

2010

In the Matter of Margaret Guynn : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the Matter of

MARGARET GUYNN

Appellate Case No. 20100350

District Court Case No. 093901284

**JOINT BRIEF OF APPELLEES MARGARET GUYNN AND BRUCE GUYNN IN
HIS CAPACITY AS LIMITED CONSERVATOR OF THE ESTATE OF
MARGARET GUYNN**

Appeal from the Decision of the Honorable Sandra Peuler
Third Judicial District Court in and for Salt Lake County, State of Utah

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COPY

LIST OF PARTIES

The parties to these proceedings are (i) Margaret Guynn (“Margaret”), the person alleged to be in need of protection, (ii) Bruce Guynn, in his capacity as limited conservator of Margaret Guynn (“Bruce”), and (iii) Catherine Ortega (“Catherine”), as the original petitioner to serve as guardian and conservator of Margaret. Margaret and Bruce are the appellees and Catherine is the appellant herein.

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JURISDICTION

Jurisdiction is conferred upon this Court by virtue of Utah Code Ann. § 78A-3-103(2)(j).

STATEMENT OF ISSUES RAISED BY APPELLANT AND STANDARD OF REVIEW

Issue No. 1: Whether the trial court correctly denied Catherine's request for attorneys' fees in this guardianship and conservatorship proceeding.

Standard of Review: Whether attorney fees are recoverable in an action is generally a question of law, which is reviewed by the appellate court for correctness. *Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶22, 100 P.3d 1200, 1206. "The appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion." *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148; *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845.

Catherine is not seeking an award of attorneys' fees based on the established Utah rule of granting attorneys' fees where authorized by a contract or statute. Instead, Catherine is requesting this Court to adopt a new rule, never before recognized in Utah, providing that her fees should be awarded based on the specific facts and circumstances of this case. Specifically, Catherine urges this Court to adopt a rule that attorneys' fees should be awarded whenever a conservator is appointed, even if the Court never made a finding of incapacity. To the best of Appellees' knowledge, such a rule does not exist in any jurisdiction. Some jurisdictions have authorized trial courts to award fees in guardianship and conservatorship proceedings after a finding of incapacity and a showing

that the guardianship and conservatorship was in the best interests of the person to be protected. *See, e.g., In re Estate of Bayers*, 983 P.2d 339, 341-42 (Mont. 1999). In these cases, appellate courts have held that the decision to award or deny attorneys' fees is within the discretion of the trial court and will only be overturned upon a finding of abuse of discretion. *Id.*; *see also, Chavis v. Patton*, 683 N.E.2d 253, 256 (Ind. Ct. App. 1997).

Determinative Authority. Generally, "attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty Clerk*, 2007 UT 97, ¶5, 175 P.3d 1036, 1038. The exception to this rule is where the Court, "deems it appropriate in the interests of justice and equity" to award a reasonable fee, however, such an award is "extraordinary" and would require an "exceptional" case. *Id.* at 1038.

Utah law does not currently recognize the right of a petitioner to be awarded fees in a guardianship or conservatorship action, and the Utah legislature has expressly rejected proposed legislation intending to grant such a right. (*See Addendum One, HB 167, Elder Protection Provisions by Rep. Patricia Jones*). Courts that do recognize this right have tended to leave the discretion of whether to award fees with the trial court and narrowed any award to those circumstances where the trial court made findings, among other things, that the person to be protected was incapacitated. *See, e.g., In re Estate of Bayers*, 983 P.2d at 342; *see also, In re Landry*, 886 A.2d 216, 221 (N.J.Super. Ch. 2005) ("This court sees no basis for concluding that there is any authorization for an award of fees when the plaintiff is not successful in establishing incapacity and the need for a guardianship."); *In re Guardianship of Donley*, 631 N.W.2d 839 (Neb. 2001).

Issue No. 2: Whether the trial court correctly denied Catherine’s Rule 59 Motion requesting the trial court to reconsider its denial of Catherine’s request for attorneys’ fees in this guardianship and conservatorship proceeding.

Standard of Review: The denial of a motion under Rule 59(a)(7) for errors in law is reviewed for correctness. *Hart v. Salt Lake Cnty Comm’n*, 945 P.2d 125, 136 (Utah Ct. App. 1997). If this Court applies a new rule of attorney fees urged by Catherine, discussed *supra*, the underlying decision of whether to award or deny fees should only be overturned upon a finding of abuse of discretion. *Chavis*, 683 N.E.2d at 256.

Determinative authority: Rule 59(a)(7) of the Utah Rules of Civil Procedure provides a basis for the Court’s denial of Catherine’s request for fees. To the extent the issues involve whether the denial of attorneys’ fees was proper by the trial court, Margaret and Bruce refer the Court to their explanation of the determinative authority to Issue No. 1., *supra*.

Issue No. 3: Whether Catherine’s appeal is without merit under Rule 33 of the Utah Rules of Appellate Procedure.

Standard of Review: “[S]anctions for frivolous appeals should only be applied in egregious cases. . . . [yet] should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing.” *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988) (internal quotation marks omitted).

STATEMENT OF THE CASE

Appellees Bruce Guynn and Margaret Guynn object to Appellant Catherine Ortega's Statement of the Case, because it contains misleading and argumentative assertions that unfairly distort the record below, states numerous "facts" not in the record, none of which was established below, and presents legal issues as if they were facts. Given that this case was resolved by stipulation, the district court did not make formal findings of fact in this case, and no evidentiary hearings were conducted.

This case involves a dispute related to whether Catherine Ortega should be awarded her attorneys' fees for initiating a petition for guardianship and conservatorship for her mother, Margaret Guynn, whom she had not seen in 25 years. On August 31, 2009, Catherine filed a petition seeking appointment as guardian and conservator of Margaret. (R. 001). Two days later, on September 2, 2010, Catherine appeared at the weekly law and motion probate calendar despite the fact that notice of her petition had not been provided to any parties, including Margaret, and the court had not set her petition for hearing. As the petition had only been filed two days prior, Catherine's petition was not on the probate calendar for the day.¹ Instead, Catherine, with her counsel, waited until the end of the probate calendar and requested that her petition be included as an "add-on" to the day's calendar. (R. 009). Catherine then made an *ex parte* request that the law and motion judge appoint Catherine as temporary conservator and

¹ The Salt Lake Department of the Third District Court holds a weekly law and motion probate calendar where all probate, guardianship and conservatorship petitions are heard. Typically, judges in the Salt Lake Department will grant petitions if no objections are raised at the hearing, or if objections are raised, the parties are automatically referred to mediation.

guardian over Margaret based solely on representations by Catherine and her counsel. Also at the *ex parte* hearing, Catherine requested that an attorney, Wendy Bradford, be appointed for Margaret. *Id.* Margaret had not met Ms. Bradford when Ms. Bradford was appointed to represent her. (R. 203; Addendum Two at 4, ¶¶ 20-23). The law and motion judge granted the *ex parte* guardianship and conservatorship and directed Catherine to return for the law and motion probate calendar set for September 16, 2010, to determine whether there were objections to the *ex parte* guardianship and conservatorship being made permanent. (R. 009).

After Margaret learned of Catherine's petition and Catherine's unilateral appointment of Wendy Bradford as her attorney, Margaret retained Elizabeth Conley to represent her at the September 16, 2010 hearing. At that hearing, Margaret and her son, Bruce, through counsel, objected to Catherine's petition. Based on the objections to the petition lodged by Margaret and Bruce, the matter was referred to mediation in accordance with the custom of the courts in the Salt Lake Department. (R. 023).

The day after the September 16th hearing, Catherine sought a hearing before the assigned trial judge as to who should serve as Margaret's counsel (Wendy Bradford or Elizabeth Conley). The trial court therefore scheduled a formal hearing to determine whether the temporary guardianship and conservatorship should remain in place, and whether Ms. Conley or Ms. Bradford would represent Margaret. (R. 024). The hearing was held on September 21, 2010, at which the Honorable Sandra Peuler recognized Ms. Conley as Margaret's chosen counsel, and overruled Catherine's objection that Margaret should be required to engage Ms. Bradford – an attorney who Catherine unilaterally

chose for Margaret without her consent. (R. 026). Judge Peuler also dismissed Ms. Bradford from the case and ordered the temporary conservatorship and guardianship be terminated. *Id.*

In an effort to avoid further litigation and legal fees, the parties exchanged proposed stipulations at the beginning of November, 2009, that would provide for the appointment of Bruce as a limited conservator of Margaret in final resolution of the matter. As part of the negotiation of the stipulation, Mr. Jensen, counsel for Catherine, requested that his attorney fees be included in the stipulation. (R. 151). Margaret, through Ms. Conley, denied Catherine's request for attorney fees. (R. 153). Catherine therefore agreed to a stipulation that did not include an award of her attorney fees when she signed the Stipulation for Appointment of Limited Conservator (the "Stipulation"). (R. 038-041). The Stipulation clearly provides that it was entered into for the purpose of ending the litigation:

While Catherine believes that Margaret lacks the capacity to manage her own care and financial affairs, Bruce and Margaret disagree. **Nonetheless, to avoid further litigation, they have reached an agreement** on the level of protection that is now needed.

(R. 039; Addendum Three at 2)(emphasis added).

Not directly relevant to this appeal, but also occurring simultaneously in this case, was a dispute regarding whether attorney Wendy Bradford should be awarded her attorney fees for her limited appearance in the case. On December 18, 2010, almost a full month after the Stipulation was entered, Catherine filed a memorandum in support of Ms. Bradford's motion for fees. (R. 075). As part of Catherine's memorandum in support of

Ms. Bradford's request for fees, Catherine, for the first time, added on a request that Catherine's fees be paid as well.² Again, Catherine made this request almost a month after she had agreed that the final Stipulation would not award her attorney fees.

On February 24, 2010, Judge Peuler issued a Minute Entry wherein she, among other things, denied Catherine's request for fees, and that ruling is now the subject of this appeal. Importantly, the trial court found that the Stipulation was a resolution of the issues outstanding in the matter and the request for fees was therefore improper:

Based on the resolution of the matter, which did not provide for petitioner's attorneys fees, as well as the increase of fees since the order was entered, the court declines to award fees to petitioner.

(R. 284; Addendum Four).

