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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship of ARTHUR D. HAYS, an Incapacitated Person.

ARTHUR D. HAYS,

Appellant,

v.

REBECCA CASTILLEJA,

Respondent.

BRIEF OF RESPONDENT REBECCA CASTILLEJA

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I. INTRODUCTION

This case concerns the reasonableness of the attorney fees and costs that were awarded to Rebecca Castilleja for the guardianship petition she filed on behalf of her incapacitated father, the appellant Arthur Hays. Mr. Arthur Hays vigorously and unsuccessfully contested Castilleja's petition to appoint a professional guardian to manage his complex estate, which prior to trial Mr. Hays estimated was worth \$28 million. CP 606. After a six-day bench trial presided over by the Honorable Mary I. Yu, where the trial court heard testimony from 24 witnesses (14 of whom were called by Mr. Hays) and admitted 181 exhibits, CP 760-774, 2658-2683, a full guardian of the estate was appointed for Mr. Hays. CP 2606-2643. Pursuant to RCW 11.96A.150, the trial court ordered that the reasonable attorney fees and costs incurred in bringing the guardianship petition were to be paid by Mr. Hays. CP 2625, 2631, 2639. The order appointing the guardian and awarding fees was entered November 18, 2011. No appeal was taken.

Attorneys for Mr. Hays and Ms. Castilleja each petitioned for approval of their fees from the guardianship estate. Mr. Hays requested that the trial court reduce Castilleja's attorney fees and costs by \$77,136.75. CP 1664. The trial court rejected Mr. Hays' objections to Castilleja's fees. In separate orders entered January 31, 2012, Mr. Hays'

attorney fees and costs for unsuccessfully opposing the guardianship were approved in the amounts of \$210,802.90 and \$17,418.98, CP 1525, and Castilleja's attorney fees and costs of \$352,755.36 and \$27,837.56 were approved. CP 1394.

Mr. Hays now appeals the trial court's order that approved Castilleja's attorney fees and costs, erroneously arguing that the standard of review should be *de novo*, and attempting to challenge the trial court's decision requiring him to pay Castilleja's attorney fees, even though that ruling was not timely appealed. He also argues for the first time on appeal that Castilleja's attorney fees should be reduced by the \$77,136.75 he objected to at trial, and then *additionally* reduced by one-half based on the contention that evidence deemed relevant and admissible by the trial court should be found to be irrelevant by this Court. App. Brf. at 30, 37. Castilleja has had to incur additional significant attorney fees responding to Mr. Hays' misguided appeal. This Court should affirm the trial court and award Castilleja her reasonable attorney fees on appeal pursuant to RCW 11.96A.150 and RAP 18.1.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. Should this Court disregard clear precedent and review the reasonableness of the attorney fee award *de novo*?
- B. Can the Appellant challenge the order requiring him to pay

the guardianship petitioner's attorney fees when he did not appeal that order?

C. Should Mr. Hays be allowed to challenge \$167,969.59 of the attorney fees and costs approved by the trial court, when he did not object to these fees below?

D. Did the trial court abuse its discretion in approving Castilleja's attorney fees, where the record reflects the trial judge considered contemporaneous billing records, the results obtained through the litigation, the work performed by the attorneys, the contested nature of the proceedings, the manner in which the case was presented, the hourly rates charged by the prevailing party's attorneys, the reasonableness of the attorneys' hourly rates based on the attorneys' experience and the work performed, whether there was redundancy, waste or unnecessary services, and the objections raised by the Appellant?

E. Did the trial court abuse its discretion in entering a judgment against the incapacitated person for the amount of the attorney fees and costs that it approved and by ordering that the approved fees and costs could be allocated by the Guardian of the Estate among Mr. Hay's individual, corporate, and trust interests?

F. Should the Appellant be ordered to pay Castilleja's attorney fees on appeal pursuant to RCW 11.96A.150 and RAP 18.1?

III. RESTATEMENT OF THE CASE

A. Mr. Hays' Estate Is Large And Complicated.

This case involved a vigorously contested lawsuit over whether a guardian of the estate should be appointed for Arthur Hays, whose pre-trial real estate holdings were estimated to be worth \$28 million. CP 606. As Mr. Hays' attorney summarized in his Motion for Order Approving and Directing Payment of Attorneys' Fees: "This matter involved not only Mr. Hays' alleged incapacity with respect to his personal financial affairs, but also his alleged incapacity with respect to his position as manager of Hays Elliott Properties LLC, president of Hays Distributing Corporation, and Trustee of the Hays Family Trust." CP 1515. Indeed, Mr. Hays called a number of witnesses at trial to testify about the operation of Hays Elliott Properties LLC, including real estate agent Richard Mermelstein, CP 847-849, tenant Kurt Dehnke, CP 851-852, and employees James Brown, Larry Sokolovski and Matt Casey. CP 659-660, 853.¹ In addition, Mr. Hays offered documentary evidence that included several trust agreements and powers of attorney, CP 679-680, several operating agreements for Hays Elliott Properties LLC, CP 680, and 16 lease agreements that Hays Elliott Properties LLC had signed. CP 681-

¹ Mr. Hays called a total of 14 witnesses at trial, including himself. CP 2658-2660. The petitioner below called 9 witnesses. *Id.*

683, 2681-2683. The complexity of Mr. Hays' financial circumstances and property holdings is established by 30 separate findings of fact entered by the trial court in the unappealed order establishing a full guardianship over Mr. Hays' estate. *See* Findings of Fact 32-61 at CP 2615-2623.

B. Mr. Hays Vigorously Opposed the Guardianship.

Mr. Hays chose to be represented by experienced counsel, who zealously enforced Mr. Hays' procedural and substantive rights to oppose the petition for guardianship. Mr. Hays opposed mediation;² filed a 12-person jury demand, which he withdrew shortly before trial;³ requested a postponement of the original trial date to permit sufficient time for pre-trial discovery;⁴ propounded interrogatories and requests for production of documents;⁵ opposed the GAL's request for a supplemental medical

² The guardian ad litem requested mediation early in the case due to concerns about the high costs of discovery and litigation. Sub Nos. 16, 36; CP _____. Mr. Hays filed a response in opposition to the GAL's request for mediation and then filed a motion for revision to challenge the Court Commissioner's ruling that mediation occur. *See* Sub Nos. 33, 34, 38, 44, 47; CP _____. Respondent's Brief will be supplemented to include citations to the newly designated Clerk's Papers.

³ Sub No. 42; CP ___; CP 484. Because Mr. Hays did not withdraw the jury demand until shortly before trial, it was necessary to prepare proposed jury instructions and questions for *voir dire*. CP 1395.

⁴ Sub No. 71. CP ___.

