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64224-3-I

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

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In Re the Guardianship of Christine W. Savadkin

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BRIEF OF APPELLANT IAN LANE

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## Table of Contents

I. ASSIGNMENTS OF ERROR .....	1
II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III. STATEMENT OF THE CASE .....	1
IV. ARGUMENT .....	4
A. The award of fees was premature.....	4
B. Fees were not reasonable because the declarations of counsel on which the fee award was based showed irrelevant, duplicative, and wasteful time. ....	4
1. Frontier Bank was the only party required to seek an accounting and the turnover of Trust assets to it and the only party that could have been entitled to fees for compelling the accounting and turnover of trust assets. ....	5
2. Work by the GAL (Cooper) and counsel for Ms. Zacher and Ms. Laubacher (Jelsing) was duplicative of work performed by Frontier Bank (Hickman). ....	7
3. Mr. Cooper’s statement that his work performed after March 5, 2009 was “directed to and relating to obtaining Mr. Lane’s compliance with orders of this Court” is grossly inaccurate because he requested fees for time for his basic duties as GAL. CP 164, pg. 2, Ln. 9.....	12
4. Ms. Zacher and Ms. Laubacher failed to support their request for an award of costs. ....	13
5 Ms. Zacher and Ms. Laubacher have been pursuing a separate agenda, for which the outcome remains unresolved. ....	14
C. The Commissioner failed to take an active role in assessing the reasonableness of the fee award against Mr. Lane, but simply accepted fee declarations from counsel without developing a record, or entering findings of fact and conclusions of law. ....	16
V. CONCLUSION .....	17

## Table of Authorities

### Cases

<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wash.2d 581, 601, 675 P.2d 193 (1983).....	7
<i>Estate of Ehlers</i> , 80 Wn. App. 751; 911 P.2d 1017 (1996).....	15
<i>Estate of Larson</i> , 103 Wn.2d. 517, 530-31, 694 P.2d 1051 (1985) .....	7
<i>Estate of Niehenke</i> , 117 Wn.2d 631, 647, 818 P.2d 1324 (1991).....	15
<i>Mahler v. Szucs</i> , 135 Wn. 2d 398, 434, 957 P.2d 632 (1998).....	7, 16, 17
<i>McGreevy v. Oregon Mutual Ins. Co.</i> , 90 Wn. App. 283, 291, 951 P.2d 798 (1998) .....	5
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 744, 733 P.2d 208 (1987) .....	16
<i>Panorama Village v. Allstate Ins.</i> , 99 Wn. App. 271, 286, 992 P.2d 1047 (2000).....	13
<i>Porter v. Porter</i> , 107 Wn.2d 43, 56-57, 726 P.2d 459 (1986) .....	15
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) ....	4

### Statutes

RCW 4.84.010.....	13, 14
RCW 11.68.070.....	5
RCW 11.76.070.....	5
RCW 11.96A.150.....	5, 6, 15

### Rules

CR 54.....	4
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**I. ASSIGNMENTS OF ERROR**

A. The Guardianship Court erred in awarding a judgment for attorneys' fees against Ian Lane prematurely, before the conclusion of the guardianship;

B. The Guardianship Court erred in awarding a judgment for far more than reasonable attorneys' fees against Ian Lane based on fee declarations that included irrelevant, duplicative, and wasteful time; and

C. The Guardianship Court erred in awarding a judgment for attorneys' fees against Ian Lane without entering findings of fact or conclusions of law.

**II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

What is the burden of proof for a party seeking attorneys' fees? Is a court required to take an active role in assessing the reasonableness of fee awards? Was the court required to enter findings of fact and conclusions of law to support a judgment?

