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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Petitioner,

vs.

WILLIAM L.E. DUSSAULT and JANE DOE DUSSAULT, husband  
and wife, and the marital community composed thereof; WILLIAM  
L.E. DUSSAULT, PS, a Washington professional corporation, the  
DUSSAULT GROUP, a Washington corporation; RICHARD  
MICHAEL McMENAMIN and SHARI L. McMENAMIN, husband  
and wife, and the marital community composed thereof;  
McMENAMIN & McMENAMIN, PS, a Washington professional  
service corporation; and WELLS FARGO BANK, N.A., a foreign  
corporation,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

SMITH GOODFRIEND, P.S.

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## I. INTRODUCTION

A fiduciary cannot immunize itself from claims for breach of its duties to a minor trust beneficiary by submitting trust accountings for judicial approval without ensuring that the minor has a guardian ad litem to represent her interests. This Court should reverse Division Two's published opinion to the contrary, award petitioner Rachel Anderson her attorney's fees on appeal, and remand for resolution of her claims on the merits.

## II. STATEMENT OF FACTS

### A. **Shortly after she became an adult, petitioner sued respondents under TEDRA for breaches of fiduciary duty in managing a trust while she was a minor.**

Petitioner Rachel Anderson was six years old when a horse kicked her in the face in November 1996. (CP 477) Rachel "sustained major skull and facial damage," requiring extensive surgery, and suffered substantial "psychological and emotional impact." (CP 477) To pursue tort claims on her behalf, Rachel's family retained respondent Richard McMEnamin, who in turn hired respondent William Dussault to prepare a trust to hold and invest the proceeds remaining from settlement of Rachel's claim after McMEnamin took his fee. (CP 250, 313-14, 476-78) The trust, created in August 1997, appointed respondent Wells Fargo as a

compensated trustee, and established a “trust advisory committee” (TAC) of McMenamin and Rachel’s mother, Andrea Davey. (CP 476, 481-82, 494) The trust required Wells Fargo as trustee to “make an annual statement of transactions and assets concerning all financial and investment activity undertaken on behalf of the Trust.” (CP 493) The trust directed that copies of the annual accountings be delivered to members of the TAC, to Rachel, and “to any Court appointed personal representative acting on behalf of” Rachel, and recited that the failure to object to an accounting within 30 days of receipt “shall operate as a full discharge of the Trustee by the beneficiary as to all transaction set forth in such annual statement.” (CP 493)

Wells Fargo hired Dussault to prepare its annual accountings. (CP 170) Both Wells Fargo and Dussault paid themselves from Rachel’s trust funds. (CP 176, 181, 196, 199-200, 207-08, 216, 233, 246) With the exception of an accounting prepared in 2009, shortly after Rachel turned 18, there is no evidence that any accountings were ever delivered to her. (CP 91) Rachel had no “Court appointed personal representative,” so no accountings were delivered to someone acting on her behalf. However, Wells Fargo, through Dussault’s office, filed the

accountings, and sought superior court approval of them, ex parte, pursuant to the Trustees' Accounting ACT (TAA), RCW ch. 11.106. (CP 178, 183, 199-200, 207-08, 215-16, 232-33, 245-46)

After the superior court approved the first two accountings, filed in January 2000 and February 2001 (CP 178, 183), an attorney hired by Rachel's father and grandmother wrote to respondents expressing concerns about expenditures that were being made from the trust by and to Rachel's mother, Davey, who was a member of the TAC. (CP 184-85) The attorney pointed out that any claim Rachel had against the trustees would be tolled during her minority. (CP 191) McMenamain thereafter resigned from the TAC. (CP 288) Dussault denied any impropriety in the accountings, but proposed that the TAC be dissolved and that Wells Fargo assume the TAC's functions. (CP 196)

In July 2003, the superior court dissolved the TAC and assigned Wells Fargo "all of the duties of the TAC." (CP 199) Sometime thereafter, Wells Fargo obtained an order sealing the file of the action in which it sought court approval of its accountings. (CP 72-74) The superior court approved four additional trust accountings submitted by Dussault and Wells Fargo in December 2003, November 2004, December 2005, and December 2009. (CP

201-46) Despite the concerns raised about the administration of the trust, none of the respondents ever requested, and the trial court never appointed, a guardian ad litem or other “Court appointed personal representative” for Rachel in any of these proceedings.

