account statements or appeal the Court's approval thereof. Furthermore, beginning in August of 2001, Anderson's biological father and grandmother, on her behalf and through her counsel in the instant action, raised the same issues—the real estate purchase, computer, pet care, recreation, and transportation expenses—by objecting to the Trust's administration.[5] CP 220-21. A judicial hearing took place, after which the Court approved the Trustee's accounts for the 2000/01 and 2001/02 reporting periods. CP 235-36. The Court did not disturb its previous orders approving of the accounts concerning 1998/99 and 1999/2000 reporting periods. Id. These reports encompassed the vast majority of the purchases which Anderson purports to challenge in this action. CP 209-19

[5] Despite these objections, the Court approved and continued to approve the Trustee's reports. CP 207.

and 228-36. Thus, the claims which either were or should have been raised in the previous and instant actions are identical.

Third, the persons and parties in this action and in the Trust account approval proceedings are identical because each Trust account report was open to objection by Anderson or her parent or legal guardian acting on her behalf. Neither Anderson nor her mother, with whom Anderson was living at the time, ever raised any objections to the Trustee's reports. The only objections were raised in August of 2001 by Anderson's biological father and grandmother. CP 220-21. Since Anderson's father and grandmother were in privity with her and each other, they are considered the same parties for purposes of *res judicata*. See Ensley v. Pitcher, 152 Wn. App. 891, 902, 222 P.3d 99 (2009) (citing Kuhlman v. Thomas, 78 Wn. App. 115, 121, 897 P.2d 365 (1995)); see also United States v. Deaconess Med. Center, 140 Wn. 2d 104, 994 P.2d 830 (2000); Woodley v. Myers Capital Corp., 67 Wn. App. 328, 835 P.2d 239 (1992).

Finally, the quality of the persons and parties in this action and in the Trust account approval proceedings is identical. Since Anderson's mother failed to object to the Trustee's reports, and all those concerned failed to appeal the Court's approval thereof, they, together with Anderson, on whose behalf they were acting, became bound by the

Court's judgment approving the Trustee's reports. As such, they are persons of the same quality as the Appellant in the instant action. 14A Tegland, Wash. Prac., Civil Procedure § 35.27 (Westlaw 2011).

In light of the above, Anderson's claims against Wells Fargo are barred by *res judicata* and were properly dismissed by the trial court.

C. Even Assuming *Arguendo* That Anderson's Claims Are Not Barred, Wells Fargo Did Not Breach Fiduciary Duties Owed to Anderson.

Under Washington law, a Trustee is required to adhere to the prudent investor rule in managing the Trust assets. In re Estate of Cooper, 81 Wn. App. 79, 913 P.2d 393 (1996) ("Washington's prudent investor rule requires a Trustee to 'exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs...." This exercise of judgment requires, among other things, "consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets. ... A court's focus in applying the prudent investor rule is the trustee's conduct, not the end result.") (citing RCW 11.100.020). Additionally, a Trustee has the duty to administer the Trust in the interest of the beneficiaries. Tucker v. Brown, 20 Wn. 2d 740, 768, 150 P.2d 604 (1944). The Trustee further must diversify the Trust's

assets in order to minimize the risk of large losses. In re Estate of Cooper, 81 Wn. App. 79, 88, 913 P.2d 393 (1996).

The Trust Agreement vests Wells Fargo, as Trustee, with the power and authority granted under the laws of the State of Washington, "except as modified by this Trust instrument." CP 490. The Trust Agreement also expressly provides that the Trustee shall have discretion in the application of its powers, including the authority to "[a]cquire, borrow, invest, reinvest, sell for cash or on terms, convey, exchange, transfer, mortgage, pledge, rent, lease for any term and otherwise manage any part of the Trust estate." Id.

As detailed below, Wells Fargo did not breach fiduciary duties owed to Anderson under either the terms of the Trust Agreement or Washington law. Accordingly, Anderson's claims against Wells Fargo for breach of fiduciary duties are untenable and were properly dismissed by the trial court.