**III. STATEMENT OF THE CASE**

This is an appeal from Snohomish County Commissioner Jacalyn Brudvik's order in the Guardianship of Christine Savadkin assigning attorney fees against Ian Lane, the former guardian of Mrs. Savadkin and

the Trustee of the 2006 Savadkin Family Trust<sup>1</sup>. On June 15, 2009, the Guardian of the person of Christine Savadkin, Bernice Zacher, petitioned the court to rule that attorney fees incurred to (1) compel an accounting by Mr. Lane as Trustee and (2) force him to turn over Trust assets to the Guardian of the Estate, Frontier Bank<sup>2</sup>, be paid by Mr. Lane. CP 162, p. 2-4. Ms. Zacher's counsel, Larry Jelsing, submitted a supporting declaration detailing the time that he allegedly spent on those tasks. CP 163. Mrs. Savadkin's Guardian ad Litem, Thomas Cooper, and Frontier Bank joined Ms. Zacher in this petition. CP 164; CP 168. Mr. Cooper's petition included his bills to his client, although without a sworn declaration. CP 168, Exhibit A. Counsel for Frontier, William Hickman, submitted a supporting declaration detailing the time that he allegedly spent on those tasks. CP 178. These declarations show that all three attorneys were doing the same work toward the same goal. They further include time in pursuit of their clients' individual goals and duties which were unrelated to either compelling an accounting by Mr. Lane and or forcing him to turn over Trust assets to the Guardian of the Estate.

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<sup>1</sup> The 2006 Trust contains all of Mrs. Savadkin's property.

<sup>2</sup> Pursuant to a previous order by the Guardianship Court.

the Trustee of the 2006 Savadkin Family Trust<sup>1</sup>. On June 15, 2009, the Guardian of the person of Christine Savadkin, Bernice Zacher, petitioned the court to rule that attorney fees incurred to (1) compel an accounting by Mr. Lane as Trustee and (2) force him to turn over Trust assets to the Guardian of the Estate, Frontier Bank<sup>2</sup>, be paid by Mr. Lane. CP 162, p. 2-4. Ms. Zacher's counsel, Larry Jelsing, submitted a supporting declaration detailing the time that he allegedly spent on those tasks. CP 163. Mrs. Savadkin's Guardian ad Litem, Thomas Cooper and Frontier Bank joined Ms. Zacher in this petition. CP 164; CP 168. Mr. Cooper's petition included his bills to his client, although without a sworn declaration. CP 168, Exhibit A. Counsel for Frontier, William Hickman, submitted a supporting declaration detailing the time that he allegedly spent on those tasks. CP 178. These declarations show that all three attorneys were doing the same work toward the same goal. They further include time in pursuit of their clients' individual goals and duties which were unrelated to either compelling an accounting by Mr. Lane and or forcing him to turn over Trust assets to the Guardian of the Estate.

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<sup>1</sup> The 2006 Trust contains all of Mrs. Savadkin's property.

<sup>2</sup> Pursuant to a previous order by the Guardianship Court.

Mr. Lane opposed the request to award attorney fees against him on the bases that (1) an award of fees was premature; (2) all three attorneys performed wasteful and duplicative work; (3) much of the work claimed in the fee affidavits had nothing to do with compelling an accounting or forcing him to turn over Trust assets. CP 171, CP 172.

At a hearing on June 25, 2009, the Commissioner heard argument from counsel and ruled:

I am going to award the fees requested by Mr. Hickman, Mr. Jelsing and Mr. Cooper to Mr. Lane. But for his not following Court orders, and now it's been four of them, we wouldn't have incurred those fees.

RP I (June 25, 2009), 27/12 27/15.

The Commissioner's June 25, 2009 Order provided in relevant part:

3. Attorney fees Re: Ian Lane's Failure to Provide Accounting and Turn Over Assets. The court awards the attorneys' fees requested by requested by Frontier Bank in the amount of \$9,212.50; and the fees of the guardian ad litem in the amount of \$6,314 and all such fees shall be paid by Ian Lane individually.

CP 183, p. 2-3.

On September 11, 2009, Ms. Zacher's successor Guardian of the Person, Karen Laubacher, Petitioned for entry of a judgment against Ian Lane from the June 25, 2009 Order on fees. CP 212. Again, Mr. Lane

opposed the entry. CP 222; 223. On September 22, 2009, the Commissioner entered a Judgment against Mr. Lane. CP 231.

