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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

AMENDED OPENING 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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A. ASSIGNMENTS OF ERROR

1. As to the March 19, 2004 Findings of Fact, Conclusions of Law, and Order Appointing Guardian of the Estate, Appellant Michael A. McKean assigns error to the authorization of the limited guardian of the estate to

3.2 f. “pursue the recovery of any trust, custodial account, or estate assets that have been dissipated by any custodian (or agent of the custodian) of the assets of the respective trusts, custodial accounts, estate, or other assets” of the minors;

3.2 k. “take other legal action, with the prior approval of the Court in this proceeding, as necessary to protect the beneficial interest of [the minors] in the trusts, custodial accounts, or estate of Patricia Mandich listed in paragraph 1.2 above, or to recover property or assets of [the minors] which another person or persons have in his or her possession or which has been concealed, embezzled, conveyed or disposed of”;

3.5 “make expenditures for the monitoring the assets of or interests of [the minors] and recovering any asset that may have been concealed, embezzled, conveyed, or disposed of.”

2. As to the August 2, 2005 Order on Annual Report of Limited Guardian of the Estate and Substitution of Guardian, Appellant Michael A. McKean assigns error to the following Findings of Fact and Conclusions of Law:

1.7 It was necessary for Guardianship Services of the South Sound to independently verify the amount and location of all assets belonging to Morgan and Michelle

McKean given Mr. McKean's disbarment as an attorney and his criminal acts involving moral turpitude.

3. As to the Order Approving and Directing Payment of Guardian's and Attorneys' Fees and Costs entered on October 31, 2005, Mr. McKean assigns error to the following Findings of Fact and Conclusions of Law:

1.4 The guardian and its attorneys performed services necessary for the proper administration of the guardianship estates by investigating and marshaling the assets of the minors, preparing and filing inventories of assets and preparing and filing reports with the court as required by law and court order.

1.6 The Court finds that the fees of Hertog & Coster, PLLC for the period July 1, 2003 through April 22, 2004 in the amount of \$4,341.00 are reasonable and were necessary services and should be paid equally from the guardianship estates of Morgan McKean and Michelle McKean.

1.7 The Court finds that the fees of Hertog & Coster, PLLC for the period April 28, 2004 through August 23, 2004 in the amount of \$1,905.00 are reasonable and were for necessary services and should be paid equally from the guardianship estates of Morgan McKean and Michelle McKean.

1.8 The Court finds that the fees of Hertog & Coster, PLLC for the period August 30, 2004 through September 24, 2004 in the amount of \$3,262.50 are reasonable and were for necessary services and should be paid equally from the guardianship estates of Morgan McKean and Michelle McKean.

1.9 The Court finds that the costs of Hertog & Coster, PLLC for the period September 27, 2004 through

August 5, 2005 in the amount of \$7,750.00 are reasonable and were for necessary services and should be paid equally from the guardianship estates of Morgan McKean and Michelle McKean.

1.10 The Court finds that the costs of Hertog & Coster, PLLC for the period July 1, 2003 through August 5, 2005 in amount of \$3,269.67 are reasonable and should be paid equally from the guardianship estates of Morgan McKean and Michelle McKean.

1.11 The Court finds that the fees of Guardianship Services of the South Sound in the amount of \$4,485.00 are reasonable and were for necessary services and should be paid from the guardianship estate of Morgan McKean.

1.12 The Court finds that the fees of Guardianship Services of the South Sound in the amount of \$4,529.00 are reasonable and were for necessary services and should be paid from the guardianship estate of Michelle McKean.

2.2 The fees of the guardian and its attorneys as set forth in Findings of Fact 1.6 – 1.16 above are reasonable both as to the hourly rates charges for services, the time spent providing services, the costs incurred by the guardian and its attorney should be reimbursed to each of them.

4. As to the Order Approving and Directing Payment of Guardian's and Attorneys' Fees and Costs entered on February 13, 2006, error is assigned to the following Findings of Fact:

1.1 The actions taken by the guardian and its attorneys as authorized and directed by this Court have benefited [sic] the estates of Morgan and Michelle McKean. Each pleading and argument propounded by the

guardian and its attorneys was well grounded in fact and made in the best interest of Morgan and Michelle McKean.

1.3 The fees of the guardian and its attorneys are reasonable both as to the hourly rates charged and the time spent performing necessary tasks, and the costs incurred by the guardian and its attorney were necessarily incurred and should be reimbursed to each.

1.4 There was no duplication of effort and no duplicate charging of fees by the guardian or its attorney.

1.5 The guardian and its attorney performed services necessary for the proper administration of the guardianship estates by investigating and marshaling the assets of the minors, preparing and filing inventories of assets and preparing and filing reports with the court as required by law and court order.

1.8 The guardian and its attorneys deserve their fees and costs. They have behaved professionally and admirably considering the context of this case.

5. The trial court abused its discretion in entering the October 31, 2005 Order Unblocking Financial Accounts to permit the limited guardian to pay the fees and costs submitted by the guardian and its attorneys.

6. The trial court abused its discretion in awarding more than 100% of the guardianship assets to the limited guardian and its attorneys for fees and costs.

7. The trial court abused its discretion in requiring Mr. McKean to pay the amount of the guardian's attorneys' fees in excess of

the amount of the guardianship assets and entering judgment against him thereon.

