

533347MAJ

~

DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division I  
State of Washington

Opinion Information Sheet

Docket Number: 53334-7-I  
Title of Case: In re the Guardianship of Loren Stamm, App.  
v. Guardianship Services of Seattle, et al., Resp.  
File Date: 11/28/2005

SOURCE OF APPEAL

-----  
Appeal from Superior Court of King County  
Docket No: 01-4-05323-7  
Judgment or order under review  
Date filed: 10/06/2003  
Judge signing: Hon. Kimberley Diane Prochnau

JUDGES

-----  
Authored by Ronald Cox  
Concurring: H Joseph Coleman  
Mary Kay Becker

COUNSEL OF RECORD

-----  
Counsel for Appellant(s)  
Margaret K. Dore  
Law Offices of Margaret K Dore PS  
1001 4th Ave 44th Fl  
Seattle, WA 98154-1119

Loren W Stamm (Appearing Pro Se)  
8218 NE 145th Street  
Kenmore, WA 98028

Counsel for Respondent(s)  
Howard Mark Goodfriend  
Edwards Sieh Smith & Goodfriend PS  
1109 1st Ave Ste 500  
Seattle, WA 98101-2988

John Herman Jr Hertog  
Hertog & Coster PLLC  
520 Pike St Ste 1350  
Seattle, WA 98101-4023

Devin T Theriot-Orr  
Edwards Sieh Smith & Goodfriend PS  
1109 1st Ave Ste 500  
Seattle, WA 98101-2988

Counsel for Other Parties  
Wanda Stamm (Appearing Pro Se)  
c/o Wanda Inderbitzin  
8218 N.E. 145th Street  
Kenmore, WA 98028

Mark L. Stamm (Appearing Pro Se)  
1127 Chewiliken Valley Road  
Riverside, WA 98849

Sharon L. Harpole (Appearing Pro Se)  
8218 N.E. 145th Street  
Kenmore, WA 98028

Linda K. Weninger (Appearing Pro Se)  
10115 N.E. 192nd Street  
Bothell, WA 98011-2918

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Guardianship of	)	
	)	No. 53334-7-I
LOREN STAMM,	)	
	)	DIVISION ONE
Appellant,	)	
	)	
v.	)	
	)	
GUARDIANSHIP SERVICES OF	)	
SEATTLE,	)	UNPUBLISHED
	)	
Respondent.	)	FILED: November 28, 2005
	)	

COX, C.J. - In this successive appeal arising from a guardianship proceeding, Loren Stamm appeals the awards of guardian fees, attorney fees, and costs to Guardianship Services of Seattle (GSS). Under both a substantial evidence and a de novo review of the challenged factual findings, the record supports them. There was no breach of any fiduciary duty owed by GSS to Stamm, its former ward. The guardianship statute that Stamm challenges is not unconstitutional. The trial court properly exercised its discretion in awarding fees to GSS and its attorneys. We affirm and award fees and costs on appeal to GSS, subject to its compliance with RAP 18.1. Background of this appeal is set forth in this court's prior decision in this case.1

The two-year period of the limited guardianship prior to this court's reversal of the order of incompetency proved to be extremely litigious. Stamm, through his appointed counsel, continually objected to the limited guardian's actions. Stamm alleged gross misconduct on the limited guardian's part and steadfastly objected to the existence of the guardianship itself. The court commissioner who presided below over the matters now on appeal conducted numerous hearings. She made extensive findings of facts, entered nearly two dozen orders, and awarded substantial fees.

So contentious was the relationship between Stamm and GSS that six months into the guardianship, GSS reported to the court that the guardianship was not succeeding. GSS attributed Stamm's on-going dissatisfaction to the influence of Wanda Inderbitzen, who is now his spouse, and his attorney, Margaret Dore. Viewing his marriage to Inderbitzen as a change in Stamm's circumstances that could justify termination, the court commissioner set a hearing on termination of the guardianship and stayed the hearing pending mediation between Stamm and his children. The mediation was unsuccessful.

In January 2004, the court entered an order further limiting the guardianship for a period of four months. The order gave Stamm and his wife nearly full control of the estate and limited GSS's responsibility for Stamm's person to monitoring his medical care. At the end of the trial period, GSS submitted a report recommending termination of the limited guardianship.

Five days later, this court filed an opinion reversing the order of incompetency on grounds not relevant to this appeal and remanding for a new trial.2 Within 10 days of that decision, the court commissioner who presided in this case entered an order terminating the guardianship.

