

No. 34132-8-II

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

In re the Guardianship of:
MICHELL McKEAN and MORGAN McKEAN

BRIEF OF RESPONDENT

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

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I. INTRODUCTION

There exists a consensus amongst everyone that has ever had the misfortune of dealing with Michael McKean. “[N]othing goes smoothly, everything is much harder than it should be, everything takes forever, and virtually nothing productive ever takes place.” (CP 543; CP 562) This appeal is a prime example of this consensus.

Six separate judicial officers that touched this case concluded that Michael’s children, Morgan and Michelle, have financial interests that need to be investigated and protected. Judge Sebring of the Pierce County Superior Court found that Michael and ex-wife Connie McKean (n.k.a. Connie Hodges) had practiced deceit with respect to their community and separate assets, (CP1598) and that the trusts established for Morgan and Michelle were being mismanaged by family members (Shannon Keene) and friends at the control of Michael McKean. (CP 1598-1599; CP 1126-1137). Commissioner Marshal of the Pierce County Superior Court, stated that “we have children with assets, we have a father who is a convicted felon, a mother who has misappropriated assets. How much more clear a picture is there that you need a guardian, I don’t know.” (CP 521) He also stated Michael and Shannon had provided no accountings for the assets for the children, tax returns, or any documents that indicate that the assets of the children had ever been properly managed. (CP 519) Judge Grant of

the Pierce County Superior Court, agreed with the need for a guardian for Morgan and Michelle McKean and in great detail set forth the duties and parameters for the guardianship. (CP1-19) Judges Armstrong, Bridgewater, and Houghton of this Division II Court of Appeals unanimously supported the establishment of this guardianship. *In re the Guardianship of McKean*, 126 Wn.App. 1028, 2005 WL 591245.

The guardian and its attorney did not create Michael's plight in life, this is entirely a creation of his own choices.¹ The guardian and its attorney did not petition the trial court to establish the guardianship and it did not seek out this appointment. The guardian and its attorney were requested to fulfill a recognized need for two minor children and they agreed to do so. The guardian and its attorneys acted at all times in good faith, at the behest and direction of the trial court, and sought instructions from the trial court before proceeding in its efforts to identify, marshal, protect and preserve the assets of the minors in this matter.

The reason for the guardianship over Michelle McKean and Morgan McKean dates back to sometime around 1996 when Michael

¹ As an example, the guardian and its attorneys were authorized to review and obtain court records for Michael's chapter 11 bankruptcy that he filed on April 2, 2002 to locate any assets that might belong to Morgan or Michelle (e.g. Ocean Shores property). Michael's bankruptcy was converted from Chapter 11 to a Chapter 7 on May 11, 2005 based on pleas from his creditors that Michael had withheld financial information, and demonstrated a total unwillingness or inability to discharge his fiduciary duties as a debtor in possession. (CP 556-564)

found himself in trouble with the Federal Government for among other things: bank fraud, false request for a loan, false cost certification, unlawful payment from a bank, presenting a forged cashier's check, and filing false tax returns. (CP1121-1124; CP 1598) Michael began to change assets into cash, bearer bonds, gold, and other items that were hard to seize or trace. (CP1598) Michael and his then wife, Connie, also established bank accounts and trusts in the name of Michael's child, Michelle, and Michael and Connie's child, Morgan. (CP1112; CP1123; CP1130) These transactions were conducted with the intent and purpose of hiding assets from the Federal Government. (CP 1598; CP 1126-1137)

In May 1998 Connie and Michael separated. (CP1598) In July 1998 after entering a guilty plea, Michael began serving a prison sentence in a federal penitentiary in Oregon. (CP1598) During his incarceration Connie spent lavishly using not only community assets, but assets belonging to Michelle. (CP1598) In December 1999 Michael returned to his home from prison to find Connie destroying financial documents. (CP 1598) Soon thereafter, Michael created a trust for his daughter Michelle and named his sister, Shannon Keene as Trustee. (CP247-249) In violation of a restraining order entered in the divorce proceeding, Michael transferred title to a parcel of real property located in Ocean Shores, Washington to Shannon as the trustee of the Michelle McKean

Dependency Trust, which Shannon accepted. (CP289-296; CP 1534-1535).

It was the destruction of records, the hiding, absconding and mismanaging of assets, and the lack of fiduciary trust that ignited both a trust action and this guardianship action to protect the assets and interest of Morgan and Michelle McKean.

II. RESPONSES TO THE ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

A. The trial court's duty was to protect the financial interest of two minor children and, in so doing, the trial court had full and ample authority to make, issue, and cause to be issued any and all manner and kinds of orders and judgments granting the limited guardian any necessary or desirable power not otherwise granted or given by law. (Response to Error 1,2)

B. After carefully scrutinizing the fees and costs of the guardian and its counsel and considering the case law pertaining to the award of professional fees and costs as well as the rules of professional conduct, and considering all of the assets available to Morgan and Michelle, the trial court did not abuse its discretion in awarding fees and costs payable from the guardianship assets of the estate. (Response to Error 3,4,5,6)

C. Michael was a party to this guardianship proceeding, and as such, the trial court had the authority to apportion responsibility for payment of the fees and costs of the guardian's counsel to Michael. (Response to Error 7)

D. On May 18, 2006 and May 19, 2006, this court ruled that the amount of the supersedeas bond was proper. (Response to Error 8)

E. The Guardian and the Guardian's counsel should be awarded fees and costs for defending this appeal. (Response to Error 1-6)

III. RESPONSE ARGUMENT

A. STANDARD OF REVIEW: THE TRIAL COURT'S FACTUAL FINDINGS ARE REVIEWED FOR SUBSTANTIAL EVIDENCE AND ITS ORDERS REVIEWED FOR ABUSE OF DISCRETION.