On July 22, 2011, Rachel, now age 20, sued respondents alleging malpractice and breaches of fiduciary duty, including approving misuse of trust funds, fictitious requests for reimbursement, and the use of trust funds to buy an interest in real property owned by Davey’s former boyfriend without ensuring the trust received rent and that the trust was listed on the property’s title, as well as excessive and unjustified trustee and attorney fees. (CP 58-62, 68-71, 115-21, 135-36)

**B. The courts below barred petitioner’s claims under the TAA even though a guardian ad litem had never been appointed to protect her interests while she was a minor.**

The respondents indisputably owed Rachel fiduciary duties in the administration of her trust. Respondent McMEnamin concedes he owed Rachel a fiduciary duty as a member of the TAC, which bore responsibility for ensuring that trust disbursements were consistent with the trust’s purpose of providing Rachel

medical care and “promot[ing] [her] happiness, welfare, and development.” (McMenamin Answer 14-15; CP 99-100, 106, 111-12) Wells Fargo was a compensated trustee, and had a duty to disapprove any expenditure that “would bring direct benefit to a Trust Advisory Committee member” or that would “indirectly benefit a Committee member,” including Davey. (CP 94, 111-12)<sup>1</sup> As the attorney Wells Fargo charged with preparing accountings for Rachel’s trust, Dussault also owed Rachel a duty of care. Restatement (Third) of The Law Governing Lawyers § 51 (2000) (“a lawyer owes a duty to use care . . . to a nonclient when . . . the lawyer’s client is a trustee”).

Rachel submitted ample evidence that respondents breached their duties, repeatedly approving distributions to Davey for her personal benefit, not Rachel’s, despite Davey’s obvious conflict of interest and without independently scrutinizing distributions or even obtaining basic documentation to verify Davey’s expenditures. (CP 58-62, 68-71, 101, 111-12, 115-21, 135-36) Wells Fargo

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<sup>1</sup> The trust also required Wells Fargo to manage the purchase of any real estate and ensure that “[t]itle to or ownership of such [real estate] shall be maintained by the Trust.” (CP 110) Wells Fargo had allowed trust funds to be used to purchase an interest in real property titled, not in the name of the trust, but in the name of Davey’s former boyfriend. (CP 61, 68, 70, 118-20)

continued to make ill-advised distributions to Davey after McMenamain resigned and the TAC was dissolved in 2003, and after Rachel left Davey's home in 2004. (CP 59-60, 117-21, 199) Wells Fargo compounded its breach of duty by submitting accountings, prepared by Dussault and paid for by Rachel's trust, that rubber-stamped misuse of trust funds. (CP 68-71, 111-21, 173-83, 192-246) Dussault concedes that he did not independently review the expenditures set forth in the accountings he was paid from Rachel's trust to prepare and submit for court approval.<sup>2</sup> (Dussault Supp. Br. 10-11)

The trial court nevertheless dismissed Rachel's claims on summary judgment, on the grounds that accountings submitted by respondents for approval by the trial court while Rachel was a minor immunized them from any liability for breach of their duty to

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<sup>2</sup> Had Dussault or Wells Fargo reviewed the expenditures set forth in the accountings they now allege bar Rachel's claims, the misuse of Rachel's trust would have been discovered long before it drained the trust of a substantial portion of its value. Whether respondents breached their duties to Rachel is a question of fact, ill-suited for resolution on summary judgment. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, ¶ 31, 257 P.3d 532 (2011) ("questions of breach are typically reserved for the finder of fact"); *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 76-78, ¶¶ 73-77, 293 P.3d 1206, *rev. denied*, 177 Wn.2d 1018 (2013). This Court should decline the respondents' invitation in their answers to the petition to hold, based on a disputed summary judgment record, that they did not violate any duties to Rachel as a matter of law.

her. (CP 512) Recognizing that Rachel had in “good faith” raised “legitimate concerns” about management of her trust, the trial court denied respondents’ requests for awards of attorney fees under RCW 11.96A.150(1).

