

No. 68419-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Arthur D. Hays,

Appellant,

vs.

Rebecca Castilleja,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY YU

REPLY BRIEF OF APPELLANT

HERTOG & COSTER, PLLC

By: John H. Hertog, WSBA No. 7205

By: Ellen E. Barton, WSBA No. 16209

200 W. Mercer Street, Ste. 310

Seattle, WA 98119

(206) 587-6556

Attorneys for Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

ORIGINAL

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I. ARGUMENT

A. STANDARD OF REVIEW

In her brief, Mrs. Castellja mischaracterized Mr. Hays' position on the appropriate standard of review. Mr. Hays agrees that the trial court's decision on the amount of fees and whether those fees were properly apportioned should be reviewed for abuse of discretion. However, the *evidence* upon which the trial court based its decision, since it is in the form of declarations, should be reviewed *de novo*. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009).

B. ARGUMENTS ALLEGEDLY MADE FOR THE FIRST TIME ON APPEAL

Contrary to Mrs. Castilleja's response, the argument that her counsel's fees should be reduced to reflect unnecessary or duplicative time was made to the trial court both by Arthur Hays and by his son, Robert. While Arthur Hays sought reduction in specified amounts that he considered to be excessive and/or unreasonable, Robert Hays objected because the total amount of fees charged was excessive. [CP 1646-1647]

Robert Hays included the following argument in his response to Mrs. Castilleja's fee petition:

The amount sought in Petitioner's fee application is not commensurate with the relief obtained. RPC 1.5(a) requires that fees charged be "reasonable." The Petitioner approached this case as if it were a shareholder's derivative suit or similar business litigation. It was not. Petitioner

claims that the action was brought for Arthur Hays' own good. If this is true, the fees charged to him should be minimized, not maximized. The fact that Petitioner was successful in establishing a guardianship does not justify an excessive fee award charged to Arthur Hays.

[CP 1647]

RAP 2.5(a) provides that a party may raise on appeal any argument raised by another party on the same side of the case. Robert Hays objected to the appointment of a guardian for his father and was, therefore, on his father's "side" in this guardianship proceeding. [CP 436-444] The trial court had ample opportunity to consider both general and specific objections to Mrs. Castilleja's attorneys' fees.

Even if the issue as to the overall excessive amount of fees incurred had not been raised to the trial court, application of RAP 2.5(a) is discretionary and cannot be applied to excuse the trial court's failure to follow applicable law. *Robertson v. Perez*, 156 Wash. 2d 33, 39, 123 P.3d 844 (2005); and *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wash.App. 954, 962, 214 P.3d 964 (2009), *aff'd* 170 Wn.2d 1028, 228 P.3d 17 (2010), (the trial court's reliance on superseded statutory law must be reviewed on appeal).

Further, the appellate court may consider arguments made for the first time on appeal if it is related to other arguments made to the trial

court. *Lansford v. Saberhagen Holdings, Ltd.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), *aff'd* 166 Wn.2d 264, 208 P.3d 1092 (2009). In this case, both Arthur Hays and his son, Robert, argued that the fees charged were unreasonable, duplicative and excessive. Arthur Hays made specific objections to fees and Robert Hays objected to the overall reasonableness of the fees. Thus, neither argument can be considered newly made at the appellate court level. Arthur Hays' adoption of Robert Hays' position on fees at the appellate level is related to, and consistent with, the objections he made below and should be considered on appeal.

C. VOLUME OF EVIDENCE PRESENTED AND CIRCULAR NATURE OF RESPONSE

1. Counsel for Mrs. Castilleja Presented the Majority of Documentary Evidence at Trial

To determine whether Mrs. Castilleja or Mr. Hays submitted the greatest volume of documentary evidence to the trial court requires a simple counting of exhibits proffered by both side. Mrs. Castilleja submitted 179 exhibits. Mr. Hays submitted 22. [CP 2661-2683]. The circular nature of Mrs. Castilleja's argument becomes apparent when she claims the necessity to proffer all the evidence in response to Mr. Hays' evidence. The burden of proof was on Mrs. Castilleja to establish that Mr. Hays was in need of a guardian. Mr. Hays objected to the appointment of

a guardian and was required to produce evidence in response to the evidence presented by Mrs. Castilleja, not the other way around.