1) *Wells Fargo Did Not Breach Any Duty In Relation To The TAC Decisions To Purchase And Maintain The Vehicle, Purchase Computer Equipment, And Fund Anderson's Recreation And Pet Care: The TAC Had Sole And Absolute Authority Over Disbursements Until July 2003.*

Since its inception, the Trust Agreement's stated purpose was to provide Anderson with "extra and supplemental medical, health, and nursing care, dental care, developmental services, **support, maintenance,**

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

Wells Fargo's authority as Trustee was limited to financial management and investment of the Trust estate, and general Trustee powers under the laws of Washington State. CP 488, 490.

Anderson claims that Wells Fargo breached duties owed to her relating to the purchase, licensing, maintenance and insurance of the

vehicle which was to be used to transport her to and from medical appointments, computer hardware and software intended for Anderson's education and entertainment, and certain transportation, recreational and pet care expenses.[6] However, it was the TAC, following its charge within the Trust Agreement, that authorized these purchases.

The computer, with its attendant maintenance and software, served as an educational tool, a social opportunity, or, at a minimum, a source of entertainment. According to the report approved by the Court in January of 2000, "Anderson [was] thrilled with her new computer and [was] eager to [sic] on the Internet." CP 212.

The Mercury Tracer, together with its attendant costs, clearly falls within the meaning of the term "transportation costs" in Article II(a) of the Trust Agreement. CP 482. Furthermore, the vehicle was purchased specifically to help transport Anderson to and from her medical appointments. As such, it is an assistive device, designed to make Anderson's life more comfortable, and its purchase by the Trust is expressly authorized. CP 482.

[6] All of these purchases were made between 1998 and 2001, documented in the accounts filed with the court on January 19, 2000, January 15, 2001, and December 4, 2002, and approved by the trial court's decrees dated January 25, 2000, February 12, 2001, and July 11, 2003, respectively. CP 209-19 and 228-36.

In light of the above, the purchases at issue were made in accordance with the Trust's terms and purpose, and Wells Fargo did not breach fiduciary duties owed to Anderson by following the direction of the TAC. Therefore, Anderson's claims against Wells Fargo arising out of or related to these purchases were properly dismissed as a matter of law.

2) The Trust Agreement Permits the Trust to Own And Retain Without Liability Real Estate And Personal Property Such as Computer Equipment And a Vehicle.

Under the express terms of the Trust, the "Trust corpus may from time to time include property other than cash, including, but not limited to, ... real estate and other personal property." CP 481. As Trustee, Wells Fargo was expressly authorized to "acquire, borrow, invest, reinvest, sell for cash or on terms, convey, exchange, transfer, mortgage, pledge, rent, lease for any term and otherwise manage any part of the Trust estate." CP 491. Furthermore, Wells Fargo was expressly authorized to

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

> Trustee would ordinarily deem advisable or prudent.

Id. (emphasis added).

"Where discretion is conferred upon a trustee, the exercise thereof is not subject to control by the court except to prevent an abuse of such discretion." People's Nat. Bank of Seattle v. Jarvis, 58 Wn. 2d 627, 364 P.2d 436 (1961) (citing Monroe v. Winn, 16 Wn. 2d 497, 508, 133 P. 2d 952 (1943)). A finding of abuse of discretion depends on the terms and purposes of the trust, and 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." REST. (THIRD) OF TRUSTS § 87 cmt. b. A court should judge a Trustee's actions prospectively, not "from the vantage point of hindsight." Baldus v. Bank of California, 12 Wn. App. 621, 633, 530 P.2d 1350 (1975) (quoting In re Pate's Estate, 84 N.Y.S.2d 853, 858 (1948)).