Stamm appeals, setting forth 90 assignments of error in his opening brief.

STANDARD OF REVIEW

Stamm assigns error to a substantial number of factual findings. The parties dispute the applicable standard of review. We need not resolve this dispute in this case. Under either a substantial evidence standard of review or a de novo standard, the record in this case supports the challenged findings of the trial court.

Generally, where the trial court relies on only documentary evidence in reaching its decision, the appellate court is in the same position as the trial court and may review the case de novo.<sup>3</sup> However, where 'competing documentary evidence had to be weighed and conflicts resolved{,}' the substantial evidence standard of review applies.<sup>4</sup> Moreover, 'the trial court below has the benefit of oral argument to clarify conflicts in the record.'<sup>5</sup> On appeal, the time to do so in oral argument is much more limited. Thus, for cases such as this where the trial court had extended opportunities to consider documentary evidence, hear arguments of and question counsel, and clarify conflicts in the record, the trial court is arguably in a better position to assess discrepancies and resolve conflicts.<sup>6</sup>

For purposes of this case, we need not decide whether one standard of review is preferable to the other. Having carefully examined the record and history of this case, we conclude that under either the substantial evidence or de novo standard of review, the trial court's findings are proper.

#### BREACH OF FIDUCIARY DUTY

Stamm argues that GSS breached its fiduciary duties, engaging in a pattern of misconduct including over-billing, violating Stamm's retained rights, and violating its duty to seek out information supporting termination of the guardianship. He also argues that GSS violated its duty of candor, in effect committing perjury, by submitting false statements to the court in an effort to have Stamm's attorney discharged. Stamm contends that, as a result of such breach, this court should require disgorgement of all fees awarded by the trial court. We disagree.

'A fiduciary is a person with a duty to act primarily for the benefit of another.'<sup>7</sup> The guardian of the estate of an incapacitated person owes a fiduciary duty to his ward.<sup>8</sup> Among the fiduciary duties of a guardian is to conserve and protect the estate of the ward and act for the benefit of the ward insofar as the ward's interests can be ascertained.<sup>9</sup> 'A fiduciary relationship is a relationship of trust, which necessarily involves vulnerability for the party reposing trust in another. . . . Because of this, the law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them.'<sup>10</sup> When a fiduciary's acts involve self-dealing or create a conflict of interest, a breach of fiduciary duty has occurred even if it resulted in a net benefit to the beneficiaries.<sup>11</sup>

Here, the independent audit ordered by the court substantiated that there were no financial irregularities that breached any fiduciary duty that GSS owed to Stamm. For each specific irregularity Stamm alleged, there was substantial evidence in the record, including the results of the independent audit, for the trial court's finding that GSS had performed its duties properly.

#### Overbilling

Stamm argues that GSS intentionally 'buried' charges for the court-ordered audit, which GSS was required to pay for in its fee request. He also contends that GSS intentionally put Stamm's bills into collection and then billed him to correct the problems, a process Stamm identifies as 'churning.'

GSS maintains that, to the extent staff charges related to the court-ordered audit were included in a fee request, that inclusion was inadvertent. Though Stamm claims the fees were 'buried' in the billing intentionally, he presents no evidence of misconduct on GSS's part.

Stamm argues that there are multiple examples of 'churning' by GSS. For example, GSS's failing to pay his heating oil bill and other bills and then charging him when he complained the heat was off. GSS presented the trial court with explanations that refuted Stamm's allegations of misconduct. GSS maintained that several missed bills resulted from Stamm's failure to forward the bill to GSS in a timely fashion and the problem with the oil bill resulted from a payment returned for insufficient postage.

While Stamm presents evidence that bills were missed, paid late, or even deliberately unpaid by GSS, Stamm presents no evidence that these mistakes or decisions by GSS amounted to misconduct that could properly be

labeled 'churning.'

GSS did not pay Stamm's cell phone bill which, ultimately went into collection. GSS maintained that the cell phone, while in Stamm's name, was primarily for Inderbitzen's use, Stamm had a residential phone line for his use, and GSS viewed payment of the cell phone bill as inconsistent with the guardianship order. GSS had also petitioned the court for instructions regarding this bill but the court failed to respond and the bill went into collection because, according to GSS, it lacked the authority to pay it.

