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No. 356531

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

In the Matter of the
GUARDIANSHIP OF ANNA MAY BLACK

LORI SORENSEN, GUARDIAN OF THE PERSON

Appellant,

v.

JAMES P. SPURGETIS, Trustee of the Second Amended and Restated
Living Trust of JACK P. BLACK and ANNA MAY BLACK;
RICHARD W. PEREDNIA, Guardian Ad Litem Under RCW 4.08.060
for ANNA MAY BLACK;
DEBORAH A. BLACK, Daughter of ANNA MAY BLACK; and
JOHN BLACK, Son of ANNA MAY BLACK

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Briefs of Respondent Deborah Black (“Deborah”), Respondent Richard W. Perednia, Guardian Ad Litem for Anna May Black (“GAL”) and Respondent James P. Spurgetis, Trustee of the Second Amended and Restated Living Trust of Jack P. Black & Anna May Black (“Trustee“) do not address or respond to the Assignments of Error and Issues on Appeal raised by the Appellant; rather, these three Respondents attempt to re-characterize and add new issues as the subject of this appeal. The Appellant has clearly identified this case as a statutory construction case which is clearly reviewed *de novo* by this Court. Instead of addressing the issues raised by the Appellant in her Opening Brief, the Respondents attempt to change the issues on appeal. Moreover, the Respondents wrongly assert that these new issues should be reviewed on an abuse of discretion standard. In other words, the Respondents did not respond to the issues on appeal as outlined in the Appellant’s Opening Brief, but are attempting to raise new issues which are not the subject of this appeal and change the standard of review applicable to this **appeal**.

II. APPELLANT’S REPLY TO RESPONDENTS’ FACTUAL BACKGROUND

The Respondents do not rebut the Factual Background outlined in the Appellant’s Opening Brief. However, each Respondent provides

additional factual information which will be addressed in this Reply Brief in order.

A. Reply to Factual Background of Respondent Deborah Black

The Brief of Respondent Deborah Black does not provide additional factual information and “is satisfied with the Factual Background as stated by appellant except for her consistent blurring of her status in the case by referring to herself as ‘the Guardian’ when, in fact, she is Guardian of the Person, only.” Brief of Respondent Deborah Black, Page 1. In fact, the Appellant was not blurring her status in the case by referring to herself as “the Guardian”; rather, the Appellant was merely using the term “the Guardian” as a defined term as outlined in the Appellant’s Opening Brief which clearly identifies the Appellant as the Guardian of the Person of Anna May Black. Appellant’s Opening Brief, Page 2. Therefore, the Appellant was not “blurring” her status in the case, but was merely using a short-hand reference for purposes of expediency and conciseness.

B. Reply to Factual Background of Richard W. Perednia, Guardian Ad Litem for Anna May Blackk

Initially, Respondent Richard W. Perednia, Guardian Ad Litem for Anna May Black (“GAL”), states that the statement of facts of the Appellant “is essentially correct”, but goes on to state that “he would like

to emphasize several different facts that are relevant.” Brief of Richard W. Perednia, Guardian Ad Litem for Anna May Black, Page 2. The GAL’s recitation of the “different facts” make scarce reference to the record on appeal with only four references to the Clerk’s Papers and no references to the Record of Proceedings. The Factual Background proffered by the GAL involves speculation and facts not supported by the record.

Arguments and facts not supported by any reference to the record or by any citation of authority do not need to be considered by the Court. *Foster v. Giliam*, 165 Wn.App 33, 56, 268 P.3d 945 (Div. 1 2011), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, speculation by a party without referring to the record should be disregarded by the Court. *Specialty Asphalt & Construction v. Lincoln County*, Dkt. No. 95085-7, fn. 2 (July 26, 2018). Therefore, most of the information contained in Mr. Perednia’s section entitled Factual Background should be disregarded as speculation and unsupported by the record.