This court ordinarily reviews the trial court's orders in probate cases for abuse of discretion. *Guardianship of Bouchat*, 11 Wn. App. 369, 374, 522 P.2d 1168 (1974), *rev. denied*, 85 Wn.2d 1010 (1975); *In re Jausaud's Estate*, 71 Wn.2d 87, 91, 426 P.2d 602 (1967). However, in a case such as this one where a local trial court judge routinely sits as a probate court, and over months of proceedings becomes intimately familiar with the parties' dispute, such decision makers are "better equipped than multi-judge appellate courts to resolve conflicts and draw inferences from the evidence." *Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003); *See Parentage of Jannot*, 149 Wn.2d 123, 127,

65 P.3d 664 (2003)(giving deference to the trial court's determination because the trial court "evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review").

B. THE TRIAL COURT'S DUTY WAS TO PROTECT THE FINANCIAL INTEREST OF TWO MINOR CHILDREN. IN SO DOING, THE TRIAL COURT HAD FULL AND AMPLE AUTHORITY TO MAKE, ISSUE, AND CAUSE TO BE FILED ANY AND ALL MANNER AND KINDS OF ORDERS AND JUDGMENTS GRANTING THE LIMITED GUARDIAN ANY NECESSARY OR DESIRABLE POWER NOT OTHERWISE GRANTED OR GIVEN BY LAW.

The trial court's fundamental role in a guardianship proceeding is to protect the interests of the incapacitated person. *In re Gaddis' Guardianship*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942). To carry out such an important role the legislature provided the courts with full and ample power to administer and settle all matters concerning the estates and assets of incapacitated persons. RCW 11.96A.020. The term "matter" includes any issue, question, or dispute involving the direction of a guardian² to do or to abstain from **doing** any act in a fiduciary capacity. RCW 11.96A.030(1)(b). The 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) or given by law.

² The statute refers to "personal representative," which as used under Title 11 RCW includes guardian or limited guardian. RCW 11.02.005 (1)

RCW 11.96A.030(1)(d). “The court may make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title.” RCW 11.96A.060.

The Washington Supreme Court has interpreted a Superior Court’s authority as not being bound by the constraints of the guardianship statutes. *See In re Adamec*, 100 Wn.2d 166, 175 667 P.2d 1085 (1983)(*citing* RCW 11.02.020 now codified at RCW 11.96A.020, “The trial court in a guardianship proceeding is not limited to the particular powers enumerated in the statutes specifically governing guardianship proceedings.”)

Despite the clear intent of the legislature, the clear language of the statutes, and the case law interpreting the authority of the court in guardianship matters, Michael tries to convince this court that the trial court, and therefore the guardian was limited in its actions in this matter to the powers and authorities granted by RCW 11.92.185 and 11.48.070.

RCW 11.92.185 and 11.48.070 do not limit the authority of a guardian or the superior court. These statutes provide a procedural tool for obtaining personal jurisdiction over an individual, not already a party to the guardianship proceeding, who has been accused of concealing,

embezzling, conveying or disposing of any of the property of the estate of the incapacitated person. Michael also tries to argue that because the procedural tools of a citation were not used the trial court did not have jurisdiction over him.

During the two year guardianship Michael never raised an objection as to jurisdiction, even when the trial court entered conclusions of law that it had personal jurisdiction over him. (CP 683-685; CP 920; CP 1372; CP 1446-1447) Michael provided both written and oral testimony to the trial court and engaged in discovery in this matter. (CP 80-86; CP 93-96; CP 160-163; CP 678-682; CP 884-887; CP 1001-1006; CP 1462-1469; CP 1484-1489) Michael filed a substantial number of objections and pleadings in this matter which requested affirmative relief from the trial court. (CP115-118; CP 1162-1169; CP 1292-1293; CP 119-122; CP 1159-1161; CP 1423; CP 1424; CP 1448-1449; CP 1508-1515; CP 1650-1651) (A party personally submits to the jurisdiction of the court by requesting affirmative relief, *In re Marriage of Parks*, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987)). Michael also took an appeal from the order appointing limited guardian. For Michael to now argue that the trial court was without jurisdiction over him is farcical. There was no reason for the trial court to cite Michael under RCW 11.92.185 and 11.48.070, he had already made himself a party to the proceeding.

Assuming that the citation process would have been used, would Michael, his straw person, Shannon, or Connie's veracity have improved? Would they state anything different than what they provided in over twenty convoluted and contradictory declarations? As the six judicial officers who reviewed this case intimated, this guardianship cried out for an investigation done with due diligence, not a blind obedience to what Michael may suggest.