⁵ CP 1394.

examination;⁶ took the depositions of five witnesses;⁷ submitted a witness list identifying 26 possible primary witnesses;⁸ filed a pre-trial motion to dismiss the petition for guardianship, which argued that the “existing DPOA, the trusts, the corporation and the LLC provide a preferred and adequate alternative arrangement to the guardianship;”⁹ filed motions in limine to exclude evidence;¹⁰ attempted to call a witness who he failed to timely disclose on the mandatory witness lists;¹¹ filed an objection to the designation of deposition excerpts and interrogatory answers as substantive evidence;¹² filed an objection to documentary evidence offered

⁶ Sub Nos. 118, 121, 124, 126, 127. CP _____. The supplemental medical examination requested by the GAL was ordered over Mr. Hays’ objections. *See* CP 136.

⁷ CP 1394.

⁸ CP 147-152.

⁹ Motion to Dismiss Petition for Appointment of Guardian, CP 27; *see also* CP 23-46. The petitioner below filed a Memorandum In Opposition and supporting declarations. *See* CP 202-420, 513-536. The Motion to Dismiss was denied September 16, 2011. CP 573-575.

¹⁰ CP 587-595; 761; 776-778.

¹¹ CP 580-581. The late witness offered by Mr. Hays was not permitted to testify. *See* CP 760; 777.

¹² CP 705-706. Most of the deposition excerpts and interrogatory answers were admitted as substantive evidence. *See* CP 779-787.

under Evidence Rule ER 904,¹³ called 14 witnesses at trial;¹⁴ offered as evidence 16 separate lease agreements entered into by Hays Elliott Properties LLC as evidence in opposition to the petition for guardianship;¹⁵ offered new documentary exhibits after the conclusion of trial;¹⁶ and submitted post trial briefing opposing appointment of a guardian. CP 832-868.

C. The Trial Court Granted the Petition for Guardianship, Appointed a Full Guardian for Mr. Hays' Estate, and Awarded Castilleja her Reasonable Attorney Fees and Costs.

The petitioner below was required to prove by clear, cogent and convincing evidence that Mr. Hays was incapacitated and that there were no less restrictive alternatives before Mr. Hays' liberty and autonomy could be curtailed by establishment of a guardianship. *See* RCW 11.88.045(3). This heavy burden of proof was repeatedly stressed by Mr. Hays' attorney in opposing appointment of a guardian for Mr. Hays. *See, e.g.,* CP 27, 38-45, 616-628. With real estate holdings valued at \$28

¹³ CP 557-567. Mr. Hays later entered into a stipulation admitting most of the offered documents. CP 758-759. The remaining documents were admitted through witness testimony. *See* CP 761, 762, 763, 764, 765, 767, 768, 769, 775.

¹⁴ CP 2658-2660.

¹⁵ CP 2681-2683.

¹⁶ CP 871-881. The late exhibits were not admitted except for the purpose of establishing that the LLC was continuing operations. *See* CP 886-892.

million, CP 606, which were titled to Mr. Hays individually and to the limited liability company he managed, which in turn was co-owned by Mr. Hays, trusts managed by Castilleja, and the Hays Family Trust managed by Mr. Hays, the financial evidence was complex and voluminous. CP 2615-2619. The trial took six court days. There were 22 non-party witnesses, 13 of whom were called by Mr. Hays. CP 2658-2660. The trial court admitted 181 documentary exhibits as well as designated excerpts from the deposition of Mr. Hays and his answers to interrogatories. CP 760-774; 779-787; 2658-2683.

On November 18, 2011, the trial court entered its Findings of Fact, Conclusions of Law and Order Appointing Full Guardian of the Estate. CP 2606-2643. The 35-page order included 68 findings of fact. CP 2606-2643. The trial court appointed a full guardian of the estate, and as requested by the petitioner below, CP 3, determined that the guardian should be a professional fiduciary. CP 2623-2624. The trial court did not appoint a guardian of the person for Mr. Hays. The petition for guardianship did not request appointment of a guardian of the person, but the petitioner below supported the guardian ad litem's recommendation that a guardian of the person be appointed. CP 1-8; 649.¹⁷

The Findings of Fact, Conclusions of Law and Order Appointing

¹⁷ The petitioner below devoted one paragraph of her 23-page trial brief to the request for a guardian of the person. CP 649.

Full Guardian of the Estate entered November 18, 2011 awarded Castilleja her reasonable attorney fees and costs to be paid from Mr. Hays' assets.

Finding of Fact 68 states:

The Petitioner requested reimbursement of her attorneys' fees and costs. The petition for guardianship was necessary and benefitted Mr. Hays. See Conclusion of Law 11.

CP 2625. Conclusion of Law 11 states in pertinent part:

The Petitioner's request for fees is governed by RCW 11.96A.150. The court finds that it is equitable to award Petitioner her reasonable costs and attorneys' fees to be paid from the guardianship estate and/or any other asset/entity in which Mr. Arthur Hays has a beneficial interest because the petition for guardianship was filed in good faith, was necessary to protect Mr. Hays' assets and property interests, and benefitted Mr. Hays' estate by resulting in the appointment of a guardian of the estate of Mr. Hays. Petitioner shall file a fee petition supported by contemporaneous billing statements.

CP 2631. Paragraph 20 of the Order states:

The reasonableness of the attorneys' fees awarded to the Petitioner shall be determined under the lodestar measure by separate motion filed under LCR 7 before the undersigned Judge with notice to Arthur Hays, Arthur Hays' guardian, and other parties requesting notice of the guardianship proceedings. Petitioner's fee petition shall be supported by contemporaneous billing statements.

CP 2639.

The Findings of Fact, Conclusions of Law and Order Appointing Full Guardian were not appealed. Mr. Hays has repeatedly asserted that the November 18, 2011 order is not the subject of this appeal. *See, e.g.*, Brief of Appellant at 9.

D. Mr. Hays' Vigorous Opposition to the Appointment of a Guardian for his Estate Resulted in High Attorney Fees and Costs.

Early in the litigation, the experienced guardian ad litem appointed to investigate the petition for guardianship foretold the high attorney fees and costs that are now the subject of this appeal. *See* CP ___ (Sub No. 16, 36). Mr. Hays incurred \$210,802.90 in attorneys' fees and \$17,418.98 in costs unsuccessfully opposing the petition for guardianship of his estate. CP 1506. Castilleja incurred attorney fees of \$352,755.36 and costs of \$27,837.56 successfully establishing a guardianship of the estate for Mr. Hays. CP 1393-1493.

