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IN THE MATTER OF EVAN O. KOLLER, An Incapacitated Person. : Brief of Appellee

Utah Court of Appeals

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BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Issue No. 1: Did the district court err in concluding that Kathryn Prounis ("***Prounis***") was estopped from claiming compensation as a conservator and guardian?[1] (R. 5262-70, 5537-45.)

Standard of Review: The Court should review the district court's legal conclusions for correctness and its factual findings for clear error. *See State, Dep't of Human Servs. ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997). Further, equitable estoppel is a "classic mixed question of fact and law." *See id.* Different degrees of deference apply to mixed questions of law and fact, but due to the fact-sensitive nature of equitable estoppel, the decision of the district court is always given a great degree of deference. *See, e.g., Save Beaver Cty. v. Beaver Cty.*, 2009 UT 8, ¶ 9, 203 P.3d 937; *Ohio Sav. Bank*, 2007 UT 56, ¶¶ 18-19, 181 P.3d 791, *as supplemented* (Feb. 22, 2008); *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 31, 989 P.2d 1077; *Irizarry*, 945 P.2d at 678; *Atlas Van Lines, Inc. v. Dinosaur Museum*, 2016 UT App 30, ¶ 10, 368 P.3d 121.

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[1] As further discussed below, Prounis incorrectly frames the district court's decision as being decided "as a matter of law." But these were not summary judgment proceedings and the district court was permitted to make factual determinations.

Prounis asserts that the district court's findings of fact should be reviewed for correctness under a *Levin* analysis because its decision was made by weighing facts appearing of record. *See State v. Levin*, 2006 UT 50, ¶¶ 19–24, 144 P.3d 1096; *see also State v. Pena*, 869 P.2d 932, 936–39 (Utah 1994), *abrogated on other grounds by Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 65 P.3d 1134; *In re Adoption of Baby B.*, 2012 UT 35 ¶¶ 46–47, 308 P.3d 382. *Levin* identified three factors to weigh in considering how much deference to give to a district court in decisions involving mixed questions of law and fact. *Levin*, 2006 UT 50, ¶ 25. Those three factors are (1) the degree of variety and complexity in the facts to which the legal rule is to be applied, (2) the degree to which a trial court's application of the legal rule relies on facts observed by the trial judge, and (3) society's interest in establishing consistent statewide standards or other policy reasons, such as whether important constitutional issues are at stake. *Id.* at ¶ 23, 25; *Pena*, 869 P.2d at 938.

Applying those factors to this matter, it is clear that the Court should grant the district court a great degree of deference. First, Utah appellate courts have consistently recognized that equitable estoppel cases are highly fact intensive. As evidenced by the district court's lengthy findings of fact in its Order Denying Motion for Approval of Compensation to Kathryn Prounis (the "***Order Denying Compensation***"), the district court relied on many factual representations in its decision. (R. 6098–6103.) Second, Second, a number of the facts on which the district court made its decisions were representations made by Prounis or her attorney at the hearing held by the district court (or their failure to be able to produce evidence in support of her request for compensation

upon the specific invitation of the district court) where the district court had the benefit of observing Prounis' demeanor and knowing the context of the representations. (*Id.*) Third, equitable estoppel is not a matter recognized as having important social or policy concerns. In *Pena*, the Court specifically stated that "waiver," a doctrine closely related to equitable estoppel, is a doctrine where it is more beneficial for an appellate court to apply a deferential standard. *See Pena*, 869 P.2d at 938. Furthermore, as discussed above, Utah appellate courts appear to defer to district courts on equitable estoppel issues almost universally. Therefore, the Court should apply a deferential standard of review to the district court's decision.

Prounis mischaracterizes the district court's decision as a decision on summary judgment. It was not. It was a Motion for Acceptance and Approval of Compensation to Kathryn Prounis (the "***Motion for Compensation***"). With the exception of motions brought pursuant to Rule 56 of the Utah Rules of Civil Procedure (which the Motion for Compensation was not), a district court must weigh evidence and make findings of fact on issues brought before them by motion. *See* Utah R. Civ. P. 43(b); *State v. Cater*, 2014 UT App 207, ¶ 12, 336 P.3d 32 (recognizing the ability of the district court to make factual findings on matters brought forth by motion); *H.U.F. v. W.P.W.*, 2009 UT 10, ¶¶ 49-52, 203 P.3d 943 (same); *see also Stan Katz Real Estate, Inc. v. Chavez*, 565 P.2d 1142, 1143 (Utah 1977) (recognizing the ability of district courts to resolve factual disputes brought before them by motion). District courts weigh facts and make decisions on a variety of issues brought before the district court by motion. *See, e.g., Terry v. Zions Co-op. Mercantile Inst.*, 605 P.2d 314, 323 (Utah 1979), *overruled on other grounds by*

McFarland v. Skaggs Cos., Inc., 678 P.2d 298 (Utah 1984) (district court weighs facts in a pretrial matter); *Hunsaker v. Kersh*, 1999 UT 106, ¶ 6, 991 P.2d 67 (district court weighs evidence in resolving preliminary injunction motion); *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 6, 974 P.2d 821 (district court's factual decisions on preliminary injunction motion reviewed for clear error); *State v. Thatcher*, 157 P.2d 258, 264 (Utah 1945) ("[T]he trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial . . . ."); *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 49, 176 P.3d 476 (district court required to weigh facts on motion for attorneys' fees).[2]

In sum, if an issue of fact is brought before a district court by motion, the district court must decide that issue of fact.[3] In cases of equitable estoppel, deference is given to the district court's decision about whether the requirements of estoppel have been satisfied. *See Nunley*, 1999 UT 100, ¶ 31.

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[2] A summary judgment on the Motion for Compensation would not have been proper even if Prounis had attempted to file one. Summary judgment may only be requested with respect to "claims" brought forth by pleading. *See* Utah R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each *claim* . . . ." (emphasis added)); 8(a) (pleadings contain "claims"). Prounis never filed a petition containing any claim for compensation. To the contrary, she represented numerous times that if she were appointed she would not seek compensation.

[3] In *Atlas Van Lines*, this Court applied this deferential standard on an appeal from *summary judgment* on the issue of equitable estoppel. *See Atlas Van Lines*, 2016 UT App 30, ¶¶ 8–10. Accordingly, even if Prounis were appealing from summary judgment, the district court's decision would be entitled to deference.

Issue No. 2: Did the District Court err in failing to conduct an evidentiary hearing on the Motion for Compensation?

This issue was not raised at the district court and has not been preserved for appellate review. The Court should decline to consider the issue and arguments, because they were not properly preserved for appellate review. *See Seamons v. Brandley*, 2011 UT App. 434, ¶¶ 2-3, 268 P.3d 195 (*per curiam*) ("[I]n order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (quoting *438 Main St. v. Easy Heat Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801)). In order to properly preserve an issue for appeal "(1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant authority." *Easy Heat*, 2004 UT 72, ¶ 51; *see also State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989) (an issue must be *specifically* and *distinctly* raised to be preserved for appellate review).

Prounis did not specifically and distinctly raise this issue to the district court. In Prounis' Motion to Reconsider or in the Alternative Rule 52 Motion to Make Further Findings and to Alter or Amend the Order and Judgment (the "***Motion to Reconsider***") and supporting memoranda, Prounis argued that Mark Koller's ("***Koller***") proposed form of order on the Motion to Reconsider was erroneous because it contained a "findings of fact" section and that findings of fact should only be made if an evidentiary hearing is conducted. (R. 5533, 5542, 5980–81.) Prounis did not at any time argue that the district court should hold or should have held an evidentiary hearing. Prounis did not even request an evidentiary hearing. Prounis therefore failed to specifically and distinctly raise

this issue to the district court, this issue was only remotely raised as an argument that Koller's proposed order was defective. The district court resolved this by modifying Koller's proposed order to cure any deficiencies in the proposed form of order—the district court never decided whether an evidentiary hearing should have been held because that issue was not before the district court. (R. 6386.)

Prounis has not put forth any reason why exceptional circumstances exist or that plain error occurred, such that this Court should consider this issue notwithstanding Prounis' failure to preserve this issue at the district court level. *See State v. Holgate*, 2000 UT 74, ¶ 11, 10 P. 3d 346 (stating that the "preservation rule applies to every claim, including constitutional questions, unless a defendant demonstrates that exceptional circumstances exist or that plain error occurred"). Therefore, the Court should not consider this issue on appeal.