C. THE TRIAL COURT DID NOT BREACH ITS FIDUCIARY DUTY TO MORGAN AND MICHELLE MCKEAN.

The guardian had a duty to inventory all property that came into the guardians possession or knowledge and to then "protect and preserve" the estate. RCW11.92.040(2) and (4). The broad scope of RCW 11.92.040 requires the guardian or limited guardian to inventory all property of the ward coming into his or her knowledge and requires the inventorying of assets subject to a trust for the ward's benefit. GERALD TREACY, WASHINGTON GUARDIANSHIP LAW: ADMINISTRATION AND LITIGATION, §9-16, fn.71 (3rd ed. 2006)(*Cf. First Interstate v. Lindberg*, 48 Wn. App. 788, 791, 746 P.2d 333 (1987), interpreting "protect and preserve" assets as the duty by a fiduciary to marshal assets). Through the carefully constructed orders appointing the guardian, (CP 1-19) subsequent orders directing the establishment of a discovery plan, (CP 98; CP 168-171) and

a requirement of a meet and confer arrangement by which the parties and counsel were to disclose and exchange information relevant to the guardianship, (CP 683-685) marshaling, protecting and preserving the assets of Morgan and Michelle is exactly what the trial court achieved.

The universe of assets belonging to Morgan and Michelle included within the guardian's order of appointment was not limited to those assets that Michael may have hidden, absconded, or mismanaged. The order of appointment also included assets under the control of Shannon in her multiple fiduciary roles, and Connie. (CP 1-19)

When the guardianship was established in 2004 there were three available sources of information that disclosed potential leads as to the whereabouts of Morgan and Michelle McKean's financial interests: 1) the Findings of Fact, Conclusions of Law and Decree of Dissolution entered by Judge Sebring that finalized the divorce between Michael and Connie; (CP 1583-1600) 2) the report filed by the court appointed guardian ad litem in this matter; (CP 1472-1483) and 3) the declarations filed by Michael. (CP 1462-1469; CP 1484-1490)

Judge Sebring found that assets were held in an unidentified trust for the benefit of Morgan and Michelle. Two of the trust accounts were held at Primevest in the approximate amounts of \$10,800.00 and \$21,811.00. (CP1598) Savings bonds in the approximate amount of

\$6,000.00 were being held at an unidentified financial institution. (CP 1599). Shannon held approximately \$112,000.00 in an unidentified trust started by Michael's mother, Patricia Mandich, for perhaps Morgan or Michelle. (CP 1599)³

According to Michael, Michelle had a Uniform Gift to Minor Account (UGMA) at Primevest, which Connie put her name on, took approximately \$10,000.00 from, and moved the account Denver, Colorado. Michael stated "I do not know where the children's cash accounts are." (CP 1463-1464) Michael also stated that he established UGMA accounts at Columbia Bank in the total amount of \$20,000.00 for Michelle and Morgan, which he stated vanished. "I do not know what happened to those accounts." (CP 1464) Michael disclosed the Morgan McKean Dependency Trust which he stated held title to a parcel of real property in Ocean Shores, Washington, and 15,000 shares of stock ownership in the Environmental Fuel Development Corporation. (CP 1465) Michael also disclosed the existence of a Michelle McKean Dependency Trust, which also owned 15,000 shares of stock in Environmental Fuel Development Corporation. (CP 1465) Michael disclosed the property belonging to an irrevocable trust he created for his children. Lastly, Michael disclosed a trust established and funded by his

³ The list of assets also included the Irrevocable Trust for Michael McKean's Children.

mother Patricia Mandich but did not disclose what assets were held in the trust. (CP 1465)

The guardian ad litem reported that Michael had established an irrevocable trust for his children and the contents of that trust. The guardian ad litem also reported that Michelle had a dependency trust with 15,000 shares of Environmental Fuel Development Corporation, real property located in Ocean Shores, Washington, real property located on Fox Island, Washington, and a Sterling Savings Bank Account. (CP1478) The guardian ad litem reported that Morgan also had a dependency trust that held 15,000 shares of Environmental Fuel Development Corporation. (CP 1479) The guardian ad litem also stated that there was an unconfirmed \$20,000.00 CD at Columbia Bank and an account at Twin County Credit Union. (CP 1480)

Within three months of its appointment the guardian had located, marshaled, and inventoried accounts in the name of Morgan at Twin County Credit Union in the amount of \$11,942.51 and at Columbia Bank in the amount of \$2,647.89. (CP 109-111; CP 112-114) Within five months of its appointment the guardian turned up assets such as a Raymond James Financial Account for Michelle with a balance of over \$25,000.00 and a Raymond James Financial Account for Morgan with a balance of almost \$13,000.00. In sum, between the accounts at Raymond

James Financial, Columbia Bank, and Twin County Credit Union the guardian identified and marshaled \$27,185.19 in the name of Morgan and \$24,823.49 in the name of Michelle. (CP 134-137)

On January 12, 2005 the guardian filed an extensive memorandum outlining the financial interests and potential causes of action belonging to Morgan and Michelle. (CP 206-396) Those assets and interests presented to the trial court were as follows:

MICHELLE'S ASSETS AND INTRESTS: (CP 206-396)

A) INDIVIDUAL ASSETS: Raymond James account with a value of \$25,823.49.

B) CLAIM AGAINST CONNIE McKEAN: On November 3, 2000, Judge Sebring found that Connie removed \$10,000.00 from an account in Michelle's name at Primevest financial in June 1999.

