

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re:

MARK ANTHONY FOWLER SPECIAL
NEEDS TRUST

No. 39729-3-II

UNPUBLISHED OPINION

Penoyar, C.J. — The trustee and beneficiary of the Mark Anthony Fowler Special Needs Trust appeal the trial court’s orders (1) disapproving of the trust’s investment performance from October 1, 2007 to September 30, 2008, (2) directing the trustee to present the court with a plan to transfer a portion of the trust’s assets to insured deposits, and (3) enjoining the trustee from transferring or liquidating the trust’s assets before a hearing on the trustee’s reallocation plan. Additionally, they contend that the trial court abused its discretion by failing to approve the trustee’s fees. We reverse and vacate the trial court’s orders and remand for entry of an order approving the trustee’s accounting and a determination of trustee’s fees. Additionally, we exonerate the supersedeas bond that the trustee filed in this matter.

FACTS

In 2000, 13-year-old Mark Anthony Fowler suffered brain damage while at a supervised church function. Fowler’s parents used settlement proceeds from the resulting lawsuit to establish the Mark Anthony Fowler Special Needs Trust.¹ The trust’s original corpus consisted of

¹ A special needs trust allows disabled individuals to receive settlement funds while retaining eligibility for means-tested governmental benefits. Jennifer Brannan, *Third-Party Special Needs*

approximately \$940,000 and an annuity.²

On September 25, 2001, the superior court approved the trust agreement. At the time, Fowler's life expectancy was 57.85 years. The agreement states that the trust's purpose is to "provide for [Fowler's] extra and supplemental care . . . includ[ing] supplemental care, support, education and activities." Clerk's Papers (CP) at 25. The trust "is to be conserved and maintained for the special needs of [Fowler] throughout his lifetime." CP at 25.

The trust agreement designated Wells Fargo, N.A. as trustee. As trustee, Wells Fargo may "exercise all powers granted by law, including the Washington Trust Act (RCW 11.98)." CP at 27. The trustee's exercise of discretion "shall be conclusive and binding on all persons." CP at 27. The trust agreement does not contain any provisions to guide the trustee's discretion with regard to investments. Based on Fowler's long-term needs, Wells Fargo selected a "balanced investment" approach, with the objective of maintaining the trust's assets in 60 percent equity investments and 40 percent fixed income investments. *See, e.g.*, CP at 217.

The trust agreement requires the trustee to "submit an annual accounting to the Superior Court for review and approval." CP at 27. The trustee "is authorized to receive compensation for services as Trustee, in accordance with the Trustee's schedule of fees." CP at 28. Furthermore, "[a]t each accounting review the court shall review and approve all fees paid to any professional Trustee." CP at 28.

Before the present dispute arose, the superior court approved Wells Fargo's annual

Trust: Dead or Alive in a Uniform Trust Code World, 16 Tex. Wesleyan L. Rev. 249, 250 (2010); *see also* 42 U.S.C. §§ 1396p(d)(4)(A).

² The annuity, which Fowler will receive until 2024, pays him \$1,380 per month.

accounting and trustee's fees each year from 2002 to 2007. The table below summarizes the trust's investment performance and asset allocation from 2002 to 2007, excluding monthly annuity payments and trustee's fees:

Investment Period	Investment Performance	Asset Allocation at End of Period			Ending Market Value (to nearest dollar)
		Equity	Fixed Income	Cash Equivalents	
10/1/01 – 9/30/02	- 11.84%	41.80%	43.71%	14.48%	\$815,301
10/1/02 – 9/30/03	13.10%	56.65%	40.32%	3.03%	\$881,200
10/1/03 – 9/30/04	8.05%	58.76%	36.21%	5.03%	\$966,156
10/1/04 – 9/30/05	7.43%	62.57%	34.43%	3.00%	\$987,909
10/1/05 – 9/30/06	9.04%	65.66%	33.01%	1.33%	\$1,014,982
10/1/06 – 9/30/07 ³	13.14%	59.20%	27.05%	1.05%	\$1,065,934

During this time, annual disbursements for Fowler's needs ranged from about \$38,000 to about \$90,000. From 2003 to 2007, Wells Fargo charged a fee of 1.3 percent of the trust's market value, calculated on a monthly basis.

