

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

BRIEF OF APPELLANT

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	vi
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. Assignments of Error.	2
1. The trial court failed to consider the factors set forth in the Rules of Professional Conduct prior to concluding that all of Mrs. Castilleja’s attorneys’ fees were reasonable.	2
2. The trial court failed to properly apply the lodestar principles prior to concluding that all of Mrs. Castilleja’s attorneys’ fees were reasonable.	2
3. The trial court failed to make findings on Mr. Hays’ objections to the reasonableness of the fees incurred.	2
4. The trial court abused its discretion when it ordered Mr. Hays to pay all of Mrs. Castilleja’s fees without a showing of substantial benefit to his estate.....	2
5. The trial court abused its discretion when it failed to delay entry of judgment until after review and approval of the guardian’s first report.	2
B. Issues Pertaining to Assignments of Error.....	2
1. Whether the trial court should have considered the factors contained in the rules of professional conduct prior to concluding that the fees incurred were reasonable. <i>Assignment of Error #1</i>	2
2. Whether the trial court properly applied the lodestar method prior to concluding that the fees incurred were reasonable. <i>Assignment of Error #2</i>	2

3. Whether the trial court properly articulated its reasons for overruling Mr. Hays’ objections to the reasonableness of fees. *Assignment of Error #3*. ... 2
4. Whether the trial court abused its discretion when it ordered Mr. Hays to pay all of Mrs. Castilleja’s attorneys’ fees even though some provided no benefit to the estate. *Assignment of Error #4*. 3
5. Whether the trial court erred when it ordered entry of judgment against Mr. Hays even though he no longer has control of his assets. *Assignment of Error #5*. 3

III. STATEMENT OF THE CASE..... 3

- A. Settlement of Lawsuit and Creation of Special Needs Trust. 3
- B. Mrs. Castilleja’s Retention of Counsel to Negotiate with her Father. 5
- C. Mrs. Castilleja Filed a Guardianship Petition..... 5
- D. Mrs. Castilleja Directs Subpoenas to Mr. Hays’ Former Attorneys..... 6
- E. Trial..... 7
- F. Order Establishing Guardianship of Estate..... 8
- G. Mrs. Castilleja’s Attorneys’ Fees Request..... 9
- H. Mr. Hays’ Response to Attorneys’ Fee Request..... 9
- I. Court’s Order Approving Fees and Entering Judgment ... 10
- J. Court’s Order Approving Fees and Entering Judgment Against Mr. Hays’ Estate..... 11
- K. Notice of Appeal..... 11

a.	Fees incurred in presenting evidence on irrelevant issues and pursuing unsuccessful claims.....	26
b.	Fees incurred by the presence of two attorneys at trial.....	28
c.	Fees incurred seeking discovery from Mr. Hays' prior and current attorneys.	29
d.	Fees unsupported by the record.....	30
e.	Unreasonable Costs.....	30
B.	The Court Exceeded its Enjoined the Trustee From Transferring or Liquidating Assets.	31
1.	Only Those Fees Reasonably Incurred to Establish the Guardianship Should be Paid by Mr. Hays.....	31
a.	Fees incurred prior to the guardianship petition. 32	
b.	Fees incurred by the attorneys seeking payment of their fees.....	32
c.	Fees incurred subsequent to the guardianship. 33	
2.	Fees Should be Apportioned Amongst All of the Entities Benefitting From the Litigation.	33
C.	THE COURT ABUSED ITS DISCRETION WHEN IT DIRECTED IMMEDIATE ENTRY OF JUDGMENT AGAINST THE ESTATE.	34
D.	MR. HAYS IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS ON APPEAL.	35
VI.	CONCLUSION	36

TABLE OF AUTHORITIES

Cases

<i>Absher Construction v. Kent School District No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1996).....	26, 27
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595, 224 P.2d 795 (2009).....	27, 28
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	24
<i>Estep v. Hamilton</i> , 148 Wn.App. 246, 201 P.3d 331 (2009).....	13
<i>Fetzer v. Weeks</i> , 122 Wn.2d 141, 859 P.2d 1210 (1993).....	24, 25
<i>In re Estate of Larson</i> , 103 Wn. 2d 517, 694 P.2d 1051 (1985).....	16, 32
<i>In re Estate of Morris</i> , 89 Wn. App. 431, 434 fn. 1, 949 P.2d 401 (1998).....	16
<i>In re Estate of Niehenke</i> , 117 Wn.2d 631, 818 P.2d 1324 (1991).....	15, 16
<i>In re Estate of Riemcke</i> , 80 Wn.2d 722, 497 P.2d 1319 (1972).....	33
<i>In re Guardianship of Adamec</i> , 100 Wn.2d 166, 667 P.2d 1085 (1983).....	32
<i>In re Guardianship of Hallauer</i> , 44 Wn. App. 795, 723 P.2d 1161 (1986).....	17, 31
<i>In re Guardianship of Ivarsson</i> , 60 Wn.2d 733, 375 P.2d 509 (1962).....	31
<i>In re Guardianship of McKean</i> , 136 Wn. App. 906, 151 P.3d 223 (2007).....	34
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	14, 23, 24
<i>Mayer v. City of Seattle</i> , 102 Wn.App.66, 10 P.3d 408 (2000).....	13, 17, 25, 27, 28
<i>Morgan v. City of Federal Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009).....	14

Statutes

RCW 11.88.010	19
RCW 11.88.045	19, 20
RCW 11.88.090	19, 20
RCW 11.92.040(2) and (7)	35
RCW 11.92.060	34
RCW 11.92.180	32
RCW 11.96A.150	8, 14, 15, 35, 36, 37

Rules

RAP 18.1.....	35, 37
RPC 1.5.....	12, 18
RPC 1.5(a)(1)-(8).....	18

I. INTRODUCTION

This case involves the guardianship of Mr. Hays, which was sought by Rebecca Castilleja, one of his three children, supported by another, Howard W. Hays, and opposed by the third child, Robert D. Hays. During his life, Mr. Hays acquired real property of significant value, most of which has been placed into a limited liability company and several trusts. After a six-day bench trial, a guardian of the estate was appointed for Mr. Hays. That decision has not been appealed.

