

No. 89788-3
SUPREME COURT OF
THE STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Petitioner,

v.

WILLIAM L.E. DUSSAULT, et al.

Respondents.

WELLS FARGO BANK, N.A.'S
SUPPLEMENTAL RESPONSE TO
PETITION FOR REVIEW

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 ORIGINAL

TABLE OF CONTENTS

	Page
I. SUPPLEMENTAL ARGUMENT	1
A. The Trustees' Accounting Act Bars Petitioner's Claims For Breach Of Fiduciary Duty; Appointment Of A Guardian Ad Litem Is Not A Condition To The Act's Preclusive Effect On Minors	1
B. Contrary To Petitioner's Assertion, The Legislature Revised The TAA In 1984 To Substantive Effect	4
C. The TAA Does Not Violate The Constitution.....	6
1. The TAA's Generally Applicable Claims Bar Satisfies The Equal Protection And Privileges And Immunities Clauses.....	6
2. The TAA Comports With Due Process.....	8
D. The Standard For Reviewing An Award of Attorneys' Fees Under TEDRA Is Abuse of Discretion, Not Whether Or Not The Award Was Equitable	12
II. CONCLUSION	13

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Anderson v. Dussault</i> , 310 P.3d 854 (Wash. App. 2013)	12
<i>Barovic v. Pemberton</i> , 128 Wn. App. 196, 114 P.3d 1230 (2005).....	1
<i>Custody of Brown</i> , 77 Wn. App. 350, 890 P.2d 1980 (1995).....	2
<i>Dellen Wood Products, Inc. v. Washington State Dep't of Labor and Indus.</i> , --- Wn. 2d ----, 319 P.3d 847 (2014)	8
<i>DeYoung v. Providence Medical Center</i> , 136 Wn. 2d 136, 960 P.2d 919 (1998).....	6
<i>Dodd v. United States</i> , 545 U.S. 353 (2005)	7
<i>Duke v. Boyd</i> , 133 Wn. 2d 80, 942 P.2d 351 (1997).....	7
<i>In re Guardianship of Matthews</i> , 156 Wn. App. 201, 232 P.3d 1140 (2010).....	2
<i>In re Irrevocable Trust of McKean</i> , 144 Wn. App. 333, 183 P.3d 317 (2008).....	5
<i>Nielsen v. Washington State Dep't of Licensing</i> , 177 Wn. App. 45, 209 P.3d 1221 (2013).....	11
<i>In re Quackenbush</i> , 142 Wn. 2d 928, 16 P.3d 638 (2001).....	5

<i>Segura v. Cabrera</i> , 319 P.3d 98 (Wash. App. 2014)	5
<i>Schroeder v. Weighall</i> , 179 Wn. 2d 566, 316 P.3d 482 (2014)	6, 11
<i>State v. Dixon</i> , 159 Wn. 2d 65, 147 P.3d 991 (2006).....	12
<i>State v. Enstone</i> , 137 Wn. 2d 675, 974 P.2d 828 (1999).....	4

Statutes

RCW 11.96A.020(2).....	11, 12
RCW 11.96A.150(1).....	12
RCW 11.96A.160	4, 5
RCW 11.96A.160(1).....	2, 3
RCW 11.96A.070(3).....	7
RCW 11.106.060	2, 3
RCW 11.106.070	1
RCW 11.106.070(4)	3
RCW 11.106.080	1, 2, 3, 6, 9

I. SUPPLEMENTAL ARGUMENT

A. **The Trustees' Accounting Act Bars Petitioner's Claims For Breach Of Fiduciary Duty; Appointment Of A Guardian Ad Litem Is Not A Condition To The Act's Preclusive Effect On Minors.**

Petitioner's primary issue for review is whether the Trustees' Accounting Act, RCW 11.106, *et seq.* ("the TAA"), bars breach of fiduciary duty claims where, as here, a trial court exercises its discretion to forgo appointment of a guardian *ad litem* to represent a minor in trust accounting approval proceedings. Pet. at 1. Based on the plain language of the TAA, the answer to that question is a resounding "yes." Petitioner's invitation to ignore that plain language should be rejected.

The TAA is unambiguous. *Barovic v. Pemberton*, 128 Wn. App. 196, 201, 114 P.3d 1230 (2005). By its express terms, absent an appeal, a court-approved trust accounting is forever final, conclusive and binding on "all" interested parties. RCW 11.106.080. This express claims bar includes any and all claims that could have been asserted against a trustee for "negligent or wilful breaches of trust" by a minor beneficiary, regardless of whether the minor was or was not represented by a guardian *ad litem* during the accounting proceedings. *Id.*; RCW 11.106.070. The TAA contains no relevant exceptions, nor does it incorporate TEDRA's limitations periods or tolling principles for minors.