C) MICHELLE McKEAN DEPENDENCY TRUST

(1) EFDC STOCK: Shannon, in her capacity as trustee, made a capital contribution of \$5,000.00 in EFDC. This trust gained an interest in EFDC a second time on July 1, 2001 when Michael executed a document entitled Instrument of Transfer and Gift, which purportedly transferred 15,000 shares of EFDC to the trust. Later, Shannon as trustee of the Michelle McKean Dependency Trust dissented as to the sale of EFDC's assets and demanded payment for the trust's shares in the amount of \$1,000,000.00. EFDC responded to this demand asserting the shares were worthless. EFDC proceeded to file a valuation action in Cowlitz County, Washington against Shannon as trustee of the Michelle McKean Dependency Trust and Morgan McKean Dependency Trust.

(2) STERLING SAVINGS ACCOUNT: value of \$683.17.

(3) FOX ISLAND PROPERTY: Shannon, in her capacity as trustee of the Michelle McKean Dependency Trust, spent

approximately 73% (\$75,371.06) of the money deposited into the trust as the down payment on a parcel of real property in Fox Island, Washington. Shannon also spent an additional \$13,201.80 on remodeling efforts (most through Michael) and \$28,148.92 in mortgage costs, taxes, utilities, septic permits, assessor fees and office expenses for this property.

(4) CLAIMS AGAINST SHANNON: The guardian reported that a claim existed against Shannon individually for damages arising from improper use and investment of trust proceeds in the Fox Island. The purchase of the trust property and the various expenditures exceeded \$145,000.00, leaving the trust with very little liquidity, rendering the trust useless for its intended purpose, which is to provide for the support, care, custody, medical care of Michelle. The fact that the trust had no liquidity contributed to Shannon's second breach of her fiduciary duty, which is not to commit waste of trust assets. Waste took two forms in this situation. First, the home was exposed to the elements and lost value by the day. Second, Shannon had an obligation and duty to make the property productive (e.g. rent the property), which Shannon could not do, because of the lack of liquidity to make the property habitable.

(5) OCEAN SHORES PROPERTY: The original transfer to the trust was improper. This asset is/was an asset in Michael's bankruptcy proceeding

D) TESTAMENTARY TRUST OF PATRICIA MANDICH

(1) MICHELLE PATRICIA GILLESPIE McKEAN

SUBTRUST: Shannon Keene as the trustee of this trust was directed to use 50% of Patricia Mandich's Crittenden-Roth account to fund a Trust to benefit Michael, Michelle and Morgan. These funds were actually used to fund the Michelle McKean Dependency Trust.

E) IRREVOCABLE TRUST FOR MICHAEL ALLISON McKEAN'S CHILDREN: This trust included 100 shares of stock in Northwest Community Housing, 20% of Michael's equity interest as general partner of 70 limited partnerships around the United States, life insurance policy

exceeding \$300,000.00, cash in the Bank of the Pacific from the sale of the assets of the limited partnerships, which the children have an interest.

(1) MICHELLE PATRICIA GILLESPIE MCKEAN
SUBTRUST: Rental home exceeding \$100,000.00 in value and rental income of \$400.00 per month.

F) GUN TRUST: firearms valued by Michael at \$80,000 to \$100,000.00.

MORGAN'S ASSETS AND INTERESTS: (CP 206-396)

A) INDIVIDUAL ASSETS

- (1) RAYMOND JAMES ACCOUNT: value of \$12,590.00.
- (2) COLUMBIA BANK ACCOUNT: value of \$2,652.51.
- (3) TWIN COUNTY CREDIT UNION: value of \$11,952.41.

B) CLAIMS AGAINST CONNIE: A Columbia Bank account was opened as early as June 1997 by Connie for the benefit of Morgan. Based on research completed by Robin Balsam a total of approximately \$72,000.00 passed through this account that is unaccounted.

C) MORGAN McKEAN DEPENDENCY TRUST

- (1) EFDC STOCK: 15,000 shares of stock valued at \$1,000,000.00.

D) TESTAMENTARY TRUST OF PATRICA MANDICH

- (1) MICHELLE PATRICIA GILLESPIE McKEAN
SUBTRUST: Shannon Keene as the trustee of this trust was directed to use 50% of Patricia Mandich's Crittenden-Roth account to fund a Trust to benefit Michael, Michelle and Morgan. These funds were actually used to fund the Michelle McKean Dependency Trust.

E) IRREVOCABLE TRUST FOR MICHAEL ALLISON McKEAN'S CHILDREN: This trust included 100 shares of stock in Northwest Community Housing, 20% of Michael's equity interest as general partner of 70 limited partnerships around the United States, a life insurance policy exceeding \$300,000.00, and cash in the Bank of the Pacific from the sale of the assets of the limited partnerships, which the children had an interest.

F) GUN TRUST: firearms valued by Michael at \$80,000 to \$100,000.00

The guardian was able to secure a \$10,000.00 cashiers check from Connie to satisfy the debt she owed to Michelle that was almost five years old. (CP 711-712) Michael objected to settlement of the claim. (CP 884-887) Due to Michael's objection, the trial court directed the guardian to send the check back to Connie. (CP 922) The trial court directed Michael to seek payment on this debt. (CP 922) As of the date of this brief, Michelle has not obtained satisfaction on this debt.

The guardian also brought to the attention of the trial court the fact that Connie may have misappropriated an additional \$70,000.00 in assets belonging to Morgan. (CP 218) Michael, through his counsel insisted that he knew the location of those assets and the trial court directed Michael McKean to investigate. (CP 684) To date no action has been taken on these orders.