Subsequently, on January 31, 2012 the trial court issued an order approving payment of Mrs. Castellija's attorneys' fees and costs in the amount of \$380,592.92 and directing entry of judgment for the full amount against Mr. Hays, accruing interest at 12% per annum. Mr. Hays filed a Notice of Appeal of that order.

This appeal presents three issues. First, did the trial court properly conclude that all of the fees and costs incurred by Rebecca Castilleja were reasonable. Second, should Mr. Hays be required to pay all of the attorneys' fees and costs incurred by Mrs. Castilleja. Third, should the trial court have delayed entering judgment against Mr. Hays until after the guardian's inventory was presented to and approved by the court.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court failed to consider the factors set forth in the Rules of Professional Conduct prior to concluding that all of Mrs. Castilleja's attorneys' fees were reasonable.
2. The trial court failed to properly apply the lodestar principles prior to concluding that all of Mrs. Castilleja's attorneys' fees were reasonable.
3. The trial court failed to make findings on Mr. Hays' objections to the reasonableness of the fees incurred.
4. The trial court abused its discretion when it ordered Mr. Hays to pay all of Mrs. Castilleja's fees without a showing of substantial benefit to his estate
5. The trial court abused its discretion when it failed to delay entry of judgment until after review and approval of the guardian's first report.

B. Issues Pertaining to Assignments of Error.

1. Whether the trial court should have considered the factors contained in the rules of professional conduct prior to concluding that the fees incurred were reasonable. *Assignment of Error #1.*
2. Whether the trial court properly applied the lodestar method prior to concluding that the fees incurred were reasonable. *Assignment of Error #2.*
3. Whether the trial court properly or adequately articulated its reasons for overruling Mr. Hays' objections to the reasonableness of fees. *Assignment of Error #3.*

4. Whether the trial court abused its discretion when it ordered Mr. Hays to pay all of Mrs. Castilleja's attorneys' fees even though some provided no benefit to the estate. *Assignment of Error #4.*
5. Whether the trial court erred when it ordered entry of judgment against Mr. Hays even though he no longer has control of his assets. *Assignment of Error #5.*

III. STATEMENT OF THE CASE

A. Arthur Hays' Estate Planning.

Arthur Hays has three children: Rebecca Castilleja, Howard Hays and Robert Hays. *CP 3-4.* For 60 years, Mr. Hays operated a very successful wholesale toy, game and household goods distributing business. *CP 1029-30, CP 1775.* Over the years he purchased warehouses in which he stored the products he sold. *CP 174, 183, 1030-31, 1775.* Due to changing market conditions he has transitioned from a wholesale distribution business to a commercial property leasing business. *CP 174, 1030-31, 1776.* The buildings formerly used to store his merchandise have been converted to office and warehouse space leased to others. *CP 1030-31.* The properties, located in the Interbay area of Seattle and elsewhere, were valued at approximately \$28,000,000 in 2006. *CP 461, 2269.*

Mr. Hays' wife, Madeline, died in 1980, and he has not remarried. *CP 1775.* In her Will she created a testamentary trust naming Art Hays as

the trustee and lifetime income beneficiary and the three children as residual beneficiaries. *CP 212-14, CP 2288*. This trust is known as the Hays Family Trust. *CP 212-24*. It nominates Mrs. Castilleja as first successor trustee in the event that Mrs. Hays “declines, fails or is for any reason unable to act as Trustee.” *CP 213*.

In 1999, Mr. Hays created a limited liability company called Hays Elliott Properties LLC (HEP) into which he placed all of his commercial real estate. *CP 1223-1250*. HEP also holds two non-commercial properties commonly known as the Kingston and Lake Sammamish properties. *CP 1776*. The original members of the LLC were Mr. Hays (60%) and the Hays Family Trust (40%). *CP 2288*. The HEP operating agreement was amended and restated in 2005 and provided for the removal of a managing member upon an adjudication of incapacity. *CP 1223-50*.

In 2000 Mr. Hays created three trusts, the Hays Grandchildren’s Trust, the RHRD Trust, and the Hays’ Legacy Trust. *CP 1169-1223*. Rebecca Castilleja is the present trustee of the three trusts. *CP1186, 1204 and 1222*. The three trusts have been gifted a total of 23.68% of the units of HEP. *CP 1776*. At the time of trial, Mr. Hays was the owner of a 32.71% share of the units of HEP and was the managing member. *CP*

1230-31. The Hays Family Trust has a 42.55% share of the units of HEP. CP 1775.¹

Mr. Hays retained sole ownership of the following assets: The business known as the Hays Distributing Company (a corporation); his home located in the Magnolia area of Seattle; a 40% interest in recreational property in Suquamish (the Hays Miller Bay Limited Partnership); and his antique and classic vehicle collection. CP 833, 1776-78, 1826.

B. Mrs. Castilleja's Retention of Counsel to Negotiate with her Father.

Rebecca Castilleja initially consulted with counsel on November 11, 2009 for three and one-half hours. From September 22, 2010 until December 29, 2010, counsel for Mrs. Castilleja was involved in negotiations with Mr. Hays' attorney, Joshua Brothers, over revisions to the HEP operating agreement and the appointment of independent fiduciaries of the trusts. CP 1399-1412. For those activities, Mrs. Castilleja incurred \$18,107.29 in attorneys' fees and costs. CP 1650.

C. Mrs. Castilleja Filed a Guardianship Petition

Mrs. Castilleja commenced a guardianship proceeding on January 12, 2011. CP 1418. The initial petition was dismissed and the

¹ A chart showing ownership of HEP is included in the record as CP 860.

guardianship proceeding was refiled on March 14, 2011. *CP 1-8*. In the petition, Mrs. Castilleja requested that a guardian of the estate be appointed for her father, Arthur Hays, because, he was having “increasing difficulty in exercising judgment and executing decisions ... making him unable to manage funds or property.” *CP 4*. Mrs. Castilleja requested the appointment of a guardian to “make all necessary decisions regarding Arthur D. Hays’ financial and business needs.” *CP 6*. Mrs. Castilleja claimed an interest as his daughter and in her capacity as trustee of the Hays Legacy, RDHD and Hays Grandchildren trusts. *CP 5*.

