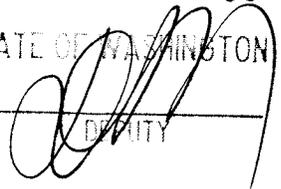


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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the

MARK ANTHONY FOWLER SPECIAL NEEDS TRUST

Wells Fargo Bank N.A., Trustee,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE ROSANNE BUCKNER

---

BRIEF OF APPELLANT

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**ORIGINAL**

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## I. INTRODUCTION

The appellant is Wells Fargo Bank, N.A, the trustee of the Mark A. Fowler Special Needs Trust. This appeal arises out of the failure by the trial court to approve the trustee's seventh annual report and presents the issue of the extent to which a trial court may control the investment decisions of a corporate trustee absent a request for court intervention by an interested party and absent evidence of a breach of fiduciary duties. In addition, this appeal presents the issue of whether the trial court can disapprove trustee's fees based solely upon investment performance. There is no responding party because there was no opposition to court approval of the trustee's report.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error.

1. The trial court erred when it directed the trustee to present a reallocation plan to include insured deposits.
2. The trial court erred when it enjoined the trustee from transferring or liquidating assets pending presentation of a reallocation plan.
3. The trial court abused its discretion when it failed to approve the trustee's fees.

### B. Issues Pertaining to Assignments of Error.

1. Whether SPR 98.16W limits the trial court's authority to the review and approval of current trust assets. *Assignments of Error #1 and 2.*

2. Whether provisions of the court-approved trust agreement limit the trial court's authority to review and approval of the annual accounting. *Assignments of Error # 1 and 2.*
3. Whether the trial court has the authority to intervene in the management of trust assets in the absence of a case or controversy. *Assignments of Error #1 and 2.*
4. Whether the trial court may overrule the Trustee's investment decisions without a finding of a breach of the trustee's fiduciary duties. *Assignments of Error #1 and 2.*
5. Whether the trial court followed the proper procedure prior to issuance of its order enjoining the trustee from transferring or liquidating assets. *Assignment of Error #2.*
6. Whether the trial court erred when it issued a restraining order without making appropriate findings of fact. *Assignment of Error #2.*
7. Whether the trial court violated the trust beneficiary's due process rights when it issued a restraining order without notice or an opportunity to be heard. *Assignment of Error #2.*
8. Whether the trial court abused its discretion when it failed to approve the trustee's fees. *Assignment of Error #4.*

### **III. STATEMENT OF THE CASE**

#### **A. Settlement of Lawsuit and Creation of Special Needs Trust**

The beneficiary, Mark Anthony Fowler, suffered severe brain damage due to a lack of oxygen while at a supervised youth program. *CP*

6-7. A lawsuit was initiated and a settlement was reached. *CP 18-19.*  
The monies from the settlement were used to purchase an annuity and to fund a special needs trust. *CP 24-38.* The trust was established by court order on September 25, 2001, and Wells Fargo Bank NA was appointed trustee. *CP 18-21.* Mark Anthony Fowler is presently 23 years old and in good health. *CP 662.*

The purpose of the trust is “to provide for Beneficiary’s extra and supplemental care ...” including “support, education and activities ....” *CP 25.* Further, the trustee “may provide such resources and experiences as will contribute to and make the Beneficiary’s life as pleasant, comfortable and happy as possible, including recreational trips and activities, equipment, and training, or education.” *CP 25.*

The trust agreement grants broad discretion to the trustee with respect to disbursements from the trust income and principal, as well as investment and management of trust assets including the authority to “exercise all powers granted by law, including the Washington Trust Act (RCW 11.98).” *CP 27.* The trustee is required to file annual accountings with the court but is not subject to the Trustee’s Accounting Act, RCW 11.106. *CP 27.*

**B. First through Fifth Annual Reports of Trustee.**

The trustee filed annual reports each year from 2002 through 2006, in which the trustee reported income, expenses and fees. *CP 1-201, 212-339, 345-462, 466-587, 596-612, 898-1008*. In addition the trustee provided information to the trial court in each annual report on then current assets and asset allocation. *CP 39, 217, 350, 470, 603*. Asset allocation ranged from 41-60 percent in equities; from 33-44 percent in fixed income; and from 1-5 percent in cash or cash equivalents. In each of those years the trustee reported fees of 1.3 percent of the market value of the trust. *CP 4, 214, 347, 467, 598*.

The trustee reported overall investment performance was as follows:

- 2002: -11.84 percent *CP 4*;
- 2003: 13.1 percent *CP 214*;
- 2004: 8.05 percent, *CP 347*;
- 2005: 7.43 percent, *CP 467*; and
- 2006: 9.04 percent, *CP 598*.

In each of those years, the trial court approved the trustee's annual reports, including trustee's fees.<sup>1</sup> *CP 207-8, 340-1, 463-4, 592-3, 615-6*.

---

<sup>1</sup> Mr. Clint Johnson, who was later appointed guardian ad litem, signed the order approving the Trustee's Second Annual Report on December 22, 2003 in his capacity as a court commissioner pro tempore. *CP 340-1*.

**C. Sixth Annual Report of Trustee**

The trustee filed its sixth annual report on December 17, 2007 covering the period October 1, 2006 through September 30, 2007. *CP 619-49, 1009-1134.* The trustee reported expenses of \$90,474.52 (excluding a court-approved loan made to the beneficiary's parents of \$140,000) and \$13,398.86 in fees, representing 1.3 percent of the trust market value. *CP 620-21.* The overall investment performance was 13.14 percent, gross of fees. *CP 621.* At that time, the assets were invested 59.2 percent in equities, 27.05 percent in fixed income and 1.05 percent in cash equivalents and 13.13 percent in a private debt obligation. *CP 624.* The court approved the trustee's report on January 25, 2008, stating, "Everything appears to be in order" and "good luck with this year." *CP 653-54, RP 4.*

**D. Seventh Annual Report of Trustee.**

The trustee filed its seventh annual report on December 16, 2008 covering the period October 1, 2007 through September 30, 2008. *CP 657-86.* The trustee reported expenses of \$92,122 and \$13,398.86 in fees, representing 1.3 percent of the trust market value. *CP 658-59.* The overall investment performance was -12.13 percent, gross of fees. *CP 659.* At that time, the assets were invested 65.56 percent in equities, 31.43 percent in fixed income and 3.01 percent in cash equivalents. *CP 662.*

As had occurred since 2006, a copy of the report and accounting was provided to the trust beneficiary and his parents. *CP 613-14, 651-52, and 688-89.* As in prior years, no objection to the approval of the report was filed.

**1. Hearing on January 30, 2009.** The court hearing on review and approval of the report was held on January 30, 2009, during which the trial court requested that the accounting summary be simplified. *CP 697; RP 12.* At that hearing, the court expressed its concern about the decrease in value of the trust assets. *RP 13.* The court also suggested that the U.S. dollar “does a lot better in Costa Rica.” *RP 15.*

In response to the court’s request, the trustee filed its Second Supplement to the Seventh Annual Report on February 13, 2009. *CP 697-701.* A copy was served on the beneficiary’s parents. *CP 702-3.*

**2. Hearing on February 27, 2009.** Another hearing was held on February 27, 2009 during which the trial court questioned the investment strategy of the professional trustee. *RP 25.* The court indicated that it could not approve of the investment performance since the trustee had not “appropriately apportioned” the assets. *RP 27.* The trial court stated that the trustee needed “to move everything into FDIC-insured accounts with diversified institutions.” *RP 31.* The trial court suggested that the trustee could invest in certificates of deposit (hereafter CDs)

earning four or five percent. *RP 33*. When Mr. Dirk Peterson, Vice President and Trust Officer for Wells Fargo Bank, stated that the interest rates on CDs were extremely low, the court responded, “Maybe at Wells Fargo.” *Id.* The trustee sought additional time to present information from the investment manager. *CP 704, RP 33-4*.

**3. Hearing on March 13, 2009.** Additional materials were provided by the trustee, including a declaration from Mr. Turner Bluechel, the Investment Manager assigned to the Mark Fowler Special Needs Trust. *CP 708-66*. Mr. Bluechel summarized the trust’s investment performance over the seven-year period of its existence, as follows:

The historical information shows a beginning value of \$940,000 with disbursements over a seven year period of \$488,689. The ending market value for the period is \$870,790 reflecting a loss of about \$70,000.

*CP 709*.

In addition, Mr. Bluechel discussed the trustee’s investment philosophy for this particular trust:

At the time the account was initially funded, Tony Fowler was a minor.<sup>2</sup> Considering his overall general good health and his disability, it was clear that the potential life of the Trust could be a long one, based on the beneficiary’s life expectancy.