2. Mr. Hays' Counsel did Object to the Evidence Presented

Mr. Hays did make objections both to documents and testimony in an attempt to limit the amount of irrelevant evidence presented. For example, Mr. Hays filed an objection to Mrs. Castilleja's ER 904 disclosure [CP 557-567] and objections to deposition testimony [ER 568-569]. These objections were overruled. Further, Mr. Hays filed a motion in limine to exclude evidence pertaining to estate planning and estate tax liability issues, and evidence protected by the attorney-client privilege. [CP 587-595] The motion was denied. [CP 776-778]

3. Mr. Hays' is Not Renewing Objections that were Overruled by the Trial Court

Mr. Hays did not seek review by this court of the trial court's decision to admit the evidence. Mr. Hays is merely pointing out that Mrs. Castilleja's attorneys submitted a large volume of unnecessary information considering the simplicity of issues presented – whether Mr. Hays was incapacitated as to his estate and whether the appointment of a guardian was necessary. Contrary to Mrs. Castilleja's assertion, the size (or dollar value) of

Mr. Hays' estate does not complicate the issues. Indeed, the size of his property holdings (individually, in Hays Elliott Properties, LLC and the Hays Family Trust) may have eased the burden on Mrs. Castilleja since there was so much at stake.

D. THE TRIAL COURT DID NOT RULE ON THE REASONABLENESS OF THE FEES AND COSTS IN ITS NOVEMBER 18, 2011 ORDER OR DIRECT ALLOCATION OF FEES AND COSTS

1. The Trial Court Concluded That Only the Fees and Costs Incurred for Establishing the Guardianship Were to be Paid by Mr. Hays

The trial court concluded that the *reasonable* attorney fees and costs incurred by Mrs. Castilleja should be paid from Mr. Hays' estate or any other asset/entity in which he had a beneficial interest, because the petition was filed in good faith, was necessary to protect his assets and property interests *and benefitted his estate*. [CP 2631].

The trial court ordered that the reasonableness of the attorneys' fees awarded to Mrs. Castilleja would be determined in accordance with the lodestar method by motion made and supported by contemporaneous billing statements. [CP 2639]

Thus, the trial court did not rule presciently that all of Mrs. Castilleja's fees and costs were reasonable and benefitted Mr. Hays on November 18, 2011. Instead, it ordered Mrs. Castilleja to submit fee

declarations that the trial court would review to make a determination as to the reasonableness of the fees and costs, and the amount to be allocated to the various parties/entities. As Mrs. Castilleja has repeatedly stated, this decision was not appealed. Therefore, Mrs. Castilleja's assertion that the appellate court cannot review the trial court's determination of the reasonableness of her attorneys' fees and the amount that benefitted Mr. Hays is incorrect. Both the trial and appellate court must make that determination in accordance with RCW 11.96A.150.

2. The Trial Court Held That the Fees and Costs Should be Allocated to Other Entities.

In its order on attorneys' fees, the trial court directed payment of the fees from Mr. Hays' estate or any other asset/entity in which Mr. Hays has a beneficial interest. [CP 1807]. The court went on to state that, "The fees and costs may be allocated to Hays Elliott Properties, LLC, Hays Distributing Corp. and Arthur D. Hays individually as determined by the guardian." [CP 1808] Thus, the trial court recognized that entities other than Mr. Hays benefitted from the litigation, but failed to acknowledge that the trusts also benefitted.

3. Apportionment Is Appropriate

Mrs. Castilleja objects to allocation of the payment of fees to the several trusts and to Hays Elliott Properties, LLC (HEP) on two grounds.

