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Nº. 34132-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Guardianship of:
MICHELLE McKEAN and MORGAN McKEAN

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 02-4-00243-1
The Honorable Beverly Grant, Presiding Judge

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 **ORIGINAL**

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I. INTRODUCTION

In *In re the Guardianship of McKean*, 126 Wn. App. 1028, 2005 WL 591245, this Court ruled that because “the independent corporate trustee had no access to assets not in its trusts” and “could not monitor these assets” of Michelle and Morgan McKean, “a guardian was necessary to protect the children’s interests.” *Id.* at *3.

The opening paragraph of the Brief of Respondents¹ reveals a basic problem with the guardianship proceedings below as well as with the Respondents’ Brief itself: neither the guardianship established for his daughters nor this appeal is about Michael McKean. Mr. McKean served time for his crime and was disbarred: his “debt to society” has been dearly paid. The issues before this Court are entirely independent of Michael McKean’s legal history.

Contrary to Respondent’s assertion at page 1 of the Brief, “six separate judicial officers” have not concluded that Morgan and Michelle McKean “have financial interests that need to be investigated.” Rather, it

¹ The “consensus amongst everyone that has ever had the misfortune of dealing with Michael McKean” exists only on the pages of the Brief of Respondents: it certainly does not apply to Mr. McKean’s counsel, who has had extensive dealings with Mr. McKean. The quote provided is an opinion stated by one Mr. Mellen in reference to Mr. McKean’s bankruptcy. *See* CP 543. While Respondents may agree with Mr. Mellen’s opinion, this certainly does not amount to a “consensus amongst everyone” that has ever dealt with Mr. McKean, and these inflammatory and disparaging comments are improper in an appellate brief. Both Mr. Mellen’s opinion and the Respondents’ opinion of Mr. McKean are utterly irrelevant on this appeal.

was concluded that a guardianship was necessary to protect the children's interests.

This Court's ruling that a guardian should "protect the children's interests" was expanded far beyond any explicit or implicit statutory duties of a limited guardian, in disregard of a statutory procedure that would have saved thousands of dollars belonging to Michelle and Morgan McKean, and it is these issues only that are before the Court.

II. REPLY

A. The standard of review suggested by the Respondents does not apply to this case.

At page 5 of their Brief, Respondents correctly cite *Guardianship of Bouchat*, 11 Wn. app. 369, 374, 522 P.2d 1168 (1974), *review denied*, 85 Wn.2d 1010 (1975) and *In re Jaussaud's Estate*, 71 Wn.2d 87, 91, 426 P.2d 602 (1967) as authority for an abuse of discretion standard of review of a trial court's orders in probate cases. However, Respondents inappropriately quote *Marriage of Rideout*, 150 Wn.2d 337, 351-352, 77 P.3d 1174 (2003) and *Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) as authority for the proposition that this Court should defer to the trial court's decisions and apply a substantial evidence standard of review.

In *Rideout*, a family law case, the Supreme Court wrote that “where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.” *Rideout*, 150 Wn.2d at 351, 77 P.3d 1174. The court noted that “trial judges and court commissioners routinely hear family law matters,” and that trial judges and court commissioners are “better equipped to make credibility determinations.” *Rideout*, 150 Wn.2d at 351-352, 77 P.3d 1174, citing *Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664.

In *Jannot*, the Supreme Court “recognized that ‘local trial judges decide factual domestic relations questions on a regular basis’ and consequently stand in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan.” *Id.*, quoting *Jannot*, 149 Wn.2d at 126, 65 P.3d 664.

This is not a family law case, and the issues in this case do not turn on credibility determinations or a factual finding of bad faith. *Rideout* and *Jannot* do not apply. Instead, the main issue in this case is whether the trial court improperly interpreted and applied the guardianship statutes by ordering the limited guardian and its attorneys to undertake an independent prosecutorial-like investigation into the financial affairs of

third persons instead of utilizing the statutory citation procedure set out in RCW 11.48.070 and 11.92.185. A second issue is whether the trial court abused in discretion in ordering payment for these activities that more than exhausted the non-trust assets of Morgan and Michelle McKean.

Although there is authority for an abuse of discretion review of the trial court's orders in this guardianship case, the trial court's orders are based upon its interpretation and application of the guardianship statutes. The proper standard of review of the court's orders on the scope of the limited guardianship is therefore de novo. *Kinnan v. Jordan*, 131 Wn. App. 738, 751, 129 P.3d 807, 813 (2006) ("A court's choice, interpretation, or application of a statute is a question of law that we review de novo under an error of law standard.").