On March 1, 2010, Catherine filed a Rule 59 Motion solely on the issue of whether the trial court made an error of law in determining that Catherine should not be awarded fees. On April 7, 2010, the trial court once again denied Catherine's request for attorney fees. Judge Peuler made clear that no contract, statute or equity justified an award of fees in this case and Catherine was simply incurring unnecessary fees. (R. 324-327; Addendum Five). Catherine has now appealed the trial court's denial of her attorney fees and its refusal to reverse itself on the issue of fees in its ruling on Catherine's Rule 59 Motion.

² Catherine never separately moved the trial court for her fees as required by Rule 7 of the Utah Rules of Civil Procedure, opting instead to bury her request for fees in a memorandum on an unrelated issue.

STATEMENT OF FACTS³

Catherine Has Been Absent from Margaret's Life for 25 Years and Only Reappeared in August of 2009 After the Sale of Margaret's Home in Texas.

For almost 25 years, Catherine refused all contact with Margaret. (R. 202; Add. Two at 3, ¶ 13). Over the decades, Margaret attempted to re-establish communication with Catherine, but Catherine always refused. (R. 202; Add. Two at 3, ¶ 15). In July, 2009, Margaret moved to Utah to be closer to her family, especially her grandson, Jeremy Ortega, who she had raised as her own son for many years. (R. 201; Add. Two at 2, ¶ 5-8). Jeremy is also Catherine's son. *Id.* Margaret has always been close to her son Bruce, and grandson, Jeremy. (R. 204; Add. Two at 5, ¶ 25). As part of her move to Utah, Margaret sold her home in Texas where she had lived since 1986. (R. 200-01; Add. Two at 1-2, ¶ 3, 9). In connection with the sale, the title company required both Bruce and Catherine to sign a waiver of interest in the home. (R. 201; Add. Two at 2, ¶ 9). In July, 2009, Jeremy contacted Catherine and explained to her that Margaret's home was being sold and Catherine needed to sign a waiver of interest in the home. (R. 210; Addendum Six at 2, ¶ 7-8). Catherine signed the waiver without objection. (R. 211; Add. Six at 3, ¶ 10-11).

After the sale in July, 2009, Catherine called Margaret, out-of-the-blue, and according to Margaret, one of the first things Catherine said to her was "Where is my money? Where is my money?" (R. 201; Add. Two at 2, ¶ 10). Subsequently, in August,

³ The trial court did not make any formal findings of fact in this case. Both parties submitted affidavit testimony regarding the facts and circumstances of the case. The statement of facts as set forth herein is based on affidavit testimony that was introduced to the trial court.

2009, Catherine appeared at Margaret's door at the Atria Assisted Living Center in Sandy, Utah. (R. 202; Add. Two at 3, ¶ 16). Margaret had not seen her daughter, Catherine, in approximately 25 years, and Margaret testified that Catherine's first words to her were "Do you know who I am?" Margaret did not recognize Catherine after the long absence. *Id.*

Shortly after this first face-to-face visit in many years, Catherine then returned to Margaret's residence at Atria and informed her that Catherine was going to help Margaret manage her affairs. (R. 203; Add. Two at 4, ¶ 17). Although Catherine and Margaret had not spoken for such a long period, Margaret had sincerely hoped that Catherine was attempting to reconcile with her. (R. 203; Add. Two at 4, ¶ 18).

Catherine Seizes Control of Margaret's Bank Accounts

On August 28, 2009, just a matter of days after their first meeting in 25 years, Catherine and her husband, Murray, took Margaret to a bank and left her in one office as Catherine and Murray went into another room with a bank employee. (R. 203; Add. Two at 4, ¶ 19). Catherine and Murray later came into the room and asked Margaret to sign some documents that were not explained to her. *Id.* Margaret later learned that Catherine and Murray had caused Margaret to sign documents placing Catherine's and Murray's names on her bank accounts. *Id.* Prior to this, Margaret was the sole owner on the accounts that Rebecca Ortega, Jeremy's wife, had helped her establish in July when she moved to Utah. *Id.*

Catherine Files a Petition for Guardianship and Conservatorship Shortly After Seeing Margaret for the First Time in Over 25 Years

On August 31, 2009, Catherine filed a Petition to Appoint Guardian and Conservator, whereby she would be appointed the guardian and conservator of Margaret. (R. 001). She further sought an *ex parte* temporary appointment on the following grounds:

The basis for requesting a temporary appointment is as follows: The Ward appears to be subject to exploitation by Petitioner's son who has been trying to obtain a power of attorney from the Ward so that he can access her bank accounts. A temporary conservator is needed until this Court holds a hearing on this Petition . . .

(R. 001 at ¶ 5).

Catherine also represented to the Court in her Petition that she would be filing a physician's letter in support of her claim that Margaret was incapacitated. (R. 003)(“Petitioner also requests the Court to waive the presence of the Ward and to waive the appointment of a visitor, based on the physician's letter to be submitted prior to or at the hearing on this matter”).

On September 2, 2009, without notice to any of the parties, Catherine and her counsel appeared in Court, and based on the representations made to the rotating probate judge, Catherine was appointed as emergency conservator and guardian. (R.009). This appointment was made without any medical evidence, including a physician's letter, of Margaret's alleged incapacity. On September 4, 2009, Catherine visited Margaret and served her with the court papers that Catherine filed to have herself appointed as Margaret's guardian and conservator. (R. 203; Add. Two at 4, ¶ 20). Margaret did not

understand the meaning of the documents. *Id.* Catherine assured Margaret that the documents were no big deal. *Id.* On the next day, Catherine went to Margaret's apartment at the same time as attorney Wendy Bradford. (R. 203; Add. Two at 4, ¶ 21). Catherine informed Margaret that Catherine and Ms. Bradford were going to obtain a guardianship and conservatorship on her behalf and stated that Ms. Bradford was now her attorney. *Id.* Again, it was never fully explained to Margaret what a guardianship and conservatorship meant. *Id.* Catherine and Ms. Bradford simply assured Margaret that it was in her best interests. *Id.*

Ms. Bradford did not know Margaret. (R. 203; Add. Two at 4, ¶ 22). Margaret did not understand why Ms. Bradford was her attorney. *Id.* Margaret felt that Ms. Bradford seemed to be working on Catherine's side. (R. 203-04; Add. Two at 4-5, ¶ 22-23). Catherine barely knew Margaret and had actively avoided her for decades. (R. 204; Add. Two at 5, ¶ 23). Margaret had not seen Catherine in nearly 25 years, and within weeks of meeting her again for the first time, Catherine was in Court requesting that she be made Margaret's guardian and conservator on an *ex parte* basis after already seizing control of Margaret's bank accounts. *Id.*

Margaret Learns the Truth

Margaret later learned that Catherine's stated purpose for obtaining a guardianship and conservatorship was to supposedly protect her from her grandson, Jeremy, who Catherine alleged was trying to take advantage of Catherine. (R. 204; Add. Two at 5, ¶ 24). Neither Catherine nor Ms. Bradford told Margaret that the grounds for the guardianship and conservatorship were that Margaret was incapacitated or that Catherine

believed Jeremy was trying to steal her money. *Id.* They only told Margaret it was no big deal for Catherine to serve as her guardian and conservator. *Id.*

Jeremy and Bruce have maintained contact with Margaret their whole lives. (R. 204; Add. Two at 5, ¶ 25). They have shown Margaret that they care for her. *Id.* They have shown her time and again that they want her best interests. *Id.* Catherine, on the other hand, wanted nothing to do with Margaret for over 25 years, and only showed up in her life when Catherine learned that Margaret sold her home in Texas. *Id.*

The bare, self-serving allegations Catherine made against Jeremy are also completely contrary to objective, reliable measures of his character. Jeremy is employed and financially stable – he makes in excess of six figures annually. (R. 212; Addendum Six at 4, ¶ 15). He is a Chief Warrant Officer (equivalent to a Captain) in the Army. *Id.* He works as a senior solutions architect for EMC, a data management company. *Id.* He is responsible for assisting with the design and integration of all United States government data virtualization and storage facilities. *Id.*

In connection with his employment, the United States government has granted Jeremy Secured Compartmental Investigation (“SCI”) security clearance, and he is authorized to access classified information of the United States. (R. 212; Addendum Six at 4, ¶ 16). To achieve and maintain SCI clearance he has been through extensive background checks, including a comprehensive review of his financial stability. *Id.* Jeremy cannot obtain SCI clearance if the United States government deems him financially irresponsible or of questionable character. *Id.*

Margaret testified that she would have strongly objected if either Wendy or Catherine had told her that they were seeking a guardianship and conservatorship to supposedly protect her from Jeremy or Bruce. *Id.*

Bruce Discovers that Catherine Had Obtained an Emergency Guardianship and Conservatorship

When Bruce found out about the guardianship and conservatorship, he was very concerned. (R. 204; Add. Two at 5, ¶ 26). He was able to explain to Margaret what a conservatorship and guardianship would mean. *Id.* Margaret then became fearful that Catherine had abused her trust. *Id.* Margaret did not trust Ms. Bradford to protect her from Catherine and thought that Ms. Bradford was on Catherine's side. *Id.* Ms. Bradford told Margaret she did not have to go to court and Margaret does not know what Ms. Bradford would have told the court about her wishes. (R. 205; Add. Two at 6, ¶ 26). Margaret has testified that she believes that Catherine and Ms. Bradford abused her trust, and acted against her interests. (R. 205; Add. Two at 6, ¶ 27). Margaret felt all alone and was frightened. *Id.* Margaret sought another attorney and asked Elizabeth Conley to be her counsel and requested that Wendy be removed as her court-appointed lawyer. *Id.* Margaret therefore retained Elizabeth Conley as her counsel, and Ms. Conley made her appearance on September 16, 2009. (R. 026).

The Meeting with Dr. Newhall

After the initial emergency hearing on September 2, 2009, but before the formal hearing on Catherine's Petition on September 16, 2009, Margaret had an appointment with Dr. Clark Newhall. (R. 230; Addendum Seven at 2, ¶ 5). Dr. Newhall testified that

in or around late August, 2009, he was contacted by a nurse at Atria Assisted Living Center regarding meeting with Margaret. (R. 229; Add. Seven at 1, ¶ 3). On September 11, 2009, the day of his scheduled exam with Margaret, Dr. Newhall testified that he also received a call from Catherine. (R. 230; Add. Seven at 2, ¶ 4). Catherine identified herself to Dr. Newhall as Margaret's daughter. *Id.* Dr. Newhall met with Catherine and Margaret on September 11, 2009. (R. 230; Add. Seven at 2, ¶ 5). It appeared to Dr. Newhall that Catherine and Margaret were not getting along, and Margaret expressed to her that she was upset that Catherine had called him. (R. 230; Add. Seven at 2, ¶ 5).