8. The trial court exceeded its authority in requiring Mr. McKean to post a bond in the amount of \$25,000 to guarantee payment of the guardian's costs and the guardian's attorneys' costs and fees on appeal.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court exceed its authority and breach its duty to Michelle and Morgan McKean by authorizing the limited guardian to perform a prosecutorial-like investigation into the financial and legal affairs of third parties, seeking evidence to support the guardian's suspicion that Mr. McKean had concealed or dissipated assets belonging to his daughters, at the expense of the minors? (Assignments of Error 1, 2)

2. Did the trial court abuse its discretion by approving as reasonable and necessary payment of the guardian's and the guardian's attorneys' fees and costs that totaled more than 100% of the minor's non-trust assets? (Assignments of Error 3, 4, 5, 6)

3. Did the trial court abuse its discretion by ordering Mr. McKean to pay the amount of the guardian's attorneys' fees and costs that exceeded the total amount of the guardianship assets and entering judgment against him thereon? (Assignment of Error 7)

4. Did the trial court exceed its authority by ordering Mr. McKean to post a bond in the amount of \$25,000 to guarantee payment of the guardian's and the guardians' attorneys' fees and costs on appeal? (Assignment of Error 8)

5. Should the Court award attorney's fees to Mr. McKean where he is bringing this appeal as the next friend of his daughters?
(Assignments of Error 1-6)

C. STATEMENT OF THE CASE

This is the second time this guardianship case has been before the Court. In an unpublished opinion, this Court affirmed the finding of the trial court that a limited guardianship for the estates of Michelle and Morgan McKean was “both reasonable and necessary.” *In re the Guardianship of McKean*, 126 Wn. App. 1028, 2005 WL 591245 at *2. The Court ruled that because the corporate trustee had no access to and could not monitor the non-trust assets of Michelle and Morgan McKean, “a guardian was necessary to protect the children’s interests.” *Id.* at *3.

The non-trust assets of Morgan and Michelle McKean had been set up by Michael McKean and his mother as gifts to the children and were identified by the superior court during the dissolution proceedings between Michael and Connie McKean in November 2000. *See* CP 2; CP 12; CP 160-161; CP 492.

On March 19, 2004, the trial court appointed Guardianship Services of the South Sound (GSSS) as guardian of the estates of Michelle and Morgan McKean CP 1-18. On September 13, 2004, the guardian located a small savings account (\$2,647.89) at Columbia Bank belonging to Morgan McKean. CP 135. This account, apparently overlooked during Mr. McKean’s dissolution proceedings, had been opened in 1999 and had remained inactive since it was opened. *Id.*

On September 23, 2004, the guardian's attorneys "confirmed" the previously known non-trust assets of Michelle and Morgan, added the small savings account, and stated: "To this point, we have identified approximately \$27,185.19 in the name of Morgan McKean and \$24,823.49 in the name of Michelle McKean." CP 137. The total amount of the non-trust assets of Michelle and Morgan McKean was \$52,008.68 on September 23, 2004. *Id.* **There were no other non-trust assets found by the guardian and its attorneys during the four-year guardianship.** See CP 1234-1245.

On October 31, 2005, the court entered an order approving payments for the guardian's fees and the legal fees and costs of the guardian's attorneys (Hertog & Coster, PLLC) through August 5, 2005. CP 1215-1221. These fees and costs totaled \$30,085.17, to be paid from the non-trust assets of Michelle and Morgan McKean. *Id.*

Prior to that date, legal fees had already been paid to Robin Balsam in the amount of \$10,951.00 and to Charles Granowski in the amount of \$3,368.00 (CP 1418), bringing legal fees and costs paid through October 31, 2005 to a total of \$44,404.17, all paid from the non-trust assets of Michelle and Morgan McKean. CP 1215-1221; CP 1418-1419.

On February 15, 2006, the court entered an Order Approving and Directing Payment of Guardian's and Attorneys' Fees and Costs for the

period of August 5, 2005 through February 16, 2006. CP 1450-1453. The court ordered that Hertog & Coster, PLLC be paid \$17,765.34 and that Capitol Guardianship Services (the successor guardian to GSSS) be paid \$2,117.00 (CP 1453).

These amounts added to the \$44,404.17 previously paid for legal fees and costs total \$64,286.51 (CP 1215-1221; CP 1418; CP 1453), which exceeded the total amount of the guardianship assets by \$12,277.83. *Id.* The Order also states that “the sum of \$14,382.34 shall be paid to Hertog & Coster PLLC by Michael McKean within fourteen days after entry of this order.” CP 1453. A judgment in that amount plus interest at 12% per annum was entered against Mr. McKean on March 10, 2006. CP 1456.

Also on February 15, 2006, the court entered an Order on Guardian’s Petition for Instructions Regarding Appeal, which states:

Michael McKean shall . . . individually post a bond for \$25,000 to guarantee payment of the guardian’s fees and costs and the guardian’s attorneys’ fees and costs for the appeal.

CP 1455.

Notice of Appeal from the February 2006 Orders and the Judgment entered on March 10, 2006 was filed on March 14, 2006 (CP 1448-1458), and by letter dated March 27, 2006, was consolidated with the appeal

pending under Case Number 34132-8-II. This Amended Opening Brief of Appellant is submitted to reflect the consolidation of the two appeals.