...

For a young person with a normal life expectancy, a balanced diversified investment portfolio would be the

---

<sup>2</sup> The trustee refers to the trust beneficiary as “Tony Fowler” and the beneficiary’s father as “Mark Fowler.”

most likely to keep up with and ultimately exceed the rate of inflation and provide long term returns.

*CP 710-11.*

A major expense for the trust is the cost of care for the beneficiary.

*CP 711.* The account historically has a deficit, in the sense that disbursements exceed income. *CP 711.* Mr. Bluechel prepared a “depletion analysis” using projected returns from certificates of deposit versus a diversified investment portfolio and projected expenses. *CP 753-61.* According to Mr. Bluechel’s analysis, the trust funds would be depleted approximately five years sooner if invested solely in certificates of deposit. *CP 711.* The trustee’s investment philosophy for this trust “has been to have a balance between growth of capital and income production.” *CP 713.* The trustee uses “asset allocation” to help it achieve this balance. *CP 713.* The trustee employs a framework of four types of asset classes: stocks, bonds, real estate and alternative investments. *CP 713.* Within each asset class, the trustee invests in a “mixture of individual securities and mutual funds to achieve a broad diversification at the account level.” *CP 713.* The trustee develops “capital market assumptions” for each asset class, based upon historical data and “forward-looking capital market risk adjustments.” *CP 713-14.* The assumptions are relied upon “to capture the risk/return relationships between asset classes used in the asset allocation portfolios.” *CP 714.*

Mr. Bluechel acknowledged that the market environment was challenging but stated that selling all the assets during a down market would not be prudent in the long-term. *CP 714*. The trustee evaluates not just “volatility or price risk” but also considers, “leverage, transparency, concentration, event risk, bond market sensitivity and equity market sensitivity.” *CP 714*. Mr. Bluechel stated that a down market presents opportunities. *CP 714*.

Mr. Bluechel stated that reallocation of the investments into certificate of deposits would “lock in the losses at perhaps the worst possible time” and “would eliminate any chance for the account to recover the losses of the prior accounting period.” *CP 714-15*.

At a third hearing on March 13, 2009, the following colloquy took place:

The Court: Let me just check with Mark’s father, Mr. Fowler. Hi, Mr. Fowler.

Mr. Fowler: Hello.

The Court: Did you want to say something about the issue of investments at this point?

Mr. Fowler: I remember when it started dropping a few years ago, and they actually called me up, the people who were in charge at the time, and asked what we wanted to do. And I told them to leave everything alone because it would come back, and it did. The only way my son is going to lose money is if they sell these stocks. The stocks will come back. It

will take a year or it might take more, but it will come back. And I have no problem with what they have been doing. I watch every time. Every month I review it.

The court: You realize the million dollars is down to about \$400,000 at this point.<sup>3</sup>

Mr. Fowler: It will come back.

...

The Court: What about the fact that none of these funds are in secured deposits? Do you know what I'm talking about?

Mr. Fowler: Vaguely, but I trust them. They have not let us down yet. People are losing money because they are selling. The only way ... I mean, he has lost money on paper. He doesn't actually lose the money until the stocks are sold and redistributed.

Later, Mr. Fowler again addressed the court:

Mr. Fowler: I'm not meaning to be offensive, but are you – do you know about the stock market? This is their job, is to watch my son's money. Your job is to make sure that they do their job, but for you to, I don't know, kind of hog-tie them and tell them that they have to do this or have to do that, it seems like its wrong.

The Court: That's not what I said. I said I'm not approving it. You are approving of it, but I'm not approving of it. They have lost a lot of money here.

---

<sup>3</sup> The trial court was mistaken. The asset value on March 12, 2009 was reported to be \$663,862. *RP 43*.

Mr. Fowler: And everybody in the market is losing money, but it will come back.

The Court: I understand if it was your account, but it's a fiduciary account and it's a fiduciary relationship responsibility not to let this happen.

Mr. Fowler: There is nobody around that could not let this happen in today's economy.

...

Mr. Fowler: And I trust these people. And I will be very unhappy if they have to start taking and selling some of these stocks and putting them into something that's not going to produce.

The Court: You are not unhappy with the loss of money from a million dollars –

Mr. Fowler: Oh, I'm unhappy with that, but I also trust these people. I get the report every month. I look at the numbers. I talk to them regularly. When it happened back in 2001, they called me. I said, leave it alone, it will come back, and it did. And it will come back again.

...

Later, counsel addressed the court to clarify its ruling:

Counsel: I just want to make sure I'm understanding. The court is not approving of investments, not approving of fees.

The Court: Not approving investment performance.

Counsel: Investment performance, okay, not approving of fees, and denying any request for an RCW 11.96A guardian ad litem?

The Court: Well, I don't see any dispute here. Mr. Fowler and the bank are wanting to hold the same course here, so I guess we are going to watch the money disappear even further.

...

The Court: [to Mr. Fowler] My opinion is that it will continue to lose money when it shouldn't be, and that's because this is a fiduciary relationship. This isn't my money. It isn't your money. This is your son's money. It's not the bank's money.

*RP 38-40, 44-7.*

**4. Hearing on April 3, 2009.** At a fourth hearing on April 3, 2009, which was scheduled for presentation of an order, the trial court again considered the appointment of a guardian ad litem to investigate the trustee's actions, stating:

If I appoint a Guardian ad Litem, [Wells Fargo] might have to get their errors and omissions policy and bonding out, right?

*RP 55.* The trial court stated that it believed that the failure to invest in insured deposits was a violation of the prudent investor rule. *Id.* The trial court suggested that if the trustee would pay, it would appoint a guardian ad litem (hereafter "GAL"). *RP 58.* Later the trial court reconsidered and appointed a GAL pursuant to RCW 11.96A.160. *RP 58-9, [Appendix I].*

The trial court ordered the GAL to review the “issue of prudent investor rule and approval of fees” and “whether or not the funds should be invested in insured deposits.” *RP 64-5*. In addition, the trial court inquired of the trustee as follows:

Trial Court: My understanding is that the trustee does not want to [invest in insured deposits]; is that correct?

Mr. Peterson: That’s correct, your Honor.

Trial Court: Because then you wouldn’t get your fee out of that, right?

Mr. Peterson: I don’t think that’s the case. Our investment people do not think that those kinds of certificates of deposit are the best.

Trial Court: So your investment people didn’t think that the market was going to plunge and [Tony Fowler] would have 60 percent in equity in stock, did they?

Mr. Peterson: I believe there were a lot of people that didn’t believe that was going to happen.

...

Trial Court: You don’t think I did?

Mr. Peterson: In the prior year?

Trial Court: I think I did.

Mr. Peterson: That there was an issue with the portfolio allocations?

Trial Court: I think I did. It’s just that this was a special needs trust, and I was told I

couldn't order that done, because I have ordered that in guardianships, to diversify.

*RP 65-6.*

**5. Order appointing guardian ad litem.** On April 10, 2009 the trial court appointed Mr. Clint Johnson as guardian ad litem to investigate and provide a written report to the trial court by June 12, 2009.<sup>4</sup> The GAL report was to include the following:

- (1) whether the trustee complied with the prudent investor rule;
- (2) whether funds should be invested in insured deposits; and
- (3) whether the trustee fees should be approved.

*CP 796-97.*

**6. Guardian ad litem report.** The GAL submitted his report to the trial court on June 18, 2009. *CP 810-25.* In the report, the GAL reached the following pertinent conclusions:

- (1) Whether the trustee complied with the prudent investor rule. Your Guardian ad Litem is satisfied that the Trustee did comply.  
...
- (2) Whether funds should be invested in insured deposits. When the net present value of the annuity is added to the consideration, the guaranteed or more secured portion of the portfolio is not insignificant. Approximately 50 percent of the total trust assets are in

---

<sup>4</sup> The court and counsel were unaware of Mr. Johnson's previous involvement in the matter. *See note 1, p. 4.*

fixed [income securities], cash (which is FDIC insured) or a guaranteed annuity.

...

(3) Whether the trustee fees should be approved. The proposed fees are consistent with the Trustee's fee schedule which was understood, perhaps even approved, at the time the special needs trust was created and the Trustee appointed. The fee schedule is based on asset values, calculated monthly, and is a reasonable measure for determining fees. Therefore, it is your Guardian ad Litem's conclusion that the Trustee fee should be approved and paid from trust funds.