D. Mrs. Castilleja Directs Subpoenas to Mr. Hays’ Former Attorneys

At an early stage of the proceedings, Mrs. Castilleja’s counsel sent subpoenas duces tecum to all of Mr. Hays’ former attorneys. *CP 60-77, 87-106*. Mr. Hays was required to and did obtain a court order quashing the subpoenas because the information requested was protected from disclosure by the attorney-client privilege, client confidentiality and the work-product doctrine. *CP 126-127*. The trial court awarded costs for the motion to Mr. Hays and directed counsel to file a declaration in support of fees incurred. *CP 127*. Counsel for Mr. Hays filed a petition for the fees incurred related to the motion to quash seeking reimbursement of \$4,340.00 from Mrs. Castilleja. *CP 128-140*. The court reserved the award of fees until trial. *CP 164*.

E. Trial.

A bench trial commenced on October 6, 2011 and continued for six days. *CP 760-72, CP 2606*. Mrs. Castilleja's counsel submitted 175 exhibits, excerpts of deposition transcripts for 3 witnesses (including Arthur Hays), interrogatory responses and called 9 witnesses during trial. *CP 2658-60 and CP 2661-2681*. Mrs. Castilleja's exhibits totaled 1589 pages. The vast majority of those exhibits pertained to HEP or matters of estate planning: Exhibit Nos. 14-19, 31-32, 34-100, 102-124, 126-134, 144-149, 157-58, 163-175. *CP 2662-81*.

During the trial, Mrs. Castilleja's counsel submitted evidence (Exhibits 8 and 9), elicited testimony and made argument in support of the establishment of a guardian of the person for Mr. Hays. *CP 790, 810-11, 826, 2662*.

In her supplemental trial brief, Mrs. Castilleja's counsel argued that the establishment of a guardianship would obviate the need to file separate actions to remove Mr. Hays as trustee of the Hays Family Trust; and as managing member of HEP (should he not resign from those positions). (*CP 815-18*). In addition, Mrs. Castilleja made the point that a guardian could proceed with a quiet title action to resolve ownership of property jointly owned by Mr. Hays with his son, Robert. *CP 790*. In

addition, according to Mrs. Castilleja, a guardian could resolve issues that are a financial drain on HEP. *CP 816*.

F. Order Establishing Guardianship of Estate.

In its order establishing a guardianship of the estate for Mr. Hays, the court found that Mr. Hays was unable to adequately manage his property and financial affairs placing him at substantial risk of harm to himself, to HEP and to the Hays Family Trust. *CP 1779*. Later, the court again states that Mr. Hays' deficiencies place HEP at risk of "significant financial harm" and that he is unable to adequately manage the financial interests of HEP. *CP 1782-83*. The court noted that since there is family conflict an independent guardian should be appointed. *CP 1783*. The trial court denied the request for appointment of a guardian or limited guardian of the person. *CP 1785*. The trial court directed the newly appointed guardian to file his first report within three months, or by February 18, 2011. *CP 2636-37*.

The trial court awarded Mrs. Castilleja her costs and reasonable attorneys' fees pursuant to RCW 11.96A.150. *CP 1791*. The court held that the fees should be paid from Mr. Hays' estate "and/or any other asset/entity in which Mr. Arthur Hays has a beneficial interest" *CP 1791*. The trial court ordered that the reasonableness of Mrs. Castilleja's

attorneys' fees would be "determined under the lodestar measure by separate motion" *CP 1799*. This order was not appealed.

G. Mrs. Castilleja's Attorneys' Fees Request.

On December 12, 2011, Mrs. Castilleja submitted a petition requesting fees and costs of \$380,592.92 to be paid entirely by Mr. Hays. *CP 1387-92*. She supported the fee request with a declaration from counsel with billing statements attached. *CP 1393-1493*. In her declaration, Ms. Howle states that both she and Ms. Vaughn bill at the rate of \$350.00 per hour. *CP 1393*. Ms. Howle has 29 years of experience and has limited her practice to "complex guardianship and probate questions ..." since 1984. *CP 1396*. Ms. Vaughn has "been litigating contested vulnerable adult cases since 1987 and is a frequent speaker on that topic at CLEs." *CP 1397*.

H. Mr. Hays' Response to Attorneys' Fee Request.

Mr. Hays filed his response to the petition for approval of attorneys' fees and costs incurred by Mrs. Castilleja by itemizing the fees and costs that were unreasonable and/or did not benefit him. *CP 1648-1726*. Mr. Hays' objections were made on the following grounds: (1) duplicative or unnecessary fees and costs; (2) the pursuit of inappropriate discovery directed to Mr. Hays' former attorneys; (3) vague or block billings; (4) fees incurred in pursuing unsuccessful claims; (5) fees

incurred prior to or after the guardianship; and (6) fees incurred by counsel in seeking fees. *CP 1663-64*. In addition, Mr. Hays requested the trial court apportion the fees and costs amongst the entities that benefitted from the appointment of a guardian for Mr. Hays. *CP 1659-1660*.

I. Court's Order Approving Fees and Entering Judgment Against Mr. Hays' Estate.

Mr. Robert Hays submitted a response to Mrs. Castilleja's fee request objecting to the reasonableness of hourly rates of Ms. Castilleja's counsel and to the hours spent. *CP 1646-47*. Mr. Hays characterized Ms. Castilleja's counsels' approach to the case as if it were "a shareholder's derivative suit or similar business litigation" and argued that the success of the guardianship petition does not justify an award of excessive fees against Mr. Hays' estate. *CP 1647*.

The appointed guardian, Michael Longyear, submitted a response stating that he "was shocked at the total of attorneys' fees and costs incurred by all parties' counsel" and stated that,

Based upon my review of the court docket and conversations with counsel for all parties, a substantial portion of the attorneys' fees and costs incurred were a result of litigating issues relating to control of legal entities in which Arthur D. Hays possesses an ownership interest.