C. Reply to Summary of the Case of Respondent James P. Spurgetis, Trustee of the Second Amended and Restated Living Trust of Jack P. Black and Anna May Black

Respondent James P. Spurgetis, Trustee of the Second Amended and Restated Living Trust of Jack P. Black and Anna May Black

(“Trustee”) does not state whether there are any disagreements with the Factual Background set forth in the Appellant’s Open Brief. However, the Trustee outlines facts he believes are relevant to this appeal as set forth in his “Restatement of the Issues”.

In The Trustees’ Statement of the Case, the Trustee misstates the applicable findings determined by the trial court. In particular, the Trust mischaracterizes conclusions of law as findings of fact. Findings of fact that are really conclusions of law will be treated as conclusions of law and will stand if there are other findings of fact sufficient to support such conclusions. *Miller Lumber Co. v. Holden*, 45 Wn.2d 237, 245, 273, P.2d 786 (1954). All relevant conclusions of law as determined by the trial court are subject to this appeal. In particular, the Appellant did appeal any findings of fact as the only issues on appeal are conclusions of law.

1. The Trial Court’s Finding That the Guardian Exceeded the Scope of Her Authority is a Conclusion of Law.

Contrary to the Trustees assertion, the trial court orders denying the Guardian’s attorney fees did not make a finding of fact that the Guardian exceeded the scope of her authority; rather, the finding in the Commissioner’s Order is a conclusion of law as supplemented by the Superior Court’s Order. This Court reviews the Superior Court’s ruling, not the Commissioner’s. *Maldonado v.*

Maldonado, 197 Wn.App 779, 789, 391 P.3d 546 (Div. 1 2017).

While the Superior Court did affirm the Commissioner's ruling, including all findings of fact and conclusions, the Superior Court made its own findings and conclusions of law. The affirmation of the Commissioner's findings of fact and conclusions of law are subject to the findings and conclusions of the Superior Court.

The Commissioner's Order states "The Guardian of Person engaged in activities outside the scope of her authority, as defined by statute and this Court Order, when she engaged Randall Danskin and attempted to represent reward in litigation.". CP 479. This is a conclusion of law and does not state a finding of fact. The Commissioner is concluding that the relevant statutes and the Court Order appointing the Guardian determine that the Guardian acted outside the scope of her authority in retaining Randall Danskin ("RD"), without prior court approval. This conclusion of law is supplemented by the Superior Court when it concluded that "[t]here is no meaningful distinction between fees incurred for the Guardian of Person and fees incurred for Anna May Black, the incapacitated person for whom the Guardian of Person serves . . . The language of RCW 11.88.045 is clear. By its terms it is not limited to attorney fees incurred through actual litigation . . .

Together RCW 11.88.045 and 11.92.180 authorize the Guardian of Person to hire RD only after securing court approval.” CP 611-612. The relevant language of the Superior Court’s Order clearly confirms that the legal conclusion that attorney fees are not payable is based upon the relevant statutory provisions.

2. Randall Danskin represented the Guardian in Her Capacity as Guardian and Did Not Represent Anna May Black Directly.

Again, contrary to the Trustees assertion, the Court did not make a factual finding that RD was directly representing Anna May Black. The record is clear that RD was representing the Guardian in her capacity as the Guardian of Anna May Black. RP 6, 55 and 74. The Superior Court Orders subject to this appeal made a conclusion of law that by representing the Guardian, RD was effectively directly representing Anna May Black. CP 611. As a result, the Superior Court’s Order affirming the Commissioner’s Order made a conclusion of law that there was “no meaningful distinction between fees incurred for the Guardian of the Person and fees incurred for Anna May Black, the incapacitated person for whom the Guardian of the Person serves.” In other words, the Superior Court recognized that RD was representing the Guardian,

but made a conclusion of law that the representation of the Guardian by RD was equivalent to representing Anna May Black directly. This conclusion of law was based on the Superior Court's reading of the relevant statutes. This conclusion of law is in error for the reasons outlined in the Appellant's Opening Brief.