As directed by the trial court in the November 18, 2011 order, CP 2639, Castilleja filed a petition to approve the amount of her requested attorney fees and costs. The attorneys for Rebecca Castilleja submitted contemporaneous billing records, CP 1399-1493, a declaration describing the work performed, CP 1393-1398, and a motion discussing the relevant legal standard. CP 1387-1392. In addition, they submitted a reply declaration and brief in response to Mr. Hays' and Robert Hays' objections to the amount of their fees and the rate of \$350 per hour charged by Castilleja's attorneys. CP 1727-1735.

In seeking approval of his fees and costs, the attorney for Mr. Hays stated in his motion:

This was a complex matter (in part as a result of the business organization and estate planning for Mr. Hays), involved a family in conflict, and involved numerous professionals of various sorts who had advised Mr. Hays in the past, and were currently advising him. The matter involved not only Mr. Hays' alleged incapacity with respect to his personal financial affairs, but also his alleged incapacity with respect to his position as manager of Hays Elliott Properties LLC, president of Hays Distributing Corporation, and Trustee of the Hays Family Trust.

CP 1515.

E. The Trial Court Approved Castilleja's and Mr. Hays' Attorney Fees and Costs.

Mr. Hays objected to \$77,136.75 of the attorneys' fees and costs incurred by the petitioner below. CP 1655, 1663-1664. On January 31, 2012, the trial court entered orders approving the attorney fees and costs incurred by Mr. Hays and by the petitioner below in the contested guardianship action that resulted in appointment of a full guardian of the estate for Mr. Hays. CP 1760-1762; 1805-1808. The trial court denied the request by Robert Hays for an order approving his attorney fees from Mr. Hays' assets. CP 1758-1759.

In approving Castilleja's attorney fees and costs, the trial court entered written findings of fact and conclusions of law indicating that it had reviewed contemporaneous billing statements, considered the work performed by the attorneys and their method of presenting the case to the trial court, evaluated whether there was redundancy or waste in the presentation of the evidence, considered the objections raised by Mr. Hays

to the reasonableness of the fees and the detail of the time records, and assessed whether the hourly rates charged by the attorneys were reasonable. CP 1805-1808. The findings and conclusions expressly referred to the lodestar methodology and described how the trial court calculated the amount of fees that it awarded. The trial court expressly found that “the billing statements were sufficient and not vague.” CP 1806. The trial court also “specifically reject[ed] the arguments made by Mr. Hays re: the reasonableness of the fees [and] the manner in which the case was presented.” CP 1808. Finally, the trial court ruled that “the fees and costs may be allocated to Hays Elliott Properties LLC, Hays Distributing Corporation, and Arthur D. Hays individually as determined by the guardian.” *Id.*

F. Mr. Hays Appealed Only the Reasonableness of the Attorney Fees Awarded to the Petitioner.

Mr. Hays timely appealed the Order Approving Petitioner’s Attorneys’ Fees and Costs, Judgment and Judgment Summary on or about February 29, 2012. In Mr. Hays’ Notice Regarding Verbatim Report of Proceedings, he confirmed that “the sole issue presented on appeal is the reasonableness of the attorneys’ fees awarded to the respondent (petitioner below) from the assets/estate of the appellant.”

**G. Mr. Hays Filed a Motion to Supplement the Record,
Which Was Consolidated with his Appeal on the Merits.**

Mr. Hays filed a motion with this Court to allow him to supplement the record on appeal pursuant to RAP 9.10 or RAP 9.11. Castilleja opposed the motion. *See* Response in Opposition dated May 14, 2012. On May 30, 2012, Commissioner Neel referred Mr. Hays' motion to the panel that will decide the merits of the appeal.

IV. ARGUMENT

Washington law favors the filing of meritorious guardianship petitions for the protection of incapacitated persons; therefore, persons who bring petitions for guardianship in good faith are awarded their reasonable costs and attorney fees from the incapacitated person's assets. RCW 11.88.030(1) provides that "[n]o liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis." Because guardianship proceedings are "to benefit and protect the life and liberty of the alleged incompetent," *In re Guardianship of Atkins*, 57 Wn. App. 771, 777, 790 P.2d 210 (1990), "the fees of counsel involved on both sides have been held recoverable from the incompetent's estate on the principle that an incompetent is liable for necessities furnished him." *Allowance of Attorney's Fee Out Of Estate Of Alleged Incompetent For Services In Connection With Inquisition Into Sanity*, 22 A.L.R.2d 1438 (2011).

RCW 11.96A.150 is the statutory vehicle for authorizing attorney fees in guardianship actions to be paid from the incapacitated person's estate. The statute provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. **In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.**

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. **This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).**

(Emphasis supplied.) The experienced trial judge who heard this case did not abuse her discretion in approving the attorney fees and costs that Castilleja incurred establishing the guardianship for her father.

A. The Standard of Review is Abuse of Discretion, Not *De Novo* As Argued by Mr. Hays.

Mr. Hays argues that the standard of review is both abuse of discretion and *de novo*. App. Brf. at 13-14. It cannot be both. Applying

the *de novo* standard of review to an award of attorney fees would run afoul of the well-established rule that a trial court's determination as to what constitutes reasonable attorney fees will not be reversed absent an abuse of discretion. *Allard v. First Interstate Bank*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998). The abuse of discretion standard of review applies with equal force in guardianship attorney fee cases. See *In re Guardianship of Matthews*, 156 Wn. App. 201, 214, 232 P.3d 1140 (2010); *In re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007).

Mr. Hays' reliance on *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009) to support his request for *de novo* review is misplaced. *Morgan* was a public records act case, where the only evidence before the trial court consisted of "documentary evidence, affidavits and memoranda of law." *Id.* at 753. In the present case, however, the trial judge had before her and considered the court record and file from the recently concluded trial, as well as her observations and impressions of the work performed by the prevailing attorneys. CP 1806. It is hard to imagine subject matter more deserving of deference to the trial court than the reasonableness of attorney fees incurred during the trial of a contested matter. The trial court had the opportunity to review the

evidence presented and the conduct of parties and their attorneys first hand. Having appellate courts engage in *de novo* review of trial courts' fee awards would contravene existing law and burden appellate courts.

Furthermore, even when a trial court's decision is based solely on documentary evidence, *de novo* review is not always appropriate. For example, *In re Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003), held that the standard of review is abuse of discretion when an appellate court reviews a trial court's determination that there is adequate cause for modification of a parenting plan, even though adequate cause rulings are based solely on documentary evidence.

B. Review Should Be Limited to the Reasonableness of the Fees Approved by the Trial Court.

Mr. Hays challenges the trial court's ruling that he should be required to pay the entire amount of Castilleja's attorney fees, claiming that "a portion of those fees did not benefit him or his estate." App. Brf. at 12. However, the award of fees against Mr. Hays was made by the trial court in its November 18, 2011 order, which was not appealed. Mr. Hays' attempt to bootstrap an untimely appeal to his challenge to the reasonableness of the fee award should be disallowed.