Dr. Newhall testified that one of the reasons for Margaret's visit was to discuss Margaret possibly signing an Advance Health Care Directive (the "Directive"). (R. 230; Add. Seven at 2, ¶ 6). Dr. Newhall explained the Directive to Margaret in detail and he felt that she had the ability to provide informed consent regarding her medical care, including the decisions required to sign the Directive. (R. 230; Add. Seven at 2, ¶ 6). **Dr. Newhall testified that he expressly told Catherine that he believed Margaret had the ability to provide informed consent and make her own medical decisions.** (R. 230; Add. Seven at 2, ¶ 7). Dr. Newhall also testified that Margaret directed him that in the event of a medical emergency, he was to contact her son, Bruce Guynn, and not Catherine.⁴ (R. 230; Add. Seven at 2, ¶ 8).

⁴ Catherine has described the meeting with Dr. Newhall as follows: "Petitioner arranged for Dr. Newhall to examine and evaluate Ms. Guynn for the guardianship proceeding. However, Petitioner later learned that Dr. Newhall would not accept being Ms. Guynn's physician because she refused needed lab work. This was the first indication that Petitioner's mother may have some delusions, since she expressed her belief that Petitioner had told Dr. Newhall that Petitioner wanted her blood drawn to get her

In other words, Catherine knew before the September 21, 2010 hearing, that Margaret had the ability to make her own decisions. Nevertheless, Catherine pushed her Petition forward with no evidence of incapacity. She also moved forward knowing that she could not obtain a physician's letter showing Margaret's alleged incapacity that she had promised to provide in her Petition. (R. 003).⁵ No medical evidence of incapacity of Margaret was ever submitted to the trial court by Catherine. The only medical testimony was that of Dr. Newhall who testified that Margaret had the ability to make her own medical decisions and provide informed consent.

The Stipulation

Given the contentious nature of the proceedings, and the acrimonious family feelings involved, the parties agreed to the Stipulation. As there was no evidence of incapacity, and Margaret and Bruce believed Margaret had capacity, Margaret refused to consent to a full guardianship and conservatorship. Instead, as a means of concluding the litigation and stopping the fighting and legal fees, Margaret agreed to have Bruce serve as her limited conservator with the caveat that she would have full decision making authority over her affairs so long as she is able. (R. 038; Add. Three at 1-2).

Despite (i) no medical evidence of incapacity, (ii) the final Stipulation agreed to by Catherine that does not award her fees, and (iii) the trial court's repeated refusals to award her fees, Catherine has relentlessly pressed forward seeking her fees through

money.” (R. 081). As shown by the declaration of Dr. Newhall (a disinterested party to this litigation), every aspect of Catherine's version of the appointment is dramatically contradicted by Dr. Newhall's testimony. (R. 229-30; Add. Seven).

⁵ A physician's letter is the usual basis to establish incapacity in guardianship and conservatorship proceedings.

further litigation. Catherine had openly shunned all contact with Margaret for 25 years, and in the few short months that Catherine has returned to Margaret's life she has brought nothing but strife, contention, and costs.

SUMMARY OF ARGUMENTS

1. Utah law permits the award of attorney fees where such fees are found in a contract, statute, or in highly rare cases, where fees would be equitable. Catherine has admitted that no contract or statute authorize the award of fees in this case. The trial court did not abuse its discretion in finding that equity did not justify the award of fees. Therefore, there is no basis under Utah law for the award of fees to Catherine and the trial court's rulings denying Catherine's fees were correct.

2. The Utah Legislature expressly considered adding two statutory provisions to the Utah probate code that would authorize the payment of fees to a petitioner in guardianship and conservatorship matters under certain circumstances. The Legislature deliberately chose to deny enacting such a law, and it would be inappropriate for this Court to circumvent undisputed legislative intent by creating a rule that would permit the award of fees to petitioners in guardianship and conservatorship proceedings.

3. Even if the Court were to adopt a rule found in case law from other jurisdictions awarding fees to petitioners in guardianship and conservatorship proceedings, such a rule would not apply to the facts of this case. Unlike case law from other jurisdictions, this case was settled by the Stipulation, which did not award fees, and was expressly agreed to in order "to avoid further litigation." Catherine initially requested her attorney fees be included in the Stipulation, but agreed to the Stipulation

without an award of fees. Catherine should now be estopped from seeking her fees in light of her prior agreement to the Stipulation, which did not award her fees. Also unlike the case cited by Catherine in support of her proposed rule, there was no trial court finding in this matter that Margaret was incapacitated. The only medical evidence submitted to the trial court was the testimony of Dr. Newhall, and Dr. Newhall testified that Margaret had the ability to provide informed consent and make her own medical decisions. The law presumes that Margaret has capacity until proven otherwise by clear and convincing evidence. Case law from other jurisdictions granting attorney fees after a finding of incapacity simply does not apply to this case.

4. The trial court correctly denied Catherine's Rule 59 Motion. Catherine failed to cite any Utah law, rule or statute that would justify the award of her fees. Catherine also failed to demonstrate why equity would demand an award of fees in these circumstances. Therefore, the trial court correctly ruled that it did not err when it initially denied her fees.

5. Equity requires that Catherine not be awarded her fees. It would be inequitable to award Catherine fees after her agreement to the Stipulation without an award of fees. Catherine had shunned contact with Margaret for 25 years, and within a few short months of reentering Margaret's life (conveniently timed with the sale of Margaret's home), Catherine commenced litigation seeking to control the funds of a mother she did not know while making unfounded and false allegations against Bruce and Jeremy – two individuals who have cared for and maintained contact with Margaret throughout their lives. This matter has also been highly distressing and costly to

Margaret with no real benefit to her. Equity requires that Catherine's fee request be denied.

6. In the unlikely event Catherine were successful on appeal, she is not entitled to receive her attorney fees incurred in attempting to obtain an award of fees, otherwise known as the "fees-for-fees" doctrine. Under Utah law, the "fees-for-fees" doctrine only applies where a party was clearly entitled to their attorney fees under a contract or statute. Here, Catherine is seeking her attorney fees based on a common law rule that has never been recognized in Utah, not a statute or a contract. In the unlikely event that Catherine is awarded her attorney fees incurred in obtaining the Stipulation, she should not also be awarded her attorney fees for prosecuting this appeal.

7. Catherine's appeal is not supported by the facts or existing law, and is without merit. Catherine had very clearly agreed to the Stipulation that did not award her fees. Nevertheless, Catherine has insisted on pursuing fees without the support of facts or law. This Court should therefore make Margaret whole and award damages against Catherine pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

ARGUMENT

I. UTAH LAW DOES NOT AUTHORIZE RECOVERY OF ATTORNEYS' FEES IN THIS CASE.

The district court properly denied Catherine's request for attorneys' fees. In Utah, the law is clear "that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Utahns for Better Dental Health-Davis, Inc. v. Davis County Clerk*, 175 P.3d 1036, 1038 (Utah 2007) ("Utahns for Better

Health”). The exception to this rule is where the Court, “deems it appropriate in the interests of justice and equity” to award a reasonable fee, however, such an award is “extraordinary” and would require an “exceptional” case. *Id.* at 1038. If the trial court denies attorney fees based on principals of equity, the appellate court should only overturn the trial court on a finding of abuse of discretion. *Hughes v. Cafferty*, 2004 UT 22, ¶20, 89 P.3d 148 (“The appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion.”); *Fisher v. Fisher*, 2009 UT App 305, ¶8, 221 P.3d 845.

With respect to the award of fees in this matter, the district court held in its minute entry:

The petitioner’s motion for payment of her attorneys’ [*sic*] fees is denied. The [*sic*] substance of this matter was resolved in November 2009, by a stipulation signed by counsel for all parties, and an order entered by the court on November 30, 2009. The stipulation and order did not contain a provision for fees; that issue, apparently, arose later after disagreements between the petitioner and conservator. Based upon the pleadings filed since the entry of the order, it is apparent to the court that many of the requested attorneys’ [*sic*] fees have been incurred since then.

Based on the resolution of this matter, which did not provide for petitioner’s attorneys’ [*sic*] fees, as well as the increase of fees since the order was entered, the court declines to award attorneys’ [*sic*] fees to petitioner.

(R. 284; Add. Four).

There is no dispute that the Stipulation resolving this case does not award fees, and Catherine has failed to cite a statute awarding fees. Therefore, the district court was

correct to determine that Catherine is not entitled to attorneys' fees based on the resolution of the matter that did not include an award of fees. *Id.*

Catherine's Appellant Brief clearly concedes both points, and as with her arguments below, Catherine cites no Utah case law, rule or statute which authorizes or requires the award of her fees. (Br. of Appellant at 13)(Catherine admitted in her Appellant Brief: "The stipulation would naturally be deemed to fall under the contract provision for attorney fees, and no statutory basis was cited for an award of fees"). Instead, Catherine attempts, without citation to authority, to assail the logic of the trial court. For example, Catherine erroneously asserts that the trial court is incorrect "because there is no basis in law that requires a stipulation to contain a provision for attorney fees, whether attorney fees are paid or not." (Br. of Appellant at 12). However, Catherine's argument entirely misses the point. Of course parties to a contract are not required to include an attorney fee provision in their agreement. The burden is on the parties to the contract to ensure that a fee provision is included, assuming that is their agreement and desire. If the contract fails to provide an award of fees, then a party cannot then seek to obtain the benefit of a non-bargained for benefit, in this case, fees. *Utahns for Better Health*, 175 P.3d at 1038. The Stipulation, which by its plain terms was entered into "to avoid further litigation," did not provide for fees, no statute awards fees, and the trial court was correct to deny an award of fees.

Catherine also incorrectly asserts that the trial court failed to base its Minute Entry on the rule that fees are typically only paid where provided by statute or contract. (Br. of Appellant at 13). This is also incorrect. In the Minute Entry denying Catherine's motion

for fees, the Court stated that “[t]he stipulation and order did not provide for fees” and concluded that “[b]ased on the resolution of this matter, which did not provide for petitioner’s attorneys’ [sic] fees, as well as the increase of fees since the order was entered, the court declines to award attorneys’ [sic] fees to petitioner.” (R. 284). The trial court clearly contemplated the lack of authority for awarding fees in its conclusion to deny the award of attorney fees. In its later denial of Catherine’s Rule 59 Motion, the Court was even clearer that fees are not awarded absent a statute or contract and the Court further did not “find any reason to consider awarding attorney fees based in the interest of justice and equity . . .” (R. 325).⁶ The trial court’s denial of Catherine’s fees was correct and should be upheld.

