

IN THE DISTRICT COURT OF APPEAL
SECOND JUDICIAL DISTRICT
STATE OF FLORIDA

PIERO POLICICHIO,
Trustee,

Appellant,

v.

CASE NO.: 2D13-1585

L.T. NO.: 2011-GA-000760-NC

LUTHERAN SERVICES
FLORIDA, INC.,

Appellee.

ANSWER BRIEF

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF CITATIONSii

STATEMENT OF THE CASE AND THE APPEAL.....1

STATEMENT OF THE FACTS2

SUMMARY OF THE ARGUMENT7

ARGUMENT8

 A. Under an Abuse of Discretion Standard, the Lack of a
 Transcript of the Proceeding Compels Affirmance of the
 Order on Appeal.....8

 B. The Appellant has Failed to Demonstrate that the Award of
 the Lower Court is an Abuse of Discretion and is Not
 Supported by Competent, Substantial Evidence10

 C. The Fee Order is Based on Competent, Substantial Evidence
 and Must be Affirmed11

CONCLUSION14

CERTIFICATES OF SERVICE AND COMPLIANCE.....15

TABLE OF CITATIONS

Cases

<i>Applegate v. Barnett Bank of Tallahassee</i> , 377 So.2d 1150 (Fla. 1979)	10
<i>Canakaris v. Canakaris</i> , 382 So.2d 1197 (Fla. 1980).....	8, 9
<i>Chirino v. Chirino</i> , 710 So.2d 696 (Fla. 2d DCA 1998).....	9-11
<i>Delno v. Market Street Railway Company</i> , 124 F.2d 965 (9th Cir. 1942))	8
<i>Ferguson v. Ferguson</i> , 54 So.3d 553 (Fla. 3d DCA 2011).....	10
<i>Henderson v. Henderson</i> , 905 So.2d 901 (Fla. 2d DCA 2005).....	9
<i>In re Guardianship of Sapp</i> , 868 So.2d 687, 693 (Fla. 2d DCA 2004)	9
<i>In re Guardianship of Shell</i> , 978 So.2d 885, 889 (Fla. 2d DCA 2008).....	13
<i>In re Guardianship of Sitter</i> , 779 So. 2d 346 (Fla. 2d DCA 2000)	8
<i>Thorpe v. Myers</i> , 67 So.3d 338 (Fla. 2d DCA 2011)	8

Statutes

§ 744.108, Fla. Stat. (2012)	<i>passim</i>
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STATEMENT OF THE CASE AND THE APPEAL

Lutheran Services Florida, Inc. (“LSF” or “Appellee”) hereby answers the initial brief filed by Appellant Piero Policichio, as Trustee of the Pasquale Di Ielsi and Frances D. Di Ielsi Revocable Trust dated 11/15/06, as amended (“Appellant or “Policichio”), who appealed the March 12, 2013 Order Authorizing Payment of Compensation and Expenses of Guardian (the “Fee Order”), which was entered pursuant to section 744.108, Florida Statutes, after an evidentiary hearing. Frances D. Di Ielsi, who is not a party to this appeal, will be referred to as “the Ward”.

References to the pages of the record on appeal are designated (R. ____). References to the pages in the Initial Brief are designated (IB ____). References to the pages in LSF’s Appendix are designated (APP ____). The Fee Order on appeal appears in the record as an attachment to Policichio’s Notice of Appeal at R. 46-47, and for ease of reference appears in LSF’s Appendix at APP 1-2. Policichio did not designate to the court reporter present at the hearing to transcribe the hearing and file the transcript of the hearing for this appeal, so no record of the trial proceedings has been presented to this Court.

STATEMENT OF THE FACTS

LSF agrees with Policichio's statement that in its Petition for Order Authorizing Payment of Compensation and Expenses of Guardian (the "Fee Petition"), LSF requested \$19,116.50 in fees (230.60 hours x \$85.00) and \$269.37 in expenses, for a total of \$19,385.87. Other than as stated, LSF disagrees with Policichio's other characterizations about its Fee Petition as factually incorrect.