The court commissioner resolved these disputes, disapproving of GSS's refusal to pay Stamm's cell phone bill, despite acknowledging that GSS had requested instructions from the court 'early on.' The court noted that it was 'troubled' by any bills having gone into collection. However, the court also acknowledged the context within which the administration of the guardianship was occurring - a highly litigious and difficult one. The court did not find that the failure to pay Stamm's bills amounted to 'churning' by GSS. Substantial evidence supports this decision.

While Stamm cites numerous cases supporting the principle that harsh sanctions are appropriate for dishonest conduct, he points to nothing in the record to support the contention that GSS's actions were deliberate or rose to a level that demands sanctions. We need not further address this argument.

#### Violation of Retained Rights

Stamm contends that GSS breached its fiduciary duty to him by violating his retained right to see Wanda Inderbitzen, the woman he eventually married during these proceedings. Stamm points out that GSS was required by the Standards of Practice to employ the 'Substituted Judgment Standard,' and 'do what the ward would want, not what the guardian would want or what a reasonable person would do.'

For support Stamm cites *In re Ingram*.<sup>12</sup> *Ingram*, an incompetent, suffered from severe pulmonary disease and laryngeal cancer. The ward's physicians urged a laryngectomy, which the ward refused, preferring instead to undergo radiation. The ward's guardian petitioned the trial court to order the surgery. At the hearing, the physicians testified that the malignancy was too far advanced for radiation and without the laryngectomy, the ward could die within months. The trial court ordered the surgery, and the ward, through her guardian ad litem, appealed.<sup>13</sup> The supreme court reversed the order, holding that the trial court erroneously applied a 'reasonable person' test. The supreme court explained that the correct test was what *Ingram* would do if she were competent.<sup>14</sup>

*Ingram* does not support Stamm's argument. The relevant Standards of Practice provide:

402.1 The primary standard is the Substituted Judgment Standard. This means that the guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person.

402.2 When the competent preferences of an incapacitated person cannot be ascertained, the guardian is responsible for making decisions which are in the best interests of the incapacitated person. A determination of the best interests of the incapacitated person shall include consideration of the stated preferences of the incapacitated person.<sup>{15}</sup>

As these standards plainly state, the guardian is required to make reasonable efforts to ascertain the ward's preferences. But that does not end the inquiry. If there is a question regarding whether such preferences are appropriate under the circumstances, the guardian is not bound to follow them.

Stamm argues that GSS was 'obligated to facilitate Stamm's relationship with his significant other' and that GSS violated its duty when it 'recommended that she be forcibly removed from the home, with protective orders to prevent further contact.' In its January 2003 Report and Recommendations Regarding the Status of Guardianship, GSS noted that it did not believe that 'the jury finding regarding Mr. Stamm's social contacts was intended as a license for Ms. Inderbitzen to continue to ruin his life. The guardian believes that the {recommendations} are consistent with the jury findings and with the Original Order Appointing Limited Guardian.'

GSS then made two alternative recommendations: either to authorize the guardian to '{D}etermine who may reside on estate property' (including

discretion to deal with Wanda Inderbitzen, then resident in such property) or to 'Dismiss the guardianship.'

In light of the jury's verdict at trial, and the fact that the guardianship was imposed in large part to protect Stamm's person and estate from exploitation, the guardian properly exercised its authority to seek financial contribution from Inderbitzen and to seek a mechanism to protect Stamm's health from her presence. Moreover, Stamm's 'retained right' was not specifically to reside with Inderbitzen. It was the right to make decisions about his social life. But, in the context of the purpose of the limited guardianship and the jury's verdict, GSS's actions did not violate that right. In short, there was no improper action by GSS in this respect.

#### Duty to Seek Termination of the Guardianship

Stamm further argues that GSS violated its duty to seek out information supporting termination of the guardianship. Stamm contends that GSS violated the Certified Professional Guardian Standards of Practice, section 407.1, in not seeking out 'information that will provide a basis for the termination . . . of the guardianship.' Stamm appears to ignore the fact that the heading of section 407 is Change of Circumstances, and the section begins by stating: 'The guardian has an affirmative obligation to be alert to changes in the incapacitated person's condition or circumstances and report to the court when an increase or reduction in the authority of the guardian should be considered.'<sup>16</sup>

Here, Stamm points out that the purpose of the meetings Dore requested with GSS were attempts to 'present GSS with information that would justify termination of the guardianship.'