Based partially on the testimony from Michael (CP 678-682) the trial court chose not to direct the guardian to prosecute claims against Shannon with respect to her breaches of fiduciary duties. (CP 922) The guardian was ordered not to pursue the litigation on behalf of the children against Environmental Fuel Development Corporation, rather Shannon was allowed to proceed as she saw fit. (CP 922) It should be noted that even though Morgan and Michelle have received nothing for their claim involving Environmental Fuel Development Corporation, Shannon and

Michael had also filed dissenter rights claim against Environmental Fuel Development Corporation for shares of stock they owned as joint tenants. Michael and Shannon settled their claim along with other claims for \$25,000.00 on June 29, 2005. (CP 1307-1312).

The guardian agreed to the use of guardianship funds in the amount of \$3,401.00 to pay for orthodontic work for Micheile, (CP 173-176) but later found out that Michael had not been honest and forthcoming about his finances. (CP556-560) It is the obligation of parents to support their children, there should be no support money paid from a child's estate, unless and until it is established that the parents are unable to adequately support that child. *See In re Ivarsson*, 60 Wn.2d 733, 740, 375 P.2d 509 (1962). At the request of the guardian the trial court ordered Michael McKean to pay Michelle McKean back for \$3,401.00 in dental work. (CP 921) Michael has ignored this order of the trial court.

Finally, over the objections of the guardian, Shannon Keene was allowed to terminate a trust, which included Michelle and Morgan as beneficiaries, and pay all of the proceeds (over \$266,000.00 in cash) to Michael. (CP 1358-1359)

There is no doubt that the trial court had sufficient legal basis, and the guardian had a fiduciary obligation to investigate and inventory the nature, extent, value and whereabouts of the assets of Morgan and Michelle.

Michael accuses the trial court and the guardian of leaving his children penniless. Michael needs to review the record for the claims that he has abandoned, the money that he has failed to pay back, and the money he usurped, all in which his children have significant interests.

D. MICHAEL MCKEAN AND SHANNON KEENE ARE DIRECTLY RESPONSIBLE FOR THE EXPENSE OF THIS GUARDIANSHIP.

Whether true or not, in 2002 Michael stated that he did not know where Michelle's Uniform Gift to Minor Account (UGMA) at Primevest went. (CP 1463-1464) Michael also stated that he did not know where Michelle and Morgan's UGMA accounts at Columbia Bank went. (CP 1464) It was Michael's position that because Connie stole or absconded with all of the children's assets there was no reason to establish a guardianship. (CP 1509; CP 80-84)

Despite the fact that Judge Sebring and the guardian ad litem stated that Shannon was not a dependable fiduciary, Michael stated, to the extent that the children have any assets, they were all in trust managed by his trusted sister, Shannon. (CP 1492-1495; CP 93)

The truth is, until the guardian filed its memorandum on January 12, 2005 the assets of Morgan and Michelle were largely unknown, or rather known, but perhaps not disclosed by Michael.

Once the guardian began to marshal and inventory the interests and assets of Morgan and Michelle, Michael's arguments began to take on a schizophrenic quality. He argued his children have no assets, however if the children have assets they were all disclosed in the divorce proceeding so the guardian should not be paid for any work done to marshal assets, and to the extent the children have assets they are all in trust and Shannon is the individual that should manage them. (CP 116)

It was astounding to see the extent and degree that Michael's arguments changed. On March 5, 2002, Michael declared that the 15,000 shares of stock in Environmental Fuel Development Corporation owned by the Morgan McKean Dependency Trust, and the 15,000 shares of stock in Environmental Fuel Development Corporation owned by the Michelle McKean Dependency Trust were valued in excess of \$200,000.00 each. (CP 1465) Shannon and Michael were officers of EFDC. On June 25, 2002 when the board decided to sell the company's assets, Shannon filed a dissenter's rights claim against Environmental Fuel Development Company demanding two million dollars as trustee of the Michelle McKean Dependency Trust and Morgan McKean Dependency Trust for

their shares of stock. (CP 255-256) This figure was not pulled out of thin air; it was based on offers submitted over the course of one and one-half years. (CP 656-657) When the guardian brought these claims to the attention of the trial court, Michael McKean called them an “absolute absurdity.” (CP 493)

Despite the repeated requests by the guardian to have Shannon removed as a fiduciary, (CP 179; CP 213) the Honorable Beverly Grant allowed her to remain trustee of the Michelle McKean Dependency Trust, the Morgan McKean Dependency Trust, the Michelle Patricia Gillispie McKean Trust, and the Gun Trust.

Unfortunately, Judge Sebring and the guardian ad litem were correct about Shannon’s lack of independence, and it was borne out during the course of the guardianship.

Shannon was directed by Michael to purchase real property located on Fox Island. (CP 680) Shannon followed through on this request and purchased the property with funds from a bank account at Sterling Savings Bank titled in the name of the Michelle McKean Dependency Trust. (CP 233) Shannon titled the property in the name of the Michelle McKean Dependency Trust. (CP1090-1096; CP1102) Shannon submitted spreadsheets to the guardian in the name of the Michelle McKean Dependency Trust that showed the purchase of the Fox Island property.