B. Chapter 11.96A RCW does not authorize the court's orders setting the scope of the limited guardianship.

At page 6 of Respondent's Brief, the "trial court's fundamental role in a guardianship proceeding" is correctly set out as the protection of the interests of the incapacitated person. However, Respondents then stray from the law by citing several sections of Chapter 11.96A RCW as the statutes that "provide[] the courts with full and ample power" to "carry out such an important role." Brief of Respondents, page 6. Respondents are wrong: a trial court has "full and ample power" to protect interests of

a ward not because of any authority granted by Chapter 11.96A RCW, but because a superior court is a court of general jurisdiction. *See In re Adamec*, 100 Wn.2d 166, 175, 667 P.2d 1085 (1983) (a superior court deals with any issue touching an estate as a court of general jurisdiction, not one of limited jurisdiction).

The purpose of Chapter 11.96A RCW “is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single matter under Title 11 RCW.” RCW 11.96A.010. Resolution of such disputes may be reached by mediation, arbitration, agreement, or by judicial resolution “if other methods are unsuccessful.” RCW 11.96A.010.

A trial court is specifically empowered to resolve any issue, question or dispute involving “[t]he direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity.” RCW 11.96A.030. A trial court is also empowered to resolve any issue, question or dispute involving “[t]he grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law.” RCW 11.96A.030(1)(d).

Respondents’ interpret RCW 11.96A.030(1)(d) to mean “[t]he court has the ability to grant to a guardian any necessary or desirable power not otherwise granted in the governing instrument (the order

appointing the limited guardian)² or given by law.” Brief of Respondents, page 6. This is **not** what the statute authorizes, as its plain language makes clear. Such an interpretation would directly contradict the provision of RCW 11.88.010(2) that no person shall “lose any legal rights or suffer any legal disabilities as a result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship.”

Subsection (1)(d) of RCW 11.96A.030 is not the broad grant of power suggested by Respondents; rather, it is merely authorization for a trial court to **settle a dispute** over a grant to a personal representative or trustee “of any necessary or desirable power not otherwise granted in the governing instrument or given by law.” RCW 11.96A.030(1)(d).

The trial court could have settled such a dispute by ordering mediation or arbitration on the issue, or the parties could have reached an agreement on the issue, or the dispute could have been settled by the court itself in judicial proceedings. RCW 11.96A.010.

However, judicial resolution of disputes under Chapter 11.96A RCW takes place through “special proceeding[s] under the civil rules of court.” RCW 11.96A.090(1). Such proceedings must either be

² A court order is not an “instrument,” which is “a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.” Black’s Law Dictionary (7th ed. 1999), page 801.

commenced “as a new action or as an action incidental to an existing judicial proceeding related to the same . . . estate asset.” RCW 11.96A.090(1), (2), and (3). No such action was commenced in this case.

Application of the dispute resolution provisions set out in Chapter 11.96A RCW is further limited by the language of the statute itself:

The provisions of this chapter apply to disputes arising with estates of incapacitated persons **unless otherwise covered by chapters 11.88 and 11.92 RCW**. (Emphasis added.)

RCW 11.96A.080(2) (emphasis added).

Where the “dispute” here was whether Michael McKean (or through his influence, Shannon McKean) had “in his or her possession” property or assets of the wards or whether Michael McKean “had concealed, embezzled, conveyed or disposed of” such property or assets” (CP 344), the “dispute” was “covered” by RCW 11.92.185. RCW

11.92.185 provides:

The court shall have authority to bring before it, in the manner prescribed by RCW 11.48.070, any person or persons suspected of having in his or her possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate of incapacitated persons subject to administration under this title.

The court should have utilized the provisions of RCW 11.92.185 and RCW 11.48.070 to resolve the “dispute” over whether Mr. McKean,

Shannon McKean, or Connie (McKean) Hodges were controlling property belonging to Michelle and Morgan McKean.

Finally, rather than granting unfettered discretion to order a limited guardian to pursue any activity whatsoever, RCW 11.96A.060 actually limits what a court “may make, issue, and cause to be filed.” Under that statute, the court may only do what “might be considered proper or necessary in the exercise of the jurisdiction or power given or intended to be given” by Title 11 of the Revised Code of Washington. RCW 11.96A.060. Chapter 11.96A RCW does not legitimize the trial court’s orders expanding the duties of the limited guardian far beyond the intent of the legislature as set out in Chapters 11.88 and 11.92 RCW.