Stamm's attorney represented to GSS that the guardianship had an adverse affect on Stamm's physical health and that it was financially unsupportable. Moreover, Dore's strategy in a face-to-face meeting was to allow the director of GSS to 'see Stamm's competency for himself.' The record does not support a finding that Stamm's circumstances had changed since the jury verdict imposing the limited guardianship. Nor does Stamm argue that the circumstances that lead to the jury's determination that Stamm was incapacitated had changed. In short, this argument does not provide a basis for challenging the guardian's actions.

Stamm argues that GSS misrepresented itself in its response brief as 'having proactively sought to limit or terminate the guardianship.' This misconstrues GSS's position. In fact, GSS argued that it 'did not interfere with Mr. Stamm's ability to contest the guardianship and, in fact, proactively sought to limit or terminate the guardianship when it proved ineffective.'

#### Duty of Candor

Stamm argues that GSS violated its duty of candor to the tribunal by falsely telling the court that Dore, Stamm's attorney, 'makes no effort at informal problem-solving' in an effort to have Dore discharged. Stamm also maintains that GSS 'appears to also have committed perjury.' We disagree with both contentions.

In its January 27, 2003 Report and Recommendations Regarding Status of Guardianship, GSS proposed two divergent alternatives: (1) to dismiss the guardianship or (2) expand the limited guardian's powers to further limit Inderbitzen's influence over Stamm's person and estate, and dismissal of Dore and the appointment of new counsel. The comment about Dore occurred in the following context:

Compounding the problems discussed above are the actions of Mr. Stamm's counsel, Margaret Dore. Ms. Dore consistently takes whatever complaint that is made by Mr. Stamm or Ms. Inderbitzen at face value. Ms. Dore has stated that she uses Ms. Inderbitzen as a conduit for communicating with Mr. Stamm. Ms. Dore consistently makes little or no inquiry into the validity of the complaints and makes no attempts at informal problem solving. Instead, Ms. Dore prepares highly inflammatory and poorly grounded correspondence and pleadings.{<sup>17</sup>}

The above expression of opinion by GSS, fairly read, does not amount to either a lack of candor or perjury. We need only look at the highly litigious nature of the relationship between the parties in this proceeding to conclude that GSS was entitled to take that view of these proceedings, whether or not that view was accurate. The trial court properly rejected arguments to the contrary.

APPROVAL OF AUDIT

Stamm argues that the court abused its discretion in approving the court-ordered audit of GSS. Specifically, he maintains that neither the auditor nor GSS submitted to the court the underlying data on which the audit relied. He also claims the audit report was excludable as hearsay and the independent auditor utilized an incorrect standard in performing the audit directed by the court. Lastly, he asserts that the court delegated its judicial function by relying on the audit it ordered. None of these arguments is meritorious.

GSS contends that the invited error doctrine precludes Stamm's challenge to the court's order approving the audit because Stamm requested the audit.<sup>18</sup> We need not address this contention. Rather, we exercise our discretion and proceed directly to the arguments.

Stamm's attorney submitted documents to Stamm's CPA, Reed Bettinger. On the basis of the evidence Dore provided to him, Bettinger concluded that there were 'systematic problems' with GSS's accounting practices, including 'frequent and material errors,' and suggestions of 'intentional skimming.'

As a result, the court ordered an independent audit of GSS's books and records, conducted at GSS's expense. The scope of the audit was Stamm's 'investment account and the consolidated operating accounts for all GSS clients as Mr. Stamm's funds are partially held in that account.' The auditor was to address all the concerns raised by Stamm's CPA Reed Bettinger, including the issues of Stamm's unpaid bills, alleged overpayments, balancing of the general ledger with the accounting summary of assets, and GSS's lack of a double entry accounting system. The court ordered the parties to 'attempt to agree on a CPA that can provide this accounting in an expeditious manner, further directing that 'if they cannot agree {they shall} each suggest three CPAs to the court for its consideration.' The court ordered that the CPAs could not have provided past services to either attorney or to GSS.