*CP 819-21.*

**7. Order approving trustee's report.** Another hearing was held on June 19, 2009 during which the GAL presented his findings and recommendations, including his opinion that the assets should not be liquidated and invested into certificates of deposit. *RP 77-*

8. The trial court again addressed Mr. Fowler, as follows:

Trial Court: Is there anything you want to say at this time?

Mr. Fowler: No, Your Honor. Last time I addressed the court, which was back in February or March, the market was 6900 for the Dow. It's up to 85. It's coming back. I have faith in these people. They are doing their job.

*RP 80.* The trial court indicated that it would issue a memorandum opinion. *RP 79.*

The trial court issued two orders on June 30, 2009. In its first order, the trial court stated, *inter alia*:

[T]hat the accounting contained in the Seventh Annual Report of Trustee for October 1, 2007 through September 30, 2008, along with the Second Supplemental Report is approved, except as to investment performance;

*CP 826-28.* The trial court also approved the trustee's proposed budget for expenditures for the period October 1, 2008 through September 30, 2009. *CP 827.* The trial court reserved the issue of trustee fees. *CP 828.*

**8. Order regarding diversification of assets.** The trial court entered its second order regarding diversification of assets, making three specific findings regarding the asset allocation in the special needs trust as follows:

- (a) That the investments of the trust are not diversified so as to include insured deposits;
- (b) That the trustee continues to invest in equities totaling 60 percent of the asset allocation; and
- (c) That the trust loss on investments has totaled – 13.32 percent.

Based upon these findings, the trial court ruled as follows:

Now, therefore, it is hereby ordered that the trustee shall present the court with a plan to transfer a portion of assets to insured deposits and showing fees and costs of such a plan to the trust at a hearing to be held on August 7, 2009 at 9 A.M. No transfers or liquidations are hereby authorized until said hearing on approval of a plan.

*CP 829.*

**9. Motion for reconsideration.** The trustee filed its motion for reconsideration on July 10, 2009 requesting that the trial court rescind its June 30, 2009 order regarding diversification, arguing that the

evidence did not support the trial court's ruling and that the trial court did not have the authority to direct the trustee to reallocate trust assets or to enjoin the trustee from liquidating or transferring assets. *CP 836-68*. Furthermore, the trustee argued that there was no reason for the trial court to interfere since there had been no finding of a breach of the trustee's fiduciary duties. *CP 841*. The trustee also requested that the trial court clarify its ruling on a reallocation plan to include a specific portion of the assets the trial court required be held in "insured deposits." *CP 843*. In addition, the trustee requested that the trial court approve its fees and approve payment of the GAL from the trust. *CP 843-46*.

In support of its motion, the trustee filed a supplemental declaration from Dirk Peterson, Vice President and Trust Officer at Wells Fargo Bank in which Mr. Peterson indicated that the trust assets had increased in value between the period January 31, 2009 through August 3, 2009 by more than \$100,000.00. *CP 872-74*.

**10. Hearing on motion for reconsideration.** During the hearing on August 7, 2009, the trial court questioned whether its June 30 order requiring the trustee to present a plan to transfer a portion of assets into insured deposits presented a problem for the trustee. *RP 86*. Counsel for the trustee stated that liquidating assets that were increasing in value to purchase certificates of deposits would only lock in losses, and

would potentially be a breach of the trustee's fiduciary duties. *RP 86-7.* Counsel observed that losses at this point were not due to the actions of the trustee but due to unanticipated market conditions. *RP 88.* The trial court responded,

Except if you had the money in CDs, insured deposits. I don't know too many people that lost money on insured deposits during this crash.

*RP 88.*

**11. Order on reconsideration.** The trial court entered an order on August 10, 2009 denying the trustee's motion for reconsideration without making any findings supporting its decision. In addition, the trial court failed to provide any clarification of its June 30, 2009 order regarding diversification; failed to rescind its order enjoining the trustee from liquidating or transferring assets; and failed to approve compensation of the trustee. *CP 879-82.*

**E. Trustee's Notice of Appeal**

On August 25, 2009, the trustee filed its Notice of Appeal of the trial court's June 30, 2009 orders and the trial court's August 10, 2009 order denying the trustee's motion for reconsideration and clarification. *CP 884-95.*

#### **F. Trustee's Motion for Stay**

On October 26, 2009 the trustee filed its motion for stay of the trial court orders requiring the trustee to present a reallocation plan and the order preventing the trustee from liquidating or transferring assets during the pendency of this appeal. In support of its motion, the trustee submitted a supplemental declaration of Turner Bluechel, in which he stated that the asset value had increased to that point by approximately 19 percent since February 1, 2009. *[Appendix A]*.

On November 5, 2009 the Court of Appeals granted the stay and required the trustee to file a supersedeas bond. The trustee filed a supersedeas bond on November 19, 2009.

#### **IV. SUMMARY OF ARGUMENT**

The trial court exceeded its authority when it interfered in the management of trust assets absent any evidence or finding of a breach of fiduciary duty by the trustee. Further, the trial court exceeded its authority when it issued a temporary injunction against the trustee absent a request by a party and without complying with the statutory requirements governing such relief. Finally, the trial court abused its discretion when it refused to approve the trustee's fees based upon the diminution in value of the trust assets.

## **V. ARGUMENT**

### **A. The Trustee Has Standing to Appeal.**

A trustee has standing to appeal on behalf of the trust beneficiary “to protect the interest of those whom he represents.” *Retail Store Employees Union v. Washington Surveying and Rating Bureau*, 87 Wn. 2d 887, 894, 558 P.2d 215 (1976).

### **B. Standard of Review**

#### **1. Interpretation of governing law.**

Questions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Statutory interpretation is a question of law. *In re Minor Settlement of AGM and LMM*, 2010 WL 17054 (Wn. App., Div. II).

Thus, the trial court’s order requiring the trustee to present a reallocation plan, since it is based upon the trial court’s erroneous interpretation of governing law, is reviewed *de novo*.

#### **2. Inappropriate exercise of discretion.**

Normally whether a trial court appropriately issued an injunction is reviewed for abuse of discretion. *Washington Federation of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). However, whether the trial court acted “outside the range of acceptable discretionary choices” is a question of law. *State v. Williamson*, 100 Wn.App. 248, 257,

996 P.2d 1097 (2000). Thus, “whether equitable relief is appropriate is a question of law.” *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365, 374, 113 P.3d 463 (2004); *Rudolph v. Empirical Research Systems, Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001).

Since no one requested an injunction here, the trial court’s order enjoining the trustee from exercising its discretion pending a decision on reallocation, is outside the scope of its discretion and is reviewed *de novo*.

### **3. Documentary evidence.**

Finally, where a trial court’s findings are based entirely on documentary evidence, the reviewing court “stands in the same position as the trial court and reviews the trial court’s decision *de novo*.” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009).

Thus the trial court’s failure to approve and order payment of the GAL from trust assets is reviewed *de novo*.<sup>5</sup>

### **4. Trustee fees.**

The trial court’s failure to approve the trustee’s fees is reviewed for an abuse of discretion. *Brunson v. Pierce Cy.*, 149 Wn.App. 855, 861, 205 P.3d 963 (2009). A trial court “abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Wash. State*

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<sup>5</sup> The remarks by counsel, the GAL, Mr. Fowler and the investment manager on the record were not made under oath.

*Physicians Insurance v. Fisons Corp*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Thus, a trial court's decision that is based upon unsupported facts, an erroneous view of the law or incorrect legal analysis is an abuse of discretion. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007); *Hyundai Motor v. Magana*, 141 Wn.App. 495, 509, 170 P.3d 1165 (2007). Further, a trial court's failure to exercise its discretion is an abuse of that discretion. *Brunson*, 149 Wn.App. at 861.

**C. The Trial Court's Authority is Limited by Court Rule and by the Trust Agreement.**

**1. SPR 98.16W limits the trial court's authority to approval of current assets.**

SPR 98.16W provides that

The fiduciary shall prepare an annual statement of income, expenses, *current assets*, and fees charged; ... and shall present the statement for review and approval by the court having jurisdiction over the beneficiary.

SPR 98.16W(j)(3), (emphasis supplied). [*Appendix B.*]

The rules of statutory construction apply to the interpretation of court rules. *In re AGM and LMM*, 2010 WL 17054. The court must give effect to the rule's plain meaning and must construe it so that no portion is rendered meaningless or superfluous. *In re AGM and LMM*, 2010 WL 17054 at ¶ 27.