1. Mr. Hays did not appeal the order requiring him to pay Castilleja's attorney fees.

Pursuant to RAP 5.2, a notice of appeal must be filed with the

superior court within thirty (30) days after entry of the final decision the person seeks to appeal. RAP 5.2(a). “The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal[.]” RAP 18.8(b). “This rigorous test has rarely been satisfied in reported case law[.]” *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). No extraordinary circumstances justify letting Mr. Hays appeal the award of attorneys’ fees as part of his challenge to the reasonableness of the amount awarded.

Mr. Hays’ appeal is timely only with regard to the reasonableness of the fee award, and any appeal of the decision to award fees is untimely. RAP 2.4(b) provides in pertinent part: “A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.” RAP 2.4(b) was applied by this Court in *Bushong v. Wilsbach*, 151 Wn. App. 373, 376-7, 213 P.3d 42 (2009), holding that where a trial court enters a judgment for attorney fees and sets the amount of the fee award in a later judgment, an appeal taken from the later judgment does not permit review of the earlier order that awarded fees if more than 30 days have elapsed since the earlier order was

entered.

In the present case, the order requiring Mr. Hays to pay Castilleja's attorneys' fees based on the trial court's assessment of the equities was entered November 18, 2011. Mr. Hays did not file a notice of appeal until February 29, 2012. Therefore, the instant case is exactly analogous to *Bushong*, where the trial court awarded fees in one order and then determined the reasonableness of the fees in a subsequent order. Because the first order awarding fees was not appealed, only the reasonableness of the amount, not the decision to award, can be considered in this appeal.

Mr. Hays falsely asserts that he is not seeking review of the November 18, 2011 order. That is exactly what he is doing by arguing that "[p]rinciples of equity prohibit" ordering Mr. Hays to pay Castilleja's attorney fees when "a portion of those fees did not benefit his estate." App. Brf. at 12, 16. It would be impossible for this Court to review whether the trial court erred in awarding all fees against Mr. Hays without bringing up for review the November 18, 2011 order that was not appealed. Unappealed Finding of Fact 68 specifically found "The petition for guardianship was necessary and benefitted Mr. Hays." CP 2625. Unappealed Conclusion of Law 11 specifically found that it was equitable to order Mr. Hays to pay Castilleja's attorney fees because "the petition for guardianship was filed in good faith, was necessary to protect Mr.

Hays' assets and property interests, and benefitted Mr. Hays' estate by resulting in the appointment of a guardian of the estate of Mr. Hays." CP 2631. Mr. Hays' challenge to the equity of apportioning fees to him under the auspices of their "reasonableness" is a thinly veiled effort to revive an issue that he failed to appeal in a timely manner.

2. Mr. Hays previously represented that the only issue on appeal was the reasonableness of the fees.

Concerned about the timeliness of Mr. Hays' Notice of Appeal (filed February 29, 2012) because it designated Finding of Fact 68, Conclusion of Law 11, and Paragraph 20 of the November 18, 2011 order, undersigned counsel raised the issue by letter dated March 19, 2012 to Mr. Hays' attorney. *See* Response to Motion to Supplement Record (previously filed). Mr. Hays' attorney stated in response: "Although we designated the portions of the November 18 order pertaining to the petitioner's attorneys' fees, we do not intend to seek review of the November 18 order." *Id.* On the same date, Mr. Hays filed a Notice Regarding Verbatim Report of Proceedings, which stated in pertinent part: "the appellant does not intend to order a verbatim report of proceedings because the sole issue presented on appeal is the reasonableness of the attorneys' fees awarded to the respondent (petitioner below) from the assets/estate of the appellant." Contrary to these prior representations, the

Appellant now asserts that the decision to award all fees against Mr. Hays is properly before the Court.

3. The motion to supplement the record should be denied.

Mr. Hays has not established any basis under RAP 9.10 or RAP 9.11 for supplementing the record. The evidence he seeks to include in the record does not relate to the only issue on appeal, which is the reasonableness of the attorney fees and costs awarded by the trial court. Furthermore, the findings of the trial court reflect that the trial court had ample evidence concerning Mr. Hays' income, assets and debt at the time that it awarded the fees. *See* Findings of Fact 32-58 at CP 2615-2622. Mr. Hays does not contend that his financial circumstances are any different now than they were at the time that the trial court assessed the reasonableness of the attorney fees.

The case relied on by Mr. Hays does not support supplementing the record in the present case. In *In re Guardianship of Way*, 79 Wn. App. 184, 901 P.2d 349 (1995), the Department of Social and Health Services appealed an order that imposed only a limited guardianship of the person for an incapacitated person. In so doing, DSHS objected to the appellate court considering positive changes that had occurred in the incapacitated person's circumstances since imposition of the limited guardianship, which supported the trial court's ruling that a limited guardianship of the

person was adequate. Here, Mr. Hays seeks to offer new evidence that he asserts would undermine the trial court's ruling that he should pay the attorney fees awarded to the petitioner below. Furthermore, unlike *In re Way*, the offered evidence does not reflect a change in Mr. Hays' circumstances. Moreover, any changes occurring in Mr. Hays' financial circumstances after trial could have no bearing on the reasonableness of the attorney fees awarded to the prevailing counsel.

Mr. Hays' motion also should be denied under RAP 9.11. RAP 9.11 provides that this Court may "direct the trial court to take additional evidence and find the facts based on that evidence" where six criteria are established, including that "the additional evidence would probably change the decision being reviewed." Among other things, Mr. Hays has failed to establish that the information contained in the Guardian's proposed inventory and budget would change the trial court's ruling as to the reasonableness of the attorney fee award. Findings of Fact 32 through 58 reflect that the trial court had ample evidence relating to Mr. Hays' financial circumstances, including evidence of his monthly income and assets, his monthly expenses, the cash flow and debt load of Hays Elliott Properties, and the cash flow and debt load of Hays Distributing Corporation. No need has been established under RAP 9.11 for additional findings relating to Mr. Hays' income and assets, which were already

considered and ruled upon by the trial court in its unappealed decision.

C. Mr. Hays Should Not Be Permitted To Appeal Errors Not Raised Below.

Mr. Hays erroneously asserts that the petitioner below made the case unnecessarily complicated by introducing “irrelevant information,” App. Brf. at 20-22, 26-28, and asserts without citation to the record that “Castilleja’s counsel nearly overwhelmed the court with evidence during the trial.” App. Brf. at 26. Based on these criticisms, he requests that this Court substitute its judgment for the trial court that heard the evidence and arbitrarily cut Castilleja’s attorney fees in half by an additional \$167,969.59. App. Brf. at 30, 37. In addition to lacking merit, as argued *infra*, this argument should be rejected because it was never made below.