Subsequently, Stamm's attorney wrote to the commissioner regarding the agreed upon procedures:

I have now investigated how one would actually do an {independent} 'audit' in the circumstances presented. There is apparently no available agency. As a possibility, I contacted a forensic accountant. She seemed eager to do whatever I wanted. This, in turn, made me uncomfortable with the retention of a so-called independent expert. Guardianship Services would presumably be uncomfortable with anyone I would propose and vice versa. With this situation, I suggest that the guardian's proposed interim accounting coupled with direct discovery, may be more appropriate.{19}

At a June 3 hearing to appoint the CPA, GSS submitted the names of three accounting firms to the court. Stamm's attorney proposed no accountants, but rather filed a challenge to the previously agreed upon procedures. Stamm objected because the engagement letter's proposed criteria were to be '{i}n accordance with the measurement criteria used by Guardianship Services of Seattle.' Dore stated that  
If I get audited by the IRS, I would like to have the audit by the Margaret Dore criteria, but, you know, instead it's going to be by the IRS regulations and the Tax Code. . . . And that's what the audit - if we're going to have an audit here, especially of the pooled account, that is what we need to have . . . .{20}

GSS noted that it had 'no objection to that being inserted in the letter so it's clear what the measurement of criteria are.'

The court commissioner resolved these and associated disputes by ordering a full audit rather than following the procedures Stamm had previously agreed to and then later rejected. The court determined that all three firms GSS suggested met 'the court's criteria for independence.' The court selected the firm with the most litigation experience as being 'more able to deal with this audit in terms of forensic consideration.'

Thereafter, the auditor completed the assigned tasks and filed an 'unqualified opinion' (the highest audit opinion) of both Mr. Stamm's account and the pooled accounts maintained by GSS. The CPA concluded that there were neither systematic problems nor evidence of intentional skimming or intentional mistakes, as Bettinger had alleged.<sup>21</sup> The auditor concluded that the mistakes or problems he encountered were 'likely caused by unintentional human error.' Substantial Evidence

Stamm specifically contends on appeal that the court erred in accepting and approving the audit report because the report contained the

auditor's hearsay opinions and because the auditor did not submit the data he relied on in forming those opinions.<sup>22</sup> Nothing cited by Stamm in the record substantiates that either of these objections was made below. 'An issue, theory or argument not presented at trial will not be considered on appeal.'<sup>23</sup>

#### Applicable Standard

Though Stamm maintains that the auditor applied only the standard typically used when auditing a small business, as opposed to the 'highest standard' required by guardianship law, he fails to explain how the two differ. Nor does he cite any case law supporting the view that the accounting firm's standards were inappropriate for purposes of a court-ordered audit. Having failed to cite any authority for this proposition, we assume counsel has found none.<sup>24</sup>

It appears from the record that the accounting firm, in carrying out the court's directive, applied the standards appropriate in its professional field. Moreover, Charles Pratt, the court selected CPA addressed the concerns. He noted that Bettinger seemed 'to suggest that GSS should have 'accounting standards applicable to a bank or trust company, (where) there is zero tolerance.' However, banks and trust companies also make mistakes, many of which are probably caused by unintentional human error.'<sup>25</sup>

Nonetheless, the court, if not the accountant, in considering the auditor's report, clearly applied the 'highest standard' when deciding to approve the report. The court noted that because GSS was a fiduciary, it was responsible for finding and correcting its mistakes. Noting that the 'highest standard' did not mean perfection, it did mean that GSS was held to a higher standard than that of a regular small business. The commissioner indicated that it was exactly because the 'highest standard' applied that GSS was required to conduct and pay for an independent audit. The court did not err in approving the audit report.

Finally, Stamm argues that the court, in ordering the audit to be carried out by an independent auditor suggested by GSS, and in approving the auditor's report, improperly delegated its 'judicial function' to others. This argument is totally without merit.

Here, the court chose an independent auditor to perform the professional task of auditing the books and preparing a report on its audit. Thereafter, the court carefully considered the results of the audit and made an independent determination that GSS was properly handling the subject accounts. The court's assessment of the professional work done by the independent auditor in this case is no more a delegation of judicial duties than consideration of an opinion by an expert testifying in court on special matters.

In short, this argument is totally without merit.

#### CONSTITUTIONALITY OF RCW 11.92.010

Stamm argues that RCW 11.92.120 is unconstitutional because it denies wards their fundamental right to court access. We reject this contention.

Although GSS argues that we should not address this issue, we again choose to reach the arguments.

Stamm contends that his 'right to court access' is violated by the court supervision of guardians required by RCW 11.92.010. Stamm also argues that the trial court is biased on grounds that the court merely accepts recommendations from the guardian, who Stamm characterizes as the ward's 'opposing party.' Neither of these arguments has merit.