III. ARGUMENT

The issues on appeal are conclusions of law made by the Superior Court in its two Orders. CP 606-609 and 610-623. All questions of law, conclusions of law and conclusions of law erroneously labeled as findings of fact are reviewed by this court on a *de novo* basis. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 556, 132 P.3d 789 (Div. 2 2006). The Respondents attempt to re-categorize the conclusions of law made by the Superior Court to findings of fact. However, the issues on appeal as identified by the Appellant in her Opening Brief clearly identify issues of law as determined by the Superior Court Orders which are reviewed on a *de novo* basis. Moreover, the Respondents have incorrectly stated the relevant due process standards applicable to this case. All parties to this matter were given adequate notice and did not object at any hearing to the lack of notice. Moreover, all parties were given an opportunity to be heard. As a result, the due process rights of the parties in this matter were not violated.

A. The Proper Standard of Review For This Appeal is *De Novo* Since the Errors Made in the Superior Court Orders Are Conclusions of Law.

Washington law clearly provides that findings of fact that in reality pronounce legal conclusions are treated as legal conclusions. *Goodiell v. Madison Real Estate*, 191 Wn.App. 88, 99, 362 P.3d 302 (Div. 3 2015). A determination made by a trial court through the process of legal reasoning from, or interpretation of the significance of, the evidentiary facts, is a conclusion of law as opposed to a finding of fact. *Moulden & Sons, Inc.*, 21 Wn.App. 194, 197, fn. 5, 584 P.2d 968 (Div. 2 1978). Findings of fact on the other hand are a determination of whether the evidence shows that something occurred or existed. *Casterline v. Roberts*, 168 Wn.App. 376, 382, 284 P.3d 743 (Div. 2 2012), citing *Moulden & Sons, Inc.*, 21 Wn.App. at 197. In the case of the Superior Court Orders denying the attorney fees incurred by the Guardian, the Superior Court determined that the relevant statutory provisions require the Guardian to obtain court approval prior to any attorney fees being awarded. The portions of the Superior Court Orders which the Respondent refer as findings in fact are not establishing that something occurred or existed as determined from the evidence, but rather employs a process of legal reasoning from the facts and statutes applicable to this matter. Therefore, the issues on appeal are conclusions of law.

Well-settled principles of appellate law provide that conclusions of law are reviewed on a *de novo* basis. *Barr v. Snohomish County Sheriff*, ___ Wn.App. ___, 419 P.3d 867, 874 (Div. 2 2018). The issues presented by the Appellant in her Opening Brief clearly identify the issues of law and assignment of errors in this matter. This case is a matter of statutory construction which involves the interaction of RCW 11.88.045(2) and RCW 11.92.180. In particular, the two Superior Court Orders incorrectly interpret RCW 11.88.045(2) to require a guardian to obtain court approval prior to retaining an attorney and providing for the payment of fees to the attorney. CP 606-609 and 610-623. Therefore, this Court must apply a *de novo* standard of review in resolving this appeal.

B. The Trial Court Did Not Exercise Any Discretion in Denying an Award of Attorney Fees.

The trial court did not exercise any discretion since the trial court found that RCW 11.88.045(2) required the court to approve the retention of an attorney by a guardian prior to the court awarding any attorney fees. In other words, the Court determined that it did not need to exercise discretion since RCW 11.88.045(2) barred the award of attorney fees in this matter. The trial court did not find that the attorney fees were not payable based on the work performed or on some other basis, but solely on the basis of RCW 11.88.045(2) requiring prior court approval. There are

no findings of fact in any of the applicable Orders where the trial court found that the services performed by RD were not necessary or otherwise helpful to the guardianship. The trial court did exercise its discretion when it twice reappointed the Guardian and awarded the Guardian's fees in full over the vociferous objections of the Respondents. CP 480 and 608. Since the trial court incorrectly concluded that RCW 11.88.045(2) required prior court appointment of an attorney, the trial never exercised its discretion regarding the amount of attorney fees to be awarded.