D. SUMMARY OF ARGUMENT

The trial court exceeded its authority under Chapter 11.92 RCW, failed to protect and conserve the assets of the minors, and failed to control the guardian as mandated by RCW 11.92.010.

The trial court failed to utilize the procedure set out in RCW 11.92.185 and RCW 11.48.070 for handling suspicions that a person has concealed, embezzled, conveyed or disposed of the property of the minors' estate, and instead authorized prosecutorial-like investigation activities by the guardian and its attorneys that went far beyond the statutory duties of a limited guardian, resulting in complete depletion of the minors' guardianship assets.

The trial court abused its discretion in approving fees and costs submitted by the guardian and its attorneys amounting to more than 100% of the minors' guardianship assets.

The trial court abused its discretion by ordering Mr. McKean to pay the amount of the claimed fees and costs exceeding the amount of the guardianship assets and exceeded its authority by ordering Mr. McKean to post a \$25,000 bond to guarantee payment of the guardian's and his attorneys' fees on appeal.

This Court should award attorneys fees to Mr. McKean for bringing this appeal on behalf of his daughters.

E. ARGUMENT

- 1. The trial court exceeded its authority by authorizing the limited guardian of the estate to pursue recovery of “dissipated,” “embezzled,” or “concealed” assets, initiate legal proceedings to recover such assets, and to make expenditures for such activities.**

This Court ruled that because the corporate trustee could not monitor the non-trust assets of Michelle and Morgan McKean, “a guardian was necessary to protect the children’s interests.” *Guardianship of McKean*, 2005 WL 591245 *3.

The trial court appointed a limited guardian for the estates of Michelle and Morgan McKean. CP 1-19. Duties of a limited guardian of an estate are set out in RCW 11.92.040 and include filing of an inventory “of all the property of the incapacitated person which comes into the guardian’s possession or knowledge”; filing of an annual verified account of administration of the estate or alternatively, providing a petition for withdrawal of funds from the blocked account of a minor; reporting any “substantial change in income or assets of the guardianship estate within thirty days of the occurrence of the change”; protecting and preserving the guardianship estate, accounting for it faithfully, performing all of the duties required by law, and at the termination of the limited guardianship,

delivering the assets of the ward to the persons entitled thereto; investing property of the ward; and applying for orders authorizing disbursements on behalf of the ward. RCW 11.92.040. For a limited period of time, the court may also authorize a limited guardian “to do anything that a trustee can do under the provisions of RCW 11.98.070.” RCW 11.92.040(4).

In this case, the court’s order appointing the limited guardian went far beyond RCW 11.92.040 and RCW 11.98.070: the court authorized the limited guardian to “pursue the recovery of any trust, custodial account, or estate assets that have been 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 Morgan McKean. CP 5; CP 15.

The order appointing the limited guardian also authorized the guardian to “take other legal action, with the prior approval of the Court in this proceeding, as necessary to protect the beneficial interest of” Michelle and Morgan McKean “in the trusts, custodial accounts, or estate of Patricia Mandich listed in paragraph 1.2 above, or to recover property or assets of” Michelle and 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; CP 15-16.

Finally, the court authorized the limited guardian “to make expenditures for the monitoring the assets of or interest of” Michelle and

Morgan McKean and for “recovering any asset that may have been concealed, embezzled, conveyed, or disposed of.” CP 6; CP 16.

In authorizing the limited guardian of the estate to pursue recovery of assets that had been dissipated by a custodian or a custodian’s agent, to take legal action to “recover” assets which had been concealed, embezzled, conveyed or disposed of, and to make expenditures for “recovering” any asset that “may have been concealed, embezzled, conveyed, or disposed of,” the trial court exceeded its authority granted under Chapter 11.92 RCW.

RCW 11.92.185 and 11.48.070 authorize the court to “bring before it any person . . . suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any property of the estates” for examination and answering questions regarding the property. RCW 11.48.070.

However, this is “a statute of discovery” only. *State ex rel. Wolfe v. Superior Court of King County*, 139 Wn. 102, 105, 245 P. 764 (1926); *State ex rel. Brown v. Long*, 180 Wn. 602, 607, 41 P.2d 396 (1935) (“Discovery, by the means and to the extent defined by the terms of the statute, is the limit of the authority given.”). *See also In re Bailey’s Estate*, 58 Wn.2d 685, 699, 364 P.2d 539 (1961) (“In this state the

legislature has provided the means to enable administrators to obtain necessary information from any person. *See* RCW 11.48.070. . . .”).

In *Wolfe*, an administrator filed a petition in probate proceedings, alleging that one Clara Wolfe had in her possession property that belonged to the estate of the deceased, which she refused to turn over to the administrator. *Id.* at 102-103, 245 P. 764. The court issued a citation directing Ms. Wolfe to surrender the property, and Ms. Wolfe made a special appearance, moving to quash the citation because the court had no jurisdiction over her or the subject matter of the petition. *Id.* at 103, 245 P. 764. The trial court refused to quash the citation and “announced its intention to try out the issues raised by the allegations of the petition and the affidavit filed in response thereto, and to enter such a judgment as it should deem the facts appearing at the trial warranted.” *Id.* at 104, 245 P. 764. The Supreme Court explained:

The court’s power to try the issue it has announced it will try must be found in the cited statute. Turning to the statute¹, it is at once apparent that it does not upon its face authorize the procedure here contemplated by the trial court. On its face it is a statute of discovery. It provides a means by which the representatives of an estate may bring before the court a person suspected of having in his possession, or having concealed, embezzled, conveyed, or otherwise disposed of, property of an estate, or suspected of having possession or knowledge of documents which might tend to establish title in the estate to property, and subject

¹ Former RRS 1472, predecessor to RCW 11.48.070.

the person to an examination with respect to the property. It provides, moreover, only for an examination. **It does not directly authorize the court to make an order with respect to property, even if property is discovered. Much less can it be said that it directly authorizes the court to try out the title to property claimed by the representatives of the estate on the one side, and by the person holding it on the other.** If, therefore, the statute authorizes the procedure contemplated by the trial court, it does so not by direct enactment, but by necessary intendment. But we cannot conclude that it has this effect. Seemingly, if the Legislature had so intended, it would have expressed the intention in language not capable of being misunderstood, and not left it to surmise or conjecture.

Wolfe, 139 Wn. at 105-106, 245 P. 764 (emphasis added).

The Supreme Court issued a writ prohibiting the Superior Court “from exercising jurisdiction in the premises.” *Id.* at 104, 106, 245 P. 764.

The trial court here had no authority to authorize the limited guardian to pursue recovery of or to take legal action to recover assets which may have been concealed, embezzled, conveyed or disposed of, or to make expenditures for such activities. The court’s authority to make discovery regarding such assets is set out in and limited by RCW 11.48.070, and the court’s authority does not include “recovering” and/or deciding title to assets not in the possession of the wards.

This Court should rule that the trial court exceeded its authority by ordering the limited guardian to pursue such activities, and that the hours

expended in this pursuit and any related costs and fees claimed by the guardian and its attorneys were not “reasonable or necessary.”

2. The trial court breached its duty to Michelle and Morgan McKean.

“The court having jurisdiction of a guardianship matter is said to be the superior guardian of the ward, while the person appointed guardian is deemed to be an officer of the court,” and “Washington guardianship statutes are in accord.” *Seattle-First Nat. Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977), citing RCW 11.92.010. The trial court was the “superior guardian” of the estates of Michelle and Morgan McKean.

“[T]he real object and purpose of a guardianship is to preserve and conserve the ward’s property for his own use, as distinguished from the benefit of others.” *In re Michelson’s Guardianship*, 8 Wn.2d 327, 336, 111 P.2d 1011 (1941).

In this case, the guardianship assets were completely exhausted by the fees and costs awarded to the guardian and the guardian’s attorneys, in large part for work that is not authorized by RCW 11.92.040.

In addition to this fact, the court failed to consider whether the cost of the (improperly) authorized activities of the guardian outweighed any possible benefit to the minors until the guardianship assets had been

exhausted. No attempt was made to preserve and conserve the children's property by the court or by the guardian or by its attorneys, in spite of the fact that "[a] guardianship has been described as 'a trust relation of the most sacred character'" (*In the Matter of the Guardianship of Eisenberg*, 43 Wn. App. 761, 766, 719 P.2d 187 (1986)), and the fact that the attorney of a guardian also owes a duty to the ward. *In re Guardianship of Karan*, 110 Wn. App. 76, 86, 38 P.3d 396 (2002).

"In a case involving the welfare of a minor, the courts have a particular duty to protect the interests of the child, and may act sua sponte to correct perceived errors affecting the child's welfare." *Durham v. Moe*, 80 Wn. App. 88, 91, 906 P.2d 986 (1995), *review denied*, 129 Wn.2d 1016, 917 P.2d 574 (1996), citing *In re Guardianship of Ivarsson*, 60 Wn.2d 733, 375 P.2d 509 (1962); *Karan*, 110 Wn. App. 85, 38 P.3d 396 ("In matters involving the welfare of minors and other legally incompetent individuals, the courts assume a particular duty to protect the interests of the ward."); *In re Deming's Guardianship*, 192 Wn. 190, 200, 73 P.2d 764 (1937). "[C]ourts require a more jealous guarding of the interests of such helpless persons than those of other beneficiaries of trusts." *In re Carlson's Guardianship*, 162 Wn.2d 20, 28, 297 P.764 (1931).

The *Ivarsson* court quoted a New Mexico case in which the court approved "the rule that a minor who has a case in court is represented not

only by his guardian ad litem, but by the court itself.” *Ivarrson*, 60 Wn.2d at 737, 375 P.2d 509, quoting *Haden v. Eaves*, 226 P.2d 457, 462 (1950).

When confronted with petitions for instructions authorizing the guardian and its attorneys to perform prosecutorial-like tasks (*see, e.g.*, CP 99-105; CP 178-185), the court owed Michelle and Morgan a duty to protect and conserve their assets. The trial court utterly failed to do so.

3. The trial court failed to follow statutory procedure and authorized waste of the minors’ assets.

Repeated throughout the record before this Court are references to Michael McKean’s conviction for fraud and Connie McKean’s wrongful taking of money from an account established for Michelle. In its Order on Annual Report of the Guardian, the trial court entered a finding that “[i]t was necessary for Guardianship Services of the South Sound to **independently verify the amount and location of all assets** belonging to Morgan and Michelle McKean **given Mr. McKean’s disbarment as an attorney and his criminal acts involving moral turpitude.**” CP 918. (Emphasis added.)