C. RCW 11.92.185 and 11.48.070 do limit the authority of a superior court in a guardianship proceeding.

1. The trial court exceeded its authority by ordering the limited guardian to “pursue recovery” and “recover property” in the possession of persons other than Morgan and Michelle McKean in the guardianship proceeding.

Respondents assert at page 7 of their Brief that “RCW 11.92.185 and 11.48.070 do not limit the authority of a guardian or the superior court.” Again, Respondents are wrong.

RCW 11.92.185 states:

The court shall have authority to bring before it, in the manner prescribed by RCW 11.48.070, any person or

persons suspected of having in his or her possession or having concealed, embezzled, convey or disposed of any of the property of the estate of incapacitated persons subject to administration under this title.

No Washington court has yet construed RCW 11.92.185; however, current RCW 11.48.070 is the successor statute to law that has been in existence since 1854. *See* Historical and Statutory Notes to RCWA 11.48.070. This statute and its predecessors have been construed and applied by Washington courts. RCW 11.48.070 states:

The court shall have authority to bring before it any person or persons suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate of decedents or incompetents subject to administration under this title, or who has in his possession or within his knowledge any conveyances, bonds, contracts, or other writings which contain evidence of or may tend to establish the right, title, interest or claim of the deceased in and to any property. If such person be not in the county in which the letters were granted, he may be cited and examined either before the court of the county where found or before the court issuing the order of citation, and if he be found innocent of the charges he shall be entitled to recover costs of the estate, which costs shall be fees and mileage of witnesses, statutory attorney's fees, and such per diem and mileage for the person so charged as allowed to witnesses in civil proceedings. Such party may be brought before the court by means of citation such as the court may choose to issue, and if he refuse to answer such interrogatories as may be put to him touching such matters, the court may commit him to the county jail, there to remain until he shall be willing to make such answers.

This statute is "one of discovery only," and does not authorize a court, upon citation, to try title to the property in question. *State ex rel.*

Wolfe v. Superior Court of King County, 139 Wn. 102, 105, 245 P. 764

(1926). Application of the statute was more fully explained in a subsequent case:

Boiled down, the statute means that a person suspected concerning property of the decedent's estate may be brought before the court, and if he refuse to answer such interrogatories as may be put to him touching such matters the court may commit him to the county jail, there to remain until he shall be willing to make such answers.

The statute in no way authorizes, nor was it intended to authorize, the superior court to try out the title to, nor the right of possession of, property claimed by the representative of an estate; nor to qualify any witness, whether interested or not, expert or nonexpert, so that he may testify at some possible future trial, civil or criminal. The statute is one of discovery. It does not relate to the trial of any pending issue. We have so held.

State ex rel. Brown v. Long, 180 Wn. 602, 605, 41 P.2d 396 (1935).

“Trying out the title to” or determining the “right of possession” of identified property claimed by a limited guardian to be part of a ward's estate but in the possession of another person would be the proper subject of special judicial proceedings under RCW 11.96A.090(1) – (3). In this case, no such proceedings were commenced.

The trial court's initial order authorizing the limited guardian “pursue the recovery” of unidentified property “dissipated by any custodian (or agent of the custodian) of the assets of the respective trusts, custodial accounts, estate, or other assets of Michelle [and/or Morgan]

McKean” (CP 5) and “to recover property or assets of Michelle [and/or Morgan] McKean which another person or persons have in his or her possession or which has been concealed, embezzled, conveyed or disposed of” (CP 6) far exceeds the scope of what a trial court and a limited guardian may do in a guardianship proceeding.

In *In the Matter of the Estate of Bailey*, 58 Wn.2d 685, 364 P.2d 539 (1961), RCW 11.48.070 was utilized to call before the court an heir who had at one time served as special administratrix of an estate to answer interrogatories about an “unorganized mass of data (which filled twenty-four cartons).” *Id.* at 701, 364 P.2d 539. The Court wrote: “In this state the legislature has provided the means to enable administrators to obtain necessary information from any person. See RCW 11.48.070, supra[.]” The Court added that in spite of the heir’s failure to co-operate, “[t]he remedies of the administrators are purely statutory and no other remedy lies.” *Id.*

Applying *Bailey* by analogy to this case, the limited guardian had the statutory means to “obtain necessary information from any person” regarding identified property of Morgan and Michelle McKean that the guardian suspected had been concealed, embezzled, conveyed or disposed of. That “statutory means” consisted of the citation procedure set out in RCW 11.48.070 and adopted in RCW 11.92.185, and “any person”

included Michael McKean, Connie [McKean] Hodges, and Shannon McKean. If the guardian desired to have a court determine the right to possess or to “try out the title” to identified property the guardian believed belonged to the guardianship estates, a special proceeding under Chapter 11.96A RCW could have been commenced.