Finally, Catherine claims that the trial court was confused about whether the dispute over attorneys’ fees arose before or after the Stipulation was entered. Catherine complains that it appears the trial court believed the parties did not begin disputing fees until after the Stipulation was entered, when Catherine asserts the dispute arose before. However, Catherine fails to explain why the timing of the dispute would affect the trial court’s ruling. Even worse, the fact that the parties had specifically discussed whether Catherine should be awarded her fees prior to entering into the Stipulation, and the final Stipulation agreed to by Catherine is silent as to fees, is harmful to Catherine, not helpful.

⁶ Even if the trial court had not made these express findings, this Court may “affirm trial court decisions on any proper ground, despite the trial court’s having assigned another reason for its ruling.” *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988); *Hart v. Salt Lake County Commission*, 945 P.2d 125, 136 (Utah App. 1997). Therefore, this Court may affirm the trial court’s decision to deny Catherine’s fees on the grounds that no statute or fee permits recovery, and the trial court was correct to deny fees to Catherine.

It is not disputed that Catherine had requested that fees be contained in the final Stipulation. (R. 151; Addendum Eight). Yet Catherine agreed to a Stipulation that by its terms was entered into “to avoid further litigation,” and the Stipulation did not award Catherine attorney fees. (R. 153; Addendum Nine). Therefore, the fact that Catherine agreed to a final Stipulation that did not provide for fees, after she had requested her fees, makes clear that an award of fees was not a part of the parties’ bargain in the Stipulation, and fees should not be awarded. As aptly noted by the trial court, all Catherine is accomplishing is to increase the fees incurred by the parties. The decision of the trial court denying Catherine’s fees was correct and should be affirmed.

II. THE NEW LAW URGED BY CATHERINE WAS EXPRESSLY REJECTED BY THE UTAH LEGISLATURE.

In light of the undisputed fact that neither the Stipulation nor Utah law permit Catherine to recover her fees, Catherine is requesting this Court create a new law that would permit trial courts to grant fees to petitioners in guardianship and conservatorship proceedings. However, this proposal was presented to the Utah Legislature in 2005 and the Legislature expressly rejected the proposal. Catherine cites to the *Final Report to the Judicial Council by the Ad hoc Committee on Probate Law and Procedure*, dated February 23, 2009 (the “Committee Report”), in support of her argument that a petitioner’s fees should be paid from the estate of the person to be protected. (Add. B. to Br. of Appellant at B066-B0110). Mr. Alderman, counsel for Bruce, was a member of the Committee that created the Committee Report and is familiar with its findings. In her

brief, Catherine only selectively cited the Committee Report, without disclosing critical findings of the Committee that are relevant to the rule she wishes the Court to adopt.

The Committee Report, after recommending a rule that the petitioner's costs could be paid under appropriate circumstances (which largely do not apply in this case), noted that "[t]he Legislature rejected a similar policy in the 2005 General Session, but we believe it to be a sound policy, and urge the Legislature to reconsider." (*See* Committee Report at B088, attached as Add. B. to Br. of Appellant). Indeed, in 2005, House Bill 167 was introduced which had the primary purpose of amending the Utah probate code to provide the following provisions:

Upon the appointment of a guardian for an incapacitated person, the costs, including reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by the incapacitated person, provided that the estate of the incapacitated person can reasonably pay the costs and fees. If the court finds that the estate of the incapacitated person cannot reasonably pay the costs and fees, the costs and fees may become a lien against any interest the incapacitated person has in real property.

(Add. One at 3).

A similar provision was also proposed with respect to conservatorships:

Upon the appointment of a conservator for an incapacitated person, the costs, including reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by the incapacitated person, provided that the estate of the incapacitated person can reasonably pay the costs and fees. If the court finds that the estate of the incapacitated person cannot reasonably pay the costs and fees, the costs and fees may become a lien against any interest the incapacitated person has in real property.

(Add. One at 4).

These two provisions were the only substantive proposals of House Bill 167. *Id.* As the Committee Report notes, House Bill 167 was rejected. In light of this rejection, the Committee Report to Chief Justice Durham does not recommend that the Judiciary create a common law rule adopting the legislation in the appropriate case. To the contrary, the Committee Report recommends that the Judiciary “urge the Legislature to reconsider” its prior denial of the proposed law. (See Committee Report at B088, attached as Add. B. to Br. of Appellant). The Legislature and not the Judiciary is the appropriate avenue for Catherine’s suggested change in law, and the Legislature rejected the proposed change. This conclusion is also supported by other jurisdictions as well. *See In re Guardianship and Protective Placement of Evelyn O.*, 571 N.W.2d 700 (Wis. Ct. App. 1997) (“Perhaps the legislature could have also required persons to pay the attorney’s fees of those commencing and prosecuting guardianship and protective-placement proceedings against them. It did not, however, and the trial court had no authority to direct that [the petitioner’s] attorney’s fees be paid from the guardianship estates . . .”). Given that the Legislature considered and denied a statute that would grant fees to a petitioner in guardianship and conservatorship proceedings, this Court should refrain from judicially creating new law as urged by Catherine.

III. CASE LAW CITED BY CATHERINE DOES NOT APPLY TO THE CIRCUMSTANCES OF THIS CASE.

Even if this Court were to adopt a rule providing that a petitioner could be reimbursed its fees in the appropriate circumstance, the case law cited by Catherine does not support her position that her fees should be awarded in this case. No case cited by

Catherine involves the facts found here. The sole case cited by Catherine, as well as case law from other jurisdictions, grant fees only after several formal findings of the trial court, including incapacity of the person to be protected. *In re Guardianship of Donley*, 631 N.W.2d 839 (Neb. 2001); *In re Estate of Bayers*, 983 P.2d at 342; *In re Landry*, 886 A.2d 216, 221 (N.J. Super. Ch. 2005). Unlike the cases that have awarded fees, this matter was resolved by a settlement (i.e. the Stipulation), and not a trial. A limited conservator was appointed for Margaret as a means to stop the litigation brought by Catherine, and Margaret has never been adjudicated incapacitated. The Stipulation is clear that the purpose of the limited conservatorship was to end the litigation:

While Catherine believes that Margaret lacks the capacity to manage her own care and financial affairs, Bruce and Margaret disagree. **Nonetheless, to avoid further litigation**, they have reached an agreement on the level of protection that is now needed.

(R. 0038; Add. Three)(emphasis added).

That Margaret and Catherine agreed to a conservatorship simply to stop the litigation is further highlighted by the comments of Ms. Conley (counsel for Margaret) to Mr. Jensen (counsel for Catherine) prior to entry of the Stipulation. In response to Mr. Jensen's request that the Stipulation include fees, Ms. Conley replied:

Your reason for payment of your client's fees is that she has gained nothing from the proceedings. Neither did Margaret. Margaret has accepted a conservator in order to stop the litigation and for no other reason. Although your client may believe that she undertook this litigation to protect Margaret, the litigation was successful only in upsetting Margaret, costing her legal fees and bringing to an end reconciliation of this family.

We made an agreement to end the litigation and there should be no further negotiation in this matter. In fact, even your own proposed order says nothing about payment of your client's fees. There is no need for further work on this matter.

(R. 153; Add. Eight).

In addition to the fact that the Stipulation was for the purpose of concluding the litigation, and unlike the case law cited by Catherine, Margaret has never been adjudicated incapacitated. Under the law, all persons are presumed competent unless proven otherwise by clear and convincing evidence. *Anderson v. Brinkerhoff*, 756 P.2d 95, (Utah Ct. App. 1988) ("The law will presume competency rather than incompetency, and will do so unless proof to the contrary is presented. Mental competency must be established by clear, cogent, satisfactory, and convincing evidence."). The only medical evidence ever presented to the trial court regarding Margaret's capacity was the Declaration of Dr. Clark Newhall, M.D., J.D., whose testimony indicates that Margaret has capacity. (R. 229-231; Add. Seven). Dr. Newhall testified that he "felt that [Margaret] had the ability to provide informed consent regarding her medical care . . .". He further "informed Catherine that [he] believed Margaret had the ability to provide [him] with informed consent to make her own medical decisions." (R. 230; Add. Seven). Despite this knowledge, Catherine did not correct her express representations to the Court in her Petition to Appoint Guardian and Conservator that "the Ward [Margaret] is deemed to be incapacitated as defined by § 75-1-201(22), Utah Code Ann." (R. 002).

Further distinguishing this case from the cases supporting the rule put forth by Catherine is the circumstances surrounding the negotiation of the Stipulation. It is

undisputed that Catherine's counsel requested his fees be included in the final Stipulation resolving this case and appointing a limited conservator. It is further undisputed that Margaret refused Catherine's request, and Catherine agreed to the final settlement (i.e. the Stipulation), which did not award to fees to any party. Even if there were a rule adopted by this Court that permitted trial courts to award fees to a petitioner in a successful conservatorship action, that rule would be trumped by the Stipulation of the parties that did not award fees to any party. The parties, through their agreement, have effectively contracted around any rule this Court might adopt. The trial court was therefore correct in denying fees to Catherine.

It should also be noted that jurisdictions permitting a trial court to award fees in guardianship and conservatorship proceedings still leave the decision of whether to award attorney fees within the sound discretion of the trial courts. In these cases, the decision of the trial court to deny attorney fees will only be overturned on appeal upon a finding of abuse of discretion. *In re Estate of Bayers*, 983 P.2d 339, 341-42 (Mont. 1999); *see also*, *Chavis v. Patton*, 683 N.E.2d 253, 256 (Ind. Ct. App. 1997). Certainly, the trial court in this matter did not abuse its discretion when it determined that Catherine should not be awarded her fees.

It should further be noted that counsel for Bruce and Margaret are not opposed to a rule authorizing a trial court to grant attorney fees to a successful petitioner in a guardianship or conservatorship proceeding. As stated above, Mr. Alderman, counsel for Bruce, served on the Ad hoc Committee on Probate Law and Procedure that presented the Final Report to the Utah Judicial Council. (B066). Mr. Alderman and Ms. Conley,

counsel for Margaret, have openly advocated for courts to be granted discretion to grant fees to petitioners of guardianships and conservatorships in appropriate cases. However, both of these experienced attorneys agree this is not an appropriate case to grant fees by any standard. If anything, Margaret and Bruce should be awarded their fees for having to defend an appeal that is so plainly without merit.