On December 16, 2008, Wells Fargo filed its seventh annual accounting, covering the period from October 1, 2007 to September 30, 2008. The accounting showed that the trust's market value had dropped from \$1,065,934 to \$870,790. Wells Fargo noted that this was a loss of 12.13 percent (13.32 percent including trustee's fees). At the end of the period, the trust's investments consisted of 65.56 percent equity (stocks), 31.43 percent fixed income (bonds), and 3.01 percent in cash equivalents.

During the accounting period, the trust's stocks (-19.5 percent loss) outperformed the Standard & Poors (S&P) 500 index⁴ (-21.97 percent loss) by nearly 2.5 percent, and the trust's

³ During the 2006-07 period, the trust held 13.13 percent of its assets in private debt obligations as a result of a loan that the trust made to Fowler's parents. Fowler's parents repaid the loan.

⁴ The S&P 500 measures the performance of large capitalization stocks. See S&P Equity Indices (2010), <http://www.standardandpoors.com/home/en/us/> (follow "S&P 500" hyperlink under "Featured Indices;" then follow "Fact Sheet" hyperlink) (last visited Jan. 5, 2011).

cash equivalents (3.67 percent gain) outperformed the 91-day treasury bill yield (2.56 percent) by over 1 percent. The trust's bonds (0.51 percent gain), however, underperformed the Lehman Brothers Intermediate Government/Credit A+ index (6.12 percent gain).

At the original accounting hearing on January 30, 2009, the trial court requested a simplified account summary and observed that the trust's ending value was "not a happy figure." Report of Proceedings (RP) (Jan. 30, 2009) at 13. At a February 27 hearing, Wells Fargo informed the trial court that trust's market value had dropped to \$738,000 at the end of January. The trial court repeatedly expressed concern about the allocation of trust assets:

THE COURT: [Y]ou are in a fiduciary responsibility with regard to these assets and you just can't continue to let them bleed at this point in time, and I don't hear any plan to do anything other than hope that the markets will recover. . . . Nothing is put into a secured investment; is that correct?

[WELLS FARGO]: I don't know that we have FDIC.⁵ There is cash and money market funds which are FDIC insured, but the investment portfolio, the fixed income and the equities, you are correct, are not secured.

THE COURT: Well, obviously, I can't approve of this investment performance, especially since you did not insure by apportioning assets to avoid this type of a situation.

. . . .
[Y]ou did not diversify to the extent that you did not have anything in secured assets. You put everything in equity in the market.

[WELLS FARGO]: Your Honor, that's not true. Not everything is in equities . . . the investment mix was 65.56 percent in equity investments and 31.43 [percent] in fixed income investments, and that would be bonds, in a bond investment fund.

THE COURT: But that's not FDIC insured.

⁵ The Federal Deposit Insurance Corporation (FDIC) provides \$250,000 of deposit insurance for depositors' accounts at insured banks. 12 U.S.C. § 1821(a)(1)(B), (E); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 335(a)(1), 124 Stat. 852, 1540 (2010).

[WELLS FARGO]: That's correct, but it is also not in equity.

THE COURT: What I am talking about is something that's insured. Nothing was insured; is that correct?

[WELLS FARGO]: That's correct. Except the cash and what's in the money market fund, and that would be 3 percent.

THE COURT: Okay. So because of the failure of the equity investments at this point in time, you need to move everything into FDIC-insured accounts with diversified institutions. That needs to get done at this point.

.....

THE COURT: I'm sure you can get some good CDs^[6] out there for four or five percent, right?

[WELLS FARGO]: That I'm not sure of, Your Honor. . . . I know that interest rates are extremely low these days.

THE COURT: Maybe at Wells Fargo.

RP (Feb.27, 2009) at 27, 29-31, 33.

Wells Fargo requested a continuance to allow the trust's investment manager, Turner Bluechel, to explain its asset allocation decisions to the trial court. Bluechel's declaration stated that the trust's investment objective had always been "a balance between current income and long term capital appreciation." CP at 709. Bluechel stated:

At the time the account was initially funded, Tony Fowler was a minor. 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.