In connection with the June 25 Order and the September 22 Judgment, the Commissioner entered no findings of fact or conclusions of law. CP 183; 231.

The Guardianship of Christine Savadkin has not yet been closed.

#### IV. ARGUMENT

**A. The award of fees was premature.**

This is an ongoing proceeding, in which no final order has been entered. Attorneys' fees should not be awarded piecemeal on an interlocutory basis, before all issues have been presented to, and determined by, the Court. "A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54. The Commissioner's Judgment against Mr. Lane was premature.

**B. Fees were not reasonable because the declarations of counsel on which the fee award was based showed irrelevant, duplicative, and wasteful time.**

Regardless of the theory involved, the party seeking attorney fees bears the burden of proving that it is entitled to fees, and that the amount requested is reasonable. *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141,

151, 859 P.2d 1210 (1993); *McGreevy v. Oregon Mutual Ins. Co.*, 90 Wn. App. 283, 291, 951 P.2d 798 (1998) (“In addition to establishing entitlement to attorney fees, the party requesting them must also establish they are reasonable.”)

1. **Frontier Bank was the only party required to seek an accounting and the turnover of Trust assets to it and the only party that could have been entitled to fees for compelling the accounting and turnover of trust assets.**

While under RCW 11.96A.150 the Court has extremely broad discretion in awarding fees in the guardianship and probate context, guidelines exist for evaluating when such an award is appropriate.

Generally fees should be awarded to a party instituting a legal action to compel an accounting in guardianships only when the party was reasonably required to do so. There has long been a specific statute providing that, in guardianships, if an interested party “shall be *reasonably required* to employ legal counsel to institute a legal proceeding to compel an accounting,” the court may award that party its fees against the party from whom the accounting is due. RCW 11.68.070.<sup>1</sup>

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<sup>1</sup> **§ 11.76.070. Attorney's fees to contestant of erroneous account or report.** If, in any probate or guardianship proceeding, any personal representative shall fail or neglect to report to the court concerning his trust and any beneficiary or other interested party shall be reasonably required to employ legal counsel to institute legal proceedings to compel an accounting, . . . the court before which said proceeding is pending may, in its discretion, . . . enter

This statute does not limit the scope of RCW 11.96A.150, but it reflects long-held policy about the award of fees in guardianship settings. The converse is logically true: when a party is not reasonably required to pursue legal action to compel an accounting in the guardianship context, a party should not be awarded its fees for doing so. Here, while it may have been reasonable for Ms. Zacher and Ms. Laubacher to *institute* a guardianship proceeding and seek an accounting, once the Court appointed a guardian for the Estate of Mrs. Savadkin, they were no longer “reasonably required” to do anything to protect the estate.

As shown below, Mr. Jelsing’s Declaration in support of his fee application demonstrates that most of his work was duplicative of the work being done by Frontier Bank’s counsel—that is, it was not reasonably required for Ms. Zacher and Ms. Laubacher keep litigating.

Mr. Jelsing and Mr. Cooper made no effort to explain to the Court why the work described was reasonably required, in light of (1) Frontier Bank’s appointment as Guardian of Mrs. Savadkin’s Estate; and (2) the accounting and turnover of Trust assets on which the petition for fees was based were due only to Frontier. Frontier and its counsel were perfectly capable of filing petitions to compel Mr. Lane to comply with prior Court

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judgment for reasonable attorney's fees in favor of the person or persons instituting said proceedings and against said personal representative. . .

orders. A chorus of two additional parties and two additional attorneys asking the Court for the same relief, as seen below, was inexplicably wasteful. Mr. Lane should not have been held responsible for those fees.