An award of fees to Catherine is inappropriate where Margaret was never adjudicated incapacitated, no competent evidence was presented of incapacity, and the matter was resolved by a settlement agreement that did not include Catherine's fees and was expressly entered into "to avoid further litigation."

IV. THE TRIAL COURT CORRECTLY DENIED CATHERINE'S RULE 59 MOTION.

It is, frankly, unclear how Catherine believes the trial court erred in its ruling on her Rule 59 Motion. Catherine's first complaint is that the trial court denies her Rule 59 Motion on the ground that neither statute, nor contract, nor equity justify an award of her fees. According to Catherine, this was a problem because she claims the trial court did not actually cite these reasons "for denying attorney fees when it entered its prior ruling. It did so only in response to the Rule 59 Motion." (Br. of Appellant at 18). However, Catherine had asked the Court to reconsider its first ruling. That the trial court stated its bases for denying her request for fees more clearly in its second order, is not a reason for claiming that the second decision was improper. The trial court was correct in concluding that neither statute nor contract permit an award of fees in this case, and the trial court did not abuse its discretion in finding that equity did not justify a fee award.

Catherine's second complaint about the trial court's denial of her Rule 59 Motion is that the trial court did not "acknowledge the body of law from other jurisdictions that have held as a matter of law that a successful petitioner in these proceedings should have his or her costs and attorney fees paid from the estate of the protected person." (Br. of Appellant at 18). Despite being a significant misstatement of the law of other jurisdictions, which generally provide that the award of fees is within the sound discretion of the trial court even where trial courts are authorized to award fees to petitioners in conservatorship proceedings, there is nothing improper about the trial court not addressing each and every argument set forth by Catherine. Utah law was clear that this is not a situation where fees should be awarded, and the trial court should not overturn otherwise established Utah law with law from other jurisdictions. Therefore, the trial court was correct in denying Catherine's request for fees and the Rule 59 Motion was properly denied.

V. EQUITY SUPPORTS THE DENIAL OF FEES.

The trial court was soundly within its discretion to deny fees to Catherine based on principles of equity. "The appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion." *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148; *Fisher v. Fisher*, 2009 UT App 305, ¶ 8, 221 P.3d 845. Margaret is angry that she was dragged into this case. Catherine had openly shunned Margaret for 25 years. Conveniently timed with the sale of Margaret's home, Catherine reappeared in Margaret's life and began the process of taking over Margaret's finances and decision making, with no medical evidence of incapacity. This has been a nightmare for Margaret

and the rest of the family. Margaret should not be required to now suffer further indignity by having to pay attorneys' fees to Catherine – a person who would not even return her phone calls for over two decades. Far from being equitable to award attorneys' fees to Catherine, Catherine should be required to pay Margaret's and Bruce's fees for having to defend this matter. Margaret should be returned to her financial position prior to Catherine's intervention.

It is further inequitable to award Catherine fees given that she had already agreed that Margaret would not have to pay her fees. Catherine requested an award of her fees in the Stipulation that by its terms was entered into "to avoid further litigation." Margaret asked Catherine to rescind her request for fees being included in the final Stipulation, and she did. It is highly improper for Catherine to now file a motion requesting payment of her attorneys' fees after she agreed to a Stipulation that did not include her fees. Equity demands that Catherine not be awarded her fees.

VI. CATHERINE'S "FEES-FOR-FEES" ARGUMENT DOES NOT APPLY WHERE HER FEES ARE NOT AUTHORIZED BY STATUTE OR CONTRACT.

In the unlikely event Catherine is meritorious on appeal, she asserts that she should be awarded her attorney fees for the appeal on the principal of "fees-for-fees." *Salmon v. Davis Cnty*, 916 P.2d 890, 895-96 (Utah 1996). However, Catherine conceded that the sole Utah case cited by her involving "fees-for-fees" provides that the principle only applies when there is a contract or statute that clearly provides for attorney fees to the prevailing party. *Id.*; *see also*, Br. of Appellant at 20 ("[T]he Utah Supreme Court has held that if a person is entitled to his or her attorney fees, whether by statute or contract,

then the fees expended to recover those fees should be reimbursed. **While there isn't a particular statute or contract**, there certainly are equitable grounds . . .”)(emphasis added). Given that Catherine has conceded that she is not entitled to attorney fees under any statute or contract, she should not be awarded her attorney fees in pursuing this appeal.

Further, it would be highly inequitable, and without precedent, for this Court to not only award Catherine her attorney fees incurred up to the Stipulation, but also her attorney fees for this appeal, based on a rule that was never before recognized by this Court and was rejected by the Legislature. Catherine's "fees-for-fees" request should be denied.

VII. PURSUANT TO RULE 33 THIS COURT SHOULD AWARD MARGARET JUST DAMAGES, INCLUDING DOUBLE COSTS AND REASONABLE ATTORNEY FEES BECAUSE EACH CLAIM CONTAINED IN CATHERINE'S APPEAL IS FRIVOLOUS.

As demonstrated above and as is clear from Catherine's appellate brief, her appeal contains arguments that are directly contrary to established Utah jurisprudence and directly contrary to Utah statutory law. Further, Catherine failed to cite any legal authority from Utah that would support her arguments. Most importantly, Catherine requested that fees be included in the Stipulation resolving the matter, later agreed to a version of the Stipulation that did not award her fees, and then moved for fees despite her prior agreement.

Rule 33 provides, in pertinent part:

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that

a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is **not** grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

Utah R. App. P. 33(a) & (b).

The case law applying Rule 33 holds that an appeal lacking in merit violates Rule 33. For example, *O'Brien v. Rush*, 744 P.2d 306, 310 (Utah Ct.App.1987) stated, “a frivolous appeal is one without merit.” Further, *Chapman v. Uintah City*, 2003 UT App 383, ¶33, 81 P.3d 761 held, “A claim should be deemed to be without merit when it “is 'frivolous' or 'of little weight or importance having no basis in law *or* fact.” Margaret acknowledges that the Utah Court of Appeals has added a judicial gloss to Rule 33. Specifically, in *Porco v. Porco*, 752 P.2d 365, 368-69 (Utah Ct.App.1988) this Court held, “[s]anctions for frivolous appeals should only be applied in egregious cases. . . . [yet] should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing.” *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988) (internal quotation marks omitted). *Cooke v. Cooke*, 2001 UT App 110, ¶ 14, 22 P.3d 1249 (“[t]he sanction for filing a frivolous appeal applies only in 'egregious cases' with no 'reasonable legal or factual basis.) (quoting *Maughn v. Maughn*, 770 P.2d 156, 162 (Utah Ct. App. 1989)).

This case is especially egregious. In essence, Catherine: (1) ignores Utah law that her fees should not be awarded; (2) completely ignores two rulings of the district court, each of which held that her fees should not be awarded; (3) fails to cite to any Utah authority supporting her legal positions; and (4) continues this litigation despite the Stipulation which stated that it was being entered into “to avoid further litigation.” Therefore, pursuant to Rule 33 of the Utah Rule of Appellate Procedure, this Court should award Margaret reasonable attorney fees and double costs. Margaret’s limited financial reserves should not be further burdened by Catherine’s actions. Margaret should be restored to the financial position she was in prior to this litigation.

CONCLUSION

For the foregoing reasons, this Court should uphold the district court’s order denying Catherine’s request for fees, and its subsequent order denying Catherine’s Rule 59 motion on the same grounds. There is no basis in statute, contract or equity to justify an award of fees to Catherine. Moreover, the Utah legislature recently considered whether petitioners in guardianship and conservatorship proceedings should be awarded their fees, and explicitly determined they should not. Even if this Court determined that such fees are appropriate, this is not the case for the award of fees in light of the bargained-for Stipulation of the parties resolving this matter which did not provide for Catherine’s fees. Furthermore, and pursuant to Rule 33, this Court should order Catherine to restore Margaret to her financial position prior to the commencement of these proceedings.

DATED this 15 day of November, 2010.



KENT B. ALDERMAN

PARSONS BEHLE & LATIMER

*Attorneys for Bruce Guynn in his capacity as
limited conservator of Margaret Guynn*

DATED this 15th day of November, 2010.



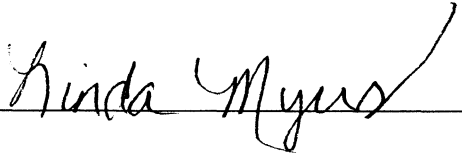
ELIZABETH CONLEY

Attorney for Margaret Guynn

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2010, I caused to be served, via U.S. mail, postage prepaid, two true and correct copies of the foregoing **JOINT BRIEF OF APPELLEES MARAGRET GUYNN AND BRUCE GUYNN IN HIS CAPACITY AS LIMITED CONSERVATOR OF THE ESTATE OF MARGARET GUYNN** to:

Michael A. Jensen
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Salt Lake City, UT 84157-0708
Attorney for Appellant and Petitioner Catherine Ortega



ADDENDUM OF APPELLEE

- Addendum One: HB 167, Elder Protection Provisions by Rep. Patricia Jones
- Addendum Two: Declaration of Margaret Guynn
- Addendum Three: Stipulation for Appointment of Limited Conservator
- Addendum Four: Minute Entry, entered February 24, 2010, by Judge Sandra Peuler
- Addendum Five: Minute Entry, entered April 7, 2010, by Judge Sandra Peuler
- Addendum Six: Declaration of Jeremy Ortega
- Addendum Seven: Declaration of Clark Newhall, M.D., J.D.
- Addendum Eight: E-mail from Michael Jensen to Elizabeth Conley, dated November 5, 2009.
- Addendum Nine: Letter from Elizabeth Conley to Michael Jensen, dated November 8, 2009.

Addendum One

HB 167, Elder Protection Provisions by Rep. Patricia Jones

ELDER PROTECTION PROVISIONS

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: Patricia W. Jones

LONG TITLE

General Description:

This bill provides for the protection of elder adults, clarifying provisions concerning the appointment of a guardian or conservator and payment of attorneys' fees for specific proceedings.

Highlighted Provisions:

This bill:

- ▶ provides for the award of attorneys' fees to a prevailing party in an action against a perpetrator for exploitation of an elder adult;
- ▶ requires that an incapacitated or protected person or their estate be required to pay attorneys' fees and costs for an action to appoint a guardian or conservator if a guardian or conservator is appointed by a court; and
- ▶ clarifies that the guardian of an incapacitated person may be granted the same powers as a conservator, if a conservator is not also appointed.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

62A-3-314, as enacted by Chapter 108, Laws of Utah 2002

75-5-303, as last amended by Chapter 104, Laws of Utah 1988



75-5-407, as enacted by Chapter 150, Laws of Utah 1975

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **62A-3-314** is amended to read:

62A-3-314. Private right of action -- Estate asset.