Mr. Hays did not object to the evidence at trial that he now asserts was irrelevant. Nor did he ask the trial court to reduce the fee award by one-half. He should not be permitted to raise these new issues for the first time on appeal. Under RAP 2.5(a), an appellate court generally will not consider arguments or theories that are raised for the first time on appeal. *See, e.g., Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 289, 840 P.2d 860 (1992). While application of this rule is discretionary, there is no justification for departing from the general rule in this case.

The policy underlying RAP 2.5(a) is to promote the efficient use of judicial resources by allowing trial courts and litigants to correct alleged

errors during trial to avoid appeals and remands. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001). This goal would be frustrated by permitting Mr. Hays to launch a wholesale attack on evidence that he failed to object to at trial and by allowing Mr. Hays to challenge such a large percentage of Castilleja's attorneys' fees on appeal for the first time.

D. The Trial Court Did Not Abuse Its Discretion In Approving The Attorney Fees And Costs That Were Incurred In The Contested Guardianship Matter.

A trial judge is given broad discretion in determining the reasonableness of a fee award. An award will be affirmed unless the trial court manifestly abused its discretion. *Ethridge v. Hwang*, 105 Wn. App. 447, 459-460, 20 P.3d 958 (2001). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, or when untenable reasons support the decision." *In re Guardianship of Matthews*, 156 Wn. App. at 214. The experienced trial judge who heard this case conscientiously listened to and weighed the evidence presented at the trial to determine if Mr. Hays needed a guardian, and just as carefully reviewed and evaluated the evidence submitted in

support of the fee petitions brought by Mr. Hays and Ms. Castilleja. The trial court did not abuse its considerable discretion.

1. The trial court was not required to consider the factors set forth in RPC 1.5.

Mr. Hays asserts that the trial court abused its discretion by failing to expressly consider the factors set forth in RPC 1.5 in approving attorney fees requested by the petitioner below. *See* App. Brf. at 18-23. This argument disregards controlling precedent and the statute that governs fee awards in guardianship actions. RCW 11.96A.150(1) provides in pertinent part: “In exercising its discretion under this section, **the court may consider all factors that it deems to be relevant and appropriate**, which factors may but need not include whether the litigation benefits the estate or trust involved.” (Emphasis supplied.) *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998) held that “courts should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees as costs” and that “[t]his methodology **can be** supplemented by an analysis of the factors set forth in RPC 1.5(a) which guide members of the Bar as to the reasonableness of a fee.” *Id.* at n. 20 (emphasis supplied.) But neither RCW 11.96A.150 nor any case cited by Mr. Hays holds that the RPC factors must be considered by trial courts when determining the reasonableness of fees to be awarded in litigation. Therefore, Mr. Hays’ contention that the trial court abused its discretion

by not engaging in a formulaic analysis under the Rules of Professional Conduct is without merit.

2. The Court properly applied the lodestar method.

Mr. Hays argues “the record [does not] reflect that the trial court applied the lodestar method when making its determination on attorney’s fees.” App. Brf. at 12. This contention is erroneous. The trial court’s ruling expressly states: “To assess the reasonableness of the attorneys’ fees requested by the Petitioner, the Court employed the lodestar methodology, multiplying the attorney’s and support staff’s hourly rates by the reasonable number of hours of work performed.” CP 1806.

The trial court made a sufficient record for this Court to perform its supervisory function. *Mahler v. Szucs*, 135 Wn.2d at 435 held that findings of fact and conclusions of law are required to establish an adequate record for review. The trial judge entered written findings and conclusions that adequately articulated the evidence she relied on, the factual basis for her ruling, and the legal standards that she applied. For example, the trial court found that the hours billed by Castilleja’s attorneys “were reasonable considering the results obtained, the work performed, and the contested nature of the proceedings, as set forth in the contemporaneous billing records and declaration filed in support.” CP 1807.

The decision below does not contain any of the deficiencies identified in *Mahler v. Szucs*. *Mahler, supra* at 435, faulted the trial court for failing to make a record of whether it considered if there were any duplicative or unnecessary services. In the instant case, the trial court specifically found that “the billing records do not reflect any significant redundancy, waste or unnecessary services.” CP 1807. *Mahler, supra* at 435, also faulted the trial court for failing to make a record of whether it considered if the hourly rates were reasonable. In the instant case, the trial court specifically found that the billing rates of \$350 and \$300 per hour charged by Castilleja’s attorneys were reasonable, based on the attorneys’ experience and the nature of the work performed. CP 1806. Thus, there is no merit to the contention that the trial court failed to make an adequate record for this Court’s review.

Mr. Hays’ contention that the trial court merely rubberstamped the fee petition is not supported by the record. “The determination of the fee award should not be an unduly burdensome proceeding for the court or the parties.” *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995) *quoted in Hulbert v. Port of Everett*, 159 Wn. App. 389, 409, 245 P.3d 779 (2011). “An explicit hour-by-hour analysis of each lawyer’s time sheets is unnecessary as long as the award is made with consideration of the relevant factors and reasons sufficient for review

are given for the amount awarded.” *Hulbert v. Port of Everett*, 159 Wn. App. at 409-410. Mr. Hays disregards the trial judge’s specific findings that she reviewed the billing records, considered the billing records sufficiently detailed, and independently determined that the work performed was not duplicative or wasteful, and that the hours expended were reasonable.

Mr. Hays’ contention that the billing records are not sufficiently detailed also lacks merit. The documentation offered in support of a fee request

need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).

Mahler v. Szucs, 135 Wn.2d at 434. The trial court did not err in finding that the billing records submitted by the petitioner below satisfied this test.

3. The attorney fees were reasonable and necessary.

Mr. Hays makes the erroneous argument that Castilleja’s attorneys unnecessarily complicated the trial by introducing evidence and issues that were not relevant. This contention is not supported by the record. Early in the litigation, Mr. Hays filed a motion to dismiss the guardianship petition contending that the LLC, trusts, and powers of attorney made the guardianship unnecessary. CP 23-46. Mr. Hays’ argument was premised on RCW 11.88.030(1)(i), RCW 11.88.090(5)(e) and RCW

11.88.090(5)(f)(iv), CP 40-41, which require trial courts to consider less restrictive alternatives before establishing a guardianship. Furthermore, “determination of incapacity is a legal not a medical decision,” requiring the petitioner to demonstrate “management insufficiencies over time.” RCW 11.88.010(c). In this case, Mr. Hays’ management insufficiencies related to not only his personal finances, but also his management of Hays Elliott Properties LLC, (Mr. Hays was manager of the LLC), Hays Distributing Corporation (Mr. Hays was president of the corporation), and the Hays Family Trust (Mr. Hays was trustee of the trust). CP 2619-2613.