CP 1736-37. Accordingly, the guardian requested the court to "segregate the amount of attorneys' fees and costs incurred in litigating the right of control of these entities and allocate those attorneys' fees and costs to

Hays Elliott Properties LLC, Hays Distributing Corporation, and Arthur D. Hays individually, in amounts to be determined.” *CP 1737*.

J. Court’s Order Approving Fees and Entering Judgment Against Mr. Hays’ Estate.

On January 31, 2012 the court entered an order approving all of Mrs. Castilleja’s attorneys’ fees and costs; entering judgment against Mr. Hays’ estate and/or any other asset/entity in which he has a beneficial interest, accruing interest at 12% per annum. *CP 1807*. The trial court found that the billing statements submitted by Ms. Castilleja’s counsel were sufficient; that the court employed the lodestar methodology; that the hourly rates and the number of hours expended were reasonable; and there was no redundance, waste or provision of unnecessary services. *CP 1806-07*. The trial court did not make specific findings on the objections made by Mr. Hays. Nor did it apportion responsibility for the fees amongst the entities that benefitted from the appointment of a guardian, except to provide that the approved fees and costs could be allocated (as determined by the guardian) to HEP, the Hays Distributing Company or Mr. Hays individually.

K. Notice of Appeal.

On February 29, 2012 Mr. Hays filed a notice of appeal of the trial court’s January 31, 2012 order regarding attorneys’ fees and costs. *CP 1763-1808*. The portions of the trial court’s November 18, 2011 order

pertaining to attorneys' fees are included for clarity only. *CP 1763*. Mr. Hays did not intend to appeal that order.

IV. SUMMARY OF ARGUMENT

A. Reasonableness of Fees and Costs. The record does not reflect that the trial court considered the factors set forth in the applicable rules of professional conduct (RPC 1.5) for determining the reasonableness of an attorney's fees. Nor does the record reflect that the trial court applied the lodestar method when making its determination on attorneys' fees. The trial court's order does not properly or adequately articulate the court's reasons for overruling Mr. Hays' objections to the reasonableness of Mrs. Castilleja's fees.

B. Responsibility for Fees and Costs. Even if the total amount of fees is found to be reasonable, the record does not support the trial court's conclusion that Mr. Hays should pay the entire amount of those fees since there is a showing that a portion of those fees did not benefit him or his estate. Fees incurred for services that did not benefit him or that benefitted other entities should be paid by Mrs. Castilleja or the other entities.

C. Entry of Judgment Against Mr. Hays. There was no need to enter judgment against Mr. Hays to secure payment of the fee award. Mr. Hays lost any ability to either avoid or pay the fee award by

the appointment of a guardian of his estate, as control over his financial affairs was conferred upon the guardian of his estate.

D. Relief Requested. Accordingly, the trial court's entry of judgment in this case should be reversed and the case be remanded for a reduction in the amount to be paid by Mr. Hays for Mrs. Castilleja's attorneys' fees and costs. In addition, the trial court should be directed not to enter judgment against Mr. Hays and/or his estate unless his ability to pay the judgment is established. Further, Mr. Hays should be awarded his fees on appeal.

V. ARGUMENT

A. STANDARD OF REVIEW

Review of a trial court's fee award is a two-step process. *Estep v. Hamilton*, 148 Wn.App. 246, 338, 201 P.3d 331 (2009). First, the appellate court reviews *de novo* "whether a statute, contract, or equitable theory authorizes the award" *Id.* Second, the appellate court reviews for abuse of discretion, the amount of fees awarded. *Id.* An abuse of discretion occurs when the trial court's ruling is "manifestly unreasonable or based on untenable grounds, or if no reasonable person would take the position adopted by the trial court." *Mayer v. City of Seattle*, 102 Wn.App.66, 79, 10 P.3d 408 (2000).

When a trial court's decision is based entirely on documentary evidence, appellate review of that decision is *de novo*. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009). In this case, the trial court's decision pertaining to the fee award was based upon declarations filed with the court and was made without oral argument. Therefore, the evidence supporting the trial court's decision should be reviewed *de novo*.

1. The Trial Court's Authority to Award Fees.

The trial court based its decision to award fees upon the following language contained in RCW 11.96A.150:

[T]he 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; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings.

RCW 11.96A.150(1). This statute applies to guardianship proceedings. *RCW 11.96A.150(2)*.

Thus, the trial court has statutory authority to award reasonable attorneys' fees to Mrs. Castilleja from any party to the proceeding and/or from the assets of an estate or trust involved in the proceedings. However, the authority must be "exercised on articulable grounds." *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

2. The Trial Court’s Discretion to Determine the Amount of Fees.

The trial court has the discretion to “order the ... reasonable attorneys’ fees to be paid in such amount and in such manner as the court determines to be equitable....” *RCW 11.96A.150(1)*. Thus, the trial court must exercise its discretion in a reasonable and equitable manner.

3. The Trial Court’s Discretion to Order Payment by Mr. Hays of the Approved Fees and Costs.

When deciding who should pay the approved fees and costs, the court is directed to, “consider any and all factors which it deems to be relevant, which factors may but need not include whether the litigation benefits the estate or trust involved.” *RCW 11.96A.150(1)*.

Although, the trial court was authorized by *RCW 11.96A.150* to award fees and costs, it abused its discretion in three ways: (1) By concluding that all of the petitioner’s fees were reasonable; (2) by failing to properly articulate the basis for its decision; and (3) by failing to properly consider all relevant factors, including, whether the particular actions taken by the petitioner’s counsel benefitted Mr. Hays. *In re Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991), (if the attorneys’ services benefitted only certain parties, the fees should not be awarded out of the estate even if the estate incidentally benefits.)