In all investments, there is a tradeoff between risk and return. History has shown that over investment cycles (which can last as long as 15 years), the return

⁶ A certificate of deposit (CD) is "a receipt issued by a bank for an interest-bearing time deposit coming due at a specified future date." Webster's Third New Int'l Dictionary of the English Language 367 (2002). CDs typically offer higher interest rates than savings accounts. *See* Certificates of Deposit: Tips for Savers, <http://www.fdic.gov/deposit/deposits/certificate/index.html> (last visited Jan. 5, 2011).

from a well diversified portfolio will provide the greatest returns. . . . For a young person with a normal life expectancy, a balanced diversified investment portfolio would be the most likely to keep up with and ultimately exceed the rate of inflation and provide long term returns. On the other hand, a portfolio invested solely in certificates of deposit or fixed income securities would surely erode over time as their return is generally less than the rate of inflation.

CP at 710-11.

Bluechel called the current market environment “challenging,” but he concluded that moving the trust’s assets into insured deposits would be a mistake:

[A] reallocation of the investments to a portfolio of only “insured” investments would be a short sighted and imprudent move . . . [that] would short circuit the investment plan currently in place and would realize or ‘lock in’ the losses at perhaps the worst possible time. . . . It would essentially eliminate any chance for the account to recover the losses of the prior accounting period. And, most importantly, it would also result in an un-diversified portfolio, breaching our duty to the Beneficiary.

CP at 714-15. Bluechel performed a depletion analysis⁷ that predicted that a portfolio consisting entirely of FDIC-insured CDs would be fully depleted by 2019, five years before the current portfolio would be fully depleted.

At the next two hearings, the trial court discussed the trust’s portfolio with Bluechel and continued to question the trust’s asset allocation: “I can’t approve of this investment strategy

⁷ Bluechel’s depletion analysis assumed the following:

- \$85,635 in annual disbursements
- \$16,560 in annual contributions from the annuity
- Annual inflation rate of 2.8 percent
- Annual trustee’s fees of 1.35 percent
- Annual rates of return of (a) 1.7 percent for CDs, (b) 9.5 percent for equities, (c) 5.0 percent for fixed income, (d) 3.3 percent for cash equivalents, (e) 8.5 percent for real estate, and (f) 8.0 percent for “alternative assets”

CP at 759.

because it does not include any insured deposits and you are losing principal as well as interest.” RP (Mar. 13, 2009) at 43. “[T]he trustee is declining to put anything into insured deposits; is that correct? I think that’s against the prudent investor rule.”⁸ RP (Apr. 3, 2009) at 55.

The trial court appointed a guardian ad litem (GAL)⁹ to determine “(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 at 796-97.

On June 18, the GAL submitted a written report concluding that Wells Fargo had complied with the prudent investor rule and had properly applied the “total asset management” approach to the trust’s assets, as Washington law¹⁰ requires:

It can certainly be argued that economic events of the last year might qualify as special circumstances and in light of the general economic condition factor of the “prudent investor rule[,]” consolidation of trust assets into less risky and guaranteed investments is a worthy consideration. The danger in this is the narrow window of time in which the consideration takes place. A reasonable and prudent investor must look at a longer time horizon and should understand that markets are volatile and there will be years of losses, which offset on occasion the years of gains. There is merit in the conservative approach to “stay the course” yet perhaps consider marginally changing proportions instead of a wholesale liquidation to no risk guaranteed investments. In the view of your Guardian ad litem, the long time view based on historical data is a prudent approach to the investment requirements and objectives for a 22 year old beneficiary with special needs. Liquidating trust assets at the bottom of the market locks in nominal and disadvantageous rates of return. The “prudent investment rule” does not require trustees to act to avoid all risk, but simply to be prudent in that risk allocation.

⁸ The trial court may have been considering a provision of the minor settlement rules, which in certain circumstances, requires funds to be “deposited in a bank or trust company or be invested in an account in an insured financial institution.” Special Proceedings Rule (SPA) 98.16W(j)(2)(A).