If Prounis had properly preserved this issue for appeal, it should be reviewed for abuse of discretion. *Menzies v. State*, 2014 UT 40, ¶ 28, 344 P.3d 581 (a district court's decision to hold an evidentiary hearing is reviewed for abuse of discretion). Rule 7(h) and Rule 43(b) state that a district court has discretion to hold an evidentiary hearing on a motion. *See also H.U.F. v. W.P.W.*, 2009 UT 10, ¶¶ 49-52 (district court did not err in finding facts without holding an evidentiary hearing). Prounis' citation to *Bangerter v. Petty*, 2010 UT App 49, ¶ 22, 228 P.3d 1250, for the proposition that a district court's decision to hold or not hold an evidentiary hearing should be reviewed for correctness is inapposite because *Bangerter* involved a motion for summary judgment and the Court was simply opining that on remand the district court would have to hold an evidentiary

hearing. As discussed under "Issue 1," this is not an appeal from summary judgment and Prounis' attempts to characterize it as such are improper. Prounis chose to file a Motion for Compensation, rather than a petition. Accordingly, the District Court had discretion to hold an evidentiary hearing, and its decision should be reviewed under an "abuse of discretion" standard.

Issue No. 3: Did the District Court err in denying the Motion for Compensation when Prounis' co-conservator did not state that Prounis should *not* be compensated? (R. 5537–40.)

This issue was not raised at the district court and has not been preserved for appellate review. The Court should decline to consider the issue and arguments because they were not properly preserved for appellate review. See *Seamons v. Brandley*, 2011 UT App. 434, ¶¶ 2-3, 268 P.3d 195 (*per curiam*) ("[I]n order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (quoting *438 Main St. v. Easy Heat Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801)). In order to properly preserve an issue for appeal "(1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant authority." *Easy Heat*, 2004 UT 72, ¶ 51; *see also State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989) (an issue must be *specifically* and *distinctly* raised to be preserved for appellate review).

In Prounis' Motion to Reconsider and supporting memoranda, the issue was whether the district court should reconsider its decision on the Motion for Compensation. One of Prounis' arguments why the District Court should reconsider its decision was that

Dan Koller ("***Dan***"), who was a co-conservator of Evan O. Koller's estate along with Prounis, did not state that Prounis should not be compensated. (R. 5534, 5540–42, 5978–79.) The actual issue before the district court, however, was whether this fact was a new fact or evidence not previously available which would require the district court to reconsider its decision. (R. 6386–87.) The district court held that the fact that Dan did not state that Prounis should not be compensated was not a previously unavailable fact, and that reconsideration of the case was not therefore appropriate. (R. 6387.) Accordingly, this issue was not specifically raised and the district court did not have an opportunity to rule on it.

If Prounis had properly preserved this issue for appeal, it should be reviewed under the same standard as "Issue # 1." This issue, as further explained in the Argument section below, ultimately leads back to Issue #1—whether the District Court erred in concluding that Prounis was estopped from claiming compensation—and should be reviewed under that same standard.

Issue No. 4: Did the District Court improperly discriminate against Prounis by denying her compensation while granting compensation to Dan, the co-conservator?

This issue was not raised at the district court and has not been preserved for appellate review. The Court should decline to consider the issue and arguments, because they were not properly preserved for appellate review. See *Seamons v. Brandley*, 2011 UT App. 434, ¶¶ 2-3, 268 P.3d 195 (*per curiam*) ("[I]n order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (quoting *438 Main St. v. Easy Heat Inc.*, 2004

UT 72, ¶ 51, 99 P.3d 801)). In order to properly preserve an issue for appeal "(1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant authority." *Easy Heat*, 2004 UT 72, ¶ 51; *see also State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989) (an issue must be *specifically* and *distinctly* raised to be preserved for appellate review). Under Rule 24 of the Utah Rules of Appellate Procedure, a party must cite to any part of the record it relies on to show that an issue is preserved for appeal.

Prounis has not cited to any part of the Record showing that she has preserved this issue for appeal as required by Rule 24 of the Utah Rules of Appellate Procedure. Prounis cites to a portion of the Record where she stated that the district court "should not treat Mrs. Prounis any differently than Dan in awarding compensation." (R. 5540). In Prounis' Motion to Reconsider and supporting memoranda, she makes this assertion several times, (R. 5534, 5538, 5972, 5974, 5978, 5980,) but she never asserts that the district court *improperly discriminated* against her or set forth any legal argument to support such an assertion. This issue was not ever raised to the district court and the district court did not have a chance to rule on this issue. Accordingly, this issue was not preserved for appeal.

If Prounis had properly preserved this issue for appeal, it should be reviewed under the same standard as "Issue # 1." This issue, as further explained in the Argument section below, ultimately leads back to Issue #1—whether the District Court erred in concluding that Prounis was estopped from claiming compensation—and should be reviewed under that same standard.

DETERMINATIVE PROVISIONS

There are no interpretative statutory issues before this Court that are of central importance to this appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW

Prounis is a daughter of Evan O. Koller ("***Evan***") and was appointed as his guardian and co-conservator in 2009. Koller is Prounis' brother. Evan died in April 2014. In January 2015, Prounis filed the Motion for Compensation seeking $477,375 in compensation for her part-time services as guardian and conservator over the course of five years. Koller opposed the Motion for Compensation on several grounds, including equitable estoppel. In July 2015, the district court denied the Motion for Compensation on the basis that Prounis was equitably estopped from seeking compensation. The district court did not address Koller's other objections.

After the district court's decision, Prounis filed the Motion to Reconsider. The Court denied the Motion to Reconsider in August 2015 on the basis that Prounis had not presented new facts or evidence previously unavailable. This appeal followed.

II. STATEMENT OF FACTS RELEVANT TO ISSUE PRESENTED FOR REVIEW

A. Background

Prounis, Koller, Dan, LuAnn Shaffer ("***LuAnn***"), Kayleen Sabour ("***Kayleen***"), and Julie Mylander ("***Julie***") are Evan's children. On September 24, 2007, Kayleen and Koller filed a Petition for Appointment of Guardian and Conservator for Evan O. Koller.[4] Prounis objected to Koller's and Kayleen's petition.[5]

On June 10, 2008, Evan's children signed a stipulation agreeing that a professional guardian should be appointed for Evan, that a professional conservator should be appointed, and that Prounis and Dan should be appointed as co-conservators (the "***2008 Stipulation***").[6]

On July 10, 2008, the District Court found that Evan was incapacitated and entered its Order Appointing Guardian and Co-Conservators for Evan O. Koller.[7] Eldercare Consult, Inc. was appointed as Evan's guardian, Stagg Eldercare Services was appointed as lead conservator of Evan's estate, and Dan and Prounis were appointed as co-conservators of Evan's estate.[8] Prounis vehemently opposed Eldercare Consult, Inc.'s and Stagg Eldercare Services' appointments because she wanted these positions for

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[4] R. 1-4 (Petition for Appointment of Guardian and Conservator).
[5] R. 21–30 (Objection to Petition for Appointment of Guardian and Conservator).
[6] R. 335–39 (Stipulation).
[7] R. 533–37 (Order Appointing Guardian and Co-Conservators).
[8] *Id.*

herself and brought numerous motions against them.[9] Because of Prounis' actions, Stagg Eldercare Services resigned as co-conservator of Evan's estate and Eldercare Consult, Inc. resigned as Evan's guardian on January 30, 2009.[10]

B. Prounis' Appointment as Guardian and Conservator

After Stagg Eldercare Services' and Eldercare Consult, Inc.'s resignations, Kayleen and Julie filed a Petition for Appointment of Emergency Guardian requesting that a professional fiduciary be appointed as Evan's temporary and permanent guardian.[11] Kayleen's and Julie's reason for requesting a professional guardian was that Evan's children had previously stipulated to the appointment of a professional guardian and conservator and, given the volatile family relations, Kayleen and Julie believed that a third party professional fiduciary would be the most efficient way to provide for Evan's care.[12] Prounis objected to Kayleen's and Julie's petition[13] on the basis that an immediate appointment of a successor co-conservator and guardian was not necessary because Prounis was willing to serve as an interim guardian "indefinitely and without compensation" until the district court makes a decision.[14] Prounis also stated her concern

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[9] R. 771-73 (Motion to Compel Productions of Information and Provide an Accounting).
[10] R. 1137–39 (Resignations of the Guardian, Conservator, and Trustee and Request for the Court to Immediately Appoint a Guardian for the Ward).
[11] R. 1150–54 (Petition for Appointment of Emergency Temporary Guardian).
[12] R. 4835 (Mem. Opp'n Status Report Mot. Confirm Status Guardian Mem. Supp. Sabour/Mylander Mot. Summ. J. at 4).
[13] R. 1178–80 (Objection to Appointment of Guardian Notice of Filing Affidavit of Kathryn Prounis and Request to Ratify Caregiver Agreement).
[14] R. 1184 (Affidavit of Kathryn Prounis at ¶ 11).

that, in appointing a successor guardian and co-conservator, "cost is a factor that needs to be considered by the Court" and that "[a]ny proposed Guardian should be required to submit an estimate of monthly fees and a description of scope of services to be approved by the Court."[15] Prounis later filed a letter with the district court in connection with her objection to Kayleen's and Julie's petition which described the financial state of Evan's estate and stated that she had been working, as co-conservator and guardian, "for no compensation."[16]

In response to Kayleen's and Julie's petition and Prounis' objection, the district court ordered that (1) a professional fiduciary would not be appointed; (2) Dan and Prounis would serve as temporary co-conservators; and (3) Prounis would serve as temporary guardian.[17]

In an Order on a Status Hearing that took place on March 17, 2009, the district court stated that Evan's children should seek to agree on a permanent guardian and conservator "with the goal of preservation of the estate of the Ward."[18]

After the district court appointed Prounis as temporary guardian, she filed a motion to confirm herself as permanent guardian, stating that she has "been diligently performing [her] duties and for no compensation."[19] Prounis also asked the district court

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[15] R. 1183 (Affidavit of Kathryn Prounis at ¶ 9).
[16] R. 1263 (Notice Filing Letter Siblings Kayleen Sabour and Julie Mylander, at Ex. A).
[17] R. 1301–03, 1314–16 (Order; Order Appointing Kathryn Prounis as Temporary Guardian for Evan Koller).
[18] R. 1465 (Order Status Hr'g ¶ 2).
[19] R. 1339 (Status Report Mot. Confirm Status Guardian, at 2).

to set aside the 2008 Stipulation due to the changed circumstance that Evan's estate could not afford to pay a professional guardian and conservator. Dan joined Prounis in asking the district court to set aside the 2008 Stipulation.