**2. Work by the GAL (Cooper) and counsel for Ms. Zacher and Ms. Laubacher (Jelsing) was duplicative of work performed by Frontier Bank (Hickman).**

Under the lodestar method, the court must exclude from the requested hours any “wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). The starting point for the calculation of the lodestar is the number of hours reasonably expended in the litigation. “In calculating this figure, the court must discount any duplicated or wasted effort by the attorneys.” *Bowers v. Transamerica Title Ins. Co.* 100 Wash.2d 581, 601, 675 P.2d 193 (1983):

In *Estate of Larson*, 103 Wn.2d. 517, 530-31, 694 P.2d 1051 (1985), the court reversed an award of attorneys’ fees because the trial court had failed to discount time where two attorneys had worked on the same issues:

Nor should a client be expected to pay for work that is duplicative. . . . A review of the record indicates that that . . . [the two attorneys] duplicated their efforts. At times they worked together on the same project or attended the same ex parte court hearing.

While *Larson* involved two attorneys within the same firm, the same principle applies here: Mr. Jelsing and Mr. cooper spent large amounts of time reviewing Frontier Bank's motions and supporting materials, while preparing their own motions and supporting materials seeking the same relief; they spent hours talking on the telephone or meeting with Frontier Bank's counsel and the GAL (an attorney), all of whom were seeking to compel Mr. Lane produce and accounting and turn materials over to Frontier Bank; all same and attending the same hearings as the Frontier Bank's counsel and the GAL. The monthly statements attached to Jelsing's declaration in support of the fee application shows, for example:

- 7/16/2008      To *bank* to deliver letters and for *brief conference* re need to push Lane re transfer
  
- 8/7/2008      . . . ; *telephone conference w/ Frontier re status of asset transfer*
  
- 9/29/2008      *Telephone conference w/ bank re status of transfer and accounting; telephone conference w/ Hickman's office; telephone conference w/ [GAL] Cooper re Withdrawal Notice from Petersen*
  
- 10-11/2008    Beginning of analysis and preparation of documentation *to require accounting* and fees in.
  
- 11/7/2008      Telephone *call from Cooper re status and need for accounting; . . .*

1/2009 Preparation of pleadings *of accounting demand* in January 2009 and awaiting bank action on same

1/6/2009 *telephone conference w/ Hickman* re status of accounting and other issues; . . .

1/12/2009 *Telephone conference w/ Tom Cooper re status of proceedings*

1/21/2009 *Telephone conference w/ Bill Hickman [1.5 hrs]*

1/22/2009 *Telephone conference w/ Attorney Hickman;* . . .

2/12/2009 *Telephone conference w/ Hickman's office*

3/4/2009 *Telephone conference with Attorney Hickman;* . . .

3/6/2009 *Telephone conference w/ GAL Cooper re motion*

3/9/2009 *telephone conference w/ GAL Cooper* re issues

3/10/2009 Brief review of bank pleadings; *telephone conference w/ Hickman* . . .

3/20/2009 . . . *telephone conference w/ Hickman*; prepare response to bank Petition and correspondence to clients; *telephone conference w/ Cooper re support for responses*

3/30/2009 . . . ; review Ian Lane's *responses to bank motions*; . . .

4/2/2009 . . . ; *follow up conference w/ Bank and GAL re subsequent proceedings*; . . .

5/5/2009 *Telephone conference w/ Hickman re need for bank to challenge trustee statement by Lane and*

re preparation of quick objection re deadman's statute;

5/18/2009 . . . ; *telephone conferences w/ GAL and w bank counsel re approach and Responses*

5/22/2009 Draft response; *telephone conferences w/ Hickman re coordination of trust research and response; telephone conference w/ Cooper; . . .*

6/15/2009 Review prior hearing issues; *telephone conference w/ Cooper re approach; telephone conference w/ Hickman re same. . .*

CP 163.

The GAL Cooper's entries show the same phone conversations with Jelsing, and show duplication of time in preparing and responding to motions regarding accounting and Trust assets, when Frontier Bank was the party responsible for those issues:

3/10/2009 Prepare response to Motion of Attorney Hickman

3/16/2009 Revise Responses to Jelsing's petition and Hickman's motion

4/2/2009 Prepare Supplemental Response to Motion to Compel Accounting

5/6/2009 Review of late full accounting provided by new counsel for Ian Lane

5/15/2009 Review motions for revision submitted by Jason Dennett

5/19/2009 Research law on authority of court

CP 168, Exhibit A.