However, it was **not** necessary for GSSS to “independently verify the amount and location of all assets” for several reasons: (1) all of the minor’s non-trust assets (save one small savings account) had already been

identified during the dissolution proceedings of Michael and Connie McKean; and (2) there is a statutory procedure that applied directly to the facts of this case that would have permitted a quick and inexpensive way to deal with the suspicion (for there was no evidence) that Mr. McKean had misused non-trust assets of his children.

All of the expense related to the investigation into Mr. McKean's legal history and the "discovery" regarding possible unknown assets of Michelle and Morgan could and should have been avoided by utilization of the statutory procedure set out in RCW 11.92.185, which 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 "manner prescribed by RCW 11.48.070" is for the court to issue a citation to any person or persons suspected of misusing the assets of a ward so that the person be brought before the court to "answer such interrogatories as may be put to him touching such matters." RCW 11.48.070.

Instead, the Order Appointing Limited Guardian of the Estate authorized the guardian to conduct a carte blanche investigation into the affairs of Michael McKean reaching back 15 years to the dissolution of his

second marriage and into the financial affairs of his extended family (*see* CP 1-6; CP 11-16), and to “pursue recovery” of assets dissipated, embezzled, or concealed.

There was absolutely **no** evidence before the court that any additional assets belonging to Michelle and Morgan McKean existed. The trial court did not require the guardian to identify what suspected additional assets might be found, and did not balance the risk that nothing would be found against the foreseeable dissipation of the known guardianship assets.

When Michael McKean objected to payment of fees because it was a “waste of money and is damaging my children financially,” and asserted that the court “should and must consider the financial harm being done to my children” (CP 83), the court’s response was to order the parties to “come together in agreement on a discovery plan.” CP 97.

The guardian later reported that he had spent **10 months** “to discover what assets and interests the children actually have.” CP 219. All non-trust assets and interests of Michelle and Morgan McKean, with the exception of one small account that had been dormant since 1999, had already been “discovered” by Judge Sebring in 2000. CP 160-161; CP 492.

The court was at all times aware of the known guardianship assets (*see, e.g.*, CP 137), and was kept apprised of the rising costs and fees of the guardian and its attorneys. In fact, no less than four requests for costs and fees were submitted to the court. *See* CP 48-79; CP 397-491; CP 791-806; CP 1375-1416.

On August 2, 2004, the guardian and its attorneys submitted a petition for an order approving \$11,239.78 in fees and costs, which constituted 22% of the total guardianship assets. CP 48-79. Nevertheless, the court entered an order authorizing the guardian and its attorneys to examine court records in three other cases. CP 168-170.

By January 12, 2005, the amount sought by the guardian and its attorneys for fees and costs had risen to \$24,575.90, or 47% of the total guardianship assets. CP 397. By April 30, 2005, the amount sought by the guardian and its attorneys for fees and costs had risen to \$33,223.14, or 64% of the total guardianship assets. CP 791-806. The final amount sought by the guardian and its attorneys totaled \$64,286.51 (CP 1215-1221; CP 1418; CP 1453), or 124% of the total guardianship assets.

The court utterly failed to either control the guardian or to protect the interests of Michelle and Morgan McKean, instead authorizing the guardian and its attorneys to perform duties of a prosecutor, seeking evidence to support their suspicion that Mr. McKean had misused assets

belonging to his children. For the guardian and its attorneys, this was a very lucrative alternative to RCW 11.92.185 and RCW 11.48.070.

Finally, on February 15, 2006, after the guardianship accounts had been depleted, the court found that “it is not reasonable or necessary to continue this guardianship action because of the costs involved in relation to the assets[.]” CP 1418. For Michelle and Morgan McKean, the court’s failure to control the guardian and its failure to utilize the statutory procedures available to it was nothing less than disastrous.

Ironically, after four years of the guardianship and complete depletion of the minors’ non-trust assets, the trial court also entered the following findings:

7. Michael A. McKean has been primarily responsible for creating an estate for his children as well as funding trusts for the benefit of his children and others;
8. Michael A. McKean has shown in the past an ability to invest in real property and other assets and to create profit and wealth;
9. The court believes that Michael McKean will continue in the future to make wise investments and increase the value of the assets owned by himself and/or the McKean children and will further provide benefit to any trust for which he is allowed to provide input;
10. Because of Michael McKean’s exhibited willingness to financially benefit his children and their estates, and given the amount of non-trust assets that exist at the present time (approximately \$20,000-\$30,000) it is not reasonable or necessary to continue this guardianship

action because of the costs involved in relation to the assets and because the court believes that Michael McKean will do everything he possibly can to benefit his children, their estates, and the estate of any trust in which his children are included as named beneficiaries. . . .

CP 1417-1420.

4. The trial court authorized activities that created a conflict of financial interest between the minors and the limited guardian and his attorneys.

There was simply no relationship between the legitimate purpose of a limited guardianship, i.e., to preserve and conserve the property of the wards for their own use (*Michelson's Guardianship*, 8 Wn.2d at 336, 111 P.2d 1011) and the authorization for the guardian and its attorneys to pursue prosecutorial-like tasks in a search for evidence confirming the suspicion that Mr. McKean had somehow wrongfully concealed or dissipated unknown assets belonging to his daughters.

As previously stated, this suspicion should have been dealt with by utilizing the procedure set out in RCW 11.92.185 and RCW 11.48.070 rather than launching an investigation at the expense of Morgan and Michelle McKean. The sweeping breadth of the court's order appointing the limited guardian created a conflict of financial interest between the wards and their guardians.