Pursuant to the plain meaning of SPR 98.16W, the authority of the trial court is limited to reviewing the accuracy of the statement of current

assets, i.e. the assets which existed at the end of the accounting period covered by the annual statement provided by the trustee. The rule does not permit the trial court to make investment decisions on behalf of a trust beneficiary.

In this case, the trial court reviewed and approved the trustee's report and budget, which is within the parameters of the governing rule. *CP 827*. However, the trial court did not stop there. It went on to disapprove investment performance. *CP 827*. Next, in spite of all evidence presented to the contrary, the trial court concluded that the assets should be reallocated into insured deposits and directed the trustee to present a "reallocation plan." *CR 829*. These actions are beyond the scope of the trial court's authority under SPR 98.16W and should be reversed.

**2. The trust agreement limits the trial court's authority to approval of the annual accounting.**

In addition to the limits set forth in SPR 98.16W, the trial court's authority to direct the manner in which trust assets are invested is also limited by the court-approved trust agreement. The trust agreement requires only that the trustee "submit an annual accounting to the Superior Court for review and approval ...." *CP 27*.

With regard to management of trust assets, the trust agreement authorizes the trustee to “exercise all powers granted by law, including the Washington Trust Act (RCW 11.98).” *CP 27*. RCW 11.98.070 grants the trustee “discretionary power to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law....” *Appendix C*.

The trust agreement and the governing statute grant the trustee the exclusive control over investment decisions. Unlike the court, a trustee is subject to liability to the trust beneficiary if it fails to perform its duties consistent with statutory and common law. *See, e.g. Monroe v. Winn*, 16 Wn. 2d 497, 510, 133 P.2d 952 (1943), (“A beneficiary of a trust has the right to appeal to the court and call in question actions of trustees which he may feel are not in his best interests, and the court has the power to intervene.”). In contrast, the trial court is immune from liability. Thus, the trial court’s intervention here may have the unintended consequence of immunizing the trustee’s actions as well. If the trustee follows the trial court’s investment strategy, resulting in earlier depletion of trust assets, the trust beneficiary would have no recourse against the court or the trustee.<sup>6</sup>

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<sup>6</sup> An alternate scenario is that the trustee may not be immune even if it follows the court ordered investment strategy and, therefore, must resign.

Furthermore, a corporate trustee is held to a higher standard of care based upon its “special skills or expertise.” *RCW 11.100.020*; [*Appendix D*]; *Fred Hutchinson*, 107 Wn.2d at 711. Thus, the appointment of a corporate trustee benefits the trust beneficiary in two ways: First, the trust benefits by the special skills and expertise employed by the corporate trustee; and second, the corporate trustee is held to a higher standard of care. The trial court’s usurpation of the trustee’s role here obviates those benefits.

For very good reasons, the trial court’s authority over the trust assets is limited both by provisions of the trust agreement and by statute. Therefore, its order directing reallocation of trust assets should be reversed.

**D. The Trial Court’s Authority is Limited by Statute and by Common Law.**

**1. There is no case or controversy.**

The trial court here was presented no case or controversy requiring adjudication. Courts should exercise judicial power only when there is an actual case or controversy. *City of Yakima v. Aubrey*, 85 Wn. App. 199, 204, 931 P.2d 927, *rev. denied* 132 Wn.2d 1011 (1997). Whether a “justiciable controversy” exists is a question of law. *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 75-76, 768 P.2d 462 (1989).

The Washington Supreme Court set out four requirements for a justiciable controversy as follows:

(1) [A]n actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Osborn v. Grant County*, 130 Wn.2d 615, 631, 926 P.2d 911 (1996).

None of the four factors for a “justiciable controversy” exist here.

First, there is no dispute, actual or hypothetical. No one has objected to the trustee’s handling of trust assets. To the contrary, the beneficiary’s father, Mr. Fowler, expressed his approval of the trustee’s actions.

Second, there is no opposing party. The GAL, appointed to review the trustee’s report, also expressed approval of the trustee’s actions. Third, the issue here, the “loss on investments” is potential rather than actual unless the trustee is forced to sell the assets. Fourth, the trial court’s order directing reallocation of trust assets raises more issues than it resolves for the reasons set forth in the preceding section.

## **2. The trustee did not abuse its discretion.**

When the trustee is granted the power to exercise discretion over the trust assets by the terms of the trust agreement, the trustee’s discretion “is not subject to control by the court except to prevent an abuse of such

discretion.” *Monroe v. Winn*, 16 Wn.2d 497, 508, 133 P.2d 952 (1943); *Occidental Life Ins. Co. v. Blume*, 65 Wn.2d 643, 648, 399 P.2d 76 (1965) (the trustee’s exercise of discretion “is subject to control by the court only when necessary to prevent an abuse of discretion”); *Baldus v. Bank of California*, 12 Wn. App. 621, 631, 520 P.2d 1350 (1975), (the court may intervene only when there has been an abuse of the trustee’s discretion. According to the court in *Baldus*, a court should not interfere with the administration of a trust unless the trustee “acts dishonestly, or with an improper ... motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.” *Baldus*, 12 Wn. App. at 631.

- a. The trustee followed the “prudent investor rule.”

In an attempt to determine whether the trustee had breached its fiduciary duties, the trial court appointed a guardian ad litem to evaluate the trustee’s performance and make recommendations to the trial court about diversification of the assets.

The standard by which the trustee’s investment decisions are evaluated is the so-called “prudent investor rule,” which 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.” *RCW 11.100.020(1)*, [Appendix D]. This rule “focuses on the performance of the trustee, not the results of

the trust.” *In re Cooper*, 81 Wn.App. 79, 82, 913 P.2d 393 (1996). While overall trust performance may be a factor in evaluating the performance of a trustee, it is not controlling. *In re Cooper*, 81 Wn.App. at 88. The court’s focus in applying the standard should be on the trustee’s “conduct, not the end result.” *In re Cooper*, 81 Wn.App. at 88. This standard includes generally the “duty to diversify trust assets” unless special circumstances exist. *In re Cooper*, 81 Wn.App. at 90; *RCW 11.100.047*, [Appendix E].

In its order appointing the Mr. Clint Johnson as GAL the trial court directed the GAL to answer three specific questions, one of which was whether the trustee had followed the “prudent investor rule.” *CP 796-97*. The GAL investigated and concluded that the trustee had done so and that there had been no breach of its fiduciary duties. *CP 819-20*.

Although the trial court failed to adopt the recommendations of the GAL, it did not adopt any alternative findings that the trustee abused its discretion or otherwise violated its fiduciary duty. The only findings were that the trust assets “are not so diversified so as to include insured deposits...” and that the trustee “continues to invest in equities totaling 60 percent of the asset allocation...”and “the loss on investments totaled - 13.32 percent.” *CP 829*. However, the trial court did not conclude that the failure to invest in certificates of deposit was a breach of the trustee’s

fiduciary duties. Nor could it have done so, based upon the record before it. There is no evidence that the trustee acted dishonestly, with an improper motive, failed to use its judgment or acted imprudently.<sup>7</sup> All the evidence is to the contrary.

- b. The trial court should not substitute its judgment for that of the trustee.

In its decision in *Baldus* the appellate court admonished that, “the mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not sufficient reason for interfering.” *Baldus*, 12 Wn. App. at 631.

The absence of any evidence from which the trial court could conclude that the trustee breached its duty or abused its discretion in this matter, compels the conclusion that the trial court focused solely on the performance of the portfolio rather than the trustee’s conduct and improperly substituted its judgment for that of the trustee’s.

- c. The trial court must consider circumstances at the time.

Furthermore, in judging a trustee’s conduct the trial court should not use hindsight, instead the trustee’s actions must be considered prospectively, “unaided or enlightened by subsequent events.” *Baldus*, 12

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<sup>7</sup> Although the trial court suggested during oral argument that the trustee was maintaining the assets in stocks solely to incur fees, it made no finding of self-dealing.

Wn. App. at 633; *see also, Monroe*, (the court should judge the trustee's actions in light of the circumstances at the time and not at some subsequent time.)

Here, the trial court repeatedly approved the allocation of assets during the lifetime of the trust. In 2008 the trial court approved a portfolio mix of 59 percent equities, 27 percent fixed income, one percent cash and 13 percent private debt obligations.<sup>8</sup> This does not include the annuity and is consistent with prior years' asset allocations. At the conclusion of the hearing on the Trustee's Sixth Annual Report, the trial court stated, "good luck." *RP 4*. Thus, the trial court is using hindsight to judge the trustee's allocation decision and its order requiring reallocation of trust assets should be reversed.