Subsequent to Prounis' motion to be appointed permanent guardian, Prounis made numerous representations to the district court and her siblings that she was performing her duties as guardian and conservator pro bono, that Evan's estate could not afford to hire a third party fiduciary, and that Prounis was willing to continue performing such services on a "pro bono basis" to save Evan's estate money. These representations include, but are not limited to, the following:

a. On April 27, 2009, Prounis filed her Update of Guardian and Co-Conservator's Activities, which stated that she was saving Evan's estate a significant amount of money by performing conservator and guardian services on a pro bono basis.[20] Prounis emphasized that, because of her willingness to serve pro bono, there was no need to appoint professional fiduciaries because they would drain Evan's estate.

b. On April 28, 2009, Prounis again stated that Evan's estate "does not have sufficient cash to afford a costly professional guardian and conservator," that Evan was receiving "good care on a pro bono basis from [Prounis]," and that Prounis was willing to "perform such services on [her] own on a pro bono basis."[21]

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[20] R. 1496–97 (Update Guardian's and Co-Conservator's Activities ¶ 2).

[21] R. 4460–61, 4475–76 (Mem. Opp'n Kayleen Sabour's and Julie Mylander's Mot. Summ. J. and Mem. Supp. Kathryn Prounis' Mot. Set Aside Stipulation at ii–iii, 6–7).

c. On May 22, 2009, Prounis affirmed that she was willing to serve without compensation.[22]

Koller did not object to Prounis' efforts to be appointed permanent guardian and co-conservator because he believed that Prounis would act without compensation.[23]

On August 18, 2009, the district court held a hearing to determine who should serve as the permanent guardian of Evan and conservator of his estate.[24] At the hearing, Julie and Kayleen again emphasized their willingness to pay for a professional fiduciary so that Evan could receive the best care possible without distractions from fighting within the family.[25] Prounis' attorney argued that she should be appointed as permanent guardian and conservator because Evan's estate could not afford to pay a professional guardian and she "ha[d] been doing the guardianship voluntarily and ha[d] been saving Mr. Koller a substantial amount of money" and therefore the district court should maintain the status quo, implying that Prounis would continue to serve without compensation.[26] Dan's attorney stated his understanding that Prounis was willing to serve as conservator and guardian without compensation, and Dan's attorney stated that Prounis should be appointed as permanent co-conservator and guardian for that reason.[27] Evan's attorney also stated his understanding that Prounis was serving without

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[22] R. 1672–73 (Reply Mem. Supp. Kathryn Prounis' Mot. Set Aside Stipulation at 7–8).
[23] R. 4592–93 (Decl. of Mark A. Koller ¶¶ 13–18).
[24] R. 6456 (Transcript of Hearing of 08-18-2009).
[25] *Id.* (Transcript of Hearing of 08-18-2009 at 4–5). *See also* R. 4502–03.
[26] R. 6456 (Transcript of Hearing of 08-18-2009 at 18, 22–24). *See also* R. 4516, 4520–22.
[27] R. 6456 (Transcript of Hearing of 08-18-2009 at 26–27). *See also* R. 4524–25.

compensation or reimbursement.[28] Koller did not object to Prounis' appointment at the hearing (although he did ask the district court to consider appointing another of Evan's children to serve as a co-guardian) because Koller believed Prounis would serve without compensation.[29]

Based on Prounis' representations that she would serve without compensation and the other parties' understandings that Prounis would serve without compensation, the district court entered an order appointing Prounis as the permanent guardian of Evan, and Dan and Prounis as the permanent co-conservators of Evan's estate.[30]

C. Prounis' Representations Subsequent to her Appointment

After the district court appointed Prounis as permanent guardian and co-conservator, she continued to represent to the district court and Evan's children that she was serving without compensation. For example:

a. On October 30, 2009, Prounis stated that Kayleen and Julie "falsely assume that Mrs. Prounis *will be* seeking her legal fees in this matter to be paid from the conservatorship estate. . . . Ms. Prounis has refrained from seeking reimbursement of any of her own attorney's fees from the Koller estate. . . . [and] has been performing her services as Guardian and Conservator on a pro bono basis."[31] (Emphasis added.) By this

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[28] R. 6456 (Transcript of Hearing of 08-18-2009 at 31–34). *See also* R. 4529–32.
[29] R. 6456 (Transcript of Hearing of 08-18-2009 at 44–48). *See also* R. 4542–46.
[30] R. 1776–80 (Order on August 18, 2009 Hearing), 6101 (Order Denying Motion for Approval of Compensation to Kathryn Prounis at ¶ 12).
[31] R. 1802 (Kathryn Prounis' Opp'n Second Amended Decl. Att'y Fees Requested by Ct. at 6).

statement, Prounis reassured her siblings that she would not at any time in the future be seeking fees.

b. On January 24, 2011, Prounis' attorney stated at a hearing before the district court that the costs of appointing a third party conservator and guardian would have been devastating to Evan's estate and that Prounis "has been spending her time . . . for free. . . . [and] [s]he has saved the estate thousands and thousands of dollars."[32] At the same hearing, Prounis' attorney stated that Prounis was paying for his services herself and that "to suggest that she's getting paid, her attorneys are getting paid out of the estate is not accurate."[33]

c. On February 14, 2011, Prounis stated that she "ha[d] devoted thousands of hours of her time to the care of her father without compensation and has contributed tens of thousands of dollars of her own money to the care of her father."[34]

d. On February 21, 2012, at a hearing before the district court, held in connection with the conservators' annual accounting, Prounis' attorney again stated that "Ms. Prounis is acting as guardian and co-conservator without compensation."[35]

During the time Prounis was appointed as guardian and co-conservator, the district court made it clear that it understood Prounis was to serve without compensation. At the February 21, 2012 hearing referenced above, the district dourt raised a concern that the

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[32] R. 2110 (Transcript for Hearing of 1-24-2011 at 25).
[33] R. 2108 (Transcript for Hearing of 1-24-2011 at 23).
[34] R. 2151 (Mem. Supp. Mot. Award Att'ys Fees Incurred from Meritless Objection to Guardian's Report at 13).
[35] R. 2566 (Transcript for Hearing of 02-21-2012 at 7).

conservators were claiming $10,404 in fees, to which Prounis' attorney responded that Prounis was not compensated personally beyond her out-of-pocket expenses.[36] In response to Prounis' attorney's statement, Dan's attorney clarified that Dan had never agreed that he would not receive compensation for the time he spends as a conservator and that Dan will be seeking reasonable compensation for his time.[37] The district court replied that its recollection was that both Prounis and Dan would perform their duties without compensation, but admitted that Dan may not have made such representations and that all such representations may have been made solely by Prounis.[38] At the hearing, Prounis did not join in Dan's representations that Dan will be seeking compensation in the future; however, shortly thereafter, Prounis filed a document with the district court to respond to its question regarding compensation in the February 21, 2012 Hearing and affirmed that she is performing her services pro bono.[39]

Throughout Prounis' tenure as guardian and co-conservator, Prounis' siblings were concerned that Prounis was mismanaging and wasting Evan's estate, and that Prounis was actively isolating Evan and preventing his children from visiting him.[40]

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[36] R. 2586 (Transcript for Hearing of 02-21-2012 at 27).
[37] R. 2591 (Transcript for Hearing of 02-21-2012 at 32).
[38] R. 2592 (Transcript for Hearing of 02-21-2012 at 33).
[39] R. 5171–72 (Resp. Julie Mylander, Kayleen Sabour and Mark Koller's Objections to Conservator's Report of 2011 at 8–9).
[40] R. 6321–30 (Verified Pet. to (1) Remove Kathryn Prounis as Guardian and Conservator, or Alternative: (2) Appoint Additional Family Members Co-Guardians and Co-Conservators; (3) Remove Rob Smith as Counsel for Evan Koller); R. 6310–20 (same).