⁹ The GAL appointed in this case signed the order approving the trustee’s second accounting on December 22, 2003, while serving as a pro tem commissioner. Apparently, the trial court and trustee were unaware of the GAL’s previous involvement in this case.

¹⁰ See RCW 11.100.020.

CP at 818-19.

The GAL observed that about 50 percent of the trust's total assets—specifically, the net present value of the annuity, the fixed income investments, and the cash equivalents—were in “the guaranteed or more secured portion of the portfolio.” CP at 820. The GAL concluded that the current portfolio was “appropriate for the current ‘special circumstances.’” CP at 820. Finally, the GAL recommended that the trial court approve the trustee's fees, noting that the fees were consistent with the trustee's fee schedule at the time the trust was created.

On June 30, the trial court entered an order approving the seventh annual accounting “except as to investment performance” and reserving the issue of trustee's fees. CP at 827. On the same day, the trial court entered a second order stating:

This matter having come on regularly for hearing on the report of the [GAL], and the court finding that the investments of the trust are not diversified so as to include insured deposits; that the trustee continues to invest in equities totaling 60% of the asset allocation; that the trust loss on investments has totaled -13.32%.

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 AM. No transfers or liquidation are hereby authorized until said hearing on approval of a plan.

CP at 829.

Wells Fargo moved for reconsideration and/or clarification of the orders. In support of the motion, a Wells Fargo trust officer stated that the value of the trust's assets had increased 15 percent since February 2009. The trust officer called the reallocation plan “both inappropriate and a violation of [Wells Fargo's] fiduciary duties.”¹¹ CP at 872. The trial court entered an order

¹¹ Wells Fargo challenged the trial court's factual findings in its motion for reconsideration but

denying Wells Fargo's motion.

On August 25, Wells Fargo appealed the trial court's two June 30 orders and the trial court's order denying its motion for reconsideration and/or clarification of orders. We granted Wells Fargo's motion to stay the trial court's second order pending appeal after it filed a supersedeas bond with the trial court.

On March 25, 2010, the trial court found Fowler to be incapacitated and appointed his parents, Mark E. Fowler and Shelley Fowler, as guardians. Fowler subsequently joined Wells Fargo's appeal through his guardians. There is no respondent in this appeal.

ANALYSIS

In this appeal, we must decide whether the trial court had authority to order the trustee to reallocate the trust's investments where the trust agreement required the trustee to submit accountings to the court "for review and approval,"¹² but where the trial court did not find that the trustee breached any fiduciary duty and where no evidence supported a finding of breach. *See* CP at 27. Because the trial court lacked this authority, we reverse and vacate the trial court's orders.

does not challenge these findings on appeal.

¹² Wells Fargo and Fowler argue that the plain language of SPR 98.16W(j)(3)(D), which pertains to settlements for minors and incapacitated persons, limits the trial court's powers with regard to the management of the settlement funds to "reviewing the accuracy of the statement of current assets." Appellant's Br. at 22-23; *see* SPR 98.16W(j)(3)(D) (requiring trustee to "prepare an annual statement of income, expenses, current assets, and fees charged."). Because the trust agreement gives the trial court arguably broader powers of "review and approval," we analyze the trial court's actions under the trust agreement's language, not under SPR 98.16W(j)(3)(D). *See* CP at 27.

I. Reallocation Plan Order

Wells Fargo and Fowler argue that the trial court erred by ordering Wells Fargo to present the trial court with a plan to transfer a portion of the trust's assets to insured deposits. We agree.

A. Standard of Review

When a trust gives the trustee discretion to carry out the trust's objectives, a court may not control the trustee's exercise of its discretion absent an abuse of the trustee's discretion. *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986); accord Restatement (Third) of Trusts § 87 (2007). "What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty." Restatement (Third) of Trusts § 87 cmt. b; *see also Waits v. Hamlin*, 55 Wn. App. 193, 201, 776 P.2d 1003 (1989) (citing Restatement (Second) of Trusts § 187 cmt. D (1959)).