Division Two affirmed, in a published opinion of first impression. *Anderson v. Dussault*, 177 Wn. App. 79, 310 P.3d 854 (2013), *rev. granted*, 321 P.3d 1206 (2014). Division Two reasoned that Rachel’s claims were barred by RCW 11.106.080, which states that a court decree approving an accounting under RCW 11.106.070 is “final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust,” even though Rachel had not been represented by a guardian ad litem as required by RCW 11.106.060. 177 Wn. App. at 93-94, ¶ 26. Division Two ordered Rachel to pay attorney fees incurred by Dussault and Wells Fargo under RCW 11.96A.150, on the grounds that her claims “lack merit.” 177 Wn. App. at 95, ¶ 29.

### III. ISSUES ON REVIEW

This Court accepted review, and characterizes the issues as:

1. Whether a trust beneficiary’s action for breach of fiduciary duties that was brought within the three-year statute of limitations of the Trust and Estate Dispute Resolution Act, chapter

11.96A RCW (which was tolled while the beneficiary was a minor without a guardian ad litem), is nonetheless barred because the beneficiary did not timely appeal from trial court orders approving annual trust accounting reports pursuant to the Trustees' Accounting Act, chapter 11.106 RCW, or because she failed to challenge the reports within the time limit specified by the trust agreement?

2. Whether a trust beneficiary is bound by unappealed court orders approving annual trust accounting reports if the orders were issued while the beneficiary was a minor without a guardian ad litem?

3. Whether in an action by a trust beneficiary for breach of fiduciary duties against the trustee and the attorney hired by the trustee to prepare annual accounting reports, the Court of Appeals properly awarded the defendants attorney fees on appeal under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW, after affirming the dismissal of the action as untimely?

#### IV. SUPPLEMENTAL ARGUMENT

- A. The TAA does not bar a minor's claims for breach of fiduciary duty under TEDRA where a guardian ad litem is not appointed to protect the minor's interests before an accounting is approved.**

The Trustees' Accounting Act (TAA) governs trust accountings, providing a means and mechanism for accountings intended for the beneficiaries of trusts created by "will, deed, or agreement." RCW 11.106.020. *See generally Nelsen v. Griffiths*, 21 Wn. App. 489, 493-95, 585 P.2d 840 (1978) (explaining the "scheme of the trustees accounting act," former RCW ch. 30.30, *now codified as* RCW ch. 11.106. Laws of 1984, ch. 149, § 127). The TAA authorizes trustees "whenever it or they so desire," to file with the superior court an intermediate accounting, RCW 11.106.030, and allows beneficiaries to demand accountings, RCW 11.106.040, which the court is then authorized to approve or disapprove. RCW 11.106.070. The court's decree is a final, appealable order, RCW 11.106.090, and "shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries . . ." RCW 11.106.080.

In filing an intermediate accounting with the superior court, the TAA requires trustees to identify "any . . . beneficiary known to

be under legal disability.” RCW 11.106.030(6). The TAA as originally enacted also required the appointment of a guardian or guardian ad litem in order for a minor beneficiary to be bound by court approval of an intermediate accounting filed under the chapter. Until 1984, RCW 11.106.060 provided:

*The court shall appoint either the legal guardian of a beneficiary, or a guardian ad litem to represent the interests of any such beneficiary who is an infant or of unsound mind or otherwise legally incompetent . . . and such beneficiary shall be bound by any action taken by such representative.*

Laws of 1951, ch. 226, § 6 (emphasis added). In 1984, the Legislature amended RCW 11.106.060 to provide that only a guardian ad litem could represent a minor. The Legislature did not alter the mandate that “[t]he court **shall** appoint guardians ad litem,” but it incorporated the procedures for appointing guardians ad litem in the Trust and Estate Dispute Resolution Act (TEDRA), “as provided in RCW 11.96.180” (now RCW 11.96A.160). Laws of 1984, ch. 149, § 133 (emphasis added).

RCW 11.96A.160 states that the court “may” appoint a guardian ad litem in any action involving a trust or estate. Division Two reasoned that use of the word “may” in RCW 11.96A.160 made the continuing requirement in RCW 11.106.060 that the court

“shall” appoint a guardian ad litem discretionary, and that Rachel was therefore bound by trust accountings approved during her minority under RCW 11.106.080 even though no guardian ad litem was ever appointed to represent her interests. 177 Wn. App. at 93-94, ¶ 26.