Thus, Koller, and his other siblings, challenged Prounis' actions as guardian and conservator. Koller filed a Verified Petition to (1) Remove Kathryn Prounis as Guardian and Conservator; or in the Alternative to: (2) Appoint Additional Family Members as Co-Guardians and Co-Conservators; and (3) Remove Rob Smith as Counsel for Evan Koller, seeking to remove Prounis as guardian and conservator; however, Koller did not seek Prounis' removal on the basis that she was charging excessive fees because Koller understood that Prounis was not being compensated for her services.[41]

As late as April 8, 2014, Prounis represented to the district court and Evan's children that she was serving pro bono.[42] Koller did not at any time have the opportunity to object to Prounis receiving compensation for her services, the rate she was charging for her services, or the hours Prounis alleged to have worked as guardian and conservator because he was led to believe Prounis was serving without compensation.[43] Had Koller known that Prounis would later seek compensation of $477,375 for her services at rates exceeding $70 an hour, he would have immediately objected to Prounis (i) receiving compensation, and (ii) paying herself excessive fees.[44]

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[41] R. 6321–30.
[42] R. 3001 (April 8, 2014 Memorandum in Support of Motion for Clarification of Prior Orders Appointing Dan Koller and Kathy Prounis as Co-Conservators and Guardians).
[43] R. 4592–93 (Decl. of Mark A. Koller ¶¶ 12–18).
[44] R. 4593 (Decl. of Mark A. Koller ¶ 18).

D. Prounis' Final Report As Guardian and Final Accounting as Conservator

On April 11, 2014, Evan died.[45] On August 21, 2014, Prounis filed her Final Report as Guardian.[46] Prounis made no request for compensation in her Final Report as Guardian.[47]

On October 10, 2014, Prounis and her co-conservator Dan Koller filed the Sixth and Final Annual Report by Conservators (the "***Final Conservators Report***") and a motion to approve the Final Conservators Report.[48] Prounis did not request any compensation in the Final Conservators Report or the motion to approve the Final Conservators Report. Dan, the co-conservator, did ask for compensation as he said that he would in the February 21, 2011 hearing.[49] Dan requested compensation of $58,835 for his services between March 2009 and April 2014.[50]

E. Prounis' Motion for Compensation and Procedural History

Koller and Kayleen raised objections to the Sixth and Final Annual Report by Conservators.[51] Prounis and her counsel were unhappy with Koller's and Kayleen's

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[45] R. 3484 (Final Report by Guardian at 2).
[46] R. 3484 (Final Report by Guardian).
[47] R. 3484 (Final Report by Guardian).
[48] R. 3636–51 (Sixth and Final Annual Report by Conservators); R. 3521–3635 (Motion for Acceptance and Approval of Conservator's Final Accounting and of Compensation to Co-Conservator Dan Koller, and Termination of Conservatorship).
[49] R. 3521–3635 (Motion for Acceptance and Approval of Conservator's Final Accounting and of Compensation to Co-Conservator Dan Koller, and Termination of Conservatorship); R. 3636–51 (Sixth and Final Annual Report by Conservators).
[50] R. 3521–3635.
[51] R. 3737–42, 3834–35.

objections. After a hearing on a guardianship matter, Prounis' attorney told Dan's attorney that "this is the straw that broke the camel's back. These people complained and fought one too many times and so [Prounis is] going to [seek compensation]."[52]

On January 23, 2015, despite the numerous representations Prounis had made to the Court and the other parties that she would serve without compensation, Prounis filed her Motion for Compensation, requesting compensation of $206,250.00 for her services as guardian between March 5, 2009 and April 11, 2014, and $271,125 for her services as co-conservator.[53] Koller, Dan, Julie, and Kayleen objected to the Motion for Compensation.[54] Koller raised a number of arguments in his opposition, including the argument that Prounis was estopped from seeking compensation.[55] On March 6, 2015, Prounis filed her reply in support of the Motion for Compensation.[56] Prounis did not

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[52] R. 5818 (Transcript of Hearing of 06-04-2015 at 65).

[53] R. 3992–93 (Motion for Compensation).

[54] R. 4155–60 (Kayleen's objection), 4194–99 (Julie's objection), 4320–22 (Dan's objection), 4797–4818 (Koller's objection). Prounis' Appellant Brief falsely asserts that Dan conceded that Prounis should receive some compensation. Dan's Opposition to Motion for Acceptance and Approval of Compensation to Kathryn Prounis stated only that "Dan does not assert that [Prounis] should not be compensated, [however] he does observe that [Prounis] has stated multiple times over the years that she is serving without compensation . . . . [Prounis]'s sudden course change at the end of the conservatorship was unexpected by Dan and appears unusual, and invites careful review and scrutiny by this court." R. 4321 (Opp'n Mot. Acceptance and Approval Compensation Kathryn Prounis at 2).

[55] R. 4807–09 (Am. Mem. Opp'n Mot. Acceptance and Approval Compensation Kathryn Prounis at 11–13).

[56] R. 5352–61 (Reply Memorandum in Support of Motion for Compensation).

offer any evidence in her reply memorandum to dispute or contradict the evidence set forth in Koller's opposition memorandum.

On June 4, 2015, the district court held a hearing on the Motion for Compensation.[57] Prior to the hearing, both Prounis and Koller had filed declarations in support of their positions.[58] At the hearing, each party had a chance to speak and present further evidence in support of his or her position on the Motion for Compensation. Prounis could have, but did not, ask to cross-examine Koller or any other witness. At the hearing, the district court even asked Prounis for some evidence to support her bare assertion that Dan Koller also represented that he would act pro bono.[59] Prounis, through her counsel, responded that he could not provide the district court with any evidence to support the assertion.[60] After each party had a chance to speak and offer additional evidence in support of his or her position, the district court ruled that Prounis was equitably estopped from seeking compensation.[61]

The Court entered its Order Denying Compensation on July 23, 2015.[62] After reviewing the briefs, the evidence, and hearing oral argument, the district court found that (1) "Prounis made numerous representations to the Court and the parties that she would

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[57] R. 5754–5876 (Transcript of 6-4-15 Hearing).
[58] R. 4005–11 (Decl. in Lieu of Decl. Kathryn Prounis); R. 4591–94 (Decl. Mark A. Koller Re Mark A. Koller's Opp'n Mot. Acceptance Approval Compensation Kathryn Prounis).
[59] R. 5766 (Transcript of 6-4-15 Hearing at 13).
[60] R. 5767 (Transcript of 6-4-15 Hearing at 14).
[61] R. 5849–53 (Transcript of 6-4-15 Hearing at 96–100).
[62] R. 6098.

serve as guardian and conservator without compensation;"[63] (2) "Daniel Koller never represented that he would not seek compensation for his services;"[64] (3) Prounis' siblings initially objected to Prounis' appointment but then "subsequently supported her appointment based on her representation that she would act in these capacities [without compensation and 'pro bono'];[65] and (4) Koller and his siblings would be damaged by the reduction of assets in Evan's estate if Prounis were compensated despite her numerous representations that she would not seek compensation.[66] From these findings the Court concluded that Prounis was estopped from claiming compensation as conservator and guardian.[67] The Order Denying Compensation mirrored the district court's findings and ruling at the June 4, 2015 hearing.[68]

On June 23, 2015, Prounis filed her Motion to Reconsider and supporting memorandum.[69] In the Motion to Reconsider, Prounis argued that the Court should set aside its June 4, 2015 ruling or alter the ruling because Prounis had additional arguments to make in support of her Motion for Compensation.[70] Koller and Julie filed their oppositions to the Motion to Reconsider.[71] Prounis filed her reply in support of her

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[63] R. 6099 (Order Denying Compensation at ¶ 9).
[64] R. 6100 (Order Denying Compensation at ¶ 10).
[65] R. 6100–01 (Order Denying Compensation at ¶ 11).
[66] R. 6101(Order Denying Compensation at ¶ 13).
[67] R. 6101(Order Denying Compensation at Conclusions of Law ¶ 2).
[68] R. 5849–53 (Transcript of 6-4-15 Hearing at 96–100).
[69] R. 5533–47.
[70] *Id.*
[71] R. 5721–39 (Koller's opposition), 5905–11 (Julie's opposition).