Significantly, much of the evidence that Mr. Hays now calls “irrelevant” was offered by his attorney. *See supra* at 5-7. In the initial witness list exchanged by Mr. Hays, he listed 26 possible primary witnesses. Mr. Hays called 14 witnesses at trial, including employees of Hays Elliott Properties and Hays Distributing Corporation. By contrast, the petitioner below called only 9 witnesses at trial. Mr. Hays initially listed 18 leases as trial exhibits, and ultimately 16 of the HEP leases were admitted in evidence. Finally, Mr. Hays complains that witnesses were asked questions about estate planning and tax liability without citation to the record. App. Brf. at 21. This Court should not review claimed errors that are not supported by citations to the record. RAP 10.3(a)(5).

4. The litigation substantially benefitted Mr. Hays.

Mr. Hays misstates the legal standard for awarding fees in a guardianship litigation by arguing that every task that an attorney bills for must be directly related to a successful result, or there is insufficient benefit to the ward for the billing to be approved. App. Brf. at 15. In guardianship matters, litigation is deemed to be for the benefit of the estate or ward if it is undertaken in good faith and with reasonable care. *In re Guardianship of Brown*, 6 Wn.2d 215, 225, 101 P.2d 1003 (1940), rejected the contention that a guardian could not be reimbursed for attorneys' fees incurred in unsuccessful litigation relating to a guardianship because "when an administrator in good faith and in the exercise of ordinary prudence employs legal counsel to defend such an action, and the attorneys in good faith and with reasonable care, skill, and judgment perform such duty, then in law the whole matter is for the benefit of the estate. **Good faith and reasonable care and not the result of the litigation is the test.**" (Emphasis supplied.) *See also* RCW 11.96A.150 ("In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.").

The primary purpose of the fee-shifting that occurs in a

guardianship case is not to reward the prevailing party or sanction the losing party, but to reimburse parties and their attorneys for work that was undertaken for the purpose of protecting incapacitated persons. Consequently, even work on unsuccessful claims and defenses is compensable if undertaken in good faith. *See* 22 A.L.R.2d 1438 (2011) (“An unsuccessful proceeding has been regarded as in the interest of the alleged incompetent when brought in good faith. And an unsuccessful defense has generally been held in the incompetent's interest; and even if a verdict in his favor would not have been to his advantage, he has been held liable for the fees if the defense was conducted in good faith, or with a reasonable belief in his sanity.”) For example, *In re Guardianship of McKean*, 136 Wn. App. 906, 919 (2007) held that a guardian “did not have to prove that it prevailed in every legal battle ... to show a benefit to the guardianship.” *Id.* (citations omitted).

Based on these authorities, the trial court did not abuse its discretion by approving attorneys’ fees and costs relating to subpoenas that were quashed, a witness who was disallowed, and the limited time spent supporting the Guardian ad Litem’s recommendation that Mr. Hays should have a guardian of the person. The attorneys’ fees and costs incurred were undertaken in good faith and with reasonable care, skill, and judgment. Notably, if the test for approving attorneys’ fees in a

guardianship were strictly result-based as Mr. Hays argues, then much of the fees billed by his attorney would have to be disallowed. He did not prevail on his motion to dismiss, in his opposition to mediation, or at trial. *See supra* at 5-7.

The present case is distinguishable from the cases Mr. Hays relies on. *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986) involved an attorneys' fees award under RCW 11.76.070, which allows trial courts to award fees to contestants of erroneous accounts or reports. Since RCW 11.76.070 only allowed fees relating to successfully contesting an erroneous report, the prevailing party's attorney was entitled only to compensation for those services relating to the disapproval of the report. RCW 11.76.070 shifts fees based on the outcome of the proceeding; whereas, the statute applied in this case, RCW 11.96A.150, shifts fees based on equitable considerations which favor reimbursing petitioners for guardianship petitions brought in good faith. Also, as argued *supra*, under the 2007 amendment to RCW 11.96A.150(1), it is not necessary to show a specific benefit to the ward or the ward's estate. *Hallauer* predated this amendment.

In re Estate of Niehenke, 117 Wn.2d 631, 818 P.2d 1324 (1991) did not concern the reasonableness of attorneys' fees awarded by the trial court, but reviewed whether the fee award against the estate was equitable

under the predecessor to RCW 11.96A.150, which was codified at RCW 11.96.140. *Niehenke, supra* at 648, held that fees could not be awarded where “litigation could result in no substantial benefit to the estate.” However, as argued *supra*, the determination that it was equitable to award Castilleja her attorneys’ fees because the guardianship petition benefited Mr. Hays was made by the trial court in the November 18, 2011 order that was not appealed. *Niehenke* does not address the issue before this Court, which is whether the amount of the fees awarded to Castilleja was reasonable.

5. The trial court considered Mr. Hays’ objections.

Mr. Hays argues that the “trial court’s order does not properly or adequately articulate the court’s reasons for overruling Mr. Hays’ objections to the reasonableness of Mrs. Castilleja’s fees.” App. Brf. at 12, 25. However, the trial court did make specific findings rejecting his objections. In written findings, the trial court “specifically reject[ed] the arguments made by Mr. Hays re: the reasonableness of the fees [and] the manner in which the case was presented.” CP 1808. The trial court also rejected Mr. Hays’ contention that the billing records were insufficiently detailed by specifically finding “the billing statements were sufficient and not vague.” CP 1806. The trial court also considered and rejected Mr. Hays’ argument that having two attorneys appear at trial was duplicative,

making a specific finding that there was no significant redundancy, waste, or unnecessary services. CP 1807.

Mr. Hays cannot plausibly claim that it was error for the trial court to fail to rule on his objection that evidence was presented on irrelevant issues when he failed to raise this objection below. In this appeal, Mr. Hays is highly critical of what he refers to as the “mind numbing amount of evidence” that he asserts “nearly overwhelmed the court,” App. Brf. at 26, and asserts that the trial court committed reversible error by not entering findings and conclusions on this objection. *Id.* at 25. But he provides no citation to the record indicating that this objection was made below. *Id.* at 26-28. In fact, Mr. Hays’ objection to awarding fees for what he deems “irrelevant issues” did not appear in the response he filed to Castilleja’s fee petition. CP 1648 – 1724. His request to reduce Castilleja’s attorney’s fees by one-half appeared for the first time in the brief he submitted to this Court. App. Brf. at 27, 30. Because Mr. Hays did not ask the trial court to reduce Castilleja’s fees by one-half or object to what he now asserts was irrelevant evidence, he cannot claim that the trial court’s failure to rule on these never-made objections was error.