(CP 259-262) After being confronted with the case against her for breach of fiduciary duty for the purchase and management of the Fox Island property, Shannon sought to sell the property to Michael's girlfriend's father. (RP 21-24 (August 2, 2005)) The guardian objected and the property was publicly marketed. (RP 45-48 (August 2, 2005)) Prior to the home being sold, Shannon sought to use the sale proceeds to pay for her legal fees and costs as well as to pay Michael. (CP 1078-1081) The guardian objected to those requests. (CP1151-1153) When the Fox Island property sold, Shannon deposited the funds into a bank account in the name of the Michelle Patricia Gillespie McKean Trust created by Patricia Mandich, claiming that either the Michelle McKean Dependency Trust was a trust within the Michelle Patricia Gillespie McKean Trust, or in the alternative, the assets were placed in the Michelle McKean Dependency Trust entirely in error and they should have been in the Michelle Patricia Gillespie McKean Trust all along. (CP1109-1111)

The guardian asserted that there was no mistake, after all Michael was a former attorney, Shannon formerly worked for the Attorney General's Office for the State of Washington, and according to Michael, Shannon knew more about fiduciary duties than most trustees. (CP1485)

The simple fact of the matter was that the Michelle Patricia Gillespie McKean Trust had more favorable terms for Michael McKean,

and allowed Shannon to terminate the trust and pay all of the funds directly to Michael McKean, which she did, all \$266,000.00. (CP 1358-1359)

The guardian's position consistently throughout this proceeding was to try and keep assets out of the hands of Michael and Shannon and protected for the beneficial use of Morgan and Michelle. On the other hand, Shannon and Michael continued to fight to take back the assets that were put in the name of the children.

E. THERE WAS NEVER A CONFLICT OF INTEREST BETWEEN THE GUARDIAN, THE GUARDIAN'S COUNSEL, AND MORGAN AND MICHELLE MCKEAN.

For the first time on appeal Michael argues that a conflict of interest existed between the guardian and Michelle and Morgan. None of the orders entered by Judge Grant addressed or discussed conflicts of interest. In general, issues not raised in the trial court may not be raised on appeal. *See* RAP 2.5(a)

In an effort to extinguish all of Michael's arguments the merits of this argument will be discussed. Michael asks this court to find that a conflict of interest arises if fiduciaries charge a fee for conducting an activity they are required to undertake.

As set forth above, a guardian has a duty to marshal the assets and ascertain the financial interests of the estates or the individuals they serve. Whenever, a guardian or an attorney representing a guardian seeks to act on behalf of the ward, or seeks payment of its fees and costs they must seek approval from the court. RCW 11.92.010; SPR 98.16W; RCW 11.92.180; and RCW 11.96A.150. The court, protecting the ward's interest, has at the time they consider the request by the guardian to do or abstain from doing something on behalf of the ward, and when the guardian and its attorneys petition for fees, the opportunity to assess whether there is or was value conferred to the incapacitated person. This interaction with and supervision by the judiciary alleviates any potential conflict of interest.

With respect to fee requests, it is well settled that guardians should receive compensation for services that benefited a ward. *In the Matter of the Estate of Carroll D. Montgomery*, 140 Wash. 51, 248 P. 64 (1946); *In re the Estate of Robert N. Leslie*, 137 Wash. 20 241 P. 301 (1925).

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY APPROVING THE GUARDIAN AND THE GUARDIAN'S ATTORNEYS' FEES AS REASONABLE AND NECESSARY.

The trial court presided over twelve contested hearings at which the approval of the fees and costs of the guardian and its attorney were at

issue. Where, as here, a trial court judge routinely sits as a probate court, and over months of proceedings becomes intimately familiar with the parties' dispute, such decision makers are "better equipped than multi-judge appellate courts to resolve conflicts and draw inferences from the evidence." *Marriage of Rideout*, 150 Wn.2d 337, 351, 352, 77 P.3d 1174 (2003); See *Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003)(giving deference to the trial court's determination because the trial court "evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review").

The trial court thoroughly and scrupulously reviewed the fee requests in this case, basing its fee determinations on the "just and reasonable" standard of RCW 11.92.180 and whether they reflected services that provided a benefit to the estate. *Guardianship of Hallauer*, 44 Wn. App. 795, 723 P.2d 1161 (1986). Each and every time the guardian and its attorney petitioned for approval of fees and costs, it was done by explaining the benefit to the guardianship estate as well as the considerations set forth under *Hallauer* and memorialized at RPC 1.5. (CP 48-56; CP1375-1386; CP 123-131; CP 397-405; CP 791-799; CP 928-940)

From the outset the guardian had submitted a declaration detailing its fee schedule. (CP 1639; CP 1646-1647) The guardian and its attorneys first petitioned for approval of fees and costs on August 2, 2004. (CP 48-79) The fee petition was considered by the trial court on August 20, 2004, at which time the trial court asked the parties to prepare a discovery plan. (CP 97) On September 24, 2004 the trial court once again considered the fees and costs of the guardian and its attorneys and ordered them to continue their investigation into the assets and interests of Morgan and Michelle. The written order from that hearing was entered on October 29, 2004. (CP 168-170) The guardian and its attorneys updated their fee request and filed it with the trial court on January 13, 2005. (CP 397-451) This petition was considered by the trial court on January 21, 2005. Being fully apprised of the fees and costs incurred by the guardian and its attorneys, on March 4, 2005, the trial court ordered them to continue their investigation through a meet and confer arrangement with Michael's counsel and Shannon's counsel. (CP 683-685) On June 1, 2005, the guardian and its attorneys filed yet another declaration of fees and costs. (CP 791-806) By August 2, 2005 the trial court entered an order detailing the course on which the guardianship was going to proceed. (CP 915-927) On August 19, 2005 the guardian and its attorneys again summarized the work done and the costs incurred in each stage of the guardianship up to