Motion to Reconsider on July 21, 2015.[72] Prounis withdrew her request for oral argument on the Motion to Reconsider.[73] On August 10, 2015, the district court issued its Memorandum Decision denying the Motion to Reconsider on the basis that Prounis had not set forth any new relevant authority or previously unavailable evidence that was not available during the Motion for Compensation proceedings.[74]

On February 3, 2016, the district court issued a Memorandum Decision disposing of the last outstanding issue in the guardianship and conservatorship case (which issue is unrelated to and irrelevant to this appeal).[75] On February 16, 2016, Prounis filed a Notice of Appeal appealing from the district court's decision relating to the Motion for Compensation.[76]

SUMMARY OF ARGUMENTS

Issue 1: Prounis is equitably estopped from seeking compensation for acting as Evan's guardian and conservator. Prounis made numerous representations that she would serve and was serving as guardian and conservator "pro bono." The district court relied on these representations when it appointed Prounis as guardian and conservator, and Koller and his siblings relied on these statements when they did not oppose Prounis' appointment and when they did not have a chance throughout her tenure to object to the

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[72] R. 5972–83.
[73] R. 6375 (Withdrawal of Request for Oral Argument).
[74] R. 6385–87.
[75] R. 6433–38.
[76] R. 6440–41.

compensation she was accruing for her services. Substantial injury to Koller, his siblings, and Evan's estate would result if Prounis were allowed to repudiate her statements.

The district court was correct to make findings of fact and weigh the evidence before it on the Motion for Compensation because district courts must weigh evidence and make findings of fact on issues brought before them by motion.

Prounis' burden is to show that the district court's findings of fact were clearly erroneous when looked at in the light most favorable to the district court. But Prounis does not cite to any facts which show that the district court's factual findings were erroneous. In fact, the facts in this matter are so clear and undisputed that the district court's decision would have been correct even if the Motion for Compensation were a summary judgment proceeding.

Issue 2: Prounis did not raise the issue of whether the district court should have held an evidentiary hearing on the Motion for Compensation to the district court; therefore, this issue has not been preserved for appellate review. Even if Prounis had raised this issue to the district court, district courts have discretion to hold evidentiary hearings on factual issues brought before them by motion. A district court does not abuse its discretion where the parties had ample opportunity to present evidence, the court held a hearing on the matter, and the parties failed to present evidence at the hearing. Prounis did not present any evidence to the district court to dispute the facts in this case. Prounis did not specifically request an evidentiary hearing, but the court held a hearing nonetheless. Prounis could have requested the opportunity to question Koller at the hearing, but did not do so. Prounis failed to present evidence at the hearing, or even

suggest that there was evidence out there supporting her claim (in fact, her counsel admitted that there was no evidence in support of some of Prounis' claims).

Issue 3: Prounis did not raise the issue of whether the district court should have approved the Motion for Compensation on the basis that Dan did not state that Prounis should never receive compensation; therefore, this issue has not been preserved for appellate review. Even if Prounis had raised this issue to the district court, Dan did not approve the Motion for Compensation, he objected to it. Moreover, conservators do not have the ability to unilaterally approve compensation to themselves. The Utah Probate Code requires court approval for any transaction that presents a conflict of interest, such as a conservator paying herself compensation. The Utah Probate Code also has further reporting and court approval requirements for conservators before they may pay themselves compensation. Therefore, even if Dan had approved Prounis' Motion for Compensation instead of objecting to it, Prounis would have still had to seek the district court's approval before paying herself one-half million dollars. This issue simply leads back to the issue of whether the district court properly found that Prounis was estopped from seeking compensation.

Issue 4: Prounis did not raise the issue of whether the district court improperly discriminated against her to the district court; therefore, this issue has not been preserved for appellate review. Even if Prounis had raised this issue to the district court, she cites no law or facts to support this argument. Prounis appears to be asking this Court to exercise equitable powers and award her compensation notwithstanding that she is equitably estopped from seeking compensation. This plea is out of place before this

Court. Ultimately, this issue leads back to the issue of whether the district court properly found that Prounis was estopped from seeking compensation and that Dan was not estopped.

Finally, Prounis' request for compensation was untimely. She did not file the Motion for Compensation until several months after she and Dan filed the Final Conservators Report. Further, Prounis' request is barred by the statute of limitations to the extent that she seeks compensation for any services more than four years before the request.[77]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PROUNIS WAS ESTOPPED FROM CLAIMING COMPENSATION AS GUARDIAN AND CONSERVATOR

The district court correctly denied Prounis' Motion for Compensation on the basis that Prounis was estopped from claiming compensation for her services as guardian and conservator. Prounis does not dispute the law applied by the district court with respect to equitable estoppel, or the district court's application of the facts to law. Prounis disputes only the district court's factual findings in support of its conclusion.

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[77] Koller raised this argument to the district court, but it was not one of the bases of the district court's decision. (R. 4811–12.) Nevertheless, "[a]n appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action." *Pentalon Constr., Inc. v. Rymark Properties, LLC*, 2015 UT App 29, ¶ 25, 344 P.3d 180.

Prounis erroneously argues that the district court erred in deciding the Motion for Compensation because there were disputed issues of fact and the district court was not allowed to make factual findings on the evidence before it, and Prounis argues that there was not enough evidence for the district court to find that Prounis was equitably estopped. Prounis' arguments fail. First, a district court may make factual findings on Motions brought before it. Second, even if the district court were prohibited from making factual findings, there were no material disputes of fact with respect to the facts supporting the district court's decisions.

A. Prounis was Estopped from Seeking Compensation.

The elements of equitable estoppel are (i) a statement by a party inconsistent with a claim later asserted; (ii) reasonable action taken on the basis of the first statement; and (iii) injury that would result from allowing the party to contradict or repudiate such statement. *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 34, 989 P.2d 1077. "Equitable estoppel reflects circumstances where it is not fair for a party to represent facts to be one way to get the other to agree, and then change positions later to the other's detriment." *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 15, 158 P.3d 1088.

Prounis' repeated representations leading up to and after her appointment as guardian and conservator that she would serve without compensation establish the basis for finding that she was estopped from claiming compensation. Prounis made at least a dozen representations to the court and the parties that she would serve without compensation.

Kayleen and Julie sought the appointment of a disinterested third-party to serve as guardian and conservator so that the fiduciary would not be influenced by the animosity between Evan's children, despite the fact that this would diminish their ultimate inheritance. This effort met stiff resistance from Prounis. Prounis repeatedly emphasized the great expense that a third-party fiduciary would be to Evan's estate. Prounis was adamant that "any proposed Guardian should be required to submit an estimate of monthly fees." (R. 1183.) Prounis also repeatedly stated that she was serving in the interim without compensation, and that she was willing to serve as permanent guardian and conservator without compensation. The district court agreed that, in appointing a permanent conservator and guardian, such appointment should be made "with the goal of preservation of the estate of the Ward." (R. 1465.) Based on Prounis' repeated statements that appointing her as permanent guardian and conservator would save the estate money because of her willingness to act pro bono, Koller and his siblings did not object to Prounis' appointment as permanent guardian and conservator. (R. 6101.)

After Prounis' appointment, she continued to represent that she was serving without compensation, including representations on October 30, 2009, January 24, 2011, February 14, 2011, February 21, 2012, March 28, 2012, and April 8, 2014.[78]

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[78] R. 1802 (Oct. 30, 2009 Kathryn Prounis' Opp'n Second Amended Decl. Att'y Fees Request by Ct. at 6); R. 2110 (Transcript for Hearing of 1-24-2011 at 23, 25); R. 2151 (Feb. 14, 2011 Mem. Supp. Mot. Award Att'ys Fees at 13); R. 2566 (Transcript for Hearing of 2-21-2012 at 7); R. 5171–72 (March 28, 2012 Resp. to Objections to 2011 Conservator's Report at 8-9); R. 3001 (April 8, 2014 Memo. In Supp. Of Motion for Clarification of Prior Orders).

The district court correctly held that Prounis was estopped from claiming compensation for her services. First, Prounis' claim for compensation was inconsistent with her prior representations to the district court, Koller, and Prounis' other siblings. Second, Koller and his siblings did not object to Prounis' appointment—and the district court appointed Prounis as permanent guardian and conservator—because of Prounis' representations that she was willing to serve without compensation. Likewise, Prounis was allowed to continue to serve as guardian and conservator based on continued representations that she would serve without compensation. Had Prounis claimed compensation earlier, Koller and his siblings could have voiced an earlier objection or otherwise moved for appropriate relief—Koller could not object to fees he did not know the estate was incurring. Additionally, the district court could have appointed a fiduciary that would have not sought compensation. Third, Prounis' claim for compensation would injure Evan's estate and his children by subjecting the estate to an unexpected liability of $477,375 for Prounis' services as guardian and conservator, an amount which would ultimately be paid by Koller and his siblings as the heirs of Evan's estate. The district court therefore correctly found that Prounis was estopped from seeking compensation.

B. The District Court Properly Made Findings of Fact.

In deciding the Motion for Compensation, the district court properly made findings of fact. Under Rule 7(b) of the Utah Rules of Civil Procedure, a request for an order must be made by motion. A district court is permitted to decide the motion based on facts appearing of record or by affidavits presented by the parties, and a district court has discretion to hear testimony related to the motion. Utah R. Civ. P. 43(b); *id.* at 7(h).