The trial court’s original order, which authorized the limited guardian to recover unidentified property or assets of Morgan and Michelle McKean “which another person or persons have in his or her possession or which has been concealed, embezzled, conveyed or disposed of” (CP 6), and which authorized expenditures for such recovery, launched a prosecutorial-like investigation seeking unknown assets “suspected” by the guardian to exist somewhere. The order exceeded the authority of the court and was the result of an incorrect interpretation and application of the guardianship statutes.

2. The citation procedure set out in RCW 11.48.070 and RCW 11.92.185 applied to Michael McKean.

By the plain language of the statutes, “**any** person . . . suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any property of the estates” may be brought before the court by citation for questioning regarding the property. RCW 11.92.185, RCW 11.48.070 (emphasis added). Michael McKean, Shannon McKean, and

Connie (Hodges) McKean are all “persons,” and they were suspected of having in their possession or having concealed, embezzled, conveyed or disposed of property belonging to Morgan and Michelle McKean. The authorized procedure to “investigate” the guardian’s suspicion was to call these persons before the court for questioning, not to authorize the guardian and his attorneys to conduct an independent investigation into the legal and financial affairs of these individuals.

Contrary to the assertion of Respondents at page 8 of their Brief, Mr. McKean has not argued on this appeal “that because the procedural tools of a citation were not used the trial court did not have jurisdiction over him.” *See* Brief of Appellant, pages 14-17.

Mr. McKean has not objected to a lack of personal jurisdiction over himself because he appeared in the guardianship proceedings and filed the first appeal in this case as the father, or “next friend,” of his daughters. *See* 6/22/04 Letter from David Ponzoha to counsel (Case No. 31661-7-II) stating, “Michael McKean has standing to appeal the orders as the “next of friend” [sic] of Michelle and Morgan McKean.”

Also contrary to Respondents’ assertion at page 8 of their Brief, Mr. McKean has not sought “affirmative relief” at any time in this case. “Affirmative relief” is defined as relief which Mr. McKean, as a defendant, might seek by raising a counterclaim or cross-claim, that could

have been maintained independently of a plaintiff's action. *See Negash v. Sawyer*, 131 Wn. App. 822, 826-827, 129 P.3d 824 (2006); Black's Law Dictionary (7th ed. 1997), page 1293.

The interests Mr. McKean sought to protect in the proceedings below and in the first appeal were those of his daughters. *See Williams v. Cleaveland*, 76 Conn. 426, 56 A. 850, 852 (1904) (prochein ami ("next friend") of an infant is not a "real party" to the action which they may prosecute or defend). Respondents incorrectly state that Mr. McKean "made himself a party to the proceeding." Brief of Respondents, page 8.

However, whether Mr. McKean was or was not a "party" in the guardianship proceedings, if there was a suspicion that he had concealed, embezzled, conveyed, or disposed of property belonging to Morgan or Michelle McKean, the only proper procedure in the guardianship proceeding was for the court to call him for questioning. Contrary to Respondents' argument that "[t]here was no reason for the trial court to cite Michael under RCW 11.92.185 and 11.48.070," the "reason" to follow the statutory procedure is that it is what the legislature has mandated for a guardianship case.

Respondents hint that because of Mr. McKean's background, utilizing the citation process was either not necessary or would have been futile. *See* Brief of Respondents, page 9. There is no exception for

application of the statutes to disbarred attorneys or persons convicted of a crime set out in RCW 11.92.185 or RCW 11.48.070.

Finally, “six judicial officers” have not “intimated” that “this guardianship cried out for an investigation done with due diligence,” as stated by Respondents at page 9 of their Brief. A guardianship does not encompass the prosecutorial-like investigation of a third party, even where the wards’ father has been disbarred and convicted of a felony. The court was required to conduct any “investigation” regarding property belonging to Morgan and Michelle suspected to be in the possession or control of Mr. McKean by means set out in RCW 11.92.185 and RCW 11.48.070.