(1) A vulnerable adult who suffers harm or financial loss as a result of exploitation has a private right of action against the perpetrator.

(2) Upon the death of a vulnerable adult, any cause of action under this section shall constitute an asset of the estate of the vulnerable adult.

(3) In any action, other than a medical malpractice action, brought under this section, the prevailing party is entitled to an award of reasonable attorneys' fees and costs.

Section 2. Section **75-5-303** is amended to read:

75-5-303. Procedure for court appointment of a guardian of an incapacitated person.

(1) The incapacitated person or any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity; and unless the allegedly incapacitated person has counsel of the person's own choice, it shall appoint an attorney to represent the person in the proceeding ~~[the cost of which shall be paid by the]~~. The person alleged to be incapacitated shall pay the fees of the attorney appointed by the court to represent him, unless the court determines that the petition is without merit, in which case the attorney fees and court costs shall be paid by the person filing the petition.

(3) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court and may be interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made, and submit a report in writing to the court.

(4) (a) The person alleged to be incapacitated shall be present at the hearing in person and see or hear all evidence bearing upon the person's condition.

(b) If the person seeking the guardianship requests a waiver of presence of the person alleged to be incapacitated, the court shall order an investigation by a court visitor, the costs of which shall be paid by the person seeking the guardianship. The investigation by a court visitor is not required if there is clear and convincing evidence from a physician that the person alleged to be incapacitated suffers from:

~~(a)~~ (i) ~~[fourth stage]~~ severe dementia of the Alzheimer's [Disease] type;

~~(b)~~ (ii) extended comatosis; or

~~(c)~~ (iii) profound mental retardation.

(c) The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel so requests.

(5) Upon the appointment of a guardian for an incapacitated person, the costs, including reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by the incapacitated person, provided that the estate of the incapacitated person can reasonably pay the costs and fees. If the court finds that the estate of the incapacitated person cannot reasonably pay the costs and fees, the costs and fees may become a lien against any interest the incapacitated person has in real property.

Section 3. Section 75-5-407 is amended to read:

75-5-407. Procedure concerning hearing and order on original petition.

(1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for the hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic

90 intoxication, the court may direct that the person to be protected be examined by a physician
91 designated by the court, preferably a physician who is not connected with any institution in
92 which the person is a patient or is detained. The court may send a visitor to interview the
93 person to be protected. The visitor may be a guardian ad litem or an officer or employee of the
94 court.

95 (3) After hearing, upon finding that a basis for the appointment of a conservator or
96 other protective order has been established, the court shall make an appointment or other
97 appropriate protective order.

98 (4) Upon the appointment of a conservator for a protected person, the costs, including
99 reasonable attorneys' fees for the petitioner who commenced the proceedings, shall be paid by
100 the protected person, provided that the estate of the protected person can reasonably pay the
101 costs and fees. If the court finds that the estate of the protected person cannot reasonably pay
102 the costs and fees, the costs and fees may become a lien against any interest the protected
103 person has in real property.

Legislative Review Note
as of 12-7-04 8:41 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number HB0167

Elder Protection Provisions

18-Jan-05
9:00 AM

State Impact

No fiscal impact.

Individual and Business Impact

Persons affected by this legislation could experience some additional legal costs.

Office of the Legislative Fiscal Analyst

Addendum Two

Declaration of Margaret Guynn

ELIZABETH S. CONLEY (4815)
Attorney for Margaret Guynn
3604 Astro Circle
Salt Lake City, UT 84109
Telephone: (801) 272-0719

**IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH**

<p>IN THE MATTER OF THE ESTATE OF: MARGARET GUYNN,</p>	<p>DECLARATION OF MARGARET GUYNN</p>
---	---

An alleged incapacitated person.

Probate No. 093901284 GU

Judge Sandra Peuler

I, Margaret Guynn, hereby state and declare under penalty of perjury as follows:

1. I am over the age of eighteen and have personal knowledge of the matters contained herein.

2. My daughter, Catherine Ortega ("Catherine"), has alleged in her petition to the court that I am incapacitated. I strongly disagree with this contention. I have lived alone since my husband's death in 1986. I have taken care of all my affairs since that time.

3. In 1986 my husband and I moved from Utah to Tyler, Texas so that my husband could receive specialized cancer treatment at the University of Texas.

4. In 1986, my husband passed away. I remained in Tyler, Texas.

5. After over two decades of living in Texas, my family in Texas and my dearest friends began to pass away. With each passing of family and friends, I was more alone. As an 85 year old woman, I did not feel that living alone in Texas was a good idea. After many discussions with my son Bruce Guynn ("Bruce") I decided to return to Utah where my grandson Jeremy Ortega ("Jeremy") lives. Jeremy is Catherine's only child.

6. I cared for Jeremy while Catherine was attending school in Utah. As a result, I became very close to Jeremy and felt that I had raised him.

7. We moved to Texas when Jeremy was 9. For a number of summers after Jeremy turned 9, he would come to visit me in Texas. He was there so often that some of my neighbors thought that he was my son.

8. Over the years since I left Utah, I maintained close contact with Jeremy, often speaking with Jeremy 4 to 5 times per week over the past decade. When I decided to leave Texas I chose to move to Utah to be close to Jeremy and his children.

9. In July 2009, Jeremy and my son Bruce helped me sell my home in Texas and move to Utah. Because the title company needed to have both Bruce and Catherine sign a waiver of ownership to the house, Catherine was aware that I was selling the house and moving to Utah.

10. When the house sold, Catherine called me and demanded, "Where is my money? Where is my money?"

10. Jeremy accompanied me on the flight from Texas to Utah, not some stranger.

11. Jeremy and his wife, Rebecca Ortega (“Rebecca”), helped me move into Atria Assisted Living Center (“Atria”) in Sandy, Utah. I am grateful for the assistance that Jeremy and Rebecca gave me. I am comfortable at Atria and enjoy living there. I was not simply “dropped off” at Atria as Catherine alleges. Jeremy and Rebecca helped me move in, and become established there. They also help me arrange my belongings in my residence.

12. On July 13, 2009, after I moved to Salt Lake City, Rebecca helped me establish local bank accounts. These bank accounts were established in my name alone. At no time did Rebecca or Jeremy ask to be owners on my bank accounts or be my agents under a power of attorney.

13. Sometime around 25 years ago, and after my move to Texas, Catherine ceased communicating with me. She would not visit me, accept my calls, send me letters or cards. This behavior began before my husband passed away in 1986.

14. From the time she was a little girl, Catherine was also reclusive around our family. Oftentimes, she would refuse to even eat dinner with us.

15. Notwithstanding her voluntary withdrawal from our family, I still loved Catherine. Over the decades that she refused to speak with me, I periodically attempted to contact Catherine, but she would never respond.

16. In early August 2009, after approximately 25 years absence, Catherine showed up at my door at the Atria assisted living center. Her first words to me were “Do you know who I am?” I did not recognize her after such a long period of time.

17. Shortly after this first visit in many years, Catherine then returned to my residence at Atria and informed me that she was going to help me manage my affairs.

18. Although Catherine and I had not spoken for such a long period, I had sincerely hoped that she was attempting to reconcile with me.

19. On August 28, 2009, Catherine and her husband Murray took me to a bank and left me in one office as Catherine and Murray went into another room with a bank employee. Catherine and Murray later came into the room and asked me to sign some documents that were not explained to me. I have since learned that Catherine and Murray had caused me to sign documents placing Catherine's and Murray's names on my bank accounts. Prior to this the account set up with the assistance of Rebecca on July 13, 2009 had me as the only owner on the accounts.

20. On September 4, 2009, Catherine visited me as I was given the court papers that Catherine filed to have herself appointed as my guardian and conservator. I did not understand the meaning of the documents. Catherine assured me that these documents were no big deal.

21. On the next day Catherine came to my apartment at the same time as Wendy Bradford ("Wendy"). Catherine informed me that they were going to obtain a guardianship and conservatorship on my behalf and stated that Wendy was now my attorney. Again, it was never fully explained to me what a guardianship and conservatorship meant. Catherine and Wendy simply assured me that it was in my best interests to have a conservatorship.

22. Wendy did not know me. I was polite to her and welcomed her as I would any visitor. I did not understand why she was my attorney. She seemed to be working on

Catherine's side. The court papers said I could hire my own attorney. It didn't say I would have to pay the court appointed attorney.

23. Catherine barely knew me and had actively avoided me for decades. She had not seen me in nearly 25 years, and within two weeks of meeting me again for the first time, Catherine was in Court requesting that she be made my guardian and conservator on an emergency basis.

24. I have since learned that Catherine's stated purpose for obtaining a guardianship and conservatorship was to supposedly protect me from Jeremy and my son, Bruce. Neither Catherine nor Wendy told me the supposed reasons for seeking a guardianship and conservatorship. They only told me it was no big deal for Catherine to serve as my guardian and conservator.

25. Jeremy and Bruce have maintained contact with me their whole lives. They have shown me time and again that they care for me. They have shown me time and again that they want my best interests. Catherine, on the other hand, wanted nothing to do with me for 25 years, and only showed up in my life when she learned that I sold my home in Texas. I would have strongly objected if either Wendy or Catherine had told me that they were seeking a guardianship and conservatorship to protect me from Jeremy and Bruce.

26. Later, when my son Bruce Guynn found out about the guardianship and conservatorship, he was very concerned. He was able to explain what a conservatorship and guardianship would mean. I became fearful that Catherine had abused her trust with me. I did not trust Wendy to protect me from Catherine but thought that she was on Catherine's side.

Wendy told me I didn't have to go to court and I don't know what she would have told the court about my wishes.

27. I thought Catherine and Wendy abused my trust, and acted against my interests. I felt all alone and was frightened. I sought another attorney and asked Elizabeth Conley to be my counsel and requested that Wendy be removed as my court-appointed lawyer.

28. I have since been fighting to undo the effects of all that Catherine has wrongfully done. Catherine's actions have caused me thousands of dollars in damages through attorneys' fees. She has also caused me incredible grief and anguish. This has been a nightmare.

29. I am also angry that Wendy, after her failure to act as an independent counselor to me, would seek payment of fees from my estate.

30. I would also like to address a few other matters raised by Catherine in the Declaration of Catherine Ortega. Bruce did not physically abuse Catherine. I do not know why she said this.