District courts are given wide latitude to make factual findings on motions, such that a finding of fact made on a motion is reviewed by an appellate court under a "clearly erroneous" standard. *See Menzies v. State*, 2014 UT 40, ¶ 28, 344 P.3d 581; *H.U.F. v. W.P.W.*, 2009 UT 10, ¶¶ 49-52, 203 P.3d 943; *see also Stan Katz Real Estate, Inc. v. Chavez*, 565 P.2d 1142, 1143 (Utah 1977) (recognizing the ability of district courts to resolve factual disputes brought before them by motion).

District courts weigh facts and make decisions on a variety of issues brought before them by motion. *See, e.g., Terry v. Zions Co-op. Mercantile Inst.*, 605 P.2d 314, 323 (Utah 1979), *overruled on other grounds by McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984) (district court weighs facts in a pretrial matter); *Hunsaker v. Kersh*, 1999 UT 106, ¶ 6, 991 P.2d 67 (district court weighs evidence in resolving a preliminary injunction motion); *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 6, 974 P.2d 821 (district court's factual decisions on preliminary injunction motion reviewed for clear error); *State v. Thatcher*, 157 P.2d 258, 264 (Utah 1945) ("[T]he trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial . . . ."); *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 49, 176 P.3d 476 (district court required to weigh facts on motion for attorneys' fees).

In probate matters before the district court, it has long been recognized that probate proceedings are different in nature than typical civil matters. *See, e.g., Matter of Estate of Morrison*, 933 P.2d 1015, 1016 (Utah Ct. App. 1997) (appellate courts must determine finality in probate matters differently than in typical civil cases). In probate proceedings, district courts must often weigh facts on matters brought before them by

motion. *See, e.g., Shurtleff v. United Effort Plan Trust*, 2012 UT 47, ¶¶ 13-15, 289 P.3d 408 (appeal from motion for fees where court considered and weighed evidence on record without an evidentiary hearing).

One exception to the general rule that district court's must weigh evidence on motions and make findings of fact is, of course, Rule 56 of the Utah Rules of Civil Procedure, which states that a party may move for summary judgment on a *claim* or *defense* and that a district court may grant such motion only if there is no genuine dispute of material fact. ("Claims" and "defenses," are set forth by pleading. *See* Utah R. Civ. P. 8.)

Prounis, without citing to any authority, argues that the district court erred in issuing its Order Denying Compensation because there were disputed issues of fact and the district court was not allowed to weigh the evidence and make findings of fact. But because Prounis chose to bring her request for compensation by motion instead of by pleading, she chose to let the district court decide issues of fact.

Even if, as Prounis asserts, there were disputed facts with respect to the Motion for Compensation, the district court was permitted to weigh those disputed facts and make findings of fact. The district court's factual determinations are reviewed under a clearly erroneous standard. As Prounis has not demonstrated that the district court's findings were clearly erroneous, the district court's decision must stand.

C. The Evidence Clearly Supported the District Court's Findings of Fact.

The evidence brought before the district court clearly supported its decision that Prounis was equitably estopped from claiming compensation for her services as guardian and conservator.

To successfully challenge a district court's findings of fact on appeal, the burden is on the person challenging such findings to marshal the evidence in support of the court's ruling and then demonstrate that *even in the light most favorable to the trial court*, the evidence was insufficient to support the findings. *Utah Med. Products, Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998); *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

Prounis does not even attempt to meet her burden of showing that the district court's findings were clearly erroneous. As shown in Section I.A of this Argument, there is evidence to support each of the district court's findings. In fact, the repeated representations that Prounis would serve without compensation are not disputed—they were made in court filings or in court hearings!

Prounis argues that there are disputed issues of fact and that there is no evidence to support the district court's findings regarding (1) Prounis' statements about not seeking compensation, (2) the actions of other parties in reliance on Prounis' statements, (3), injury to other parties, (4) Dan's statements regarding compensation, and (5) the parties' objections to Prounis' compensation. Each of these factual issues is discussed below.

The evidence in this case is so strong and one-sided that even if this were a summary judgment motion, the district court's decision would be correct.[79]

1. The Evidence Shows That Prounis Told Koller, Her Siblings, and the District Court That She Was Acting without Compensation Multiple Times.

Prounis argues that although she made many statements that she was serving "pro bono" and without compensation, she never stated that she would *not* seek compensation after Evan's death. This argument cuts against itself as it is equally true that Prounis cannot point to any instance where she said that she *would* seek compensation after Evan's death. Moreover, this assertion is simply untrue because Prounis made numerous statements that she was acting "pro bono." (*See*, *e.g.*, R. 4460–61, 4475–76, 1672–73, 1802, 2110, 5171–72.) The plain meaning of "pro bono" is simply "uncompensated." *See* Black's Law Dictionary (10th ed. 2014). Uncompensated does not mean "to be compensated at a later date." If Prounis intended to be compensated at a later date, she would have stated that she is serving on a deferred or postponed compensation basis.

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[79] Although, as discussed above, Prounis' efforts to recast the Motion for Compensation proceedings as summary judgment proceedings fail, the facts surrounding these proceedings are so clear and undisputed that Koller would still prevail even if this were a motion for summary judgment. Genuine issues of material fact don't exist just because a party says so; there must be a foundation in the evidence to support the party's assertion. *See Harding v. Atlas Title Ins. Agency, Inc.*, 2012 UT App 236, ¶ 7, 285 P.3d 1260; *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 19, 196 P.3d 588 ("The word 'genuine' indicates that a district court is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party."). As will be demonstrated, Prounis has not provided a scintilla of evidence to call the district court's findings into question or to even raise a disputed issue of material fact.

Prounis' claim that she listed her hours spent serving as guardian in her annual court reports and that this demonstrated an attempt to later seek compensation is not convincing. The hours listed in these reports were not itemized and were listed in a very vague and general way (e.g., Prounis states that she spent approximately 200 hours in one year caring for Evan). (*See, e.g.*, R. 1928–29, 2362–63, 2699–2700, 2937–38, 3483–84.) Prounis did not itemize her hours or report them in any way that could reasonably form the basis for hourly compensation in the future. And even if it may be inferred that Prounis intended to seek compensation in the future by stating the approximate hours she spent each year, this inference would not be sufficient to show that the district court *clearly erred* in finding that Prounis represented she would work without compensation when she made numerous statements to that effect. Moreover, Prounis did not list any such hours in her conservatorship reports. (R. 1729–80, 1976–86, 2377–88, 2712–20, 2920–26, 3636–45.)

Prounis apparently argues that Dan's statements that he was *not* serving pro bono should somehow be attributed to her. This argument cannot stand, however, in the face of Prounis' consistent and repeated statements that she was serving pro bono. Additionally, when the district court specifically questioned Prounis and Dan on the issue of compensation at the February 21, 2012 hearing, Dan specifically stated that he *would* be seeking compensation at some point and time, and Prounis responded by reaffirming that she was serving pro bono. (R. 2566, 2586, 2591, 2592, R. 5171–72.)

Prounis seeks to show that the district court clearly erred in finding that Prounis represented that she would serve without compensation by offering self-serving

assertions that what she *really* and *secretly* meant when she stated that she would serve pro bono is that she would serve without compensation until Evan's death. (There is not even an affidavit from Prounis asserting as much that the district court could have referred to in making its factual determinations.) But Prounis' self-serving and bare assertions would not even be enough to preclude summary judgment, *see Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 26, 206 P.3d 302, much less show that the district court clearly erred.

2. The Evidence Shows That There Was Reliance on Prounis' Numerous Representations That She Was Acting without Compensation.

Prounis, without providing any evidence, argues that it is disputed whether Koller and his siblings relied on Prounis' numerous representations that she was acting without compensation. But the evidence shows that Koller did not oppose Prounis' appointment—and many of Prounis' siblings supported her appointment—because Prounis offered to act pro bono. It is also undisputed that the district court appointed Prounis on the basis that she was acting without compensation (R. 2592). The evidence shows that Koller would have objected to Prounis receiving compensation at all. (R. 4591–93.) Koller and his siblings would have had an opportunity to object to Prounis seeking fees the first year that she sought fees before her secret fees accumulated to $477,375 had Prounis been honest about her intentions to seek compensation. Quite simply, Koller could not object to fees he did not know that the Evan's estate was incurring. It is inconsequential that Koller objected to Prounis' actions as guardian and conservator on other grounds because he never had a chance to seek Prounis' removal on

the basis that she was seeking excessive fees and nominate a successor who would serve for less compensation or pro bono.