D. The trial court did breach its duty to Michelle and Morgan McKean.

Mr. McKean’s complaint on this appeal is not that the guardian identified, marshaled, and inventoried non-trust accounts belonging to Morgan and Michelle during the first five months of its appointment. These activities are authorized under RCW 11.92.040. As noted by Respondents, however, these activities were accomplished within the first five months of the limited guardian’s appointment. Brief of Respondents, page 12-13.

Mr. McKean’s complaint is that the court authorized further “investigation” and litigation at the expense of Morgan and Michelle

McKean outside of the statutory procedures set out in RCW 11.92.185 and RCW 11.48.070. Even though the trial court was well aware that the fees of the limited guardian and its attorneys were going to be paid from the assets of the wards, the trial court did not appoint a guardian ad litem for Morgan and Michelle when making its rulings on the fees. *See In the Matter of the Guardianship of Ivarrison*, 60 Wn.2d 733, 735-736, 375 P.2d 509 (1962) (“When a probate court is called upon to determine the fees of a guardian and of his attorneys, which are to be paid from the estate of his ward, this obvious conflict of interest has caused probate courts to appoint guardians ad litem to represent minor wards in the hearings on such interim accounts of their guardians. . . .”).

The trial court’s duty to Morgan and Michelle McKean was to preserve and conserve their property for their own use, as distinguished from the benefit of others. *In re Michelson’s Guardianship*, 8 Wn.2d 327, 336, 111 P.2d 1011 (1941). Only Mr. McKean stood before the court attempting to preserve and conserve his daughter’s property for their own use in the proceedings below.

Incredibly, Respondents assert that “marshaling, protecting and preserving the assets of Morgan and Michelle is exactly what the trial court achieved.” Brief of Respondents, page 10. The non-trust assets of Morgan and Michelle were most certainly not protected or preserved by

the court: they were completely exhausted by the court's authorized payment of costs and fees requested by professionals, the large bulk of which went to the guardian and its attorneys. By authorizing improper "investigatory" activities and payment therefor from their non-trust assets, the court breached its duty to protect the interests of Morgan and Michelle McKean.

E. Where the fees of the limited guardian and his attorneys would be paid from the assets of the wards, there was a conflict of interest between the guardian and his wards.

Respondents mischaracterize Mr. McKean's argument that "the sweeping breadth of the court's order appointing the limited guardian created a conflict of financial interest between the wards and their guardians." Brief of Appellant, page 24. Mr. McKean certainly did **not** argue, as Respondents state, that "a conflict of interest arises if fiduciaries charge a fee for conducting an activity they are required to undertake." Brief of Respondents, page 22.

An "obvious conflict of interest" arises where fees of a guardian and of his attorneys are to be paid from the estate of his ward. *Guardianship of Ivarrison*, 60 Wn.2d at 735-736, 375 P.2d 509. The "obvious" conflict of interest was exacerbated when the trial court entered orders for "investigatory" activities and "recovery" of assets – work far beyond the scope of a limited guardianship.

While Respondents' description of how a court should protect the ward's interest "at the time they consider the request by the guardian to do or abstain from doing something on behalf of the ward," and should again protect the ward's interest by "assess[ing] whether there is or was value conferred to the incapacitated person" (Brief of Respondents, page 23) is absolutely correct, these protections were not afforded to Morgan and Michelle McKean.

Respondents' assertion at page 23 of their Brief that, "[w]ith respect to fee requests, it is well settled that guardians should receive compensation for services that benefited a ward" blithely ignores Mr. McKean's argument that most of the "services" performed by the guardian and its attorneys did **not** benefit Morgan and Michelle McKean. The authorities cited by Respondents do not support their position.