31. Further, I resent that Catherine has maligned Jeremy. Jeremy has shown me care and love for many years. Jeremy is a good person, he is an upstanding human being and I am proud of his many accomplishments. Jeremy loves his children. I am much closer to Jeremy and his children than I am to Catherine.

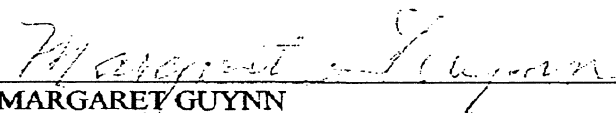
32. Catherine has also alleged that Jeremy has attempted to take over my financial affairs. Jeremy has never asked me for a power of attorney. Jeremy has never placed his name on my bank accounts. Jeremy has never sought to control me. Catherine, on the other hand, in

the span of two short weeks – after 25 years of no contact – completely hijacked my personal and financial affairs.

33. My desire is that Catherine let me be. I do not want her assistance and I do not trust her to act in my best interests.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

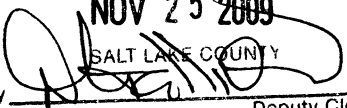
Executed on this 12 day of January, 2010.


MARGARET GUYNN

Addendum Three

Stipulation for Appointment of Limited Conservator

FILED DISTRICT COURT
Third Judicial District

NOV 25 2009
SALT LAKE COUNTY
By  Deputy Clerk

ELIZABETH S. CONLEY (4815)
Attorney for Margaret Guynn
3604 Astro Circle
Telephone: (801) 272-0719

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

IN THE MATTER OF:

MARGARET GUYNN,

A protected person.

**STIPULATION FOR APPOINTMENT
OF LIMITED CONSERVATOR**

Probate No. 093901284 GU

Judge Sandra Peuler

The parties to this action being Margaret Guynn ("Margaret"), represented by Elizabeth S. Conley, Donald Bruce Guynn ("Bruce"), represented by Kent B. Alderman of Parsons Behle & Latimer and Petitioner Catherine Ortega ("Catherine"), represented by Michael A. Jensen, hereby enter into a stipulation and agreement for the appointment of a conservator for Margaret.

INTRODUCTION

Margaret is an 85 year old woman currently residing at Atria Assisted Living in Salt Lake County, Utah. Margaret lived on her own in Tyler, Texas until the summer of 2009 when her son Bruce assisted her in selling her Texas home and moving to Utah.

On or about August 31, 2009, Catherine, the daughter of Margaret, filed a petition seeking appointment as guardian and conservator of Margaret. Bruce and Margaret objected to the appointment of Catherine as a conservator and guardian.

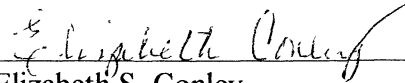
While Catherine believes that Margaret lacks the capacity to manage her own care and financial affairs, Bruce and Margaret disagree. Nonetheless, to avoid further litigation, they have reached an agreement on the level of protection that is now needed. Accordingly, the parties agree that a limited conservatorship should be established and that Bruce will serve as the Conservator for Margaret.

STIPULATED SETTLEMENT AGREEMENT

Therefore, the parties now agree as follows and intend to be bound by the terms of this Stipulation.


1. The parties agree that Margaret needs assistance in handling her financial affairs.
2. The parties agree it is in Margaret's best interest that a limited conservator be appointed to assist her with her financial affairs and to protect her estate.
3. The limitations of the Conservator are intended to grant Margaret as much financial independence and freedom as possible.
4. To that end, the Conservator shall assist Margaret in her financial affairs by first consulting with her to ascertain her desires regarding her finances.
5. The parties agree that Bruce be appointed as Margaret's Conservator with the limitations described herein.
6. The parties agree not to pursue a guardianship at this time.

DATED this 16th day of October, 2009.



Elizabeth S. Conley
Attorney for Margaret Guynn

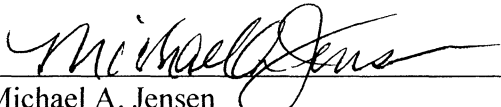
Michael A. Jensen
Attorney for Catherine Ortega



f Kent B. Alderman
Attorney for Bruce Guynn

DATED this _____ day of ^{November}~~October~~, 2009.

Elizabeth S. Conley
Attorney for Margaret Guynn


Michael A. Jensen
Attorney for Catherine Ortega

Kent B. Alderman
Attorney for Bruce Guynn

Addendum Four

Minute Entry, entered February 24, 2010, by Judge Sandra Peuler

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

IN THE MATTER OF

MARGARET GUYNN.

MINUTE ENTRY

CASE # 093901284

February 24, 2010

Judge Sandra Peuler

Before the court is a Request to Submit for Decision on Petitioner's motion for attorney fees. The memorandum filed on December 18, 2009, in support of the motion also requests that the court disqualify Ms Conley from representing Ms Guynn, that the court order payment of Ms. Bradford's attorneys fees, and opposes Ms. Guynn's claim that Petitioner's petition was filed without merit. All of these matters have been briefed by other counsel, and the court has previously ruled on the issue of Ms Bradford's fees. Although a request has been made for hearing, the Court does not find that a hearing would assist with ruling, and would only serve to increase attorneys fees, which is the major issue at this time. Accordingly, the court rules as follows, based on the memoranda filed.

1. As noted above, the court has previously ruled on the issue of Ms Bradford's fees. Mr Guynn has filed a motion to set that ruling aside, based upon Rule 60(b)(3). The court finds that the statement referred to giving rise to the motion does not rise to the level of misrepresentation, as it was in the nature of a future promise to refrain from seeking attorneys fees, rather than a statement of presently existing fact. Mr. Guynn has failed to

set forth a sufficient basis for the court to revisit the issue of Ms. Bradford's fees.

2. Petitioner's motion to disqualify Ms. Conley as counsel is denied. The court finds no basis to disqualify an attorney retained by Ms. Guynn. Although petitioner argues that Ms. Guynn's representation must be through the limited conservator, Ms. Conley represented at the hearing on September 22, 2009, that she had been retained by Ms. Guynn personally, and that was reflected in the order prepared from that hearing.

3. The petitioner's motion for payment of her attorneys fees is denied. This substance of this matter was resolved in November 2009, by a stipulation signed by counsel for all parties, and an order entered by the court on November 30, 2009. The stipulation and order did not contain a provision for attorneys fees; that issue, apparently, arose later after disagreements between the petitioner and conservator. Based upon the pleadings filed since the entry of the order, it is apparent to the court that many of the requested attorneys fees have been incurred since then.

Based on the resolution of this matter, which did not provide for petitioner's attorneys fees, as well as the increase of fees since the order was entered, the court declines to award attorneys fees to the petitioner.

4. The court has previously determined that the petition was not filed in bad faith. Although both parties have recently set forth their disagreements and family disputes in great detail, the standard to be used is what information the petitioner had at the time the petition was filed, that caused her to take the action that she did. While, as previously noted, there are many disputes between the parties, the court cannot find that the actions of the petitioner at that time were in bad faith.

This minute entry is the Order of the Court, and no further order is required to be

prepared by counsel.

Dated this 24 day of February, 2010

Jandra Deuel
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 093901284 by the method and on the date specified.

MAIL: KENT B ALDERMAN 201 S MAIN STE 1800 POB 45898 SALT LAKE CITY, UT 84145-0898

MAIL: WENDY BRADFORD 147 WEST ELECTION ROAD SUITE 200 DRAPER UT 84020-0480

MAIL: ELIZABETH S CONLEY 3604 ASTRO CIRCLE SALT LAKE CITY UT 84109

MAIL: MICHAEL A JENSEN 136 S MAIN ST STE 430 POB 571708 SALT LAKE CITY UT 84157-0708

Date: 2/24/10

R Grotelas
Deputy Court Clerk

Addendum Five

Minute Entry, entered April 7, 2010, by Judge Sandra Peuler

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

**IN THE MATTER OF THE ESTATE OF:

MARGARET GUYNN.**

**MINUTE ENTRY

Case 093901284
Judge Sandra N. Peuler**

Petitioner, Catherine Ortega has filed a motion under Utah Rule of Civil Procedure 59(a)(7). The motion has been objected to by both Margaret Guynn and Bruce Guynn. Petitioner has requested a hearing on her motion, however the court finds that oral argument will not assist it in resolving this matter, as the issues presented and relevant law are straightforward. The Court having been fully informed, rules as follows.

Petitioner requests that the court amend its minute entry of February 24, 2010, in which it denied petitioner's prior request for attorney fees. Petitioner argues that the court denied her prior request for attorney fees simply because the parties' Stipulation did not provide for attorney fees. Petitioner claims that this "leads to the question of how the Court could possibly conclude that the attorney fee issue 'was resolved' by the Stipulation when there is no language in the Stipulation relating to attorney fees or the waiver of attorney fees."

Utah Rule of Civil Procedure 59 permits the court to order a new trial or amend a judgment, based upon several grounds, including an "error in law." UT R. Civ. Pro. 59(a)(7). The denies petitioner's Rule 59 motion based on the following.

In Utah, “[a]lthough courts have inherent equitable power to award attorney fees when justice or equity requires . . . attorney fees are typically recoverable only if an applicable statute or contract so provides.” A.K.&R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, ¶ 7 (citations omitted); and see Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994) (stating “in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity.”). The situations where a court may properly exercise this power are limited. Carrier v. Salt Lake County, 2004 UT 98, ¶ 42 (rejecting a request for fees and noting in Stewart the court “held that the invocation of this exception is appropriate only when the ‘vindication of a strong or societally important public policy takes place and the necessary costs in doing so transcend the individual plaintiff’s pecuniary interest to an extent requiring subsidization.’” (citations omitted)).

In its prior ruling, the court made clear that there was no provision in the Stipulation nor in any other underlying contract or statute that authorized petitioner’s request for attorney fees. Feb. 24, 2010 Minute Entry, ¶ 3. Petitioner did not dispute this. Mem. of Pet., 13 (requesting petitioner’s attorney fees from Ms. Guynn’s estate but acknowledging “there is no Code section or Utah case on point.”). Nor did the Court find any reason to consider awarding attorney fees based in the interest of justice and equity, where “the increase of fees since the order was entered” justified the denial of

petitioner's request. Minute Entry, ¶ 3.

Petitioner has not shown that the court made any error in law in its ruling.
Petitioner is not entitled to have that judgment set aside and petitioner's motion is
therefore DENIED.

This is the final order of the court no other order is required.

Dated this 7 day of April, 2010.