This Court must reject Petitioner's argument that RCW 11.106.080 does not apply to a minor unless he or she is represented by a guardian *ad litem*. The TAA has no such requirement. RCW 11.106.060, upon which Petitioner relies, is mandatory in only one respect: it requires the trial court to look exclusively to TEDRA for guidance on when and whether to appoint guardians *ad litem*. RCW 11.106.060 ("The court shall appoint guardians ad litem as provided in RCW 11.96A.160"). Under TEDRA, of course, such appointments are wholly within the discretion of the trial court. RCW 11.96A.160(1) ("The court, upon its own motion ... may appoint a guardian ad litem to represent the interests of a minor"); *In re Guardianship of Matthews*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010) ("A GAL appointment exists at the will of the court."). Petitioner's interpretation, if accepted, would require a TAA court to simply ignore the permissive language in RCW 11.96A.160(1), which it cannot do.

This case is easily distinguishable from *Custody of Brown*, 77 Wn. App. 350, 890 P.2d 1980 (1995), upon which Petitioner relies. Pet. at 10. In *Brown*, the Uniform Parentage Act ("UPA"), unlike the TAA, expressly required appointment of a guardian *ad litem* and, as the more specific statute, the court correctly held that it superseded discretionary provisions of the general dissolution statute referenced in the UPA. *Brown*, 77 Wn. App. at 354-55. In contrast, it is clear that the legislature intended

TEDRA's discretionary provisions to apply to both TEDRA proceedings and the TAA. Petitioner's argument that the legislature intended the TAA to incorporate only TEDRA's procedure for appointment of guardians *ad litem*, but not its discretionary standard, is wholly unsupported and makes no sense.

Indeed, Petitioner's interpretation of the TAA would lead to absurd results. According to Petitioner, appointment of a guardian *ad litem* is mandatory in a TAA proceeding, but is discretionary for all other proceedings governed by TEDRA. And, if RCW 11.106.060 requires appointment of guardians *ad litem* for minors in a TAA proceeding, then it also requires the court to appoint guardians *ad litem* for all unrepresented beneficiaries suffering from a legal incapacity, known or unknown; after all, TEDRA's guardian *ad litem* provision applies to any "minor, incapacitated, unborn, or unascertained person" as well. RCW 11.96A.160(1). Satisfaction of this purported mandate—which is unnecessary in most cases, but expensive to the trust in all—would be a condition to court approval of a TAA accounting, not simply a condition to application of the claims bar in RCW 11.106.080.

Further, nothing in the TAA remotely suggests that where, as here, the trial court exercises its discretion not to appoint a guardian *ad litem*, TEDRA's minority tolling provision, RCW 11.96A.070(4), somehow

trumps the TAA's unequivocal bar on unappealed claims. To be sure, in drafting the TAA, the legislature knew how to incorporate aspects of TEDRA, and it plainly chose not to incorporate TEDRA's statute of limitations. *See State v. Enstone*, 137 Wn. 2d 675, 680-81, 974 P.2d 828 (1999) (court will not construe clear statute to incorporate provisions the legislature could have added, but did not). This Court should not do so either. The Court of Appeals' interpretation of the TAA must be affirmed.

B. Contrary To Petitioner's Assertion, The Legislature Revised The TAA In 1984 To Substantive Effect.

As Petitioner takes pains to note, in 1984, the legislature amended the TAA. The effect of the amendment was two-fold: (1) it changed the provision governing appointment of guardians from an expressly mandatory one to a permissive one, incorporating RCW 11.96A.160 by specific reference; and (2) it expressly eliminated the previously available option to appoint a legal guardian (as opposed to a guardian *ad litem*) to represent the minor's interest.

Petitioner mischaracterizes the TAA when she states, in the present tense, that "the TAA bars challenges to trust accountings by a minor beneficiary only if a guardian ad litem is representing the minor's interests...." Pet. at 8 (emphasis added). In reality, prior to the 1984 amendment, the TAA barred challenges to trust accountings by a minor

beneficiary if the beneficiary's legal guardian or a guardian *ad litem* did not represent the minor's interests. As plaintiff's mother and custodial parent, Andrea Davy was Petitioner's *de facto* legal guardian at the time the trust accounts were approved.¹ Thus, even if, as Petitioner urges, the post-1984 version of the TAA should have the same effect as the pre-1984 version—which it should not—the trust accounting approval proceedings Petitioner challenges in this case fully comported with that version of the TAA.