6. The trial court did not abuse its discretion in approving costs.

Mr. Hays’ argument in opposition to less than \$500.00 incurred in computerized legal research illustrates why fees in this case are so high.

App. Brf. at 30. Case law specifically allows reimbursement for computer research as a reasonable cost. *See Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 849, 917 P.2d 1086 (1995) (“[t]he use of computer-aided legal research is a norm in contemporary legal practice. Properly utilized, it saves the client attorney fees which would otherwise be incurred for more time consuming methods of legal research.”) It was not an abuse of discretion for the trial court to approve \$491.46 for legal research. Nor was it an abuse of discretion to allow attorney fees for the time spent by counsel conducting computerized legal research. Both items are reasonable and they are not duplicative.

E. The Attorney Fee Award Did Not Violate Equitable Principles.

Mr. Hays asserts that in addition to being “reasonable,” the fees awarded to Castilleja must also comport with “equitable principles.” *See* App. Brf. at 31-34. As argued *supra*, Mr. Hays’ argument that the fee award was inequitable impermissibly attempts to rekindle an issue that was not appealed. If this Court reaches the merits of this argument, it should find that the trial court did not abuse its discretion by awarding the fees and costs that Mr. Hays challenges under “equitable principles.”

1. Pre-petition fees were properly approved.

The trial court properly considered whether the fees incurred prior to the petition for guardianship were reasonable, necessary, and authorized

pursuant to RCW 11.96A.150. Mr. Hays cited no authority disallowing fees for pre-petition investigation. App. Brf. at 32. As argued below, the pre-filing attorneys' fees were reasonable and necessary given the due diligence requirements of Civil Rule 11 and the clear, cogent and convincing burden of proof. CP 1730-1731. Furthermore, the guardianship statute requires investigation of alternatives to guardianship, RCW 11.88.090(5)(f)(iv), and public policy favors the nonjudicial settlement of contested issues relating to trusts, probate and guardianships when possible. *See* RCW 11.96A.010. The trial court did not abuse its discretion or violate equitable principles by awarding fees for work performed to investigate the facts and to explore alternatives to guardianship prior to filing the petition.

2. Fees relating to the fee petition were properly approved.

The trial court also did not violate equitable principles or abuse its discretion by awarding attorney fees and costs incurred for preparing the fee petition and responding to the objections raised by Mr. Hays. Mr. Hays relies on cases from 1972,¹⁸ 1983,¹⁹ and 1985, which have been

¹⁸ *In re Estate of Riemcke*, 80 Wn.2d 722, 497 P.2d 1319 (1972) also does not apply to the present case because it did not involve application of RCW 11.96A.150, or its predecessor, but concerned an administrator's request for reimbursement from the estate for defense of a claim that benefited only the administrator in her individual capacity. By contrast, Castilleja did not benefit personally from the guardianship petition.

abrogated by RCW 11.96A.150. App. Brf. at 32-33. In particular, Mr. Hays relies on *In re Estate of Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985) for the proposition that a fiduciary cannot charge an estate for fees incurred defending their fees. See App. Brf. at 32. However, *Larson* predated enactment of RCW 11.96A.150 and the amendment of RCW 11.96A.150 in 2007, which added the following provision: “In exercising its discretion under this section, the court may consider all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.”

It is well settled that if a statute is inconsistent with the common law, the statute is deemed to abrogate the common law.²⁰ RCW 11.96A.150 gives the trial court broad discretion to surcharge attorney fees to parties, or to the estate, in an equitable manner. It does not restrict or make any exception in the case of fee challenges. Although the primary issue in *Larson* was whether attorney fees were reasonable, Mr. Hays relies on the portion of the decision which held that "an attorney in probate

¹⁹ *In re Guardianship of Adamec*, 100 Wn.2d 166, 178-179, 667 P.2d 1085 (1983) also does not apply to the present case because it involved application of the statute that authorizes a guardian to be reimbursed for the guardian’s attorneys’ fees, RCW 11.92.180, not RCW 11.96A.150, which is the statute applied here. Moreover, the guardian’s attorneys’ fees were approved in *Adamec*.

²⁰ *State v. Pub. Util. Dist. No.1 of Douglas County*, 83 Wn.2d 219, 517 P.2d 585 (1973); *State v. Butler*, 126 Wn. App. 741, 750, 109 P.3d 493 (2005); *Harmon v. Dep’t of Soc. & Health Servs.*, 83 Wn. App. 596, 922 P.2d 201 (1996).

is not entitled to additional fees for attorneys and experts in proving the reasonableness of his fee in the final report." *Larson*, 103 Wn.2d at 532 cited at App. Brf. at 32. This portion of the holding was clearly abrogated by RCW 11.96A.150.

It would not be equitable to deny Castilleja attorney fees that were reasonably incurred responding to Mr. Hays' unsuccessful objections. Moreover, it furthers the public policy of this State, which is to ensure that meritorious guardianship petitions are brought for the protection of incapacitated persons, to reimburse petitioners for the costs and fees incurred in bringing meritorious guardianship petitions and in obtaining approval of their attorney fees, including responding to objections to payment of those fees. It would have a chilling effect on the filing of meritorious guardianship petitions, if petitioners could be denied their reasonable attorney fees for defending their actions in bringing the petition that was found by the trial court to be in the best interests of the incapacitated person.

3. Fees for post-ruling consultation were properly approved.

Mr. Hays erroneously challenges \$315.00 billed after the order appointing guardian was entered. *See* App. Brf. at 33. The fees at issue were billed on November 22, 2011 and December 9, 2011 for the following work:

Telephone conference with client regarding guardianship order, HEP issues; memo to file. CP 1488.

Telephone conference with client regarding status of guardianship implementation, request for special notice, instructions to legal assistant. CP 1492.

Mr. Hays cites no authority for the contention that it was an abuse of discretion for the Court to find that these attorney fees were reasonably incurred. Furthermore, Mr. Hays' contention that the fees were "unrelated to the establishment of the guardianship" is factually erroneous based on the description of the work appearing in the billing statements.