On September 16, 2004, the guardian filed a Petition for Order Approving Discovery Plan. In that document, the guardian's attorney wrote:

At the present time the risk of non-payment of fees and costs rests squarely on the shoulders of the Guardian and its counsel. After a review of the Court files in this matter, the Guardian and its counsel are willing to continue in this matter with the understanding that fees and costs of the guardian and its attorney as approved by this Court will be paid from the assets which are identified and marshaled by the Guardian.

CP 104.

The Court was thus put squarely on notice that any "investigation" it authorized would be paid for out of the assets of the minors. Nevertheless, the Court entered an order authorizing a review of court records in a trust proceeding (*In re the Irrevocable Trust of Michael A. McKean*, Pierce County Cause No. 02-4-00018-8), a dissolution proceeding (*In re the Marriage of Michael McKean and Connie McKean*, Pierce County Cause No. 98-3-01560-7, and a bankruptcy proceeding (*In re Michael McKean, Debtor*, United States Bankruptcy Court, Western District of Washington Cause No. 02-44015). CP 169. The trial court also authorized the guardian and the guardian's counsel "time to interview and/or depose Connie McKean and Shannon Keen" [sic]. CP 169.

The duties of a limited guardian include filing a verified inventory “of all the property of the incapacitated person which comes into the guardian’s possession or knowledge,” identification of the property of the guardianship estate, identification of additional property received into the guardianship, protection and preservation of the guardianship estate, and investment of the incapacitated person’s property in accordance with rules applicable to investment of trust estates by trustees. RCW 11.92.040. A limited guardian may also be charged with duties of a trustee under RCW 11.98.070. RCW 11.92.040(4).

However, there is **no** statutory authority for charge to a limited guardian to investigate the financial affairs of third persons, to “independently verify” the known assets of the ward, or to discover whether there are unknown assets in some unknown location. A limited guardian is not a prosecutor. In this case, however, the court authorized activities prosecutorial in nature at the expense of Michelle and Morgan McKean.

The court authorized activities that went far beyond the statutory duties of a limited guardian in spite of the rule that “a person occupying a relation of trust or confidence to another is in equity bound to abstain from doing everything which can place him in a position inconsistent with the

duty or trust such relation imposes upon him” *Carlson’s Guardianship*, 162 Wn. at 31-32, 297 P.764.

Where the duty of the court and the limited guardian is to protect and conserve assets of the ward, the court and the guardian are “in equity bound” to abstain from engaging in lengthy, expensive, duplicative “investigation” and “verification” of assets at the expense of the ward. The trial court breached its duty to protect the interests of the minors and abused its discretion in finding that hours spent on prosecutorial-like tasks were reasonable and necessary.

5. The trial court abused its discretion by approving as “just and reasonable” payment of fees and costs that totaled more than 100% of the minor’s guardianship assets.

The trial court authorized payment of more than 100% of the guardianship accounts for the guardian’s fees and costs and the fees and costs of its attorneys. RCW 11.92.180 provides “[a] . . . limited guardian shall be allowed such compensation for his . . . services as . . . limited guardian as the court shall deem just and reasonable.”

The amount of costs and fees awarded by a trial court to a guardian and a guardian’s attorneys is a matter of discretion. *In re Kelley’s Estate*, 193 Wn. 109, 120, 74 P.2d 904 (1938); *In re Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966). Such a decision is reviewed for

abuse of the court's discretion, which occurs when "[a] trial court . . . acts on untenable grounds or its ruling is manifestly unreasonable." *In re Detention of Broten*, 130 Wn. App. 326, 336, 122 P.2d 942, review denied, 150 Wn.2d 1010, 79 P.3d 445 (2003).

In the context of a Consumer Protection Act claim, where "reasonable" attorney's fees are available to a successful plaintiff (RCW 19.86.090), the Supreme Court wrote:

[T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. . . . [T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney's fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in no way dispositive.

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

The duty imposed on trial courts to make an independent decision as to what represents a reasonable amount for attorney's fees is surely even more important in a guardianship, where as here, the fees were coming out of the wards' estates, and the award must be "just and reasonable." Here, with a few minor changes made in response to objections by Michael McKean (*see* 2/15/06 RP 12; RP 17; RP 22; RP 28; RP 30; RP 34-35; RP 3) the trial court simply approved everything the

guardian and its attorneys asked for because “they have done the work and they should get paid.” 2/16/06 RP 79.

It is not “just and reasonable” to award more in fees and costs than the total amount of the guardianship assets where the purpose of a guardianship is to protect and conserve the assets. The trial court abused its discretion in awarding more than 100% of the guardianship accounts to the guardian and its attorneys.

6. The trial court abused its discretion by ordering Mr. McKean to pay \$14,382.34 for costs and fees of the guardian and its attorneys.

(a) The trial court’s stated reasons for ordering Mr. McKean to pay the fees of the guardian and his attorneys are untenable.

RCW 11.96A.150 provides in pertinent part that “the superior court . . . may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party: (a) From any party to the proceedings[.]”