**E. The Trial Court Exceeded Its Authority When It Enjoined the Trustee from Transferring or Liquidating Assets.**

**1. No party requested an injunction.**

There was no request for an injunction by any party. To the contrary, Mr. Fowler expressed his concern that the trial court was "hog-tying" the trustee and preventing it from exercising its discretion. Certainly, the trust beneficiary would be a necessary party to any action for injunctive relief. *See, e.g., CR 19 [Appendix F]; Retail Store*

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<sup>8</sup> Contrary to the trial court's recollection, it did not predict the market downturn. *RP 3-4*.

*Employees Union*, 87 Wn.2d at 905 (removal of trustee without giving the beneficiaries an opportunity to be heard violates due process). The trust beneficiary's property rights are affected by the trial court's action and he is, therefore, a necessary party.<sup>9</sup>

**2. The trial court failed to follow the necessary procedural requirements prior to issuing a temporary injunction.**

Even if a temporary injunction had been requested by a party, the trial court failed to follow the applicable court rules prior to its issuance. If an injunction or preliminary restraining order is issued without notice it can only be based upon "specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result ..." before a hearing can be held. *CR 65(b); [Appendix G]*. Nothing of the kind was shown.

Second, "every temporary restraining order granted without notice shall ... define the injury and state why it is irreparable and why the order was granted without notice ...." *CR 65(b)*. The trial court's order fails to comply with this section as well.

Third, "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant ...." *CR 65 (c)*.

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<sup>9</sup> The GAL's role was limited to answering the questions put to him by the trial court. Even if the GAL's role had been a more general one, considering the GAL report, it is likely that the GAL would not have sought an injunction on behalf of the trust beneficiary.

Notwithstanding that there was no “applicant,” no security was required or given.

**3. There is no claim requiring injunctive relief.**

The trial court’s order also violated the statute governing the issuance of temporary injunctions, RCW 7.40.020. [*Appendix H*].

All three of the following criteria must be established to warrant preliminary injunctive relief: (1) a clear legal or equitable right, (2) a well-grounded fear of invasion of that right, and (3) that the acts to be enjoined are “either resulting in or will result in actual and substantial injury....” *WFSE v. State*, 99 Wn.2d at 888. “The failure to establish any one or more of the criteria” is fatal. *WFSE v. State*, 99 Wn.2d at 888. Since none of the criteria is present here, no injunction should have issued.

No party having clear legal or equitable right to the corpus of the trust requested a temporary injunction. To the contrary, Mr. Fowler asked the trial court to allow the trustee to continue to exercise its discretion. Consequently, a well-grounded fear of invasion of that right has not been established. Furthermore, there is no evidence that the trustee’s *actions*, (as opposed to the vagaries of the market), are causing substantial injury to

the trust beneficiary.<sup>10</sup> The trial court's order enjoining the trustee from exercising its discretion over the trust assets should be reversed.

**F. The Trial Court Abused Its Discretion When It Failed to Approve the Trustee's Fees.**

**1. The trust agreement provides for payment according to the trustee's fee schedule.**

The trust agreement provides for compensation of the trustee as follows:

The Trustee is authorized to receive compensation for services as Trustee, in accordance with the Trustee's schedule of fees, applying to trust accounts of this kind at the time such services are rendered.

*CP 28.*

The trial court approved the form of the Special Needs Trust and the appointment of Wells Fargo Bank as Trustee by order dated September 25, 2001. *CP 18-21.* The trial court has consistently approved the trustee's compensation based upon a percentage of the value of the trust assets every prior year. Most recently, the trial court approved the Trustee's Sixth Annual Report, which included trustee's fee based upon the percentage method, by order dated January 25, 2008. *CP 653-54.*

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<sup>10</sup> The trustee continues to exercise its discretion over the trust assets per the stay.

**2. RCW 11.98.070 provides for payment of the trustee from trust assets.**

RCW 11.98.070 provides that the trustee may pay itself reasonable compensation,

[C]onsidering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the trustee.

*[Appendix C].*

Thus, the trustee has statutory authority to pay itself a “reasonable fee” based upon its expertise and responsibility.

**3. The percentage method of compensation creates an incentive that is in the best interest of the trust beneficiary.**

The percentage method for compensation of trustees has been found reasonable by the Washington State Supreme Court in *Thomas v. National Bank of Commerce*, 187 Wash. 521, 60 P.2d 264 (1936). This method of compensation for a professional trustee is customary. For example, in *In re Powell*, 68 Wn.2d 38, 41, 411 P.2d 162 (1966), the court held that fees charged by the trust departments of banks is a factor that may be considered in determining the reasonableness of fees for an individual trustee.

Similarly, in *Fred Hutchinson Cancer Res. Ctr. v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987) the court considered the reasonableness of the individual trustee’s fee by comparing it to the fees charged by the

corporate trustee. In that case, “Seattle-First charged its fees in accordance with its published fee schedule.” *Fred Hutchinson*, 107 Wn.2d at 698.

Thus, the percentage method has been recognized by the courts of this state as an appropriate method for calculating trustee’s fees. Using the percentage method for determining fees creates an incentive for the trustee to work assiduously to increase the trust asset value over time. Under this method, the trustee receives more fees when the trust asset value increases and less when the trust asset value decreases.

**4. The trial court’s refusal to approve fees lacks evidentiary basis.**

Despite having repeatedly approved trustee fees according to the percentage method in this matter, the trial court concluded that the trustee should not receive *any* fees for its services from October 1, 2007 through September 30, 2008 because the investment returns were negative.

The factors to be considered in determining the reasonableness of a trustee’s fees are: “(1) the amount of risk and responsibility involved, (2) the time actually required of the trustee in the performance of the trust, (3) the size of the estate, (4) the amount of income received, and (5) the manual and over-all services performed.” *In re Powell*, 68 Wn.2d at 41. Investment performance is not one of them.

The trial court failed to make findings on any of the relevant factors or on the reasonableness of the trustee's fees in general.<sup>11</sup> The GAL concluded that the trustee's fees were reasonable and should be approved. *CP 820-21*. The trial court rejected the GAL's recommendations without comment, and simply declined to approve the trustee's fees. The trial court's refusal to approve the trustee's fees is an abuse of discretion. Since approval of trustee's fees is based solely upon documentary evidence, it would be appropriate for the appellate court to approve the trustee's fees rather than remanding for further consideration by the trial court. *Carpenter v. Elway*, 97 Wn. App. 977, 988 P.2d 1009 (1999), (questions of law may be determined by the appellate court when doing so would conserve judicial resources.)

## **VI. CONCLUSION**

The trial court's orders are contrary to both the facts and the law. The trial court acted inappropriately when it imposed its own investment strategy on the trustee. The trial court's misguided attempt to preserve the corpus of the trust will very likely be detrimental to the trust beneficiary by causing earlier depletion of trust assets. The trial court violated the beneficiary's due process rights when it intervened in the absence of a request for intervention by the trust beneficiary and without providing the

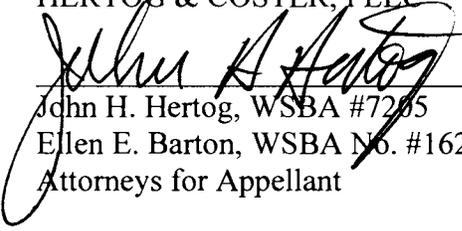
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<sup>11</sup> The trial court's oral findings pertained to the market downturn and that there would be no fees if the assets were placed into insured deposits. *RP 76-77*.

trust beneficiary an opportunity to be heard. The trial court's order preventing the trustee from exercising its discretion during the inevitable ups and downs of the market actually increases the risk of loss to the beneficiary by preventing the trustee from making purchases and sales in accordance with its overall investment plan. The trial court's orders requiring the trustee to adopt the trial court's investment strategy and enjoining the trustee from exercising its discretion over trust assets should be reversed. Furthermore, the appellate court should approve the fees of the trustee as it has done every prior year.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February,  
2010.

HERTOG & COSTER, PLLC



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## **LIST OF APPENDICES**

<b>APPENDIX A:</b>	Declaration of Turner Bluechal
<b>APPENDIX B:</b>	SPR 98.16W
<b>APPENDIX C:</b>	RCW 11.98.070
<b>APPENDIX D:</b>	RCW 11.100.020
<b>APPENDIX E:</b>	RCW 11.100.047
<b>APPENDIX F:</b>	CR 19
<b>APPENDIX G:</b>	CR 65
<b>APPENDIX H:</b>	RCW 7.40.020
<b>APPENDIX I:</b>	RCW 11.96A.160

# APPENDIX A

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

In re the

MARK ANTHONY FOWLER SPECIAL  
NEEDS TRUST.