First, that the entities were not before the court and second, that the entities did not “unwisely object to the guardianship” as did Mr. Hays.

a. The trusts and HEP were subject to the jurisdiction of the court

The trusts and HEP were made a part of this guardianship proceeding by Mrs. Castilleja. Initially, in the petition for the appointment of a guardian, Mrs. Castilleja stated that her interest in the matter was as a daughter of Arthur Hays as well as trustee of the Hays Legacy, RHRD and Hays Grandchildren Trusts. [CP 5] In addition, Mrs. Castilleja asserted that there was a need for a guardianship based upon Mr. Hays’ problems managing his businesses, HEP and Hays Distributing Corp. [CP 3-6]

A substantial portion of the evidence submitted at trial pertained to Mr. Hays’ inability to manage HEP and the Hays Family Trust. Mrs. Castilleja summarized that evidence in her supplemental trial brief. [CP 788-829]

The only assets in the various trusts are shares of Hays Elliott Properties, LLC. [CP 2615-2616] The trustees of the trusts, Arthur Hays and Rebecca Castilleja, were parties to this proceeding. The beneficiaries of the RDHD, Hays Family and Legacy Trusts - Arthur Hays, Rebecca Castilleja, Howard Hays and Robert Hays - were also parties to this proceeding. The manager of HEP, Arthur Hays, was a party. (The relative shares and beneficiaries of the various entities are described in a chart at

CP 860.) Since the assets in HEP and the trusts were controlled by Arthur Hays and formed a substantial portion of his estate, the court has jurisdiction over the trusts and HEP pursuant to RCW 11.96A.020.

b. Allocation is based on benefit not fault.

Mr. Hays agrees with Mrs. Castilleja that fault is not a consideration in making an allocation of fees in a guardianship proceeding. *RCW 11.96A.150*. Instead, the court looks to all relevant factors, which may include the benefit that accrued to the estate or trust involved. *RCW 11.96A.150*. In this case, the trial court stated what factors it considered in its November 18, 2011 order – that fees to be charged to Mr. Hays were those reasonably incurred that benefitted his estate. [CP 2631] That order was not appealed. Accordingly, the factors which the trial court determined were relevant to its decision on the fee award and apportionment is not subject to review. Unfortunately, the trial court did not rule in conformity with its prior order when it subsequently awarded 100% of the fees incurred by Mrs. Castilleja to be paid by Mr. Hays because a substantial portion of those fees did not benefit his estate. The guardianship benefitted him only a little since most of his assets are held in HEP, which is owned partially by him individually and partially by the trusts.

The trial court based its decision upon Mr. Hays' inability to manage both his personal financial and business affairs. In its November 18, 2011 order, the trial court found that Mr. Hays was not able to "adequately perform his duties as trustee" of the Hays Family Trust. [CP 2614] Further, Mr. Hays' incapacity created a significant risk of harm to himself, to HEP and to the Hays Family Trust. [CP 2619] Also, Mr. Hays, as managing member, owed a fiduciary duty to HEP. [CP 2620] That Mr. Hays' actions as manager of HEP placed the company at risk of significant financial harm. [CP 2622] That Mr. Hays is unable to adequately manage his financial affairs and those of HEP. [CP 2623] Finally, that the children "stand to benefit from any decision or error that Mr. Hays might make ..." [CP 2623] As repeatedly stated by the trial court, a number of persons and entities benefitted from the appointment of a guardian for Mr. Hays. Accordingly, those persons or entities should share the expense of the litigation. The fees should be allocated not only to Mr. Hays and Hays Elliott Properties, LLC as the trial court ordered; but also to the RDHD, Hays Family and Hays Legacy trusts.

E. THE TRIAL COURT DID NOT ADEQUATELY CONSIDER MR. HAYS' OBJECTIONS TO FEES AND COSTS

1. No Evidence That the Trial Court Carefully Considered Mr. Hays' Objections

Despite Mrs. Castilleja's assertion that the trial court carefully considered the evidence submitted on fees and costs, the trial court's order compels a different conclusion. The order on fees and costs drafted by Mrs. Castilleja's counsel and signed by the trial court included several interlineations. However, both the typed and handwritten findings are vague and conclusory, and lack any indication that the trial court considered Mr. Hays' objections in a meaningful way.