On February 15, 2006, the court ordered Mr. McKean to pay \$14,382.34 for costs and fees of the guardian and its attorneys that exceeded the total amount of the guardianship accounts. CP 1450-1453. There are no findings of fact included in the February 15th Order that explain the basis of the court’s decision to require Mr. McKean to pay this amount or why he was required to pay that particular amount. *Id.*

However, the oral ruling of the court indicates that Mr. McKean was ordered to pay the costs and fees of the guardian and his attorneys “because that’s going to be the subject of the appeal anyway. . . .” (2/16/06 RP 71), and because “the only source to get payment would be from Michael McKean.” 2/16/06 RP 77. At one point during the hearing on the claims for fees and costs, the court stated: “Let me ask you this, if Mr. McKean doesn’t pay the attorney fees and the guardianship only has \$3000 left, how then do you suppose the fees will get paid; would they have to sell an asset of the estate”? *Id.* at RP 76. The court had to be informed that “[t]here is no other asset, Your Honor.” *Id.*

The court then stated, “[s]o basically the only source to get payment would be from Michael McKean, correct, I mean were they to be paid attorney’s fees? . . . I am going to make an order that the responsibility is that of Michael McKean to pay the attorney’s [fees].” *Id.* at RP 77, RP 79.

A court abuses its discretion when a decision is based on untenable grounds or is manifestly unreasonable. *Brotten*, 130 Wn. App. at 336, 122 P.2d 942. The court’s decision to require Mr. McKean to pay the fees of the guardian and his attorneys was an abuse of discretion on both bases.

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(b) *Mr. McKean should not be penalized for contesting perceived waste of his children's assets.*

Mr. Hertog assigned blame to Mr. McKean for driving the litigation during the guardianship and for “multiplying the amount of the fees and costs incurred by the guardian and its attorneys by challenging the very interests in assets that [he] created for Morgan and Michelle McKean.” CP 1384.

Mr. McKean did not challenge his children's interests in the assets he created for them: he challenged the waste of those assets by the court's authorization and the funding from his children's accounts of prosecutorial-like work by the guardian and its attorneys. “If there is an aggrieved or interested person entitled to appeal, it is the ward. It is her money that is being so freely and generously distributed.” *Ivarsson*, 70 Wn.2d at 735, 375 P.2d 509.

Even though the court as their “superior guardian” had appointed a limited guardian to protect and conserve their estates, Mr. McKean perceived that the money belonging to Michelle and Morgan was being too “freely and generously distributed.” Mr. McKean was “a ‘next friend’ who conceive[d] that the ward's estate [wa]s being wrongfully dissipated and . . . so indicated to the probate court by chapter and verse.” *Ivarsson*, 60 Wn.2d at 735-736, 375 P.2d 509.

The court should have utilized the inexpensive statutory procedure permitting the guardian to question Mr. McKean and/or Ms. Keene under oath regarding any suspicion that they had concealed, embezzled or dissipated assets belonging to Michelle and Morgan, but did not do so. Mr. McKean was left with no alternative but to “challenge” the conduct of the guardian and its attorneys in an attempt to protect the assets he had created for his children from the improper, unnecessary, and wasteful investigation into the financial affairs of third persons and into his past legal affairs and pending legal proceedings, all unrelated to the non-trust assets of his daughters.

Mr. McKean, as next friend of his daughters, was entitled to attempt to protect their assets from perceived waste when both the court and their limited guardian failed to do so, and he should not be punished by being ordered to pay the fees of the guardian’s attorneys.

7. **The trial court had no authority to order Mr. McKean to post a bond in the amount of \$25,000 to guarantee payment of the guardian’s costs and the guardian’s attorneys’ costs and fees on appeal.**

In the Limited Guardian’s Petition for Instructions Regarding Appeal, the guardian argued that Mr. McKean and Shannon Keene should be required to post a bond to pay the costs and fees of the guardian and its

attorneys on appeal, arguing that their “intransigence and litigiousness have cost the children money[.]” *See* CP 1270-1282.

The trial court entered an order requiring Michael McKean to “post a bond for \$25,000 to guarantee payment of the guardian’s fees and costs and the guardian’s attorneys’ fees and costs for the appeal.” CP 1455.

The trial court had no authority to enter such an order. While RAP 7.2(d) allows a trial court to award attorney’s fees and litigation expenses after review is accepted, it may only do so where “applicable law gives the trial court authority to do so.”

RCW 11.96A.150(1) states in pertinent part:

Either the superior court **or the court on appeal** may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party (a) From any party **to the proceedings** (emphasis added).

The trial court is not authorized by this statute to order that a party in the trial proceedings pay (or post a bond to pay) attorneys’ fees on appeal.

This Court should vacate the requirement that Mr. McKean post a \$25,000 bond to guarantee payment of the guardian’s and its attorneys from the Order on Guardian’s Petition for Instructions Regarding Appeal. **This** Court must make the determination whether any party to **these** proceedings is entitled to attorney’s fees.

8. The Court should award Mr. McKean his costs and attorneys' fees incurred in bringing this appeal.

“If there is an aggrieved or interested person entitled to appeal, it is the ward. It is her money that is being so freely and generously distributed.” *Ivarsson*, 70 Wn.2d at 735, 375 P.2d 509. Michelle and Morgan, being minors, of course cannot exercise their right to appeal.