)  
)  
) Case No.: 39729-3-11

)  
) **SUPPLEMENTAL DECLARATION OF**  
) **TURNER BLUECHEL**  
)  
)  
)

**Turner Bluechel**, states as follows:

1. I am employed by Wells Fargo Bank, N. A., Wealth Management Group as a Vice President and Investment Manager assigned to the Mark Anthony Fowler Special Needs Trust. I have been in the investment business for eighteen (18) years and employed by Wells Fargo in my current position for eleven (11) years.

2. I make this declaration based upon personal knowledge in support of the trustee's Motion For Stay Of Trial Court Order.

3. Since February 1, 2009, the investments in the Trust have increased in value by more than \$127,000, net of distributions. This is a 19.36% increase in the asset value, with the current asset allocation. The distributions have been another \$109,406.15 over that time frame.

4. However, as a result of the increase in the value of the investments held by the Trust, the assets are no longer in the appropriate balance, and, in fact, are over allocated to equity.

**COPY**  
**ORIGINAL**

1           5.       The trustee requires the flexibility to liquidate securities to realize  
2 gains and rebalance the portfolio. The trustee cannot exercise its discretion to do so  
3 in light of the order of the trial court which is the subject of the Motion For Stay Of  
4 Trial Court Order Without Bond.

5           I declare under penalty of perjury under the laws of the state of Washington that to  
6 the best of my knowledge the statements above are true and correct.

7           SIGNED at Seattle, Washington this 23 day of October, 2009.

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Turner Bluechel

# APPENDIX B



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SPR RULE 98.16W  
ESTATES--GUARDIANSHIP--SETTLEMENT  
OF CLAIMS OF MINORS AND INCAPACITATED PERSONS

(a) Approval of Settlement Required. In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. If a suit for recovery on behalf of the affected person has been previously maintained, then the petition shall be filed in that county, or if no such suit exists, then in the county where the affected person resides, unless either court orders otherwise.

(b) Petition. The petition for approval of settlement on behalf of the affected person shall contain, as a minimum and to the full extent known:

(1) the affected person's full name and date of birth;

(2) the general identification and relationship of others having claims or potential claims arising from the same matters and identity of their counsel;

(3) the description and amount of all liens, subrogation or reimbursement claims, fees, bills, costs or expenses connected with the affected person's claim;

(4) the description and amount of all liens, reimbursements, fees, costs or expenses requested to be paid from the settlement funds to be deposited with the court (or the maximum claimed for reimbursement if any item is being disputed or negotiated further), including a columnar listing of all amounts to be received, all amounts to be paid or the maximum claimed and concluding with the net amount of money or other property remaining for the affected person.

(c) Appointment, Role and Termination of the Settlement Guardian ad Litem; Exceptions to Appointment.

(1) Upon filing of the petition, the court shall appoint a Settlement Guardian ad Litem to assist the court in determining the adequacy of the proposed settlement. The Settlement Guardian ad Litem shall conduct an investigation and file a written report with the court with a recommendation regarding approval and final disposition within 45 days of appointment or such other time as the court may order. The court, if appropriate under existing law, may order that all or part of the report and contents shall be confidential or sealed. Upon filing of the report and appearing at hearings as may be required, the Settlement Guardian ad Litem is exonerated from further duties unless otherwise ordered by the court.

(2) The court may dispense with the appointment of the Settlement Guardian ad Litem if by written finding the court determines a guardian ad litem, a guardian, or limited guardian has been previously appointed or if the court affirmatively finds that the affected person is represented by independent counsel, so long as the guardian ad litem, guardian, limited guardian, or independent counsel has the qualifications which would be

required for a Settlement Guardian ad Litem and neither has nor represents interests in conflict with those of the affected person which would not be allowed for a Settlement guardian ad Litem. Independent counsel's fee interest in the claim, if allowed by the Rules of Professional Conduct, is not a disqualifying interest. If a Settlement Guardian ad Litem is not required, the independent counsel, guardian ad litem, guardian or limited guardian shall file the report.

(d) Qualifications of Settlement Guardian ad Litem. The Settlement Guardian ad Litem shall be an attorney with at least five years of pertinent legal experience and such other qualifications as the court may require. The Settlement Guardian ad Litem shall neither have nor represent any interest in conflict with the affected person, including but not limited to the conflicting interests of parents or others legally responsible for medical care of the affected person.

(e) Report of Settlement Guardian ad Litem. The report of the Settlement Guardian ad Litem or other person authorized above shall include a description, in depth appropriate to the magnitude of injuries and settlement, of at least:

(1) the background of the appointment and qualifications of the writer including any relationship with involved parents, guardians, insurers or attorneys;

(2) a description of the investigation conducted, the persons interviewed and the documents reviewed, if any;

(3) a description of the incident and the affected person's potential legal claims;

(4) a description of the affected person's injuries, general treatment, diagnosis and prognosis attaching a recent supporting medical report or office record;

(5) a discussion of the damages potentially recoverable including identification of all special damages;

(6) a discussion of the potential liability of all persons and entities;

(7) an identification of other insurance or collateral sources for payment of any bills or expenses;

(8) A discussion and recommendation regarding any lien, subrogation or reimbursement claims, including any suggested retention in an attorney's trust account of the full amount claimed until the final resolution of such claim;

(9) an identification of all other claims, specifically including any claims held by other family members;

(10) a discussion of any proposed apportionment of claim proceeds among family members or unrelated claimants, if any;

(11) a discussion and recommendation regarding the proposed settlement form, documents and amounts;

(12) a discussion and recommendation regarding the expenses and fees for which payment is requested;

(13) a discussion and recommendation regarding the requested disposition of net proceeds;

(14) a statement of time spent, expenditures made and the fees and costs requested by the Settlement Guardian ad Litem;

(15) a discussion and recommendation regarding the presence of the affected person and the Settlement Guardian ad Litem at any court hearings on the Petition;

(16) a statement as to whether the Petition has been submitted for approval in any other jurisdiction.

(f) Hearing. At the time the petition for approval of the settlement is heard, the allowance and taxation of all fees, costs, and other charges incident to the settlement shall be considered and disposed of by the court. The court by local rule or by specific direction, may require or waive the presence of the affected person or the Settlement guardian ad Litem.

(g) Attorney's Fees and Costs. Any attorney claiming fees, costs or other charges incident to representation of the affected person, from the claim proceeds or otherwise, shall file an affidavit or declaration under RCW 9A.72.085 in support thereof. Copies of any written fee agreements must be attached to the affidavit or declaration.

(h) Deposit in Court and Disbursements. Except for any structured portion of a settlement, the total judgment or total settlement shall be paid into the registry of the court, or as otherwise ordered by the court. All sums deductible therefrom, including costs, attorney's fees, hospital and medical expenses, and any other expense, shall be paid upon approval of the court.

(i) Form for Payment of Remaining Funds. Checks for funds payable to the affected person may be made out by the clerk jointly to the depository bank, trust company, or insured financial institution and to the independent attorney for the affected person, guardian or limited guardian, or trustee, and deposit shall be made to the trust or into a blocked account for the affected person with provision that withdrawals cannot be made except as provided in the trust instrument or as ordered by the court. A deposit receipt to that effect must timely be filed with the court by the payee.

(j) Control and Orders for Remaining Funds. In calculating the amount remaining from a structured settlement, if the settlement required court approval only because the affected person was an unemancipated minor, then only the payments received and to be received before attaining majority age are counted. All orders directing funds to a blocked account should recite that the funds are payable upon further order of the court or to the affected person at his or her age of majority, which date should be specified. Upon approval of settlement and payment of all authorized fees, bills and expenses, the court shall order one of the following actions:

(1) \$25,000 or Less. If the money or the value of other property remaining after deduction for all approved fees, bills and expenses is \$25,000 or less, the court shall require that:

(A) the money be deposited in a bank or trust company or be invested in an account in an insured financial institution for the benefit of the affected person, subject to withdrawal only upon the order of the court as a part of the original proceeding; or

(B) the money or property be paid to a duly appointed and qualified guardian or limited guardian; or

(C) the money be placed in trust, subject to the conditions set forth in subsection (3).