But these individual time entries just scratch the surface. The fundamental issue is that Mr. Jelsing and Mr. Cooper were simply doing the same thing Frontier bank was doing—seeking to compel Mr. Lane to comply with the Court’s May 29, 2008 Order to turn over materials to Frontier Bank.

Frontier Bank asked the Guardianship Court to order Mr. Lane to pay all of *its* fees while talking to Mr. Cooper and with Mr. Jelsing. This is the wrong that the Courts caution against: forcing a party to pay for attorneys talking amongst themselves about the same project, when one could be doing the job.

The Guardian of the Estate, Frontier Bank, was the party which Mr. Lane owed an accounting and transfer of assets. There was absolutely no reason for Mr. Cooper and Mr. Jelsing to duplicate the work of Frontier’s counsel in attempts to compel these actions. The Court should have denied their requests to assess fees against Mr. Lane.

3. **Mr. Cooper's statement that his work performed after March 5, 2009 was "directed to and relating to obtaining Mr. Lane's compliance with orders of this Court" is grossly inaccurate because he requested fees for time for his basic duties as GAL. CP 164, pg. 2, Ln. 9.**

An incomplete but illustrative list of Mr. Cooper's time spent on his routine duties, which have nothing at all to do with Mr. Lane's actions, from his billing statements appears below:

1. On March 10 and 16, 2009, Mr. Cooper spent 1.4 hours responding to Frontier's Report Regarding the Validity of the Savadkin Family Trust and Petition for Order Determining Validity of the Trust Assets Subject to the Guardian's Control. This had nothing to do with Mr. Lane's compliance or non-compliance with court orders.
2. On March 24, 2009, Mr. Cooper spent .5 hours preparing his own fee petition.
3. On April 20, 2009, Mr. Cooper spent .3 hours faxing a letter from the Department of Veteran's Affairs to counsel.
4. On May 5, 2009, Mr. Cooper spent 1.5 hours reviewing the accounting Mr. Lane provided, something Mr. Cooper would have had to do regardless of when Mr. Lane complied.
5. On May 8, 2009, Mr. Cooper spent at least one hour making arrangements with Barbara Bridges, whose assessment had to do with Mrs. Savadkin's care, not Mr. Lane's compliance or non-compliance with court orders.
6. On May 12 and 13, Mr. Cooper spent and additional .6 hours with Ms. Bridges. On May 21 he spent 4.6 hours traveling to Mr. Lane's home with Ms. Bridges,

and an additional .4 hours reviewing the parties' settlement proposals in this matter. He reviewed a letter and emails from Ms. Bridges on May 27, 2009 and discussed Ms. Bridges' review of care with Mr. Lane's counsel.

CP 168.

In addition to the above, Mr. Cooper spent hours on the phone with, reviewing the pleadings of, and responding needlessly to the pleading of Frontier Bank and Zacher/Laubacher. As discussed above, such duplicative work is not permitted.

To blatantly assess all of these expenditures against Mr. Lane fell well short of Mr. Cooper's burden in a fee petition. The Commissioner should have denied his request for fees against Mr. Lane.

**4. Ms. Zacher and Ms. Laubacher failed to support their request for an award of costs.**

Ms. Zacher and Ms. Laubacher requested an award of \$734.55 in "costs" without any explanation of why the items listed in its billing statements qualify as recoverable costs. CP 163. The burden of doing so is on them.

When a statute authorizes the award of costs, except in special circumstances such as discrimination cases, or unless it specifies otherwise, it means costs as defined by RCW 4.84.010.<sup>1</sup> *Panorama*

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<sup>1</sup> 4.84.010 provides that the following may be recovered as "costs"

*Village v. Allstate Ins.*, 99 Wn. App. 271, 286, 992 P.2d 1047 (2000).