Division Two’s interpretation of RCW 11.106.060 conflicts with its plain language. Had the Legislature intended the TAA to bar an unrepresented minor’s TEDRA claims (and without conceding that the Legislature could constitutionally have taken such a step), it would have amended RCW 11.106.060 to state that the court “may” appoint a guardian ad litem, rather than requiring that a guardian ad litem “shall” be appointed. Indeed, the amendment to RCW 11.106.060 itself recognizes the distinction between “shall” and “may,” providing that guardians ad litem “shall” be appointed, but that other representatives “may” be allowed. *See Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) *as amended* 656 P.2d 1083 (1983) (“Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory . . .”).

The TAA and TEDRA instead must be harmonized as their plain language dictates. RCW 11.96A.160 provides the *procedure* for appointing guardians ad litem that are *required* by RCW 11.106.060. Further, RCW 11.96A.070(4) provides that the TEDRA statute of limitations runs against a minor *only if* a guardian ad litem has been appointed. *Cf. Custody of Brown*, 77 Wn. App. 350, 354-55, 890 P.2d 1080 (1995) (incorporation of discretionary procedure for appointing guardian ad litem in Dissolution Act, RCW ch. 26.09, did not negate former Parentage Act's requirement that guardian ad litem be appointed; "the reference to RCW 26.09 is merely the direction to apply the same procedures and criteria").

Respondents' argument in support of Division Two's interpretation of the statutes defies common sense as much as it violates public policy. Why would a trustee *ever* make arrangements for a minor or otherwise incompetent beneficiary to be represented by a guardian ad litem under an interpretation of the TAA that makes appointment of a guardian ad litem discretionary? Instead, it would do what Wells Fargo did here: pay itself, and its attorney, from the minor beneficiary's funds, to on a periodic basis gratuitously seek superior court approval of intermediate accountings, ex parte, in order to immunize itself from

liability once the minor reaches majority and can pursue her rights. This is not and cannot be the law.

“[S]tatutes are construed to avoid constitutional difficulties.” *Matter of Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993). Consequently, this Court has consistently rejected statutory interpretations that abrogate, *sub silentio* and by implication, “the right of every citizen to seek redress for injuries sustained during minority.” *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 377, 900 P.2d 552 (1995); *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989). The Court of Appeals’ decision contravenes the language and purpose of both the TAA and TEDRA, and undermines this Court’s longstanding tradition of protecting the right of minors to seek redress for their injuries, encouraging trustees to breach their fiduciary duties and then insulate themselves from liability by seeking judicial approval of intermediate accountings that minor beneficiaries cannot challenge. This Court should reverse.

**B. Accountings approved by a court while a minor beneficiary was not represented by a guardian ad litem cannot bind the beneficiary.**

A minor can pursue claims in court only if represented by a guardian ad litem. RCW 4.08.050; *Mezere v. Flory*, 26 Wn.2d 274, 277, 173 P.2d 776 (1946). RCW 4.16.190 and RCW 11.96A.070(4)

toll the statute of limitations on claims by a minor who is not represented by a guardian ad litem. Limiting an unrepresented minor beneficiary's ability to seek redress for breach of trust after reaching majority would violate the Washington Constitution's Article I, § 12 guarantee of equal protection, *Schroeder v. Weighall*, 179 Wn.2d 566, 578, ¶ 26, 316 P.3d 482 (2014), her right to access to the courts under Article I, § 10, *Putman v. Wenatchee Valley Medical Ctr., P.S.*, 166 Wn.2d 974, 979, ¶ 6, 216 P.3d 374 (2009), and due process rights protected by Article I, § 3 and the Fourteenth Amendment of the U.S. Constitution. *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004).

Judicial estoppel, res judicata, and collateral estoppel also do not bar Rachel's claims, because each of these doctrines requires that a party must have participated in prior litigation addressing the same issue or claim currently before the court. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, ¶¶ 7-8, 160 P.3d 13 (2007) (judicial estoppel); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, ¶ 32, 222 P.3d 791 (2009) (res judicata and collateral estoppel); see generally Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985). As an unrepresented minor, Rachel did not

participate in the ex parte court proceedings in which intermediate accountings were submitted for approval.