(2) More than \$25,000. If the money or the value of other property

remaining after deduction for all approved fees, bills and expenses exceeds \$25,000, the court in the order or judgment shall:

(A) if there is an existing or newly created guardian or limited guardian who approves, require that the money be deposited in a bank or trust company or be invested in an account in an insured financial institution for the benefit of the affected person, subject to withdrawal only upon the order of the court handling the guardianship or limited guardianship;

(B) if there is no guardian or limited guardian of the affected person or no approval under (A), the court in the order or judgment shall require that either a guardian or limited guardian be appointed, or

(C) the money or other property be placed in trust, subject to the conditions set forth in subsection (3).

(3) Conditions for Use of Trust. A trust established pursuant to this rule under subsection (1) or (2) must meet the following requirements:

(A) The selection of the trustee(s) and the terms of the trust shall be subject to the court's approval;

(B) No family member of the affected person, or other potential residual beneficiary of the trust, shall be approved by the court as a sole trustee;

(C) A bonded or insured fiduciary shall be designated as a sole trustee or as co-trustee with principal responsibility for financial management of the trust estate;

(D) The fiduciary shall prepare an annual statement of income, expenses, current assets, and fees charged; shall deliver the statement to any co-trustees, the beneficiary, and the beneficiary's personal representative; and shall present the statement for review and approval by the court having jurisdiction over the beneficiary;

(E) No family member or potential residual beneficiary who serves as a co-trustee shall exercise discretionary authority over individual expenditures from the trust that would bring direct or indirect benefit to that individual; and

(F) The administration of the trust shall be subject to the continuing jurisdiction of the appropriate court.

(k) Bond. Unless all funds are to be placed in a blocked account or court approved trust, sufficient bond shall be required for guardians and limited guardians to the extent required by guardianship law.

131 Wn.2d 1105 effective April 8, 1997

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# APPENDIX C

RCW 11.98.070  
Power of trustee.

A trustee, or the trustees jointly, of a trust, in addition to the authority otherwise given by law, have discretionary power to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in so doing may:

(1) Receive property from any source as additions to the trust or any fund of the trust to be held and administered under the provisions of the trust;

(2) Sell on credit;

(3) Grant, purchase or exercise options;

(4) Sell or exercise subscriptions to stock or other corporate securities and to exercise conversion rights;

(5) Deposit stock or other corporate securities with any protective or other similar committee;

(6) Assent to corporate sales, leases, and encumbrances;

(7) Vote trust securities in person or by proxy with power of substitution; and enter into voting trusts;

(8) Register and hold any stocks, securities, or other property in the name of a nominee or nominees without mention of the trust relationship, provided the trustee or trustees are liable for any loss occasioned by the acts of any nominee, except that this subsection shall not apply to situations covered by subsection (31) of this section;

(9) Grant leases of trust property, with or without options to purchase or renew, to begin within a reasonable period and for terms within or extending beyond the duration of the trust, for any purpose including exploration for and removal of oil, gas and other minerals; enter into community oil leases, pooling and unitization agreements;

(10) Subdivide, develop, dedicate to public use, make or obtain the vacation of public plats, adjust boundaries, partition real property, and on exchange or partition to adjust differences in valuation by giving or receiving money or money's worth;

(11) Compromise or submit claims to arbitration;

(12) Borrow money, secured or unsecured, from any source, including a corporate trustee's banking department, or from the individual trustee's own funds;

(13) Make loans, either secured or unsecured, at such interest as the trustee may determine to any person, including any beneficiary of a trust, except that no trustee who is a beneficiary of a trust may participate in decisions regarding loans to such beneficiary from the trust, unless the loan is as described in \*RCW 83.110.020(2), and then only to the extent of the loan, and also except that if a beneficiary or the grantor of a trust has the power to change a trustee of the trust, the power to loan shall be limited to loans at a reasonable rate of interest and for adequate security;

(14) Determine the hazards to be insured against and maintain insurance for them;

(15) Select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make nonpro rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries without regard to the income tax basis of specific property allocated to any beneficiary and without any obligation to make an equitable adjustment;

(16) Pay any income or principal distributable to or for the use of any beneficiary, whether that beneficiary is under legal disability, to the beneficiary or for the beneficiary's use to the beneficiary's parent, guardian, custodian under the uniform gifts to minors act of any state, person with whom he resides, or third person;

(17) Change the character of or abandon a trust asset or any interest in it;

(18) Mortgage, pledge the assets or the credit of the trust estate, or otherwise encumber trust property, including future income, whether an initial encumbrance or a renewal or extension of it, for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(19) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing structures, and make any improvements to trust property;

(20) Create restrictions, easements, including easements to public use without consideration, and other servitudes;

(21) Manage any business interest, including any farm or ranch interest, regardless of form, received by the trustee from

the trustor of the trust, as a result of the death of a person, or by gratuitous transfer from any other transferor, and with respect to the business interest, have the following powers:

(a) To hold, retain, and continue to operate that business interest solely at the risk of the trust, without need to diversify and without liability on the part of the trustee for any resulting losses;

(b) To enlarge or diminish the scope or nature of the activities of any business;

(c) To authorize the participation and contribution by the business to any employee benefit plan, whether or not qualified as being tax deductible, as may be desirable from time to time;

(d) To use the general assets of the trust for the purpose of the business and to invest additional capital in or make loans to such business;

(e) To endorse or guarantee on behalf of the trust any loan made to the business and to secure the loan by the trust's interest in the business or any other property of the trust;

(f) To leave to the discretion of the trustee the manner and degree of the trustee's active participation in the management of the business, and the trustee is authorized to delegate all or any part of the trustee's power to supervise, manage, or operate to such persons as the trustee may select, including any partner, associate, director, officer, or employee of the business; and also including electing or employing directors, officers, or employees of the trustee to take part in the management of the business as directors or officers or otherwise, and to pay that person reasonable compensation for services without regard to the fees payable to the trustee;

(g) To engage, compensate, and discharge or to vote for the engaging, compensating, and discharging of managers, employees, agents, lawyers, accountants, consultants, or other representatives, including anyone who may be a beneficiary of the trust or any trustee;

(h) To cause or agree that surplus be accumulated or that dividends be paid;

(i) To accept as correct financial or other statements rendered by any accountant for any sole proprietorship or by any partnership or corporation as to matters pertaining to the business except upon actual notice to the contrary;

(j) To treat the business as an entity separate from the trust, and in any accounting by the trustee it is sufficient if the trustee reports the earning and condition of the business in a manner conforming to standard business accounting practice;

(k) To exercise with respect to the retention, continuance, or disposition of any such business all the rights and powers that the trustor of the trust would have if alive at the time of the exercise, including all powers as are conferred on the trustee by law or as are necessary to enable the trustee to administer the trust in accordance with the instrument governing the trust, subject to any limitations provided for in the instrument; and

(l) To satisfy contractual and tort liabilities arising out of an unincorporated business, including any partnership, first out of the business and second out of the estate or trust, but in no event may there be a liability of the trustee, except as provided in RCW 11.98.110 (2) and (4), and if the trustee is liable, the trustee is entitled to indemnification from the business and the trust, respectively;

(22) Participate in the establishment of, and thereafter in the operation of, any business or other enterprise according to subsection (21) of this section except that the trustee shall not be relieved of the duty to diversify;

(23) Cause or participate in, directly or indirectly, the formation, reorganization, merger, consolidation, dissolution, or other change in the form of any corporate or other business undertaking where trust property may be affected and retain any property received pursuant to the change;

(24) Limit participation in the management of any partnership and act as a limited or general partner;

(25) Charge profits and losses of any business operation, including farm or ranch operation, to the trust estate as a whole and not to the trustee; make available to or invest in any business or farm operation additional moneys from the trust estate or other sources;

(26) Pay reasonable compensation to the trustee or co-trustees considering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the trustee;

(27) Employ persons, including lawyers, accountants, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee's duties or to perform any act, regardless of whether the act is discretionary, and to act without independent investigation upon their recommendations, except that:

(a) A trustee may not delegate all of the trustee's duties and responsibilities;

(b) This power to employ and to delegate duties does not relieve the trustee of liability for such person's discretionary acts, that, if done by the trustee, would result in liability to the trustee;

(c) This power to employ and to delegate duties does not relieve the trustee of the duty to select and retain a person with reasonable care;

(d) The trustee, or a successor trustee, may sue the person to collect any damages suffered by the trust estate even though the trustee might not be personally liable for those damages, subject to the statutes of limitation that would have applied had the claim been one against the trustee who was serving when the act or failure to act occurred;

(28) Appoint an ancillary trustee or agent to facilitate management of assets located in another state or foreign country;

(29) Retain and store such items of tangible personal property as the trustee selects and pay reasonable storage charges thereon from the trust estate;