Furthermore, the legislature is presumed to know the existing law in those areas in which it is legislating. *Segura v. Cabrera*, 319 P.3d 98, 108 (Wash. App. 2014); *In re Quackenbush*, 142 Wn. 2d 928, 936, 16 P.3d 638 (2001) (citation omitted). Thus, the legislature should be presumed to have been aware in 1984 that RCW 11.96A.160 did not expressly authorize appointment of a legal guardian to represent the interests of an incompetent beneficiary. Nonetheless, the legislature eliminated that requirement from the TAA. This substantive elimination negates Petitioner's argument that the TAA's incorporation of RCW 11.96A.160 was enacted merely for procedural purposes, and not with

¹ See *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 342, 183 P.3d 317 (2008) (noting that Washington courts recognize the concept of a "de facto guardian," whose duties are measured by the same standard as a legally appointed guardian) (internal citations and quotations omitted).

intent to substantively revise the TAA. Pet. at 10. Such change did, however, result in both the TAA and TEDRA becoming consistent in terms of providing discretion to the court in appointing a guardian *ad litem*.

C. The TAA Does Not Violate The Constitution.

Petitioner has suggested that the Court of Appeals' interpretation of the TAA would result in violation of Petitioner's constitutional rights, *see* Pet. at 7, 10-12, but she pointedly stopped short of asking this Court (or the Court of Appeals) to invalidate any portion of the TAA. Petitioner's failure to argue that the TAA itself is unconstitutional is understandable—such an argument lacks merit.

1. The TAA's Generally Applicable Claims Bar Satisfies The Equal Protection And Privileges And Immunities Clauses.

Courts have long recognized that limiting ongoing exposure to lawsuits, particularly against claims that are stale, is an appropriate government objective. *Schroeder v. Weighall*, 179 Wn. 2d 566, 576, 316 P.3d 482 (2014) (quoting *DeYoung v. Providence Medical Center*, 136 Wn. 2d 136, 150, 960 P.2d 919 (1998)) (internal citation omitted). A generally applicable claims bar—one which does not single out any subset

of individuals²—is a reasonable means of accomplishing that objective without running afoul of either equal protection or the privileges and immunities clause. *See id.* The TAA contains such a generally applicable claims bar. RCW 11.106.080 does not single out any class of individuals; it expressly applies to all beneficiaries with equal force.

In implementing such a claims bar in the TAA, the legislature expressly chose to advance the interests of finality over the interests of preserving the stale claims of all beneficiaries, including those who were incompetent or unborn at the time of court approval. *Id.* This decision with respect to the TAA, not coincidentally, is entirely consistent with the intent behind TEDRA, wherein the legislature expressly confirmed “the long standing public policy” to promote the “prompt and efficient resolution of matters involving trusts” and “complete and final resolution of proceedings involving trusts and estates.” RCW 11.96A.070(3). That such a choice may yield a harsh result in a particular case is not grounds for ignoring the plain language of the statute or the legislature’s policy. *See, e.g., Dodd v. United States*, 545 U.S. 353, 359 (2005) (upholding a limitations bar and noting that “although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that

² Petitioner’s reliance on *Schroeder* is misplaced for this very reason; the statute at issue in *Schroeder* was unconstitutional because, unlike RCW 11.106.080, it failed to eliminate tolling for all incompetent plaintiffs.

Congress has enacted.”); *cf. Duke v. Boyd*, 133 Wn. 2d 80, 87, 942 P.2d 351 (1997) (the court should not “question the wisdom of a statute even though its results seem unduly harsh”). Petitioner’s recourse is to ask the legislature, not the courts, to re-write the statute.

2. The TAA Comports With Due Process.

Petitioner did not specify whether she claims the TAA raises procedural or substantive due process concerns. Ultimately, it does not matter; the TAA does not offend either aspect of due process. Procedural due process requires that an individual receive notice and an opportunity to be heard when the state seeks to deprive him or her of a protected interest. *Dellen Wood Products, Inc. v. Washington State Dep’t of Labor and Indus.*, --- Wn. 2d ----, 319 P.3d 847, 860 (2014). “Procedural due process does not require actual notice; rather, it requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.” *Id.*

Assuming that Petitioner’s right to challenge the trust accountings is a constitutionally protected interest, there is no dispute the court followed the TAA’s notice procedures. At the time of the accountings when the court approved most of the transactions Petitioner now challenges, there was no indication that Petitioner’s mother—who was her custodial parent and court-appointed member of the Trust Advisory

Committee—would not adequately protect Petitioner's interests.³ Furnishing Petitioner's mother and legal guardian with notice of the hearings, thereby providing her with an opportunity to object on Petitioner's behalf prior to the court's approval of the accountings, was reasonably calculated under the circumstances to apprise Petitioner of the pendency of the action.