Sandra N. Peuler
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 093901284 by the method and on the date specified.

MAIL: KENT B ALDERMAN 201 S MAIN STE 1800 POB 45898 SALT LAKE CITY, UT 84145-0898

MAIL: WENDY BRADFORD 147 WEST ELECTION ROAD SUITE 200 DRAPER UT 84020-0480

MAIL: ELIZABETH S CONLEY 3604 ASTRO CIRCLE SALT LAKE CITY UT 84109

MAIL: MICHAEL A JENSEN 136 S MAIN ST STE 430 POB 571708 SALT LAKE CITY UT 84157-0708

Date: 4/7/10

R. Golepas
Deputy Court Clerk

Addendum Six

Declaration of Jeremy Ortega

KENT B. ALDERMAN (0034)
DAVID K. HEINHOLD (11165)
PARSONS BEHLE & LATIMER
Attorneys for Donald Bruce Guynn
One Utah Center
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Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

**IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
PROBATE DIVISION**

<p>IN THE MATTER OF THE ESTATE OF:</p> <p>MARGARET GUINN,</p>	<p>DECLARATION OF JEREMY ORTEGA</p>
--	--

An alleged incapacitated person.

Probate No. 093901284 GU

Judge Sandra Peuler

I, Jeremy Ortega, hereby state and declare under penalty of perjury as follows:

1. I am over the age of eighteen and have personal knowledge of the matters contained herein.
2. I am the grandson of Margaret Guynn ("Margaret"), and the son of Catherine Ortega ("Catherine"). I am Catherine's only child.
3. Until I was 9, Margaret cared for me while my mother attended school. Margaret raised me during this period of time and was like a mother to me.

4. When I was 9, Margaret and my grandfather moved to Texas so my grandfather could receive cancer treatment. It was very difficult for me to have Margaret move. For a number of summers after I turned 9, I would go to Texas to stay with Margaret.

5. I have always maintained close contact with Margaret and love her dearly. Over the last decade, I have spoken with her 4 to 5 times per week.

6. When Margaret decided that she wanted to move to Utah to be closer to me and my family, I, along with my wife, Rebecca, assisted Margaret with the move.

7. As part of the sale of Margaret's home in Texas, the title company required that we obtain Catherine's signature on the deed. This was because my grandfather had passed away many years prior and his name was still on the deed. To ensure there were no title issues, the title company wanted all of Margaret's heirs to sign off on the sale.

8. I therefore contacted Catherine and provided her with the documents she needed to sign for the sale of the home. I also told her of the plan for Margaret to move to Utah. Catherine commended me on watching out for my grandmother. Referring to Margaret, Catherine told me that she "would vomit if I [Catherine] was in the same room with my mother [Margaret] for more than 10 minutes." I believe this comment is consistent with Catherine's behavior of refusing to speak with her mother for over 25 years.

9. Catherine has alleged in paragraph 27 of the Declaration of Catherine Ortega that one day late last summer (2009), I had several drinks and told Catherine that Bruce Guynn and I had a plan to move Margaret from Texas to Utah. She further alleges that I told her that I was going to "drag" Margaret to the airport and "throw her on a plane." She also alleged that I was

going to get a power of attorney so I could sell \$200,000 of Margaret's stock. These statements are untrue. As stated above, I admit explaining to Catherine that Bruce and I were assisting Margaret move to Utah to be closer to the family. I did not tell her that we planned to take over Margaret's financial affairs, and I certainly was not inebriated when I discussed that Margaret was moving to Utah.

10. About a week after I dropped off the papers to transfer Margaret's home, Catherine signed them. She further told me that she had an attorney review the documents.

11. Catherine signed the papers without ever expressing to me any concern that Bruce Guynn and I were going to harm Margaret financially.

12. I have never asked Margaret for a power of attorney. I have never attempted to put my name on her financial accounts. Margaret is capable of managing her own affairs.

13. Margaret has not given me money on a regular basis. Margaret has certainly given me gifts over the years – I am like a son to her. Given our closeness, it would have been odd for Margaret to not give me gifts on occasion.

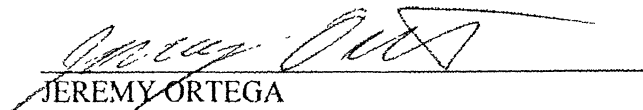
14. Additionally, Catherine spends considerable time in her Declaration disparaging me as a father and a person. Her accusations are false. I am the father of two children. These children have lived with me since they were born. I have been married to Rebecca Ortega for the last 6 years. Due to the personal nature of Catherine's allegations against me, and their irrelevance to this action, I will not respond further other than to state that I am a responsible father.

15. I am also a responsible member of the community. I am successful in my employment and financially stable. I make in excess of six figures annually. I am 34 years old and a Chief Warrant Officer (equivalent to a Captain) in the Army. I work as a senior solutions architect for EMC, a data management company. I am responsible for assisting with the design and integration of all United States government data virtualization and storage facilities.

16. In connection with my employment, the United States government has granted me Secured Compartmented Investigation ("SCI") security clearance, and I am authorized to access classified information of the United States. To achieve and maintain SCI clearance I have been through extensive background checks, including a comprehensive review of my financial stability. I cannot obtain or maintain SCI clearance if I am deemed financially irresponsible or of questionable character.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on this 14 day of January, 2010.


JEREMY ORTEGA

Addendum Seven

Declaration of Clark Newhall, M.D., J.D.

KENT B. ALDERMAN (0034)
DAVID K. HEINHOLD (11165)
PARSONS BEHLE & LATIMER
Attorneys for Donald Bruce Guynn
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

**IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
PROBATE DIVISION**

IN THE MATTER OF THE ESTATE OF:

MARGARET GUINN,

An alleged incapacitated person.

**DECLARATION OF CLARK
NEWHALL, M.D., J.D.**

Probate No. 093901284 GU

Judge Sandra Peuler

I, Clark Newhall, M.D., J.D., hereby state and declare under penalty of perjury as follows:

1. I am over the age of eighteen and have personal knowledge of the matters contained herein.
2. I am a practicing physician and a practicing attorney. I attended medical school at the University of Michigan and law school at the University of Utah.
3. In or around late August, 2009, I was contacted by a nurse at Atria Assisted Living Center regarding meeting with Margaret Guynn.

4. On September 11, 2009, the day of my scheduled exam with Margaret, I received a call from Catherine Ortega. Catherine identified herself to me as Margaret's daughter.

5. I met with Catherine and Margaret on September 11, 2009. It appeared to me that Catherine and Margaret were not getting along, and Margaret expressed to me that she was upset that Catherine had called me to see her.

6. One of the reasons for Margaret's visit was to discuss Margaret possibly signing an Advance Health Care Directive (the "Directive"). I explained the Directive to Margaret in detail and felt that she had the ability to provide informed consent regarding her medical care, including the decisions required to sign the Directive.

7. I informed Catherine that I believed Margaret had the ability to provide me with informed consent and make her own medical decisions.

8. Margaret further directed me that in the event of a medical emergency, I was to contact her son, Bruce Guynn, and not Catherine.

9. I prepared a written report of my examination of Margaret on September 14, 2009 (the "Report"), and a true and correct copy of my report is attached hereto as Exhibit A.

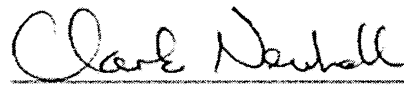
[See following page for signature]

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on this 14th day of January, 2010.

Clark
Newhall

Digitally signed by Clark Newhall
DN: cn=Clark Newhall, o=Clark
Newhall MD JD Law Office,
ou=Attorney Physician,
email=cnewhall@cnewhall.com,
c=US
Date: 2010.01.14 10:45:34 -07'00'



Clark Newhall, M.D., J.D.

Addendum Eight

E-mail from Michael Jensen to Elizabeth Conley, dated November 5, 2009.

Elizabeth Conley

om: "Mike Jensen" <mike@utahattorney.com>
o: "Elizabeth Conley" <e_conley@comcast.net>
o: "Alderman, Kent" <KAlderman@parsonsbehle.com>
nt: Thursday, November 05, 2009 4:12 PM
bject: Margaret Guynn Conservatorship

Elizabeth:

Well, finally an order after I sent you a proposed order earlier this morning. I'm not sure why it has taken so long and why my client has had to continue incurring legal fees because of the delays. However, I can accept the form of your order, although my order should have been equally acceptable.

I believe that it is reasonable for my client to be reimbursed her legal fees and costs to put in place this conservatorship. In all other guardianships and conservatorships, this is common practice, and I believe it is proper in this case. Therefore, I would like the order amended to include a provision that "Petitioner's reasonable legal fees and costs be paid from the estate of Ms. Guynn." Although such fees and costs now exceed \$5,000, my client will agree to have such fees and costs limited to \$5,000. After all, my client gained nothing from these proceedings and she commenced them solely for the protection of her mother. Now that such protection is about to be effectuated, the benefit derived from such protection should be justification to reimburse my client. Further, Ms. Guynn's estate is more than ample to provide such payment without being a burden on her.

Can we agree on this?

Michael A. Jensen
Elder Law & Probate Attorney
PO Box 571708
Salt Lake City UT 84157-1708
(801) 519-9040

Elizabeth Conley wrote:

Attached is a proposed order, please let me know if

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12/29/2009

Addendum Nine

Letter from Elizabeth Conley to Michael Jensen, dated November 8, 2009.

*Elizabeth S. Conley
Attorney at Law
3604 Astro Circle
Salt Lake City, UT 84109*

801 272-0719

November 8, 2009

Michael A. Jensen
Attorney at Law
PO Box 51708
Salt Lake City, UT 84157-1708
Re: Margaret Guynn

Dear Michael,

Thank you for accepting the Order and Letters I sent you. I would appreciate your signing them and returning them to me for filing with the court.

You mention in your email of November 5, 2009 that the Order should be amended to include a provision that Petitioner's legal fees and costs be paid from the estate. My client firmly rejects this proposal.

Your reason for payment of your client's fees is that she has gained nothing from the proceedings. Neither did Margaret. Margaret has accepted a conservator in order to stop the litigation and for no other reason. Although your client may believe that she undertook this litigation to protect Margaret, the litigation was successful only in upsetting Margaret, costing her legal fees and bringing to an end reconciliation of this family.

We made an agreement to end the litigation and there should be no further negotiation in this matter. In fact, even your own proposed order says nothing about payment of your client's fees. There is no need for further work on this matter.

Sincerely

Elizabeth Conley