The first case cited by Respondents is *In re Montgomery's Estate*, 140 Wn. 51, 52, 248 P. 64 (1926), in which a guardian of an estate "received large sums of money as commissions upon real estate loans made by him with the [ward's] funds[.]" The guardian "made no accounting of these commissions, and claim[ed] them for his own," and also "received and kept for his own use commissions received on insurance premiums paid for insuring property of [the ward's] estate[.]" *Id.*

In the year before the case was heard by the Supreme Court, the “entire income from the estate was absorbed by the attorney and guardianship fees which [the ward] allege[d] to be unreasonably large and excessive,” and the ward sought revocation of the letters of guardianship, a new appointment of a suitable person, an order revoking all ex parte orders allowing excessive compensation, and all orders allowing the guardian commissions on real estate loans, insurance, and sales, and that orders be made adjudging the reasonable amount of compensation of the attorneys and guardian.” *Id.*

The Supreme Court reversed the trial court’s ruling in favor of the guardian, writing:

A guardian cannot be allowed to make a profit from the handling of his ward’s estate. **His compensation must be such a sum as the court deems proper in view of the value of the services performed. To allow the guardian to do otherwise is to place him in a position where there is a temptation to speculate with his ward’s estate, and lead to the ultimate danger of improvident deals and perhaps loss of the estate itself. . . .**

It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

Montgomery’s Estate, 140 Wn. at 53-54, 248 P. 64 (emphasis added).

In this case, a different kind of speculation with the wards' estates than took place in *Montgomery's Estate* was authorized, but it was speculation with the wards' estates nonetheless. The court authorized the guardian and its attorneys to undertake an independent review of past litigation and conduct an independent investigation into the affairs of third parties in a gamble that somewhere some unknown assets belonging to Morgan and Michelle McKean have escaped detection by other courts. Even when only a single small and dormant savings account was unearthed, the court authorized payment for the "services," stating "they have done the work and they should get paid." 2/16/06 RP 79. It is Mr. McKean's position that most of the "work" should never have been authorized and that Morgan and Michelle should not have been required to pay for the "work" that exceeded the bounds of a limited guardianship.

The other case cited by Respondents is *In re Leslie's Estate*, 137 Wn. 2d, 241 P. 301 (1925). The opinion does not state any basis for the appellants' objection to the amount of fees paid to the guardian. The Court noted in passing that the trial court "was better able to determine than we are the value of the estate and what had been done to preserve it," and stated it did not feel justified in altering an amount determined by the trial court to be fair and reasonable. *Leslie's Estate*, 137 Wn. 2d at 23, 241 P.

301. *Leslie's Estate* is not instructive here, because in this case, the non-trust estates of the wards were not “preserved,” but were, instead, completely exhausted by payments to professionals.

F. The trial court abused its discretion by approving the fees of the guardian and its attorneys because the fees were in large part payment for “services” outside the scope of a limited guardianship.

Respondents’ inappropriate reference to *Rideout* and *Jannot* notwithstanding, the correct standard of review of a trial court’s order for payment of fees in a guardianship case is abuse of discretion. *Guardianship of Eubank*, 50 Wn. App. 611, 621, 749 P.2d 691 (1988) (applying former RCW 11.96.140, now RCW 11.96A.150) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971)).

“The trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons.” *In re Marriage of Payne*, 79 Wn. App. 43, 54, 899 P.2d 1318 (1995). In this case, the trial court approved most of the requested fees simply because the guardian and its attorneys had “done the work,” most certainly an untenable reason.

Respondents go to great length to set out the history of their fee requests and the court’s “thorough and scrupulous” review of those requests at pages 23-28 of their Brief. However, the issue of abuse of discretion is not based on any procedural error: rather, it is based on (1)

the court's approval of payment of professional fees from the non-trust assets of Morgan and Michelle McKean for "services" that went far beyond the proper scope of a limited guardianship, and (2) approval of fees that completely exhausted the non-trust assets of the minors to pay for the "services" which did not benefit their estates was not "just and reasonable."

Respondents also argue that because Morgan and Michelle have trust assets in addition to the non-trust assets that were exhausted by payment of professional fees, they were "not impoverished by the award of fees and costs to those professionals working on their behalf." Brief of Respondents, page 27. "Impoverishment" of a ward is not the applicable standard for what constitutes "just and reasonable" fees for a guardian and its attorneys. A limited guardianship is established for the purpose of **preserving** the assets of the ward which are placed in the guardianship, and the fact that the ward may have other assets outside of the guardianship estate does not change the purpose of the guardianship.

The fact remains that before the limited guardian was appointed, the Morgan and Michelle McKean had non-trust assets exceeding \$50,000.00 and after the trial court terminated the guardianship, the minors had **no** non-trust assets, all of which had gone to pay "those professionals working on their behalf."