The costs listed in counsel's monthly statements to his clients do not generally appear to qualify as recoverable costs under RCW 4.84.010. CP 163. Ms. Zacher and Ms. Laubacher failed to establish by affidavit that the costs they claim are recoverable, and the request for costs should have been denied.

**5. Ms. Zacher and Ms. Laubacher have been pursuing a separate agenda, for which the outcome remains unresolved.**

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(1) Filing fees;

(2) Fees for the service of process. . . . ;

(3) Fees for service by publication;

(4) Notary fees. . . . ;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

A party seeking an award of attorneys' fees in probate or guardianship proceedings generally is not entitled to an award for work done for the party's own benefit, rather than for some benefit to the estate or ward. *Porter v. Porter*, 107 Wn.2d 43, 56-57, 726 P.2d 459 (1986); *In re Estate of Ehlers*, 80 Wn. App. 751; 911 P.2d 1017 (1996), citing *In re Estate of Niehenke*, 117 Wn.2d 631, 647, 818 P.2d 1324 (1991). Since enactment of RCW 11.96A.150, this is no longer an absolute limitation. But it is a guideline developed over years of jurisprudence, that RCW 11.96A.150 singles out for explicit recognition as a factor to consider:

In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors *may* but need not *include whether the litigation benefits the estate or trust involved*.

Ms. Zacher and Ms. Laubacher have a larger goal than compelling Mr. Lane to give Frontier Bank what it demands. Ultimately, they seek to have the 2006 Savadkin Trust declared invalid so that they benefit from the beneficiary provisions of a prior Trust. Their attorneys' fees incurred in this proceeding are in large part for the purpose of benefiting a later action challenging the 2006 Trust. In fact, some of Mr. Jelsing's time entries appear to be explicitly in connection with the anticipated TEDRA action challenging the 2006 Trust's validity:

3/19/2009 Prepare response to bank petition re trust validity; begin preparation of second response (2.30 hours; \$609.50)

Awarding fees for work in connection with seeking remedies in a separate TEDRA action was inappropriate.

**C. The Commissioner failed to take an active role in assessing the reasonableness of the fee award against Mr. Lane, but simply accepted fee declarations from counsel without developing a record, or entering findings of fact and conclusions of law.**

A trial court should not simply accept fee affidavits submitted by counsel:

*“Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel. Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).”*

*Mahler v. Szucs, 135 Wn.2d at 434-435.*

Yet that is exactly what occurred here. Mr. Jelsing and Mr. Cooper make no effort whatsoever to explain or justify the reasonableness of the fees their clients seek to impose on Mr. Lane. The record contains no indication that Commissioner made any effort to assess their reasonableness, or the considerable duplication of efforts.

Further, Courts must develop a record, and enter findings of fact and conclusion of law in connection with an attorneys’ fee award.

*Mahler*, 135 Wn.2d at 434. The Guardianship developed no record, entered no findings of fact or conclusions of law in connection with its judgment for attorneys' fees against Ian Lane. CP 183; CP 231; RP I; RP II.

## V. CONCLUSION

This Court should:

- (1) Vacate the September 22, 2009 Judgment against Ian Lane; and
- (2) reverse that portion of the Guardianship

Commissioner's Order entered June 25, 2009, which provides:

3. Attorney fees Re: Ian Lane's Failure to Provide Accounting and Turn Over Assets. The court awards the attorneys' fees requested by requested by Frontier Bank in the amount of \$9,212.50; and the fees of the guardian ad litem in the amount of \$6,314 and all such fees shall be paid by Ian Lane individually.

Dated: February 8, 2010

CARLSON & DENNETT, P.S.

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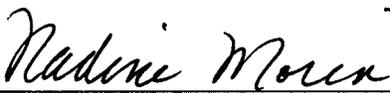
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I declare under penalty of perjury that I caused a copy of the Brief of Appellant Ian Lane to be served via U.S. Mail, postage prepaid, on the 8th day of February, 2010 on the following:

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DATED this 8<sup>th</sup> day of February, 2010

  
\_\_\_\_\_  
Nadine Morin