In a challenge to the constitutionality of a legislative enactment, the 'statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.'<sup>26</sup> '{N}aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'<sup>27</sup>

First, Stamm relies on *Bounds v. Smith*<sup>28</sup> and *Whitney v. Buckner*<sup>29</sup> for the proposition that there is a constitutional right to court access.<sup>30</sup> Both cases establish that prisoners have a right to access to the courts that is adequate, effective, and meaningful.<sup>31</sup> But neither establishes that individuals' rights to litigate are limitless, as Stamm appears to assert. The law contains many limitations on an individual's right to litigate, including statutes of limitations, statutes of repose, and dismissal where a complaint is deemed frivolous.<sup>32</sup> Here, the trial court patiently considered extensive litigation of matters involving 12 superior court hearings and six interlocutory rulings by this court's Commissioners. Stamm has simply failed to establish the existence of a constitutional

right to unlimited court access provided by the guardian statutes.<sup>33</sup> Likewise, he has failed to show any constitutional violation by the existence or operation of the guardianship statute that he challenges.

#### GUARDIAN FEE AWARD

Stamm argues that because GSS allegedly breached its fiduciary duty, the court erred in awarding any fees to GSS. He maintains that GSS should disgorge all fees as a sanction for the alleged breach. We again disagree. A determination and award of guardianship fees is within the discretion of the trial court.<sup>34</sup> However, as with attorney fees, the trial court must provide an adequate record upon which to review the fee award.<sup>35</sup> The award must also provide findings on the reasonable number of hours and the reasonableness of the hourly fee allowed.

Here, the challenge to payment is based solely on an alleged breach of fiduciary duty that we have held did not occur in this case. Stamm does not otherwise challenge the award with respect to either the reasonableness of the number of hours or the hourly fee. Because we have held there was no breach, and the court adjusted the amount of the fee after applying proper discounts, we reject this claim.

The court properly exercised its discretion in awarding fees to GSS.

#### ATTORNEY FEES

Stamm argues that the trial court abused its discretion by denying his request for attorney fees and in awarding attorney fees to GSS. We disagree.

The statutory basis for fees in this case is RCW 11.96A.150, which states that:

{e}ither the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

The court's award of attorney fees is limited by considerations of the best interests of the estate and the reasonableness of the fee requests. Case law suggests that 'it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate.'<sup>36</sup> Where fees are to be awarded, '{t}he burden of proving the reasonableness of the fees requested is upon the fee applicant.'<sup>37</sup> The reasonableness of a fee award is reviewed for an abuse of discretion.<sup>38</sup>

#### Award of Attorney Fees to GSS

Stamm's primary argument is that counsel for GSS should be denied attorney fees as a sanction for GSS breaching its fiduciary duty. Because there was no breach by GSS or its counsel, and Stamm does not contest either the reasonableness of the number of hours or the billing rate, there is no basis for reversing the trial court's attorney fee award. The trial court made findings that the fee requests were reasonable. Stamm challenges those findings, but makes no argument to indicate how the court abused its discretion in so finding. GSS's attorney submitted his billing records and the court had ample first-hand experience with the activities described in the billing records. The court reduced fee amounts where it found no benefit to the estate.

We hold that the trial court did not abuse its considerable discretion in awarding attorney fees.

#### Denial of Stamm's Attorney Fees

Stamm argues that the court abused its discretion in denying fees to his attorney. We disagree.

The court appointed Margaret Dore to pursue Stamm's appeal of the jury verdict on which the guardianship was based. Her role, in the context of the appeal, was not limited by the court. The court also authorized Dore to file responsive pleadings on Stamm's behalf.

The record supports the trial court's findings that Dore greatly contributed to the litigious nature of the guardianship. The court, in an effort to protect and preserve Stamm's assets, entered several orders limiting Dore's role in the guardianship. It directed her to 'file and serve a Petition for Instructions should she believe it necessary to file a pleading seeking affirmative relief.' It also limited motions for reconsideration to those based on 'new evidence that could not be obtained with due diligence.'

Dore repeatedly ignored the court's orders, driving up the professional fees, and providing no appreciable benefits. In response, in an effort to slow the drain on Stamm's assets, the court further limited Dore's role as Stamm's counsel in his pending appeal and discharged her from acting as Stamm's counsel below. The court found this necessary to prevent further financial harm to a 'threatened,' 'modest estate.' The court found: As evidenced by the attached docket list (12 pages), there have been over 350 documents filed since the guardian was appointed (post-jury trial). Almost immediately after the guardian was appointed, Ms. Dore filed a motion to terminate {the} guardianship, despite there being no change of circumstances since the jury verdict of incapacity. (If Ms. Dore had prevailed, it would have had the novel effect of a Commissioner who did not preside at the jury trial entering a judgment N.O.V. after the fact.) Ms. Dore has been relentless in her attacks on the guardian and the guardianship. . . . Every motion or letter Ms. Dore generates requires a response by the guardian exponentially increasing the costs to the estate.<sup>39</sup>

The court was well within its discretion in denying fees to Dore beyond those the court awarded for work done.