Without citing to any law, Prounis asserts that Koller and his siblings did not have standing to object to Prounis' Motion for Compensation. The Utah Probate Code states that "interested persons," such as Koller and Evan's other children, have standing to bring claims and object to guardians' and conservators' actions throughout the entire guardianship and conservatorship. *See*, *e.g.*, Utah Code Ann. §§ 75-5-413 (conservator submits to "any proceeding relating to the estate that may be instituted by an interested person"); 75-5-415 (interested persons must be given notice and chance to object to transactions where conservator has a conflict of interest); 75-5-416 (interested parties may institute proceedings for a variety of things related to the conservatorship); 75-5-430 (any interested person may seek termination of conservatorship); 75-5-305 (guardian submits to "any proceeding relating to the guardianship that may be instituted by any interested person"). Prounis wishes for a statutory scheme whereby upon a ward's death the conservator is free to drain the estate because no party has standing to object to the conservator's actions, but this is clearly not the law in Utah. Koller and his siblings had standing to rely on Prounis' representations that she would protect Evan's estate and to object to her attempts to claim excessive compensation after she represented that she would act without compensation.

Again, Prounis has not provided any evidence to show that the fact of reliance is disputed, much less to show clear error in the district court's decision.

3. The Evidence Shows That There Would Have Been Injury If Prounis Received Compensation after Her Numerous Representations That She Would Not Seek Compensation.

Despite the truism that a claim of $477,375 would damage Evan's estate and thereby damage the heirs of the estate, i.e., Koller and his siblings, Prounis argues that allowing her to receive compensation after her numerous representations to the contrary would not injure anyone other than Evan. However, Prounis did not seek compensation until after Evan's death. After Evan's death, his heirs had an equitable interest in his estate. Prounis' claim would diminish Koller's and his siblings' interests in Evan's estate. Therefore, Prounis' claim would injure Koller and his siblings.

Prounis also makes a hypothetical argument that there would be no injury to the estate because a professional guardian and conservator would have charged as much as she is seeking. This argument ignores that the fundamental reason Prounis was appointed was because she insisted that Evan's estate should not pay a professional to do work that she would do for free. Prounis' hypothetical argument is not supported by the evidence and cannot stand.

It is an undisputed fact that Koller and his siblings would be injured if Prounis were allowed to go back on her representations that she would serve pro bono.

4. There Are No Disputed Facts Concerning Dan's Statements about His Own Compensation, and Such Statements Are Irrelevant.

Prounis feigns bewilderment that the district court found that Dan did not represent that he would not seek compensation. But, the record clearly shows that the district court expressly questioned Dan and Prounis about whether they would be seeking compensation. And while Dan stated that he would seek compensation, Prounis affirmed that she will not be seeking compensation. (R. 2566, 2586, 2591, 2592, R. 5171–72.) Indeed, Prounis' counsel himself admitted to the district court that Dan did not at any time represent to the court that he would not seek compensation. (R. 5767.) In this appeal, Prounis fails to cite any evidence that Dan affirmatively stated that he was acting "pro bono."

Prounis grossly mischaracterizes Dan's statement that he "has been in Logan for about five to six weeks now, also taking care of things and mostly out of his own pocket. [Prounis and Dan] are not depleting the estate." (R. 5539.) This statement does not support Prounis' assertion that Dan represented that he will act pro bono, it simply states that Dan had not sought reimbursement for his expenses during that six week period, it does not state that Dan will not be seeking compensation for his services in the future. Compare this to Prounis' numerous statements that she *will be* acting or *is* acting without compensation. Prounis also attempts to make a logical leap that a statement by Dan's counsel—asking the district court to set aside the 2008 Stipulation—somehow imputed to Dan every representation she ever made about not seeking compensation. It is, of course, absurd to impute Prounis' representations to Dan simply because Dan joined with Prounis

in seeking to set aside the 2008 Stipulation, and it is contradicted by Dan's subsequent statements that he was seeking compensation.

Even if Dan's statements could be construed as a representation that he would, upon appointment, act without compensation, the elements of equitable estoppel are still not present as to Dan. In 2012 he represented to the district court and Evan's children that he was not acting pro bono and that he would be seeking compensation. (R. 2566, 2586, 2591, 2592, R. 5171–72.) Koller and his siblings thus had an opportunity to object to Dan's appointment as co-conservator from 2012 to the end of the conservatorship—however, they did not object because Dan *never* represented to the Court that he would serve without compensation. Therefore, while it is undisputed that Dan never represented that he would serve without compensation, it is irrelevant because Dan stated that he would seek compensation in 2012.

5. There Are No Disputed Facts Concerning Whether Dan Objected to Prounis Receiving Compensation, and Such Facts Are Irrelevant.

Prounis cannot in good faith dispute the district court's finding that Dan "objected to Prounis' requested compensation." Dan's Opposition to Motion for Acceptance and Approval of Compensation to Kathryn Prounis clearly objected to Prounis' requested compensation. (R. 4320–22.)

It is true that Dan does not state that Prounis should never receive any compensation, but he also does not state that Prounis should receive compensation. (R. 4321.) As explained below, Prounis wrongfully asserts that Dan had the power to unilaterally approve Prounis' compensation request. In any case, whether or not Dan

believes that Prounis is entitled to *some* compensation has no bearing on the issue of whether Prounis made representations that she would not seek compensation which Koller relied on, and whether, as a result, she was estopped from later seeking compensation.

As shown above, each of Prounis' arguments—as well as her arguments in the alternative—fail. The district court had the ability to weigh evidence and make factual findings. Prounis cannot meet her burden of showing that the district court's findings of fact were clearly erroneous, especially when looking at such findings in a light most favorable to the district court. Even if the district court did not have the ability to weigh evidence, none of the facts the district court used to find equitable estoppel are genuinely disputed. The district court correctly denied the Motion for Compensation on the basis that Prounis was equitably estopped from claiming compensation.

II. THE DISTRICT COURT HAD DISCRETION TO HOLD AN EVIDENTIARY HEARING AND DID NOT ABUSE ITS DISCRETION BY CHOOSING NOT TO HOLD AN EVIDENTIARY HEARING.

As discussed above in the statement of the issues, the Court should decline to consider this issue and arguments because they were not properly preserved for appellate review. Prounis did not specifically and distinctly raise this issue to the district court. Prounis simply argued that the Koller's form of order on the Motion for Compensation was erroneous because it contained "findings of fact" when the district court did not hold an evidentiary hearing. (R. 5533, 5542, 5980–81.) Prounis did not at any time argue that the district court should have held an evidentiary hearing or request such a hearing.

But even if this issue had been raised to the district court, there is no reversible error based on whether or not an evidentiary hearing was held. First, it is unclear what exactly Prounis means when she argues that the district court should have held an "evidentiary hearing." The district court in fact did hold a hearing at which Prounis could have questioned witnesses, introduced other evidence, or otherwise disputed the facts raised in Koller's opposition to the Motion for Compensation. She never requested the opportunity to do so. Nor did she submit a request or declaration proffering any facts or testimony or otherwise signaling to the district court that it should take additional testimony. Assuming Prounis was entitled to an "evidentiary hearing," Prounis fails to show on this record that the district court did *not* hold one. Nothing prevented Prounis from introducing additional evidence before or during the hearing except her own failure to do so.

Second, Prounis cites to no rule that mandates that a court hold an "evidentiary hearing" on a motion. As discussed in Section I.B of this Argument, district courts have discretion to decide a motion based on facts appearing of record and affidavits or to hold an evidentiary hearing. Utah R. Civ. P. 43(b); *id.* at 7(h); *Menzies v. State*, 2014 UT 40, ¶ 28, 344 P.3d 581 (a district court's decision to hold an evidentiary hearing is reviewed for abuse of discretion). Prounis' citation to *Bangerter v. Petty*, 2010 UT App 49, ¶ 22, 228 P.3d 1250, for the proposition that a district court *must* hold an evidentiary hearing is not applicable here because *Bangerter* involved a motion for summary judgment and the Court was simply opining that on remand the district court would have to hold an evidentiary hearing. In that case, apparently neither side had addressed adequately the

relevant legal issues at the district court level, leaving the appellate record incomplete. *See id.* ¶ 19. As discussed above, the Motion for Compensation proceedings were not summary judgment proceedings. And, in any event, Prounis had ample opportunity to submit a declaration to offer evidence on the points Koller raised in opposition to the Motion for Compensation or to proffer additional evidence at the hearing on the Motion for Compensation. She chose not to do so.

In *Stan Katz Real Estate, Inc. v. Chavez*, the Supreme Court of Utah held that a district court abused its discretion in failing to hold an evidentiary hearing when the record showed that there were disputed material facts. 565 P.2d 1142, 1143 (Utah 1977). But in *H.U.F. v. W.P.W.*, the Supreme Court of Utah found that the district court did not abuse its discretion in failing to hold an evidentiary hearing because (1) the parties had opportunities to present evidence, (2) the court held a hearing on the matter, and (3) the parties did not present any evidence at the hearing. 2009 UT 10, ¶¶ 49-52, 203 P.3d 943, 955.