that date. (CP 928-1000) A hearing was held on August 20, 2005, and again on August 29, 2005 but no decision by the trial court on approval of fees and costs was made. On September 1, 2005, the guardian and its attorneys chronicled how it advanced the understanding of Michelle and Morgan's financial interests. (CP 1112-1137) On September 7, 2005 the trial court heard extensive argument on the issue of fees and costs and issued an oral ruling. Finally, on October 31, 2005 the trial court entered its first order approving the guardian's and its attorneys' fees and costs. (CP 1215-1221) For the period from July 1, 2003 through August 2, 2005 the trial court approved the fees of the guardian's attorneys after reducing them by almost \$7,000.00. (CP 939; CP 1215-1221) Prior to that hearing, the guardian's attorneys had written off an additional \$5,000.00 of their fees. (CP 941-970) The guardian's fees and costs were also approved by with a reduction of over \$1,200.00. (CP 939; CP 1215-1221) This case was most certainly not about fees and costs for either the guardian or its attorneys.

The trial court's fee approval decisions were not an abuse of discretion and certainly not a rush to judgment, the trial court's ruling came only after a careful consideration of not only how the guardianship was being conducted at the time, but also with the benefit of hindsight and a full appreciation of how the activities of the guardian and its attorneys

benefited the wards. An award of guardianship and attorney fees under RCW 11.92.180 is committed to the sound discretion of the trial court. *Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966); *Estate of Lennon*, 108 Wn. App. 167, 184, 29 P.3d 1258 (2001). Where the guardian has faithfully acted pursuant to court order it is entitled to reasonable compensation. *In re Leslie's Estate*, 137 Wash.2d, 23, 241 Pac. 301 (1925)(affirming a fee award because the trial court was better able to determine the value of the estate and what had been done to preserve it than the appellate court).

The children were not impoverished by the award of fees and costs to those professionals working on their behalf.

In October, at the time the trial court awarded the guardian and attorney fees and costs, the assets of the children consisted of accounts in the name of Morgan and Michelle exceeding \$50,000.00,⁵ trusts for Michelle and Morgan's benefit under the control of Shannon worth at a minimum \$266,000.00, to several million dollars,⁶ an irrevocable trust under the care, custody and control of a professional fiduciary (Robin

⁵ Morgan McKean had an account at Twin County Credit Union in the amount of \$11,942.51 and at Columbia Bank account in the amount of \$2,647.89. There existed a Raymond James account for Michelle McKean with a balance of over \$25,000.00, and a Raymond James Financial Account for Morgan McKean with a balance of almost \$13,000.00.

⁶ There existed \$266,000 in net sale proceeds from the Fox Island Property, 33,000 shares of EFDC stock, and a Sterling Savings Bank Account in the amount of \$687.00.

Balsam) for the benefit of Michelle and Morgan worth several hundreds of thousands of dollars,⁷ and legal claims with an estimated value between \$10,000.00 and potentially exceeding \$80,000.00.⁸

The total for the guardian and its attorneys' fees and costs that were paid from the assets of the guardianship estate was \$35,585.17, which is \$16,423.51 less than just the non-trust assets of the children. The other figures that Michael tosses into his calculation include guardian ad litem fees and costs and the fees and costs of Robin Balsam in fighting with Michael to establish this guardianship.

G. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY APPORTIONING THE FEES AND COSTS OF THE GUARDIAN'S COUNSEL AGAINST MICHAEL MCKEAN.

By the time the court awarded the second round of fees and costs for the guardian and its attorneys and apportioned the responsibility for payment to Michael the court made the following findings of fact: Michael McKean was the person responsible for creating an estate for his children

⁷ The Irrevocable Trust for Michael Allison McKean's children held title to shares of Northwest Community Housing Corporation, 20% of Michael McKean's general partnership interest in Northwest Community Housing Corporation, a life insurance policy on Michael McKean in excess of \$300,000.00 and cash that was interplead into the Pierce County Superior Court. The Irrevocable Trust for Michael Allison McKean's Children has a subtrust which holds title to a single family residential dwelling with a value in excess of \$100,000.00 and with rental income in excess of \$400.00 per month.

⁸ These claims include claims against Connie for removing \$10,000.00 from Michelle's Primevest account, and \$70,000.00 from Morgan's Columbia Bank account, as well as claims against Shannon estimated at \$45,000.00 for breaching her fiduciary duty with respect to the purchase and waste of the Fox Island property.

and funding trusts for his children and others, Michael has shown in the past an ability to invest in real property and other assets to create profit and wealth, and Michael McKean will in the future increase the value of assets owned by himself. (CP 1418) Michael had also just received \$266,000.00 from a terminated trust that was intended to benefit Morgan and Michelle. Considering Michael's financial capabilities, but moreover, his recent receipt of a small fortune (\$266,000.00) that should have been for the benefit of Morgan and Michelle, it was just and reasonable to apportion the responsibility Morgan and Michelle's professional costs to Michael.