#### Attorney Fees and Sanctions on Appeal

GSS requests attorney fees on appeal pursuant to RCW 11.92.18040 and 11.96A.150.41 In addition, GSS requests sanctions against Stamm's attorney pursuant to RAP 18.9.

Stamm requests attorney fees on appeal on the same basis as his request for attorney fees below - as a sanction for GSS' breach of fiduciary duty.

We deny Stamm's request for fees on appeal. Among the reasons for this decision is that there was no breach of any duty by GSS and Stamm has not benefited his estate by this appeal. We grant fees to GSS, subject to its compliance with the Rules of Appellate Procedure.

GSS also requests sanctions on appeal under RAP 18.9(a). ' 'An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there {is} no reasonable possibility of reversal.' '42 ' '{A}ll doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.' '43

While some of the arguments on appeal are totally without merit, we cannot say they all are. GSS has not shown this appeal was frivolous. We conclude sanctions are not warranted.

#### OTHER MATTERS

Stamm makes other assignments of error that we do not address. They are either moot,<sup>44</sup> abandoned,<sup>45</sup> or otherwise lack merit.<sup>46</sup>

A party abandons assignments of error to findings of fact if it fails to argue them in its brief.<sup>47</sup> It is not the appellate court's function to sort through the record searching for the factual basis of a party's assignments of error.<sup>48</sup>

We affirm the court in all respects.

/s/ Becker, J.

/s/ Cox, C.J. WE CONCUR:  
/s/ Coleman, J.

1 Guardianship of Stamm, 121 Wn. App. 830, 91 P.3d 126 (2004).

2 See Stamm, 121 Wn. App. at 832.

3 In re Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003).

4 Id.

5 Stern v. Singleton, 68 Wn. App. 922, 928, 846 P.2d 1387 (1993).

6 Id. at 929.

7 Cummings v. Guardianship Servs. of Seattle, 128 Wn. App. 742, 755 n.33, 110 P.3d 796 (2005) (citations omitted).

8 In re Guardianship of Eisenberg, 43 Wn. App. 761, 766, 719 P.2d 187 (1986); see also S.H.C. v. Lu, 113 Wn. App. 511, 524, 54 P.3d 174 (2002)

('Whether a legal fiduciary duty exists is a question of law.'). rev. denied, 149 Wn.2d 1011 (2003); Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 798 n.2, 16 P.3d 574 (2001) (Talmadge, J., concurring) (discussing the duties of a fiduciary).

9 RCW 11.92.040(4).

10 Van Noy, 142 Wn.2d at 798.

11 In re Marriage of Petrie, 105 Wn. App. 268, 276, 19 P.3d 443 (2001).

12 102 Wn.2d 827, 689 P.2d 1363 (1984).

13 Id. at 829-32.

14 Id. at 844 (emphasis added).

15 Certified Professional Guardian Standards of Practice, section 402.1, 402.2 (Adopted 2-12-00) (emphasis added).

16 Certified Professional Guardian Standards of Practice, Sec. 407, Changes of Circumstances (emphasis added). The full remaining section reads:

407.1 The guardian shall seek out information that will provide a basis for termination or limitation of the guardianship.

407.2 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall request court action.

407.3 The guardian shall assist the incapacitated person to terminate or limit the guardianship and arrange for independent representation for the incapacitated person when necessary.

407.4 If the guardianship is a limited guardianship, the guardian shall report to the court when there are circumstances in which the incapacitated person appears to require assistance which exceeds the authority of the guardian.

407.5 If the guardianship is of the person only, the guardian shall report to the court when protection of the incapacitated person's estate may be necessary.

407.6 If the guardianship is of the estate only, the guardian shall report to the court when protection of the person may be necessary.

17 (Emphasis added.)

18 The court found that Stamm's counsel 'opposed the very procedure she had initially suggested' regarding selection of the auditor, by refusing to cooperate in the CPA selection process.