Mr. McKean is the “normal[] . . . ‘next friend’” of his children, and the right of appeal by a “next friend” has “long been recognized.” *Id.* Although this appeal is brought nominally in Mr. McKean’s name, it is clearly for the benefit of his children. *Id.* Like the appeal brought by the ward’s grandparents in *Ivarsson*, “[t]his is, in substance and effect, an appeal by a ‘next friend’ who conceives that the estate is being wrongfully dissipated and has so indicated to the probate court by chapter and verse.” *Ivarsson*, 60 Wn.2d at 735-736, 375 P.2d 509.

RAP 18.1(a) allows recovery of attorney fees and costs on appeal if applicable law grants the right. Under RCW 11.96A.150, the Court may assess attorney fees and costs against any party to the trust or guardianship proceeding.

Mr. McKean opposed the authorization of improper, wasteful, duplicative, and unnecessary services and the payment of unreasonable and unjust fees of the guardian and the guardian’s attorneys because they

were dissipating the custodial accounts he had established for his children. He sought to conserve the known assets of Morgan and Michelle throughout the guardianship in spite of the resistance of the guardian and the guardian's attorneys.

Had the court properly utilized the procedure set out in RCW 11.48.070, it would have learned that Mr. McKean did not conceal, embezzle, convey, or dispose of any of the guardianship property. Upon such a finding, Mr. McKean would have been "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." RCW 11.48.070. Instead, Mr. McKean bore the entire cost of the litigation below in an attempt to protect his daughters' assets.

This Court previously awarded attorney fees and costs to Commencement Bay Guardian Services against Michael McKean on the basis of RCW 11.96A.150 when he appealed the order appointing a guardian to monitor trusts benefiting Michelle and Morgan. Undoubtedly the Court did so because it believed a guardian was necessary to protect and conserve their assets. In other words, this Court was fulfilling its duty to protect the interests of minors. *See, e.g., Ivarsson*, 60 Wn.2d at 737-738, 375 P.2d 509.

On this second appeal, it is not the guardian, but Mr. McKean who is aligned with the Court's purpose of protecting the interests of the minors. The Court should award Mr. McKean his costs and attorney's fees incurred in bringing this appeal for the benefit of his daughters on the basis of RCW 11.96A.150.

F. CONCLUSION

At the conclusion of the guardianship, Morgan and Michelle McKean's non-trust assets had been completely depleted by payment of the fees and costs of the guardian and his attorneys. By approving appointment of a limited guardian to "protect the interests" of Morgan and Michelle, surely this Court did not mean that the guardian should conduct an investigation unauthorized by the guardianship statutes to find evidence of Mr. McKean's suspected wrongdoing **at his daughters' expense**.

The trial court exceeded its authority under Chapter 11.92 RCW and breached its duty to Michelle and Morgan McKean by ordering the guardian and the guardian's attorneys to conduct a prosecutorial-like investigation instead of utilizing the procedures set out in RCW 11.92.185 and RCW 11.48.070.

The trial court abused its discretion in finding all work performed by the guardian and its attorneys was "necessary" and that all fees and costs submitted by the guardian and its attorneys, with a few minor

exceptions, were “reasonable and necessary.” The trial court abused its discretion in awarding more than 100% of the total guardianship assets to the guardians and the guardians’ attorneys and requiring Mr. McKean to pay the amount of fees and costs in excess of the amount of the guardianship assets.

The trial court exceeded its authority under RCW 11.96A.150 by ordering Mr. McKean to obtain a \$25,000 bond to guarantee payment of the fees and costs of the guardian and its attorneys on appeal.

This Court should reverse the August 2, 2005 Order, the two Orders entered on October 31, 2005, the Order Regarding Payment of Guardian’s and Attorneys’ Fees and Costs, vacate the Judgment entered against Mr. McKean based on that Order, and vacate the requirement that Mr. McKean post a \$25,000 bond to guarantee payment of the guardian’s and its attorneys from the Order on Guardian’s Petition for Instructions Regarding Appeal.

The Court should remand this case with instructions that costs and fees related to activities not authorized by RCW 11.92.040 and RCW 11.92.185 be disallowed. The Court should also instruct the trial court to determine what services were “reasonable and necessary” to identify and marshal – not “independently verify” – the **known** assets of Morgan and Michelle McKean, and what services were “reasonable and necessary” to

protect and conserve those assets. This Court should instruct the trial court that only those services and a just and reasonable amount of compensation for those services may be approved. Costs and fees in excess of this amount should be returned by both the guardian and the guardian's attorneys to the custodial accounts of Morgan and Michelle McKean.

Finally, this Court should order the guardian and the guardian's attorneys to pay the attorney's fees and costs incurred by Michael McKean in bringing this appeal.

DATED this 15th day of May, 2006.

Respectfully submitted,



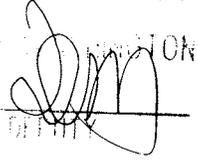
John P. O'Connor, WSBA No. 6806
Attorney for Appellant

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STATE OF 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,

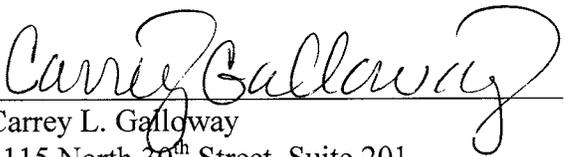
Minors.

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 **Amended Opening Brief of Appellant**; was deposited with ABC Legal Messenger Service on the date stated below, for delivery no later than May 15, 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 15th day of May, 2006.


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Tacoma, Washington 98403