"A court will not interfere with a trustee's exercise of a discretionary power . . . when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties." Restatement (Third) of Trusts § 87 cmt. b. A court should not intervene "merely because the court would have differently exercised the discretion." Restatement (Third) of Trusts § 87 cmt. b. A court should judge a trustee's actions prospectively, not "from the vantage point of hindsight." *Baldus v. Bank of Cal.*, 12 Wn. App. 621, 633, 530 P.2d 1350 (1975) (quoting *In re Pate's Estate*, 84 N.Y.S.2d 853, 858 (1948)).

B. Reallocation Plan

Chapter 11.100 RCW, which governs a corporate trustee's handling and investment of trust funds, provides that the trust agreement may expand, restrict, eliminate or alter that chapter's provisions. RCW 11.100.010. Here, the trust agreement authorizes the trustee to "exercise all powers granted by law, including the Washington Trust Act (RCW 11.98)." CP at 27. Under the Act's prudent investor rule:

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,¹³ 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.

RCW 11.100.020(1). A court's focus in applying the prudent investor rule is the trustee's conduct, "not the end result." *In re Estate of Cooper*, 81 Wn. App. 79, 88, 913 P.2d 393 (1996) (quoting J. Alan Nelson, *The Prudent Person Rule: A Shield for the Professional Trustee*, 45 Baylor L. Rev. 933, 939 (1993)); accord Restatement (Third) of Trusts § 77 cmt. a ("The test of prudence is one of conduct not of performance."). Although the trust's overall performance is a

¹³ The "total asset management approach" requires a fiduciary to consider several factors when evaluating the prudence of specific investments, including: (a) the probable income as well as the probable safety of the 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. RCW 11.100.020(2).

factor in evaluating the trustee's performance, it is not by itself controlling. *Cooper*, 81 Wn. App. at 88.

Additionally, the trustee has a duty "to administer the trust in the interest of the beneficiaries." *Tucker v. Brown*, 20 Wn.2d 740, 768, 150 P.2d 604 (1944). This duty requires a trustee to make reasonable efforts to obtain suitable investment returns from the trust assets. Restatement (Third) of Trusts, § 76 cmt. e. Thus, while a bank account "is an appropriate method for the safekeeping of funds and making them available from time to time for expenses, distribution, or investment . . . prudence requires a balancing of convenience and expense against the duty to make trust assets productive." Restatement (Third) of Trusts § 76 cmt. d(1). A trustee also has the duty to diversify the trust's assets in order to minimize the risk of large losses. RCW 11.100.047; *see also Baker Boyer Nat'l Bank v. Garver*, 43 Wn. App. 673, 679-80, 719 P.2d 583 (1986) (citing Restatement (Second) of Trusts § 228 cmt c, f).

Here, the trial court did not make a finding that Wells Fargo violated the prudent investor rule. Nor did the trial court determine that Wells Fargo breached its fiduciary duties to Fowler. Instead, the trial court ordered a reallocation plan based on three findings: (1) the trust's assets lost over 13 percent of their market value from October 2007 to September 2008, (2) the trust did not include insured deposits, and (3) the trust held 60 percent of its assets in equities. As detailed below, these findings do not support the conclusion that Wells Fargo abused its discretionary powers as trustee.

The trust's relatively poor performance from October 2007 to September 2008 was an appropriate factor for the trial court to consider in assessing Wells Fargo's performance as trustee. *See Cooper*, 81 Wn. App. at 88. Significantly, however, the trust's poor performance

occurred during a steep decline in the stock market; the S&P 500 index lost 21.97 percent over the same period. Although the specific stocks that Wells Fargo had selected for the trust's portfolio also experienced significant losses, the trust's stocks outperformed the S&P 500 index by almost 2.5 percent. The trust's cash equivalents likewise outperformed the market while the trust's bonds underperformed. As the GAL correctly recognized, the trust's losses resulted from market volatility rather than from Wells Fargo's selection of inferior assets.

The dispositive question, therefore, is whether Wells Fargo abused its discretionary powers as trustee by allocating the trust's assets as it did. The trial court implied that the answer was "yes" when it ordered Wells Fargo to present a reallocation plan after finding that Wells Fargo had allocated 60 percent of the trust's assets to equities and none of the trust's assets to insured deposits. The trial court also repeatedly challenged Wells Fargo's asset allocation decisions at the accounting hearings, suggesting that CDs and other insured deposits offered a safer alternative.