4. Fees could not be assessed against non-parties.

The trial court also did not violate equitable principles or abuse its discretion by declining to apportion fees against entities that Mr. Hays acknowledges were not parties to the action. Under RCW 11.96A.150(1), fees may only be apportioned to "any party." Thus, it would have been error of law for the trial court to assign fees against the corporation and the LLC, which Mr. Hays acknowledges were not parties to the action. App. Brf. at 33. Moreover, the LLC and corporation did not unwisely oppose appointment of a guardian – Mr. Hays did. Finally, the trial court appropriately left it to the Guardian's discretion to determine how to pay the fee award from Mr. Hays' various property interests, including his interests in the LLC and his interests in the Hays Family Trust. It would be inequitable to require the other beneficiaries of the Trust or the LLC to

pay for the costs of appointing a guardian for Mr. Hays when he is the one who directly benefitted from the appointment and he is the one who opposed the appointment.

5. *Guardianship of Ivarsson* is not on point.

Mr. Hays' reliance on *In re Guardianship of Ivarsson*, 60 Wn.2d 733, 744, 375 P.2d 509 (1962), is misplaced. *Ivarsson* disallowed attorney fees incurred by a co-guardian because the record did not establish what legal work was performed. The only evidence presented was of the time spent: "71 ¾ hours part-time figured at the rate of \$35, amounting to \$ 2,476.25; associate's time of 1 ¾ hours at \$25, \$ 43.75, totaling \$ 2,520." *Id.* at 744. The record in this case contained contemporaneous billing records that described the work that the attorneys performed. Therefore, *Ivarsson* is not applicable to the present case.

6. The size of the fee award does not make it inequitable.

Finally, the size of the fee award does not make the award inequitable or an abuse of discretion. Large attorneys' fees awards are permissible in civil litigation even when the amount at stake in the case is small. *Mahler*, 135 Wn. App. at 433. In the present case the stakes were quite high. As Mr. Hays acknowledges, prior to the guardianship he was managing an estate valued at approximately \$28 million. The unappealed findings of fact establish that Mr. Hays was not capable of managing his

assets, and in fact had seriously mismanaged them to the detriment of his businesses and his personal finances. The guardianship was essential. Mr. Hays vigorously contested the petition. Based on Mr. Hays' record of opposition, there was every reason to think that he would appeal the order appointing guardian. The petitioner below should not be penalized for putting on a strong case to ensure a favorable outcome when the stakes and the opposition were so high.

F. The Trial Court Did Not Abuse Its Discretion By Entering a Judgment for the Attorney Fees It Approved.

Mr. Hays has not established that it was an abuse of discretion for the trial court to enter a judgment against the guardianship estate. *See* App. Brf. at 12-13, 34-35. The trial court had discretion under RCW 11.96A.150(1) to determine the manner by which the award of attorney fees was to be paid. It was not an abuse of discretion for the trial court to direct entry of a judgment for the approved amounts and to authorize the Guardian to pay the judgment from Mr. Hays' assets. In fact, it would have been a violation of constitutional magnitude for the trial court to decline to rule on the issue. "Every cause submitted to a judge of a superior court for his decision shall be decided by him [or her] within ninety days from the submission thereof[.]" Washington Constitution Art. IV §20. *See also* RCW 2.48.240. Once a decision was rendered, "[j]udgment shall be entered pursuant to rule 58 and may be entered at the

same time as the entry of the findings of fact and the conclusions of law.” CR 52(a)(1). The “entry” of a judgment refers to the clerk of the court entering the judgment in the execution docket. *See* RCW 4.64.030. Entry of a judgment requires that the judgment contain a judgment summary complying with RCW 4.64.030(2)(a). The clerk of the court may not enter a judgment and “a judgment does not take effect” until the judgment includes the judgment summary required by statute. Mr. Hays has failed to identify any way in which the trial court abused its discretion under these applicable standards.

The only authority that Mr. Hays cites pertains to the collection and execution of judgments against persons subject to a guardianship, not to the entry of judgments. The statute that Mr. Hays relies on, RCW 11.92.060(3), prevents execution against or garnishment of an incapacitated person’s assets. Mr. Hays fails to articulate how this statute was violated by entry of judgment in the present case. The trial court did not enter an order of execution or garnishment against Mr. Hays’ assets, but merely authorized the Guardian to pay the debt from Mr. Hays’ assets as the Guardian determines to be appropriate. CP 1807-1808. The statute that Mr. Hays cites affords him protection against any compulsory process to enforce the judgment that was entered; therefore, it does not support his position that entry of the judgment was inequitable.

It was not an abuse of discretion for the trial court to provide for post-judgment interest. Post-judgment interest is mandatory under RCW 4.56.110(3). *Womack v. Rardon*, 133 Wn. App. 254, 264, 135 P.3d 542 (2006).

Finally, the fact that Mr. Hays cannot immediately pay the attorneys' fees debt does not make entry of the judgment an abuse of discretion. Mr. Hays has many creditors. Given the fact that Castilleja is Mr. Hays' daughter, to avoid any appearance of impropriety or allegation that there has been a fraudulent conveyance to avoid other creditors, payment to Ms. Castilleja should be pursuant to a duly recorded judgment.

G. Fees on Appeal Should Be Awarded to Castilleja.

Castilleja requests her reasonable attorney fees and expenses on appeal pursuant to RAP 18.1 and RCW 11.96A.150. RCW 11.96A.150(1) provides for the award of reasonable attorney fees and costs on appeal in guardianship matters as deemed "equitable."

It would be equitable to award fees to Castilleja on appeal because the underlying case was pursued on behalf of Mr. Hays for his protection not for personal gain or to enforce Castilleja's personal interests. In addition, this appeal has included issues that were devoid of merit, specifically, the argument that the standard of review is *de novo*, and the attempt to introduce issues that were not timely appealed. An award of

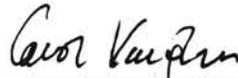
fees is also justified because Mr. Hays has claimed significant errors which were not raised below in violation of RAP 2.5(a).

V. CONCLUSION

The Respondent Rebecca Castilleja respectfully requests that this Court affirm the trial court, and that it award her reasonable attorney fees and costs for this appeal.

Respectfully submitted this 7th day of June, 2012.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship
of:

ARTHUR D. HAYS,

Appellant,

v.

REBECCA CASTILLEJA,

Respondent.

No. 68419-1

CERTIFICATE OF
SERVICE

CHRISTINE JAMES certifies as follows:

I am a legal assistant for the law firm of Thompson & Howle. I am over eighteen (18) years of age and make this declaration based on personal knowledge.

I caused a copy of the Brief of Respondent Rebecca Castilleja to be served on counsel of record and all parties entitled to notice, by the service method indicated below:

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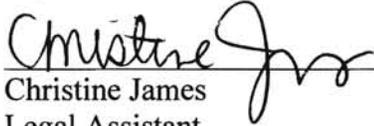
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
OF THE STATE OF WASHINGTON THAT THE FOREGOING IS
TRUE AND CORRECT.

Signed at Seattle, Washington on June 7, 2012.


Christine James
Legal Assistant