19 GSS carried out its interim accounting in addition to the court-ordered audit.

20 Clerk's Papers at 5138.

21 The auditor also spoke with Bettinger by phone regarding his concerns and the documentation, provided by Dore, that Bettinger had relied on.

22 Stamm cites *State v. Nation* for the proposition that admitting the report was reversible error. But *Nation* is inapplicable here. *Nation* held that a lab technician's testimony as to a non-testifying third party's opinions were inadmissible. 110 Wn. App. 651, 666, 41 P.3d 1204 (2002), review denied, 148 Wn.2d 1001 (2003).

23 *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). Accord *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Management*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993) (the court 'will consider only evidence and issues called to the attention of the trial court. The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.'). Stamm's citations to the record do not support the contention that he objected to the report as hearsay. Stamm filed a 'continuing objection to hearsay, speculation and mere allegation' on March 18, 2003. Stamm also points to the August 20, 2003 declaration of CPA Reed Bettinger in which Bettinger opined that Mr. DeJarnatt's report - which is not the audit report ordered and approved by the court, but a separate accounting report conducted for GSS - 'appears to be largely based on hearsay statements as opposed to documents.' Finally, in the September 17, 2003 hearing, the court asked Stamm to address DeJarnatt's explanation of GSS's failure to timely pay Stamm's bills. Stamm responded, 'first of all, it's hearsay . . . .'

24 *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

25 Letter from Charles Pratt, CPA, to Ed Gardner, Clerk's Papers at 3815.

26 *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

27 *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993); *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986); *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting with approval from *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

28 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (constitutional right of access to the courts requires prison authorities to provide adequate law libraries).

29 107 Wn.2d 861, 734 P.2d 485 (1987) (county must accept prisoners' pro se marriage dissolution pleadings submitted by mail).

30 The Washington Constitution does not establish a right to court access, other than the right to open proceedings and speedy trials. Wash. Const. art. 1 sec. 10 ('Justice in all cases shall be administered openly, and

without unnecessary delay.').

31 *Bounds*, 430 U.S. at 828; *Whitney*, 107 Wn.2d at 866.

32 See RCW 4.16.040 (six year statute of limitations for written contracts); RCW 4.16.310 (six year statute of repose for construction defect claims); RAP 18.9(c) (dismissal permitted of frivolous appeal).

33 Under RCW 11.88.120, any person, including the incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a limited guardian.

34 *In re Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966).

35 *Estrada v. McNulty*, 98 Wn. App. 717, 723-24, 988 P.2d 492 (1999).

36 *In re Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991).

37 *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993)

(citing *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)).

38 *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 82 Wn. App. 646, 669, 920 P.2d 192 (1996).

39 *Clerk's Papers* at 3848.

40 RCW 11.92.180 provides in relevant part:

A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian as the court shall deem just and reasonable. . . . Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian or limited guardian. . In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed.

41 RCW 11.96A.150 provides:

(1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This statute {section} shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(9).

42 *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 330, 917 P.2d 100 (1996)).

43 *In re Marriage of Penry*, 119 Wn. App. 799, 804 n.2, 82 P.3d 1231 (2004) (quoting *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)).

44 Order of 8/25/03 (order continuing hearing and granting Stamm Attorney Fees, denying removal of Guardian).

45 For example, Order Regarding American Express Account, entered Sept. 16, 2002. Order Authorizing Liquidation of Washington Federal Savings Bank Stock and Regarding Repairs to the Incapacitated Person's Automobile, entered December 11, 2002.

46 For example, in the Order Approving Report On Audits and Annual Report of the Limited Guardian of Person and Estate and Authorizing Disbursements, Stamm challenges the court's statement of jurisdiction. Jurisdiction, of course, is a legal conclusion, not a factual finding. In any event, there can be no serious dispute that the court below had both subject matter and personal jurisdiction of the parties in this case.

47 *Valley View Industrial Park v. Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987) (citing *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 585 P.2d 71

(1978); *Lassila v. Wenatchee*, 89 Wn.2d 804, 809-10, 576 P.2d 54 (1978);

State v. Wood, 89 Wn.2d 97, 569 P.2d 1148 (1977); Dickson v. United States  
Fid. & Guar. Co., 77 Wn.2d 785, 787, 466 P.2d 515 (1970)).  
48 Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549  
(1992); Accord Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986) (holding  
that where the basis for an assignment of error is neither stated nor  
argued, nor any legal authority cited, the assignment of error is waived).  
>>