In addition, it is undisputed that both Petitioner's father Ken Chase, as well as the attorney⁴ Mr. Chase retained in 2001 to review the trust expenditures, also received notice and were given an opportunity to appear on Petitioner's behalf at the 2001 and 2003 proceedings. CP 206; CP 066. In fact, Mr. Chase's attorney went to the courthouse on the day of the hearing and met with Wells Fargo's counsel in the hallway outside the courtroom, but he chose not to assert any objections to the court concerning the trust accountings. CP 066. Nor did he or Mr. Chase ever ask the court to replace Petitioner's mother as guardian in connection with the accountings or for any other purpose. The court's orders approving

³ Wells Fargo does not concede that Petitioner's mother committed any wrongful acts vis-à-vis Petitioner or the Trust. Indeed, Petitioner chose not to appeal the summary judgment dismissal of her claims against her mother, thereby abandoning the claim that her mother inappropriately used trust funds for her own benefit.

⁴ The attorney Mr. Chase retained in 2001, Carl Gay, is the same person who represents Petitioner in this matter.

the trust accounting were duly heard and thereafter became final under the TAA.

Moreover, until his resignation from the Trust Advisory Committee, Petitioner's attorney Richard McMenammin ("McMenamin") also received notice of the hearings. *See generally* CP 287-88. The court previously had recognized McMenammin as Petitioner's independent counsel and expressly authorized McMenammin to "proceed in the absence of a settlement Guardian ad litem." CP 313. Accordingly, McMenammin's oversight served as an additional layer of protection to safeguard Petitioner's interests in the trust accounting approval proceedings.

Petitioner implies that, in the absence of some other individual representing her interests, the court's approval of the trust accountings was merely a "rubber stamp." The record proves the opposite. The superior court took an active role in its oversight of the trust's expenditures and specifically questioned some of the expenses which Petitioner now seeks to challenge. *See* CP 235-36 (Judge Williams' hand-written directive in his Order that "the vehicle expense shall be specifically accounted for and explained during the next annual report.") In short, Petitioner was not deprived of due process and, indeed, she has never argued that a different procedure would have resulted in a different outcome.

For similar reasons, the TAA does not implicate any substantive due process concern. “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 209 P.3d 1221 (2013) (citation omitted). When state action does not affect a fundamental right, the proper standard of review is rational basis—that is, the law need only be “rationally related to a legitimate state interest.” *Id.* at 53.

Access to the courts is not, in and of itself, a fundamental right. *Id.* at 56. The TAA easily satisfies the deferential rational basis test because, as stated above, furthering finality and limiting long-term exposure to liability are legitimate state interests. *Schroeder*, 179 Wn. 2d at 577. The TAA’s lack of a mandate for appointment of a guardian *ad litem* also passes this test, because it is equally legitimate to promote efficiency in trust proceedings by giving the trial judge discretion to determine whether the expense associated with such an appointment is justified in light of the trust assets and circumstances of any given case. Neither the TAA, nor the Court of Appeals’ interpretation of it, raises any constitutional issue.

Furthermore, TEDRA expressly states that if its provisions “should in any case or under any circumstances be inapplicable, insufficient or doubtful ... the court nevertheless has full power and authority to proceed

with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.” RCW 11.96A.020(2). Given this legislative directive, the decisions of the trial court and the Court of Appeals in this case are correct and should not be disturbed.

D. The Standard For Reviewing An Award of Attorneys’ Fees Under TEDRA Is Abuse of Discretion, Not Whether Or Not The Award Was Equitable.

With respect to the Court of Appeals’ award of attorneys’ fees, the issue is not whether the award was “equitable” as Petitioner argues. Pet. at 1. RCW 11.96A.150(1) permits a court to award appellate attorneys’ fees “in its discretion” based on “any and all factors that it deems to be relevant and appropriate.” (Emphasis added.) Thus, while the court may weigh the equities in deciding whether to award attorneys’ fees, equity is neither a mandatory nor a sole factor of consideration. The only issue is whether the Court of Appeals abused its broad discretion. It did not.

A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *State v. Dixon*, 159 Wn. 2d 65, 76, 147 P.3d 991 (2006). In awarding Wells Fargo its fees on appeal, the Court of Appeals reasoned that Petitioner’s “claims against ... Wells Fargo lack merit....” *Anderson v Dussault*, 310 P.3d 854, 862 (Wash.

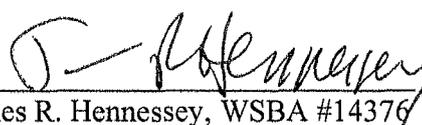
App. 2013). For the reasons articulated in the court's opinion and explained above, that conclusion was absolutely correct—and, more importantly, well within the broad scope of RCW 11.96A.150(1) as a basis for a fee award. Petitioner provides no authority to the contrary. The Court of Appeals' award of attorneys' fees on appeal was not an abuse of discretion and should be affirmed. This Court should further exercise its own discretion and award Wells Fargo its fees and expenses incurred in connection with this Court's review.

II. CONCLUSION

For all the reasons stated above and in Wells Fargo's Response to Petition for Review, Wells Fargo respectfully requests that this court affirm Division Two's decision in its entirety.

Respectfully submitted this 2nd day of May, 2014.

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