C. The Guardian's Actions Did Not Exceed Her Scope of Authority Since the Trial Court Twice Awarded Her Fees in Full.

Contrary to the Respondents assertion, the Guardian did not exceed the scope of her authority during the administration of this guardianship. In fact, the Guardian's fees in this matter have been twice approved in total and she has been twice reappointed as the guardian of the person of Anna May Black. CP 480 and 608. By twice awarding guardian fees in total, the trial court affirmed the actions taken by the Guardian as being within the scope of her authority and that the Guardian did not take any action that was outside of the scope of her authority. While the Respondent makes much ado about the Guardian's motion to modify the guardianship and motion to substitute as a party in various litigation matters on behalf of Anna May Black, the trial court did not find that her

actions in these matters were outside the scope of her authority. If the trial court determined that these actions exceeded her authority, the trial court would have reduced her fees for taking these actions. However, the trial court made no such finding and in fact twice awarded the Guardian's fees in full over the vigorous objections of the Respondents. Therefore, the Guardian did not exceed the scope of her authority and was twice affirmed by the trial court awarding her fees in full.

The sole statement in the Commissioner's Order indicating that the Guardian exceeded the scope of her authority relates to the request for the payment of attorney fees. This erroneous conclusion of law is the basis of this appeal. The other actions of the Guardian are not relevant to the outcome of this case as this appeal relates to whether RCW 11.88.045(2) requires court approval of a guardian retaining an attorney prior to awarding attorney fees and whether any party's due process rights were violated. These issues are issues of law that may be resolved by this Court regardless of the Guardian's actions in this matter.

D. The Guardian Did Not Violate Any Party's Due Process Rights in Requesting the Payment of Attorney Fees.

In order for the parties to be afforded due process, the only requirement is that the parties be given notice of a hearing and an opportunity to be heard. *State v. Townsend*, 2 Wn.App.2d 434, 443, 409

P.3d 1094 (Div. 3 2018), *citing*, *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In this guardianship, all the parties were given notice and were given an opportunity to be heard.

The Respondents make no colorable claim that any of the parties' due process rights were violated. The GAL even admits that “[n]otice was provided to all parties, including the trustees, remaindermen and income beneficiary.” Brief of GAL, Page 8. The GAL attempts to qualify this statement by stating that the notice was only provided after the fees were incurred, but the timing of when the fees were incurred is not relevant. It is undisputed by the Respondents that all parties were given notice of the request for the payment of attorney fees and were given ample opportunity to object. In fact, the Respondents did object to the award of attorneys’ fees and were given ample opportunity to present their objections to the trial court. While the Respondents would have preferred the Guardian to have requested the trial court to approve the retention of an attorney prior to incurring any fees, as outlined in the Appellant’s Open Brief, there is no statutory requirement that the Guardian obtain prior approval from the court and, in fact, RCW 11.92.180 contemplates that a Guardian would hire an attorney and request for payment of their fees without asking for prior court approval. Therefore, since all the Respondents were given

adequate notice and an opportunity to be heard, no due process rights were violated.

IV. CONCLUSION

The Respondents do not address the issues raised by the Appellant in her Opening Brief. The Respondents are merely trying to re-litigate the Guardian's actions which were twice approved by the trial court. Since the only issues appealed by the Guardian (and the Respondents did not cross appeal) are conclusions of law, this appeal should be reviewed on a *de novo* basis. Ultimately, the Respondents do not rebut the Appellant's statutory interpretation arguments, but attempt to re-cast this appeal as something it is not. As a result, this Court should reverse the trial court's conclusions of law.

DATED this 6th day of August, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the APPELLANT'S OPENING BRIEF on the 6th day of August, 2018, addressed to the following:

- | | | |
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