In *Niehenke*, 117 Wn. 2d at 648 the court held that the contest between rival claimants to an estate asset involved “no substantial benefit to the estate.” *Id.* The court reasoned that to pay the fees from the estate “would result in other uninvolved beneficiaries funding the attorneys’ fees for the litigating parties.” *Id.* Similarly, if all of Mrs. Castilleja’s fees are paid from the estate, including fees pertaining to issues unrelated to the guardianship of Mr. Hays, that would result in Mr. Hays funding litigation from which he derives no benefit. Principles of equity prohibit that result.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY APPROVED NEARLY \$400,000 IN ATTORNEYS’ FEES AND COSTS.

1. Counsel for Mrs. Castilleja Must Establish the Fees Requested are Reasonable and Necessarily Incurred.

The party requesting fees must demonstrate that the fees requested were both reasonable and necessary. *In re Estate of Morris*, 89 Wn. App. 431, 434, fn. 1, 949 P.2d 401 (1998); *In re Estate of Larson*, 103 Wn. 2d 517, 537, 694 P.2d 1051 (1985), (when objections are raised to the reasonableness of the fees of an attorney, or the necessity of services for which it is sought to recover fees, said attorney must establish that the hours charged to the estate were necessary).

It is not sufficient for an attorney to submit a conclusory declaration to which are attached copies of itemized statements showing

services rendered and costs incurred. One cannot just multiply the hours spent by a particular rate of compensation as was done here. *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986). Rather, a substantive analysis must be performed, first by the attorney seeking approval of his or her fees, and then by the court to determine what fees are reasonable. *Id.* Fees for dismissed claims or theories should be deducted. *Id.* at 799. Fees incurred for duplicative efforts should also be deducted. *Id.* at 801. If the court is left in doubt as to whether the fees sought related to the successful claims, they should be deducted. *Id.* Courts “may not merely rely on the billing records of the prevailing party’s attorney” but must “independently decide what represents a reasonable amount of attorney fees.” *Mayer v. City of Seattle*, 102 Wn. App. at 79.

In this matter, the petitioner’s counsel submitted a Petition for Approval of Fees and declaration in support of the Petition. CP1387-98. Attached to the declaration are itemized statements. CP 1399-1493. This should have been the beginning of the trial court’s substantive analysis. Instead, it was the end.

2. The Trial Court's Failed to Consider the Factors Contained in the Rules of Professional Conduct.

Before concluding that the attorneys' fees and costs requested by Mrs. Castilleja's counsel were reasonable, the trial court should have considered the factors set forth in the Rules of Professional Conduct. *RPC 1.5*. The court in *In re the Guardianship of Hallauer* stated that the factors to be used by the court when reviewing the reasonableness of fees include those listed in the Rules of Professional Conduct, as follows:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

Id. at 797, fn. 1, citing *RPC 1.5(a)(1)-(8)*.

In this case, the trial court failed to apply these factors when making its decision on fees. Instead, the trial court made conclusory findings that the fees were reasonably incurred “considering the results obtained, the work performed, and the contested nature of the proceedings...” *CP 1807*.

The relevant factors that the trial court failed to consider include the following:

(1) The novelty and difficulty of the questions involved and the skills necessary to perform the necessary legal services. The issues raised were whether Mr. Hays was incapacitated as to his estate and/or person; whether adequate alternatives to guardianship existed or could be created and who should be appointed guardian. *RCW 11.88.010* and *RCW 11.88.090(5)*.

Incapacity is defined in the statute as,

[A] significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

RCW 11.88.010(1)(b). The “determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate.” *RCW 11.88.010(1)(c)*. Incapacity must be shown by clear, cogent and convincing evidence. *RCW 11.88.045(3)*.

The court must appoint a guardian ad litem to perform an independent investigation of the need for a guardianship. *RCW 11.88.090(3)*. The guardian ad litem must obtain a medical report from a qualified professional that includes the information required by statute. *RCW 11.88.045(4)*.

While the burden placed on a petitioner in a guardianship proceeding is higher than that usually imposed in civil litigation, the issues presented are straightforward: Does Mr. Hays require a guardian and, if so, who should be appointed as guardian.

Mrs. Castellija's attorneys are experienced in the field of guardianship law. No novel issues pertaining to the establishment of a guardianship were presented here. The guardian ad litem concluded that Mr. Hays needed a guardian. An expert, selected by the guardian ad litem, opined that Mr. Hays required a guardian of the person and estate. *CP 2585*. Mr. Hays' treating physician testified that Mr. Hays had memory issues and needed the assistance of a trusted advisor. *CP 1770*. Mr. Hays' resistance to the appointment of a guardian cannot be construed as a novel issue since many alleged incapacitated people object to the appointment of a guardian for them.

Most of Mr. Hays' assets were previously transferred into a limited liability company, HEP. Control of those asset is governed by a

comprehensive operating agreement. The HEP operating agreement contains provisions relating to the incapacity of its manager. HEP was not a party to the guardianship proceeding, nor should it be. The only assets about which the trial court should have been apprised or concerned about were those that remained in Mr. Hays' name. The information presented and argued vigorously as support for the imposition of a guardianship pertained largely to his management of HEP.

Without the inclusion of all of the irrelevant information, the case would have been a simple one, consisting of the following witnesses only: Mr. Hays; Mr. Hays' children, Rebecca Castilleja, Howard and Robert; the guardian ad litem, Mr. Richard Furman; Mr. Hays' physician, Dr. Younger; and Dr. Janice Edwards; and the following exhibits: Mr. Hays' medical records; the guardian ad litem reports; and personal financial records.

Instead, Mrs. Castilleja's counsel called several additional witnesses, and questioned all witnesses about Mr. Hays' estate planning and the potential tax liabilities caused by or which might be caused by his actions regarding the management of HEP. In addition, counsel submitted 1589 pages of exhibits, the vast majority of which, 996 pages, dealt with the same issues. Mrs. Castilleja's counsel admitted in the supplemental trial brief that the real purpose for submission of all the evidence

pertaining to HEP and the trusts was to establish the effect of the appointment of a guardian for Mr. Hays on those entities. *CP811-825*. In contrast, Mrs. Castilleja's counsel devoted just 1½ pages of the supplemental brief to a discussion of Mr. Hays management of his personal financial affairs. *CP 825-6*. As a result, Mrs. Castilleja's counsel unnecessarily complicated the issues in this case.