For example, Mr. Hays made eleven specific objections to fees and/or costs incurred by Mrs. Castilleja's counsel. Rather than addressing the eleven objections, the trial court summarily stated, "The court specifically rejects the arguments made by Mr. Hays re: the reasonableness of the fees or the manner in which the case was presented." [CP 1808] This statement does not begin to address the objections raised by Mr. Hays. Considering the amount of fees requested and ordered, Mr. Hays' objections deserved more meaningful consideration by the trial court.

2. No Indication that the Court appropriately Applied the Lodestar Methodology

The trial court stated that it “employed the lodestar methodology, multiplying the attorney’s and support staff’s hourly rates by the reasonable number of hours of work performed.” However, there is no further indication in the order or elsewhere that the trial court performed any analysis of the fees incurred. It appears the trial court simply accepted the numbers stated by Mrs. Castilleja’s counsel and signed the order, without any independent review of the reasonableness of amounts billed.

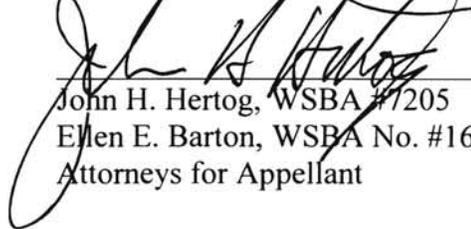
The lodestar method requires some analysis by the trial court to enable effective appellate review. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Merely stating that the method was applied without indicating how it was performed, what figures were used, and the reasoning of the trial court, provides little assistance to the reviewing court. The decision to award fees is an important discretionary function of the trial court and should not be abrogated to counsel. *Id.* at 434-5. If the trial court believed the time spent and the amount incurred to be reasonable, based upon a proper analysis, it should so state. Its failure to adequately articulate the basis for its decision requires reversal.

II. CONCLUSION

For the reasons set forth in this brief as well as in Mr. Hays' appellant's brief, the trial court's order dated January 31, 2012 awarding attorney fees should be reversed.

DATED this 9th day of July, 2012.

HERTOG & COSTER, PLLC



John H. Hertog, WSBA #7205
Ellen E. Barton, WSBA No. #16209
Attorneys for Appellant

200 W. Mercer Street, Ste. 310
Seattle, WA 98119
(206) 587-6556

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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In Re the Guardianship of:

Case No.: 68419-1-I

ARTHUR D. HAYS,

DECLARATION OF SERVICE

Appellant,

vs.

REBECCA CASTILLEJA,

Respondent.

Katie C. Dudley states as follows: On July 9th, 2012 a copy of each of the following documents were sent by ABC Legal Messenger:

- 1) Reply Brief of Appellant; and
- 2) Declaration of Service

to the following:

Suzanne Howle
Thompson & Howle
601 Union Street, Ste. 3232
Seattle, WA 98101

Michael Longyear
Jason Burnett
Reed Longyear Malnati & Ahrens PLLC
801 2nd Ave Ste 1415
Seattle, WA 98104-1517

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DECLARATION OF MAILING - 1
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HERTOG & COSTER, PLLC
Attorneys at Law
200 West Mercer Street, Suite 310
Seattle, Washington 98119-3958
(206) 587-6556 FAX (206) 587-6553

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STATE OF WASHINGTON
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1 Robert Hays
2 c/o Michael Olver
3 Hellsell Fetterman LLP
4 1001 Fourth Avenue, Suite 4200
5 Seattle, WA 98154-1154

6 Copies of the same documents were sent by United States Postal Service, postage prepaid
7 to the following party:

8 Robert Hays
9 P.O. Box 99103
10 Seattle, WA 98139

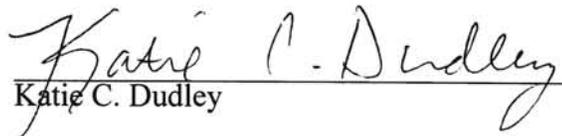
11 The same documents were sent via electronic mail to the following parties:

12 Howard Hays
13 hwhays@earthlink.net

14 Robert Hays
15 Baltambh@aol.com

16 I declare under penalty of perjury as defined by the laws of the State of Washington that
17 the foregoing is true and correct.

18 Signed at Seattle, Washington this 9th day of July, 2012.

19 
20 Katie C. Dudley