But "judicial intervention is not warranted merely because the court would have differently exercised the discretion." Restatement (Third) of Trusts § 87 cmt. b; *accord Baldus*, 12 Wn. App. at 631 (citing Restatement (Second) of Trusts § 187 cmt. e). Here, the trust agreement gives Wells Fargo broad discretion to manage the trust's assets in order to provide Fowler with care "throughout his lifetime." CP at 25. At the trust's formation, Fowler had a life expectancy exceeding 50 years. Wells Fargo, therefore, elected to create a "balanced diversified investment portfolio" of 60 percent equity and 40 percent fixed income investments to attain long-term returns that exceeded inflation. CP at 710. From the trust's 2001 inception to September 30, 2008, this diversified approach enabled Wells Fargo to preserve most of the trust's

principal—which decreased by a total of about \$70,000 during this seven-year period—while disbursing about \$485,000 to Fowler for caretaking and other needs. The GAL called this “a prudent approach to the investment requirements and objectives for a 22 year old beneficiary with special needs.” CP at 819. Moreover, as the GAL noted, about half of the trust’s assets were in “the guaranteed or more secured portion of the portfolio” once the annuity was taken into account. CP at 820.

The Restatement cautions that “[b]eneficiaries can be disserved by undue conservatism as well as by excessive risk-taking.” Restatement (Third) of Trusts § 90 cmt. e(1). Indeed, Wells Fargo’s depletion analysis suggested that re-allocating the entire portfolio to insured deposits, as the trial court suggested at one hearing, would fully deplete the trust’s assets five years sooner than if the current portfolio were left intact. Wells Fargo’s decision not to liquidate stocks that had decreased in value during the market downturn was reasonable. Both the GAL and the trust’s investment manager observed that selling stocks at the bottom of the market and placing the proceeds into insured deposits would lock in losses that would be difficult to recover.

We conclude that Wells Fargo properly exercised its discretion during the 2007-08 accounting period because it adequately considered economic conditions, the trust’s duration, and Fowler’s long-term needs in order to make investment decisions. *See* RCW 11.100.020(1), (2). Although the trial court’s concern about the sharp decline in the market value of the trust’s assets was certainly understandable, the trial court’s power to “review and approv[e]” the annual accounting did not give it authority to order a reallocation plan where the trustee did not breach any fiduciary duties or otherwise abuse its discretion. CP at 27. Additionally, because the trial court did not have authority to order a reallocation plan, it lacked authority to enjoin the trustee’s

transfer or liquidation of the trust's assets pending approval of such a plan. Accordingly, we vacate both of the trial court's June 30 orders and its order denying reconsideration and remand for entry of an order approving the trustee's seventh accounting.

II. Trustee's Fees

Wells Fargo and Fowler argue that the trial court abused its discretion¹⁴ by failing to approve the trustee's fees. Because we find that Wells Fargo properly exercised its discretion as trustee, we remand to the trial court for the award of appropriate¹⁵ trustee's fees. We decline to approve the trustee's fees in lieu of remand as Wells Fargo and Fowler request.

We reverse and vacate both of the trial court's June 30 orders and its order denying reconsideration. We remand for entry of an order approving the trustee's seventh accounting and a determination of trustee's fees. Finally, we exonerate the supersedeas bond that Wells Fargo filed in this matter.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

¹⁴ Generally, a trial court has discretion to determine a trustee's fees. *See* Restatement (Third) of Trusts § 38 cmt. c(1).

¹⁵ The trust agreement authorizes the trustee to receive compensation in accordance with its fee schedule "applying to trust accounts of this kind at the time such services are rendered." CP at 28. Wells Fargo assessed the trust a 1.3 percent fee in its seventh annual accounting, slightly less than the 1.35 percent annual fee that appears in its fee schedule for special needs trusts.

39729-3-II

Quinn-Brintnall, J.

Johanson, J.