In 2000, the Trust acquired a 31% interest in real property located in Sequim for the sum of $33,000. CP 230. Initially, this property served as Anderson's primary residence. CP 239. After Anderson moved out of the home, the Trust retained its ownership interest in the property until 2005, pursuant to its authority under Article IV(f)(i) due to real estate

market conditions. CP 240. In February of 2005, the Trust sold its interest for $49,135. CP 256. None of these facts support Anderson's allegations of a breach of fiduciary duty by Wells Fargo. To the contrary, Wells Fargo had authority pursuant to the Trust Agreement to acquire the real property interest, and ownership of the property proved to be a prudent investment that resulted in a gross profit in the sum of $16,135[7]—quite an achievement considering then-existing market conditions.

Anderson also claims that Wells Fargo breached its fiduciary duties by failing to rent the real property out to a tenant during the time Anderson did not reside at the property. However, as set forth above, Wells Fargo was authorized under the Trust Agreement to retain the property, whether or not it was productive. Moreover, according to the Trustee's accounting reports, the house was being prepared for sale as of December 2001. CP 230. Under these circumstances, introducing a tenant would have been unfeasible because the house had to remain in a presentable and saleable condition for the prospective buyer. The fact that the house remained unsold until 2005 does not support Anderson's allegations of breach of fiduciary duty.

[7] The Trust subsequently paid its proportionate share of the closing costs and the real estate broker's fee. CP 267.

In her Statement of the Case, Anderson suggests[8] that Wells Fargo should have collected rent from Anderson's mother and Joe Lancaster, the Trust's co-tenant, during the time the Trust maintained its ownership interest in the property. App. Br. at 10. However, as set forth above, Wells Fargo was not required to do so under the Trust Agreement, and, in any event, could not do so under Washington law.

In Washington, each co-tenant has the right to occupy the full premises, and may do so without owing rent to his co-tenants as long as he did not oust them. 17 Stoebuck and Weaver, Wash. Practice, Real Estate Property Law § 1.31 (Westlaw 2012); Cummings v. Anderson, 94 Wn. 2d 135 (1980); Fulton v. Fulton, 57 Wn. 2d 331, 357 P.2d 169 (1960). In Cummings, husband and wife held interest in a home as tenants in common. Shortly after moving into the home, the wife moved out, taking her children and a substantial portion of the community property with her. Subsequently, the wife brought suit, demanding one half equity interest in the property and one half of the rental value of the premises during the time the husband was the home's sole occupant. The trial court granted the husband quiet title. After a lengthy appeal process, the Washington

[8] RAP 10.3(a)(6) requires argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record. RAP 10.3(a)(6). Anderson has failed to present any argument on this issue in her brief, and thus, no such argument can be considered on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

Supreme Court held that "[i]t is the rule in Washington that, in the absence of an agreement to pay rent, or limiting or assigning rights of occupancy, a cotenant in possession who has not ousted or actively excluded the cotenant is not liable for rent based upon his occupancy of the premises." Cummings, 94 Wn. 2d at 145. As the husband did not actively exclude the wife, who left the home suddenly and of her own accord, the Court held that the wife was not entitled to a portion of the rent. Id.

In this case, as in Cummings, Anderson and her mother voluntarily moved out of the home they shared with the co-tenant. CP 061. Accordingly, Wells Fargo was not in a position to demand rent payments from Mr. Lancaster, and, in any event, was not obligated to do so because the Trust Agreement expressly authorized it to retain unproductive property without liability for so doing. The eventual sale of the Trust's interest at a profit more than justified Wells Fargo's decision to retain the property.

Accordingly, there are no triable issues of material fact in respect of Wells Fargo's compliance with its fiduciary obligations to Anderson, and the trial court properly entered summary judgment in favor of Wells Fargo.