The amount of the minors' money that was expended for payment of professionals was not "just and reasonable," even after the "write-offs" by Respondents and reductions by the court. *See* Brief of Respondents, pages 26 and 30. Aside from one small savings account that had been overlooked by Judge Sebring during Mr. McKean's divorce, the limited guardian discovered no assets that were not known before his appointment. The only "benefit" received by the minors was the initial "marshalling" of their non-trust accounts. The discovery, "independent verification," and recovery activities of the guardian and its attorneys provided no benefit whatsoever to Morgan and Michelle McKean. Surely the discretion of a trial court to authorize payment of professional fees from a ward's estate is not this broad. This Court should rule that exhausting the non-trust assets of the minors for payment of professional fees, with no benefit to their estates beyond the initial marshalling of the custodial accounts, constituted an abuse of discretion.

G. This case is one of first impression that presents debatable issues of substantial public importance and is thus not "frivolous."

Respondents request this court to assess sanctions against Mr. McKean's counsel "pursuant to RAP 18.9" because "Michael's legal arguments in this appeal are completely without merit." Brief of Respondent, page 31. An appeal is "frivolous" only if there are no

debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Childs v. Allen*, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), *review denied*, 155 Wn.2d 1005, 122 P.3d 185 (2005). This appeal is not “frivolous.”

As his daughters’ “next friend,” Mr. McKean stepped forward and “indicated to the probate court by chapter and verse” his conception that “the ward’s estate [wa]s being wrongfully dissipated,” and “[t]his appeal is properly before” this Court. *Guardianship of Ivarrison*, 60 Wn.2d at 736, 375 P.2d 509. The *Ivarrison* Court did not find the appeal of the ward’s next friend “frivolous,” and this Court should not find the appeal of Mr. McKean on behalf of his daughters “frivolous.”

No Washington court has yet construed RCW 11.92.185: this case is one of first impression that presents debatable issues of substantial public importance. It is therefore not “frivolous.” *Cary v. Allstate Ins. Co.*, 78 Wn. App. 434, 441, 897 P.2d 409 (1995), *affirmed*, 130 Wn.2d 335, 922 P.2d 1335 (1996).

III. CONCLUSION

The limited guardian was appointed not only to “inventory, protect, and preserve” (Brief of Respondents, page 32) the non-trust assets of Morgan and Michelle McKean, but also to independently “pursue the recovery” of assets “of the respective trusts, custodial accounts, estate, or

other assets” of the minors, and to “independently verify the amount and location of all assets belonging to” the minors “given Mr. McKean’s disbarment as an attorney and his criminal acts involving moral turpitude” (CP 5-6; CP 15-16; CP 918), sidestepping the mandated procedures set out in RCW 11.92.185 and 11.48.070.

While the limited guardian may have “successfully carried out” the orders of the trial court, those orders were based on an incorrect interpretation and application of the guardianship statutes and the compensation for work done pursuant to those orders was not “just and reasonable.”

This Court has affirmed the order requiring Mr. McKean to post a \$25,000 bond to guarantee payment of the fees of the guardian and his attorneys on this appeal. With that exception, the Court should grant the relief sought by Mr. McKean on behalf of Morgan and Michelle McKean at pages 37-38 of the opening Brief of Appellant.

DATED this 11th day of July, 2006.

Respectfully submitted,



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Attorney for Appellant

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COUNTY OF PIERCE

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TACOMA, WASHINGTON

BY 

**IN THE COURT OF APPEALS, DIVISION II
COUNTY OF PIERCE, STATE OF WASHINGTON**

In re the Guardianship of:

MICHELLE McKEAN, and
MORGAN McKEAN,

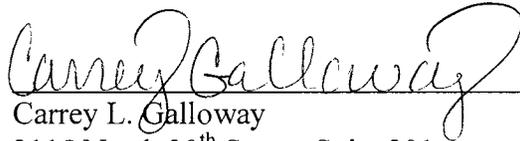
Minors.

NO. 34132-8-II

CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the **Reply Brief of Appellant, and this certificate of service;** were deposited with ABC Legal Messenger Service on the date stated below, for delivery no later than July 13, 2006, to: Robin Balsam, Attorney at Law, 609 Tacoma, Avenue South, Tacoma, Washington 98402; and to Hertog & Coster, PLLC, 520 Pike Street, Suite 1350, Seattle, Washington 98101-4023; and via United States Mail, deposited on the date signed below to Shannon Keene at 1604 Springfield Court NE, Olympia, Washington 98506.

Signed at Tacoma, Washington this 11th day of July, 2006.


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