The ability of the court to apportion fees and costs is well grounded in law. The court has the authority pursuant to RCW 11.96A.150 to apportion the responsibility for payment of the approved fees and costs of the guardian and its attorneys to any party to the proceeding and/or to the assets of any trust in which the minors have a beneficial interest and which is the subject of this proceeding. The court has plenary power and authority to supervise and direct the administration of the estates and assets of incapacitated persons and all trusts and trust matters. RCW 11.96A.020. The court has original subject matter jurisdiction over the administration of the estates of incapacitated persons and all trusts and trust matters. RCW 11.96A.040. The court has the authority to make any

kinds of orders, judgments, citations, notices, summons, and other writs and processes it considers property of necessary in the exercise of its jurisdiction or powers with respect to the estates of incapacitated persons and matters involving trusts. RCW 11.96A.060.

The trial court's review and approval of the fees and costs of the guardian and its attorney was just as scrupulous and thorough as the first. The trial court undertook the same analysis of guardian and attorney fees and costs as set forth in *Hallauer* and RPC 1.5 as it had done during the approval of the guardian and its attorneys' fees and costs on October 31, 2005. Prior to the hearing on February 15, 2006 the guardian's attorneys again wrote off over \$5,000.00 of its bill. (CP 1399-1416) In addition, the trial court reduced the firm's fees by nearly \$1,700.00. (CP 1371-1374).

H. THIS COURT UPHELD THE AMOUNT OF THE SUPERSEDEAS BOND IMPOSED BY THE TRIAL COURT.

On May 18, 2006, Commissioner Schmidt found that the amount and imposition of the supersedeas bond was appropriate. On May 19, 2006 Acting Chief Judge Van Deren also concluded that the amount and imposition of the supersedeas bond was appropriate.

I. MICHAEL’S APPEAL IN THIS MATTER IS FRIVOLOUS AND IMPOSED FOR THE PURPOSE OF HARASSMENT. THE COURT SHOULD IMPOSE SANCTIONS AGAINST MR. MCKEAN AND HIS ATTORNEY AND THE GUARDIAN AND THE GUARDIAN’S COUNSEL SHOULD BE AWARDED FEES AND COSTS FOR DEFENDING THIS APPEAL.

This court should award the guardian and its attorneys’ fees and costs pursuant to RAP 18.1 and RCW 11.96A.150. The court on appeal may in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party from any party to the proceeding. RCW 11.96A.150 (*See Also Villegas v. McBride*, 112 Wn. App. 689, 696-697, 50 P.3d 678 (2002), *rev. denied*, 149 Wn2d 1005 (2003)). Michael should pay the guardian and its attorneys’ fees on appeal.

The court should also assess sanctions against Michael’s counsel pursuant to RAP 18.9. Sanctions are proper against appellate counsel who “uses these rules for purposes of delay, files a frivolous appeal, or fails to comply with these rules...” RAP 18.9(a). *See Guardianship of Lasky*, 54 Wn. App. 841, 856-857, 776 P.2d 695 (1989). Michael’s legal arguments in this appeal are completely without merit. The trial court had the authority to order the guardian to proceed as they did, the trial court had ample justification to enter the orders that it did, the trial court cautiously approved the scope of the work to be completed by the guardian and its attorneys, and conservatively approved their fees and costs. Michael’s counsel failed to address the evidence upon which the trial court based its

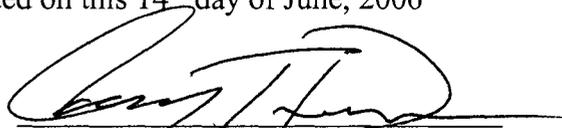
extensive findings of fact, conclusions of law and orders. There are such significant factual omissions in Michael's brief as to breach the duty of candor to the court. Advocacy must have limits. This court should assess sanctions pursuant to RAP 18.9.

IV. CONCLUSION

The guardian was appointed to inventory, protect, and preserve the financial interests of Morgan and Michelle. The guardian successfully carried out its fiduciary duty to the benefit of Morgan and Michelle and for that the trial court provided the guardian and its attorney compensation in what it determined to be a just and reasonable amount. This Court should affirm the rulings of the Superior Court.

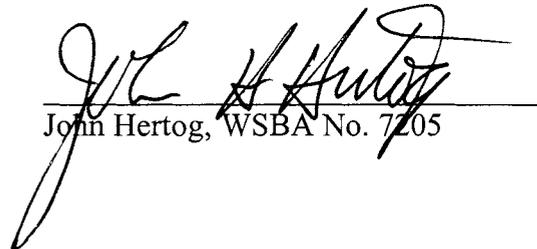
Respectfully Submitted on this 14th day of June, 2006

By:



Corey T. Denevan, WSBA No. 32114

By:

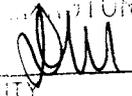


John Hertog, WSBA No. 7205

Attorneys for Respondents

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

IN RE THE GUARDIANSHIP OF

APPEAL NO. 34132-8-II

MICHELLE MCKEAN AND MORGAN
MCKEAN,

CERTIFICATE OF SERVICE

Minors.

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the *Brief of Respondent* was deposited with ABC Legal Messenger Service on the date stated below, for delivery no later than 5:00 p.m. June 14, 2006 to: The Division II Court of Appeals and John O'Connor, Attorney at Law, 2115 North 30th Street, Suite 201 Tacoma, Washington 98403.

Dated this 14th day of June, 2006.



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