D. Wells Fargo's Trustee Fees Are Proper Because They Are Expressly Authorized By the Terms of the Trust Agreement.

Throughout her Appellate Brief, Anderson implies that Wells Fargo charged excessive fees for legal and Trustee services. App. Br. at 9, 10, 11-12, 27. However, Anderson fails to present any argument on this issue in her brief. RAP 10.3(a)(6) requires argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record. RAP 10.3(a)(6). Because Anderson has failed to provide any meaningful argument in her opening brief that Wells Fargo's Trustee and legal fees were unauthorized or otherwise wrongfully charged, no such argument can be entertained on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

To the extent this Court permits such an argument, it is wholly unfounded because the Trust Agreement expressly authorizes payment of Trustee and legal fees from the Trust corpus.[9] From the inception of the Trust through March of 2002, Wells Fargo charged for its services in accordance with its regular fee schedule and actually applied a discounted

[9] "The Trustee may be compensated for its services in accordance with its regular fee schedule or any negotiated reduction thereof, subject to the annual review and approval of the Court ..." CP 494. In addition, the Trust Agreement authorizes the Trustee to "employ such agents, attorneys, accountants and appraisers as seem reasonably necessary ... and to pay them reasonable fees for said services from the Trust estate." CP 491.

rate thereafter. Furthermore, Wells Fargo engaged tax professionals to maximize tax benefits, and legal counsel to represent the Trust before the Court, as it was authorized to do under the Trust Agreement. All of the fees incurred in connection with these services, as well as Wells Fargo's own Trust service fees, were included in each accounting report submitted to the Court for approval. CP 209-19 and 228-36. The Court approved the reports, rendering any claims by Anderson with respect to Wells Fargo's fees and outside professional service expenses meritless.

E. Wells Fargo Is Entitled To an Award of Reasonable Costs And Attorneys' Fees Incurred On Appeal.

Rule 18.1 of the Washington Rules of Appellate Procedure provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, ... the party must devote a section of its opening brief to the request for the fees or expenses [unless a statute specifies that the request is to be directed to the trial court.]." RAP 18.1.

Pursuant to the Washington Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A, *et seq.*, this Court has discretion to award reasonable attorneys' fees and costs to any party in this action. RCW 11.96A.150. RCW 11.96A.150 provides as follows:

> Either the superior court or any court on an 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 state or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be pain 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).

Washington courts frequently award attorneys' fees pursuant to TEDRA to parties in Trust and estate disputes. See Bartlett v. Betlach, 136 Wn. App. 8, 146 P.3d 1235 (2006) (affirming an award of attorneys' fees from the Trust assets to a reinstated Trustee who was wrongfully removed by the Trust beneficiaries); see also Estate of Kvande v. Olsen, 74 Wn. App. 65, 871 P.2d 669 (1994) (holding that legal fees incurred by an estate's personal representative in defending contested distributions from the estate were chargeable to the estate); In re Irrevocable Trust of McKean, 144 Wn. App. 333, 183 P.3d 317 (2008) (awarding attorneys' fees to a court-appointed corporate Trustee where the Trust settlor moved to vacate the order appointing Trustee); Matter of Estate of Cooper, 81

Wn. App. 79, 913 P.2d 393 (1996) (affirming award of attorneys' fees payable from the Trust where the Trustee's administration and management of Trust investments was challenged by a remainder beneficiary).

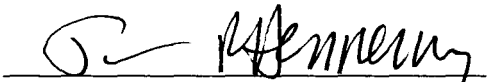
Thus, under Washington law, a defendant who prevails on appeal is entitled, in the Court's discretion, to an award of reasonable costs and attorneys' fees incurred on appeal. RAP 18.1; RCW 11.96A.150(1); Foster v. Gilliam, 165 Wn. App. 33, 58, 268 P.3d 945 (2011). Wells Fargo respectfully requests that the Court exercise its discretion to award Wells Fargo its fees and costs incurred in connection with this appeal.

VI. CONCLUSION

For all of the foregoing reasons, there are no triable issues of material fact in this case, and the trial court properly granted Wells Fargo's motion for summary judgment.

Respectfully submitted this 3rd day of August, 2012.

SMITH & HENNESSEY, PLLC



James R. Hennessey, WSBA #14376
Julia K. Doyle, WSBA #43993
Attorneys for Respondent
Wells Fargo Bank, N.A.