Here, the district court did not abuse its discretion to hold an "evidentiary hearing" (assuming *arguendo* that he district court did *not* hold one) because Prounis did not set forth facts and provide the district court with any evidence to dispute Koller's assertion that Prounis was equitably estopped from seeking compensation. Prounis did not even offer a declaration stating that she always intended to seek compensation for the district court's consideration. Prounis had ample opportunities to offer conflicting evidence. But Prounis did not even request an evidentiary hearing. Nevertheless, the district court held a hearing on June 4, 2015, on the Motion for Compensation, where each party, including

Prounis, had an opportunity to make arguments and present evidence. (R. 5754–5876.) In fact, Dan offered new evidence at the June 4, 2015 hearing that Prounis' counsel had decided to file the Motion for Compensation to spite Prounis' siblings. (R. 5818.) Prounis did not offer new evidence in support of her claims or suggest that any such evidence might exist. Prounis also filed the Motion to Reconsider with respect to the district court's decision to deny the Motion for Compensation, but again failed to offer any evidence of a factual dispute.

As in *H.U.F.*, Prounis was given ample opportunity to offer evidence of a disputed fact. Despite Prounis' failure to request an evidentiary hearing, the district court held a hearing where Prounis could have offered evidence or testimony. But Prounis failed to offer any evidence. Therefore, the district court did not abuse its discretion by not holding an evidentiary hearing (beyond what it, in fact, held) because there was no request for such a hearing and there was no indication that there was any evidence to be presented at such a hearing.

III. DAN DID NOT APPROVE PROUNIS' COMPENSATION REQUEST AND DAN AND PROUNIS DID NOT HAVE THE ABILITY TO UNILATERALLY APPROVE COMPENSATION TO THEMSELVES.

As discussed above in the statement of issues, the Court should decline to consider this issue and arguments because this issue was not raised at the district court and has not been preserved for appellate review. In Prounis' Motion to Reconsider and supporting memoranda, Prounis argued only that the district court should reconsider its decision on the Motion for Compensation because Dan did not state that Prounis should not be

compensated. (R. 5534, 5540–42, 5978–79.) The actual issue before the district court was whether this alleged fact constituted a new fact or evidence not previously available which would require the district court to reconsider its decision. (R. 6386–87.) The district court held that the fact that Dan did not state that Prounis should not be compensated was not a new fact or evidence, and that reconsideration of the case was not therefore appropriate. Accordingly, this issue was not specifically raised to the district court, and the district court did not have an opportunity to rule on it.

Even if this issue had been properly preserved for appellate review, the district court correctly denied Prounis' Motion for Compensation because neither Dan nor Prounis had the ability to approve Prounis' Motion for Compensation. First, Dan and Prounis were released as conservators on January 26, 2015. (R. 5420-23.) Therefore, neither of them could have possibly approved the disbursement that Prounis sought.

Even if Dan and Prounis were still acting as conservators, they would not have the ability to unilaterally approve a payment of compensation to themselves. While Utah Code Ann. § 75-5-414 states that a conservator may be entitled to compensation for his or her services, it does not give a conservator a unilateral and unqualified right to pay himself or herself. Utah Code Ann. § 75-5-422 states that a transaction that creates a conflict of interest for the conservator must be approved by the district court after notice to interested parties. The payment of compensation to Prounis as guardian and conservator would be a transaction that creates a conflict of interest. Thus, Prounis was required by statute to seek the district court's approval of compensation to herself and give interested parties an opportunity to object. Moreover, Utah Code Ann. §§ 75-5-417

and 75-5-419, as well as Rule 6-501 of the Judicial Council Rules of Judicial Administration, require a conservator to disclose all expenditures to the district court and the interested parties on an annual basis and gives interested parties an opportunity to object.

Furthermore, it is not even true that Dan approved Prounis' request for compensation. Dan stated that "Dan does not assert that [Prounis] should not be compensated or reimbursed . . . ." but then Dan went on to describe how Prounis made many representations that she was acting pro bono and stated that her "sudden course change . . . invites careful review and scrutiny by this court." (R. 4321.)

Dan did not approve the Motion for Compensation. But even if he had, the Court was required to approve the Motion for Compensation. Thus, the true issue is whether the district court correctly decided that Prounis was equitably estopped from seeking compensation.

IV. THE DISTRICT COURT CORRECTLY DENIED PROUNIS' REQUEST FOR COMPENSATION AND ALLOWED DAN'S REQUEST FOR COMPENSATION.

As discussed above in the statement of issues, the Court should decline to consider this issue and arguments because this issue was not raised at the district court and has not been preserved for appellate review. Prounis has not cited to any part of the Record showing that she has preserved this issue for appeal as required by Rule 24 of the Utah Rules of Appellate Procedure. Prounis cites to a portion of the Record where, in arguing that the district court should reconsider its decision, she states that the district court

"should not treat Mrs. Prounis any differently than Dan in awarding compensation." (R. 5540). In Prounis' Motion to Reconsider and supporting memoranda, she makes this assertion several times, (R. 5534, 5538, 5972, 5974, 5978, 5980,) but she never asserts that the district court *improperly discriminated* against her or sets forth any legal argument to support such an assertion. The district court did not have a chance to decide this issue.

Even if this issue had been preserved, the district court did not act improperly when it approved Dan's compensation and denied Prounis' compensation. This issue ultimately leads back to the issue of whether the district court correctly found that Prounis was equitably estopped from seeking compensation. As discussed above, Dan did not represent that he would act pro bono, in fact, Dan specifically stated that he was not acting pro bono. (R. 2566, 2586, 2591, 2592, 5171–72, 5767.) Indeed, Prounis' counsel himself admitted to the district court that Dan did not at any time represent to the court that he would not seek compensation. (R. 5767.) Prounis' assertion that Dan made joint filings with Prounis and joined in her representations that he would work pro bono is false. The plain facts show that Prounis was appointed as guardian and conservator because she stated that she would serve without compensation, while Dan was not appointed on the basis of such assertions. The district court approved Dan's compensation and denied compensation to Prounis because of these representations. The district court was correct in finding that Prounis was estopped from seeking compensation.

Prounis also makes a plea to the Court to make an equitable decision to override the district court's findings and award compensation to Prounis. (Prounis also makes a *quantum meruit* argument that was not raised at the district court level.) This equitable plea must fail because Prounis has unclean hands.

Prounis' assertions that she acted altruistically and did outstanding work are disputed and irrelevant. Many of Prounis' siblings believe that Prounis wasted and mismanaged the estate, and ultimately absconded with money from Evan's estate.

Prounis faults Koller and his siblings for objecting to Prounis' actions. But the facts on record show that Prounis was the first party to object to Evan's conservator's and guardian's work in 2008 when she filed a motion to compel the original guardian and conservator to provide an accounting. (R. 771-73.) Because of the volatile family relations, Koller's siblings sought a professional guardian and conservator, believing this would be the most efficient way to provide for Evan's care. In response, Prounis sought appointment by making numerous representations to the district court and to Evan's children that she would act without compensation. After making these representations, Prounis' request for $500,000 in compensation was made with unclean hands. Prounis' equitable plea, which is unsupported by facts, is out of place in this appeal and is without grounds.

V. PROUNIS' REQUEST FOR COMPENSATION WAS UNTIMELY.

Under Utah Code Ann. §§ 75-5-417 and 75-5-312, guardians and conservators are required to report "income received during the year, disbursements for the support of the ward, and other expenses incurred by the estate." A request for compensation must be

made "at the time a final accounting is filed." *See In re Estate of Thomas*, 853 So.2d 134, 136 (Miss. Ct. App. 2003) (conservator was not entitled to compensation for services rendered, where she did not file request for compensation for services at time of final accounting).

Prounis did not file her Motion for Compensation until several months after the Final Conservators Report was filed. The workday after Prounis filed her Motion for Compensation, this Court approved the Final Conservators Report and Dan's compensation. Prounis' requested compensation was not accounted for in the final accounting that was approved. Therefore, Prounis' Motion for Compensation was untimely. Furthermore, Prounis' Motion for Compensation is barred by the four-year statute of limitations insofar as it seeks compensation for any services rendered prior to January 23, 2011. *See* Utah Code Ann. § 78B-2-307.

CONCLUSION

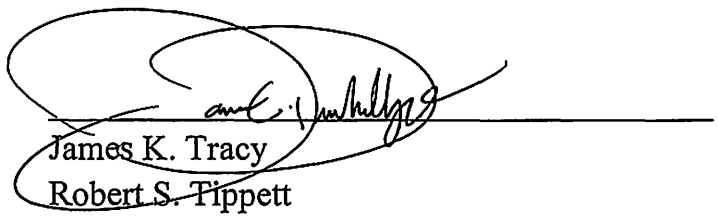
For the reasons set forth above, the district court correctly found that Prounis was estopped from seeking compensation and denied Prounis' Motion for Compensation.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, the undersigned counsel certifies that this Brief of Appellee contains 13,340 words and complies with the type-volume limitation set forth in Rule 24(f)(1)(A).

RESPECTFULLY SUBMITTED this 29th day of August 2016.

BENNETT TUELLER JOHNSON & DEERE



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, I caused to be served, via U.S. Mail, First Class, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE**, together with an electronic Courtesy Brief in searchable PDF format, upon the following:

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