(30) Issue proxies to any adult beneficiary of a trust for the purpose of voting stock of a corporation acting as the trustee of the trust;

(31) Place all or any part of the securities at any time held by the trustee in the care and custody of any bank, trust company, or member firm of the New York Stock Exchange with no obligation while the securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank, trust company, or firm, so long as the bank, trust company, or firm was selected and retained with reasonable care, and have all stocks and registered securities placed in the name of the bank, trust company, or firm, or in the name of its nominee, and to appoint such bank, trust company, or firm agent as attorney to collect, receive, receipt for, and disburse any income, and generally may perform, but is under no requirement to perform, the duties and services incident to a so-called "custodian" account;

(32) Determine at any time that the corpus of any trust is insufficient to implement the intent of the trust, and upon this determination by the trustee, terminate the trust by distribution of the trust to the current income beneficiary or beneficiaries of the trust or their legal representatives, except that this determination may only be made by the trustee if the trustee is neither the grantor nor the beneficiary of the trust, and if the trust has no charitable beneficiary;

(33) Continue to be a party to any existing voting trust agreement or enter into any new voting trust agreement or renew an existing voting trust agreement with respect to any assets contained in trust; and

(34)(a) Donate a qualified conservation easement, as defined by section 2031(c) of the Internal Revenue Code, on any real property, or consent to the donation of a qualified conservation easement on any real property by a personal representative of an estate of which the trustee is a devisee, to obtain the benefit of the estate tax exclusion allowed under section 2031(c) of the Internal Revenue Code or the deduction allowed under section 2055(f) of the Internal Revenue Code as long as:

(i)(A) The governing instrument authorizes the donation of a qualified conservation easement on the real property; or

(B) Each beneficiary that may be affected by the qualified conservation easement consents to the donation under the provisions of chapter 11.96A RCW; and

(ii) The donation of a qualified conservation easement will not result in the insolvency of the decedent's estate.

(b) The authority granted under this subsection includes the authority to amend a previously donated qualified conservation easement, as defined under section 2031(c)(8)(B) of the Internal Revenue Code, and to amend a previously donated unqualified conservation easement for the purpose of making the easement a qualified conservation easement under section 2031(c)(8)(B).

[2002 c 66 § 1; 1997 c 252 § 75; 1989 c 40 § 7; 1985 c 30 § 50. Prior: 1984 c 149 § 80; 1959 c 124 § 7. Formerly RCW 30.99.070.]

Notes:

**\*Reviser's note:** RCW 83.110.020 was repealed by 2005 c 332 § 15, effective January 1, 2006.

**Construction – 1989 c 40:** "(1) The amendments made in this act with respect to the excise tax imposed under section 4980A(d) of the Internal Revenue Code of 1986, as amended, are to be effective as to excise tax imposed by reason of a decedent's death occurring after April 18, 1989.

(2) The amendments made in this act regarding apportionment of the tax with respect to qualified real property, and regarding extensions to pay tax, shall be effective with respect to the tax attributable to deaths occurring after April 18, 1989.

(3) The amendment to RCW 11.98.070(13) shall be effective with respect to loans described in RCW

83.110.020(2) made or committed to be made after April 18, 1989." [1989 c 40 § 8.]

**Severability – 1989 c 40:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 40 § 9.]

**Short title – Application – Purpose – Severability – 1985 c 30:** See RCW 11.02.900 through 11.02.903.

**Severability – Effective dates – 1984 c 149:** See notes following RCW 11.02.005.

# APPENDIX D

**RCW 11.100.020****Management of trust assets by fiduciary.**

(1) A fiduciary is authorized to acquire and retain every kind of property. In acquiring, investing, reinvesting, exchanging, selling and managing property for the benefit of another, a fiduciary, in determining the prudence of a particular investment, shall give due consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets. In applying such total asset management approach, a fiduciary shall 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, not in regard to speculation but in regard to the permanent disposition of their funds, and if the fiduciary has special skills or is named trustee on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.

(2) Except as may be provided to the contrary in the instrument, the following are among the factors that should be considered by a fiduciary in applying this total asset management approach:

- (a) The probable income as well as the probable safety of their capital;
- (b) Marketability of investments;
- (c) General economic conditions;
- (d) Length of the term of the investments;
- (e) Duration of the trust;
- (f) Liquidity needs;
- (g) Requirements of the beneficiary or beneficiaries;
- (h) Other assets of the beneficiary or beneficiaries, including earning capacity; and
- (i) Effect of investments in increasing or diminishing liability for taxes.

(3) Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a fiduciary is authorized to acquire and retain every kind of property, real, personal, or mixed, and every kind of investment specifically including but not by way of limitation, debentures and other corporate obligations, and stocks, preferred or common, which persons of prudence, discretion, and intelligence acquire for their own account.

[1995 c 307 § 2; 1985 c 30 § 65. Prior: 1984 c 149 § 97; 1955 c 33 § 30.24.020; prior: 1947 c 100 § 2; Rem. Supp. 1947 § 3255-10b. Formerly RCW 30.24.020.]

**NOTES:**

**Application -- 1995 c 307:** See note following RCW 11.100.010.

**Short title -- Application -- Purpose -- Severability -- 1985 c 30:** See RCW 11.02.900 through 11.02.903.

**Severability -- Effective dates -- 1984 c 149:** See notes following RCW 11.02.005.

Endowment care funds to be invested in accordance with RCW 11.100.020: RCW 68.44.030.

# APPENDIX E

**RCW 11.100.047**

**Fiduciary -- Duty to diversify.**

Subject to the provisions of RCW 11.100.060 and any express provisions in the trust instrument to the contrary, a fiduciary shall diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

[1995 c 307 § 5.]

**NOTES:**

**Application -- 1995 c 307:** See note following RCW 11.100.010.

# APPENDIX F



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#### RULE 19

#### JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of rule 23.

(e) Husband and Wife Must Join--Exceptions. (Reserved. See RCW 4.08.030.)

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# APPENDIX G



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RULE 65  
INJUNCTIONS

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the

State of Washington, municipal corporations or political subdivisions of the State of Washington. The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

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# APPENDIX H

RCW 7.40.020  
Grounds for issuance.

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears in the complaint at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.

[Code 1881 § 154; 1877 p 33 § 154; 1869 p 38 § 152; 1854 p 152 § 112; RRS § 719.]

# APPENDIX I

**RCW 11.96A.160**

**Appointment of guardian ad litem.**

(1) The 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 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.

(2) The court-appointed guardian ad litem supersedes the special representative if so provided in the court order.

(3) The court may appoint the guardian ad litem at an ex parte hearing, or the court may order a hearing as provided in RCW 11.96A.090 with notice as provided in this section and RCW 11.96A.110.

(4) The guardian ad litem is entitled to reasonable compensation for services. Such compensation is to be paid from the principal of the estate or trust whose beneficiaries are represented.

[1999 c 42 § 309.]

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STATE OF WASHINGTON

BY \_\_\_\_\_ DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

IN RE THE:

Case No.: 39729-3-II

MARK ANTHONY FOWLER SPECIAL  
NEEDS TRUST.

DECLARATION OF MAILING

Diana C. Austin, states as follows: On February 5, 2010, I caused to be mailed by U.S. Mail, postage prepaid, a copy of each of the following documents:

- 1) Brief of Appellant with Appendices; and
- 2) Declaration of Mailing

to the persons listed below:

Mark & Shelly Fowler  
1024 Macah Pl.  
Fox Island, WA 98333  
(Trust Beneficiary's parents)

Clint Johnson  
Faubion Johnson & Reeder  
5920 100th St SW Ste 25  
Lakewood, WA 98499-2751  
(Guardian ad Litem)

Mark Anthony Fowler  
1024 Macah Pl.  
Fox Island, WA 98333  
(Trust Beneficiary)

Eileen S. Peterson  
Gordon Thomas Honeywell  
P.O. Box 1157  
Tacoma, WA 98401-1157  
(Co-Counsel for Trustee)

Mr. David Petrich  
Eisenhower & Carlson PLLC  
1201 Pacific Ave., Ste. 1200  
Tacoma, WA 98402-4395  
(Attorney for Petitioner in Mark A.  
Fowler Guardianship, Pierce Cy. Cause  
No. 09-4-01811-4)

///

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1 I declare under penalty of perjury as defined by the laws of the State of Washington that  
2 the foregoing is true and correct.

3 Signed at Seattle, Washington this 5th day of February, 2010.

4   
5 \_\_\_\_\_  
6 Diana C. Austin