This factor is important and the burden placed on petitioner is high. However, the record reflects that counsels' efforts on behalf of the petitioner greatly exceeded what was necessary to establish a guardianship.

(3) The fee customarily charged in the locality. The individual hourly rates are not excessive; however, the participation of two experienced attorneys during trial and at post-trial proceedings, resulted in a combined hourly rate of \$700.00. The combined rate is excessive.

(4) The amount involved and results obtained. While it appears initially that the amount involved is great – approximately \$28 million – all of those assets were not in Mr. Hays' personal control and were not the subject of the guardianship proceeding. Mr. Hays placed most of his assets into HEP and several trusts, in an attempt to reduce potential estate tax liability.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services. Ms. Howle and Ms. Vaughn are experienced in providing representation in guardianship proceedings and have excellent reputations.

In its order, the trial court should have stated how each of the above factors affected its decision. As is illustrated, had the trial court properly considered the relevant factors, it would have reached the inevitable conclusion that the total fees were excessive for the establishment of a guardianship of the estate.

3. The Trial Court Failed to Perform a Lodestar Analysis.

In making an award of fees, the court “should be guided ... by the lodestar method...” *Mahler v. Szucs*, 135 Wn.2d at 433. The lodestar method is a “clear and simple formula” that courts may use to decide “the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made.” *Id.* Trial “[c]ourts must take an *active* role in assessing the reasonableness of fee awards... [and] should not simply accept unquestioningly fee affidavits from counsel.” *Id.* (Emphasis in original.)

Under this method, the court first determines whether counsel “expended a reasonable number of hours in securing a successful” outcome. *Id.* The court should exclude any “wasteful or duplicative

hours and any hours pertaining to unsuccessful theories or claims” based upon contemporaneous records that document the work performed. *Id.* The contemporaneous records must show the hours worked, the type of work performed and the person who performed the work, including his or her status. *Id.* However, the actual hours billed by counsel “are only the starting point.” *Fetzer v. Weeks*, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993).

Next, the court determines “the reasonableness of the hourly rate of counsel at the time” the work was performed. *Id.* Finally, the court multiplies the reasonable hourly rate by the reasonable number of hours, adjusting upwards or downwards if conditions warrant. *Id.* The court should reduce the award by the amount of “duplicated work or other unproductive time.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 601, 675 P.2d 193 (1983).

Here, the trial court failed to properly articulate how it determined that the number of hours expended was reasonable, merely stating that “the number of hours was reasonable considering the results obtained, the work performed, and the contested nature of the proceedings as set forth in the contemporaneous billing records and declaration filed in support.” *CP 1807*.

In *Fetzer*, the Supreme Court held that the award of 481.89 hours on a CR 12(b)(2) motion was an abuse of discretion and reduced the amount to 70 hours. *Fetzer v. Weeks*, 122 Wn.2d at 157. Here, Mrs. Castilleja’s counsel expended 1,025.25 hours or nearly six months of full time work for one attorney ($1,025.25 \div 40 = 25.625$).

This guardianship proceeding took approximately eight months from the date the petition was filed to the entry of findings by the court. However, no one worked full time on this matter. As the record reflects and will be shown below, the time was accumulated for work performed before, during and after the guardianship proceeding, for two purposes: To establish the need for a guardianship of the estate of Mr. Hays and to ensure that the entities in which Mr. Hays had placed most of his assets were protected.

4. The Trial Court Failed to Make Findings In Response to Mr. Hays’ Objections.

Rather than engaging in a substantive analysis, the trial court simply concluded that all fees were reasonable. The trial court should have entered findings indicating its consideration of and conclusions regarding the following specific objections raised by Mr. Hays. *Mayer v. City of Seattle*, 102 Wn. App. at 79, (failure to make an adequate record “will result in a remand of the award to the trial court...”)

a. Fees incurred in presenting evidence on irrelevant issues and pursuing unsuccessful claims.

Here there was a substantial amount of unnecessary time spent by counsel in presenting a mind numbing amount of evidence to establish Mr. Hays' incapacity. Even though the case was not about Mr. Hays' estate plan or the operation of his business entities, since neither the trusts nor the LLC were parties to the guardianship proceeding, petitioner's counsel spent hours of pre-trial time deposing witnesses, including accountants of Mr. Hays, and seeking documentary evidence on the issues of Mr. Hays' estate planning and his management of HEP.

In addition, Mrs. Castilleja's counsel nearly overwhelmed the court with evidence during the trial. Counsel submitted 1589 pages of exhibits, deposition transcripts and excerpts from deposition transcripts and called 9 witnesses. Much of the evidence pertained to Mr. Hays' estate plan and the management of HEP. However, Mr. Hays' prior estate planning and his ability to operate HEP were irrelevant to Mr. Hays' ability to handle his personal financial affairs.

The trial court "may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." See *Absher Construction v. Kent School District No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1996). In that case, the court substantially reduced the fees in

part because efforts by counsel benefitted the client in other, unrelated matters. *Id.* at 848. The same is true here. The extensive discovery and investigative efforts made by counsel for Mrs. Castilleja into matters related to the trusts and HEP will benefit Mrs. Castilleja in other matters pertaining to those entities (Mr. Hays is neither the income nor remainder beneficiary of the three trusts for which Mrs. Castilleja served as trustee at the time of trial). But those efforts should not be funded by Mr. Hays.

It is estimated that counsel for Mrs. Castilleja spent approximately one-half of their time pursuing, submitting and arguing irrelevant issues, such as Mr. Hays' estate planning, Mr. Hays' management of HEP conferring with and/or preparing an excluded expert witness, Mary Lynn Pannen; and unsuccessfully seeking the appointment of a guardian of the person.