And it would be unconscionable to hold that Rachel's claims are barred under the terms of the trust because Davey had notice of but did not "object" to distributions she used for her own benefit, not Rachel's, or to the accountings detailing her misfeasance. That would be true even were there evidence that Wells Fargo and Dussault had delivered the accountings to Rachel rather than presented them ex parte for court approval. See Restatement (Third) of Trusts § 83, Comment b (2007) (noting that a designated person's "approval" of trust accounting is always subject to court review, "with particular attention . . . to neglect or to the possible effects of a conflict of interests between that person and a beneficiary . . .").

Precluding a minor from bringing claims for breach of fiduciary duty based on accountings she was never permitted to challenge in court would deny her the fundamental protections that are "[t]he very essence of civil liberty." *Putman*, 166 Wn.2d at 979, ¶ 6. Rachel never had the opportunity to take *any* position in a prior court proceeding because respondents did not comply with RCW 11.106.060's requirement that she be appointed a guardian ad

litem before seeking court approval of intermediate accountings. Given Davey's clear conflict of interest and abuse of her own fiduciary duties, Rachel also cannot be bound by her mother's failure to object to accountings. Whether under the TAA, the terms of the trust, or other judicial doctrine, Rachel constitutionally cannot be bound by actions she was legally incompetent to challenge. This Court should reverse.

**C. TEDRA does not support an award of fees against Rachel, who brought this challenge to the administration of her trust in good faith. Rachel is entitled to her fees on appeal.**

TEDRA authorizes attorney's fees "as the court determines to be equitable." RCW 11.96A.150(1). This Court has long held that it would not be equitable to use the risk of an attorney's fees award to discourage good faith challenges to the administration of a trust or estate. *Estate of Eichler*, 102 Wash. 497, 500-01, 173 P. 435 (1918); *Estate of Mitchell*, 41 Wn.2d 326, 353, 249 P.2d 385 (1952). As a consequence, this Court has imposed fees only when a party acted in bad faith or breached a fiduciary duty. *See, e.g., Estate of Jones*, 152 Wn.2d 1, 21, 93 P.3d 147 (2004) (personal representative committed "multiple breaches of fiduciary duty"); *see also Foster v. Gilliam*, 165 Wn. App. 33, 48-49, 57-59, ¶¶ 16, 58-59, 268 P.3d 945

(2011) (cotrustee breached fiduciary duties, including “personally accepting substantial distributions from the probate estate”), *rev. denied*, 173 Wn.2d 1032 (2012); *Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, ¶ 32, 183 P.3d 317 (2008) (trustor “acted in bad faith”).

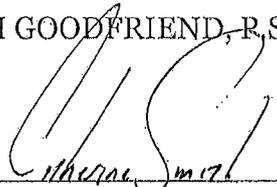
This Court should reverse Division Two’s fee award against Rachel when it reverses the lower courts’ decision that her claims were barred by intermediate accountings approved during her minority when she was not represented by a guardian ad litem. Even if it does not reverse on the merits, this Court should hold that respondents should bear their own fees on appeal. Rachel, the sole beneficiary of her trust, had the right to bring this “good faith” challenge, which the trial court recognized raised “legitimate concerns.” Rachel should not be punished by a fee award, particularly when this appeal presents a previously adjudicated question of trust law. See *Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (refusing to award fees “[g]iven the unique issues in this case”), *rev. denied*, 154 Wn.2d 1029 (2005). Rachel, not respondents, should be awarded her fees on appeal under RCW 11.96A.150 and RAP 18.1.

**V. CONCLUSION**

This Court should reverse the Court of Appeals, remand for trial of Rachel's claims, and award Rachel her fees on appeal.

Dated this 2<sup>nd</sup> day of May, 2014.

SMITH GOODFRIEND, P.S.

By:  \_\_\_\_\_

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**DECLARATION OF SERVICE**

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

That on May 2, 2014, I arranged for service of the foregoing Supplemental Brief of Petitioner, to the court and to the parties to this action as follows:

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\_\_\_\_\_  
Victoria K. Vigoren

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**Subject:** Anderson v. Dussault, Cause No. 89788-3

Attached for filing in pdf format is the Supplemental Brief of Petitioner, in *Anderson v. Dussault*, Cause No. 89788-3. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, email address [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com).

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