Mrs. Castilleja's counsels' failed to segregate those fees incurred for establishment of the guardianship from fees incurred on other matters, prevented the trial court from doing so. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 620, 224 P.2d 795 (2009), (the party requesting fees must segregate the time); *Mayer v. City of Seattle*, 102 Wn. App. at 80, (the trial court must segregate the recoverable fees from those that are not, unless the issues are interrelated).

In *Mayer* this court held that the prevailing party could not recover for attorneys' fees incurred in establishing fault of the parties, because that issue was not relevant to the party's claim under the Model Toxics Control Act, the statute which provided for recovery of attorneys' fees. *Id.* Accordingly, the court stated that "[t]he trial court abused its discretion in awarding Mayer fees for discovery of this evidence." *Id.*

Here the trial court failed to segregate those fees incurred to establish a guardianship of the estate from those incurred on all other issues, including Mr. Hays' prior estate planning, his management of HEP, and distributive issues discussed prior to the guardianship. Mr. Hays has (based upon the itemized statements submitted by counsel) estimated the time incurred by Mrs. Castilleja's counsel on these extraneous matters because Mrs. Castilleja's counsel failed to do so. Accordingly, the amount of the fee award should be reduced as requested by Mr. Hays.

b. Fees incurred by the presence of two attorneys at trial.

Mrs. Castilleja had the services of two highly experienced attorneys at every day of the trial and to argue entry of the findings of fact, conclusions of law and order appointing guardian of estate. Both attorneys bill at the firm's highest rate and supported that rate with a description of their respective backgrounds and experience. The issues presented in this guardianship proceeding were straightforward – whether

Mr. Hays was incapacitated as to his estate and whether adequate alternatives to guardianship existed. The basis articulated in support of the hourly rate contradicts the claim that the presence of two attorneys at trial and in post-trial proceedings was necessary.

Accordingly, the fees here should have been reduced by the amount incurred by the presence of two attorneys at trial and post-trial hearings, \$20,972.00 for 60.32 hours. *CP 1650-55; 1663.*

c. Fees incurred seeking discovery from Mr. Hays' prior and current attorneys.

Fees incurred in seeking privileged information from Mr. Hays' attorneys and former attorneys totaled \$10,115.00 for 30.82 hours. *CP 1650-55; 1663.* Mr. Hays received no benefit from fees incurred in seeking privileged information from his attorneys and former attorneys and moved to quash the subpoenas. The attempt to obtain privileged and confidential information was denied by order dated July 6, 2011. *CP 126-7.* The Court awarded costs related to the motion to quash and requested a specific declaration regarding the time spent on the motion. *CP 127.* Following the filing of the declaration, the court on August 1, 2011 entered an order deferring a ruling on the amount of the fee award until the record was fully developed. *CP 164.* The failure by the trial court to

deduct the fees incurred for this improper discovery was an abuse of discretion.

d. Fees unsupported by the record.

Time entries that are vague or block billings that make it difficult or impossible for the court to determine whether the fees relate to the successful claims should be deducted. These entries totaled \$8,508.50, or 24.31 hours. *CP 1650-55; 1663.*

e. Unreasonable Costs.

Unnecessary costs included those incurred for expedited entry of the petition for appointment of a guardian ad litem and recording a Notice of Guardianship Proceedings with the King County Recorder's office in the amount of \$124.00 should be deducted. Costs for computerized legal research in addition to billing for attorney time on legal research in the amount of \$491.46 should also be deducted. *CP 1663-4.*

In accordance with the principles set forth in *Mahler* and the other cases cited above, Mrs. Castilleja's attorneys' fees should be reduced first, by the specific amounts listed above, and then by one-half of the remainder.

**B. THE TRIAL COURT FAILED TO APPLY
EQUITABLE PRINCIPLES WHEN IT ORDERED
PAYMENT OF THE FEES INCURRED FROM MR.
HAYS' ESTATE.**

**1. Only Those Fees Reasonably Incurred to
Establish the Guardianship Should be Paid by
Mr. Hays.**

Even if this court concludes that the fees incurred by Mrs. Castilleja were reasonable, the trial court order should still be reversed because it failed to properly apportion what fees are to be paid by Mrs. Castilleja, by Mr. Hays and by the other entities benefitted. The only fees and costs properly assessed against Mr. Hays are those that were incurred in seeking the appointment of a guardian of the estate. See *In re Guardianship of Ivarsson*, 60 Wn.2d 733, 744, 375 P.2d 509 (1962).

In *Ivarsson*, the court held that a substantive analysis must first be undertaken by the trial court which culminates in an explicit finding that the requested fees are reasonable in the circumstances of the particular case. *Id.* at 744.

The court in *Hallauer* held that guardianships are “equitable creations of the courts,” and the court retains ultimate responsibility for protecting the ward's person and estate. *Id.* at 797. The court may reduce excessive fee requests “either by compensating fewer hours than were requested, or by reducing the requested hourly rate, depending on the trial court's assessment of other facts and circumstances.” *Id.* at 800.

Thus, in addition to his objections to the overall reasonableness of the attorney fees requested, Mr. Hays objects to imposition of those fees against his estate because he should not have to pay for any fees incurred on the following matters.

a. Fees incurred prior to the guardianship petition.

Fees incurred prior to preparation of the guardianship petition when matters other than guardianship were being explored, primarily whether the family could reach an agreement on distribution of assets following Mr. Hays' death. According to the itemized statements provided to the trial court, fees incurred for these activities totaled \$18,107.29 for 51.6 hours. *CP 1650; 1663.*

b. Fees incurred by the attorneys seeking payment of their fees.

Attorneys may not seek recovery for their fees incurred in seeking payment of or defending objections to approval of fees. When the fees of a fiduciary or its attorney are challenged by an heir or beneficiary, the fiduciary or the attorney become real parties in interest, as it is their fee which is being defended. *In re Estate of Larson*, 103 Wn.2d at 532.

In *In re Guardianship of Adamec*, 100 Wn.2d 166, 667 P.2d 1085 (1983), the court held that fees incurred by a guardian in defending his own interest could not be awarded under RCW 11.92.180. *Id.* at 179.

Similarly, the court has denied recovery of expenses incurred by the executor of an estate when the expenses were incurred in her own interest, and not for the benefit of the estate. *In re Estate of Riemcke*, 80 Wn.2d 722, 735, 497 P.2d 1319 (1972).

Mrs. Castilleja's attorneys' fee request and defense to the objections raised served only the attorneys' interests and did not benefit Mr. Hays. The fees attributable to those services should not be approved for payment from the guardianship estate. Thus, the amount to be paid by Mr. Hays should be decreased by the hours spent in that activity: 8.43 hours or \$2,320.50. *CP 1654-5; 1664.*

c. Fees incurred subsequent to the guardianship.

Mrs. Castilleja incurred fees consulting with counsel after the guardianship had been established on matters unrelated to the establishment of the guardianship in the amount of \$315.00 for .9 hours. *CP 1655-1664.*

2. Fees Should be Apportioned Amongst All of the Entities Benefitting From the Litigation.

It is Mr. Hays' position that the trusts and HEP were not parties to the guardianship proceedings. However, the trial court partially based its decision upon Mr. Hays' inability to manage HEP and potential harm to it and to the trusts. As stated above, a substantial portion of the evidence

presented and arguments proffered by counsel for Mrs. Castilleja pertained to those entities and the harm that might occur if a guardianship was not established. Therefore, if the appellate court is inclined to find those fees to be reasonable, it is also reasonable to apportion payment of those fees amongst the various entities which benefitted from the guardianship. See *In re Guardianship of McKean*, 136 Wn. App. 906, 920, 151 P.3d 223 (2007), (it is appropriate to allocate fees “amongst those who created the need for the guardianship.”)

Here, there was a substantial benefit to HEP and the several trusts by the finding that Mr. Hays was incapacitated. Indeed, many of the arguments made during trial pertained to Mr. Hays’ inability to appropriately manage the affairs of HEP. Therefore, it is reasonable for the court to apportion some of the reasonably incurred fees to HEP and the trusts.

C. THE COURT ABUSED ITS DISCRETION WHEN IT DIRECTED IMMEDIATE ENTRY OF JUDGMENT AGAINST THE ESTATE.

The court directed immediate entry of a judgment against the guardianship estate. This was inequitable for two reasons: Mr. Hays does not have sufficient cash assets with which to pay the fees and he no longer has control of his assets. RCW 11.92.060(3) provides that: when there is a guardian of the estate, the property and rights of action of the

incapacitated person shall not be subject to garnishment or attachment, except for the foreclosure of a mortgage or other lien, and execution shall not issue to obtain satisfaction of any judgment against the incapacitated person or the guardian of the person's estate as such. Before any payment of a liability of an incapacitated person may be made, the guardian of the estate must marshal the assets of Mr. Hays, inventory his assets and liabilities, report to the court and request permission to make disbursements and/or sell some of the assets as necessary. *RCW 11.92.040(2) and (7).*

Thus, it was inequitable for the court to direct entry of a judgment, with interest accruing at 12%, immediately, thereby unnecessarily depleting Mr. Hays' estate. The trial court should have exercised its discretion as to "the manner of payment" of the approved fees under RCW 11.96A.150 to delay entry of the judgment at least until the guardian's inventory and petition for order authorizing disbursements was presented and approved.

D. MR. HAYS IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS ON APPEAL.

This court should award Mr. Hays his attorneys' fees and costs pursuant to RAP 18.1 and RCW 11.96A.150. The court on appeal may order costs, including reasonable attorneys' fees to be awarded from to any party from any party to the guardianship proceeding. *RCW*

11.96A.150 and cases cited herein. Mrs. Castilleja should be required to pay Mr. Hays' attorneys' fees and costs on appeal.

VI. CONCLUSION

The trial court abused its discretion in three ways:

(1) When it concluded that all of the fees and costs incurred by Mrs. Castellija were reasonable without first performing the appropriate substantive analysis of those fees and costs.

(2) When it concluded that all of the fees and costs incurred by Mrs. Castellija should be paid by Mr. Hays without deducting for fees that were not incurred for the establishment of a guardianship and did not benefit the estate.

(3) When it directed entry of a judgment against Mr. Hays even though he has no present ability to pay it.

Accordingly, the trial court's order directing entry of judgment dated January 31, 2012 should be reversed. This matter should be remanded back to the trial court with directions to enter an order reducing the amount of attorneys' fees to be paid from Mr. Hays' estate by the following amounts:

(1) Fees incurred in seeking privileged information - \$10,115.00;
CP 1650-55; 163

(2) Vague or block billings - \$8,508.50; *CP 1650-55; 1663*

(3) Unnecessary costs - \$615.46; *CP1663-4*

(4) Fees incurred prior to the guardianship - \$18,107.29; *CP 1650; 1663*

(5) Fees incurred seeking fees - \$2,320.50; *CP 1654-5; 1664*

(6) Fees incurred subsequent to entry of the order appointing guardian - \$315.00; *CP 1655; 1664*

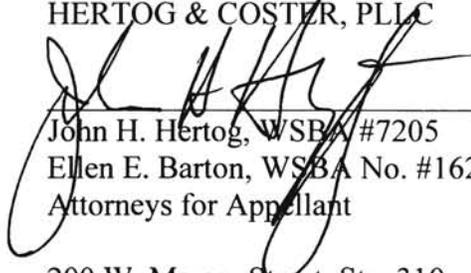
(7) Fees incurred by the presence of two attorneys at trial or hearings - \$20,972.00; *CP 1650-55; 1663*

In addition, the Court should deduct the fees incurred on discovering, analyzing and presenting evidence and argument on irrelevant matters – one-half the remainder of \$335,939.17 or \$167,969.59.

Further, the trial court should be directed to delay entry of any judgment until after the court reviews and approves the guardian's inventory and petition for order authorizing disbursements, including a method for payment of any fee award entered. Finally, the court should award Mr. Hays his reasonable attorneys' fees and costs incurred on appeal to be paid by Mrs. Castilleja, pursuant to RAP 18.1 and RCW 11.96A.150.

DATED this 7th day of May, 2012.

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