Policichio claims that LSF filed its Fee Petition on October 23, 2012, which covered the period from July 29, 2011 "when LSF was appointed plenary guardian of the person and property of Ward" through September 13, 2012, subsequent to the Ward's death. (IB 1.) LSF filed a Fee Petition, but the date it was filed was November 1, 2012, and the Fee Petition covered the period of time from March 1, 2011, when LSF was first contacted regarding the need for an Emergency Temporary Guardian for Frances Di Ielsi, through August 23, 2012. LSF was appointed Emergency Temporary Guardian on March 9, 2011. (R 5-7.)

LSF also agrees that an evidentiary hearing on the Fee Petition was held at the trial court on March 12, 2013, after Policichio objected, on December 4, 2012, to an Order dated November 6, 2012 granting LSF's Fee Petition. The trial court proceeded with an evidentiary hearing *de novo*, leaving the burden of proof with

LSF to maintain the reasonableness of its fee request pursuant to section 744.108(8), Fla. Stat. (2012).

At the evidentiary hearing, LSF presented Kathleen Boyle (“Ms. Boyle”), a USF graduate in psychology, who was LSF’s initial case manager for the Ward. She testified that she was an authorized agent of LSF, and was familiar with and was the custodian of the billing records on the Ward’s file. She described the duties of the case manager, and expressed familiarity with the billing practices. Ms. Boyle testified that the billing entries were made contemporaneously by the person performing the work, and that they were entered into a computer on the basis of tenths of an hour. Ms. Boyle testified that billing entries were made in the ordinary course of business, and that it was part of the business of LSF to keep business records of its billable time. In fact, Ms. Boyle had personal knowledge of most of the billing records, up to the time that she was replaced as the Ward’s case manager at the request of Appellant. Ms. Boyle described how the billing statement, attached to the Fee Petition as Exhibit “A”, was generated and indicated she was familiar with the process.

Ms. Boyle identified the Fee Petition and the billing statement, which was admitted into evidence without objection.

Ms. Boyle then went on to explain the billing rate of \$85.00 per hour, and made reference to the Probate & Guardianship Procedures & Legal Issues (Master

List), updated February 17, 2012, a 52-page document that was established by the probate judges in Sarasota County, Florida, to set forth practices and procedures for probate and guardianship cases. The Master List devotes approximately seven pages to fee billing and provides, among other things, that “fees for professional guardians are \$85 per hour if 25% or more of their caseload is certified to be indigent, and \$60 per hour otherwise.” (See Master List excerpt at [APP 7](#).) The Master List goes on to specify:

When an attorney files a petition for an order compensating a professional guardian, and seeks to have the guardian compensated at the increased rate of \$85 per hour, the petition must include language attesting that 25% or more of the guardian’s wards are indigent. A list that sets forth the names of the wards with case numbers, and specifies which cases are presently being handled “pro bono” must also be attached each time. If the list is not attached, the services will be compensated at \$60 per hour.

(See Master List, [APP 7](#).)

LSF is entitled to compensation at the increased hourly rate because more than 25% of LSF’s wards are indigent. Ms. Boyle explained that a list of LSF’s cases was attached to the Fee Petition as Exhibit “B”, showing the cases that LSF served as guardian, and dividing the cases between paying cases and indigent ward cases. Ms. Boyle explained that approximately seventy percent of LSF’s cases involved indigent wards, thereby qualifying LSF for the increased rate of \$85.00 per hour pursuant to the Master List.

Ms. Boyle also testified that she was familiar with Carole Wright, the case worker who took over her duties as the case worker for the Ward in the instant case, and was familiar with her billing procedures and practices. Ms. Boyle testified that the services performed were reasonable and necessary, were actually performed, and that the fees claimed for those services are reasonable. Ms. Boyle was cross-examined by attorney T. Michael Doyle, representing Policichio.

James L. Essenson, Esq., as Counsel for LSF as Guardian, testified that he had incurred three hours at \$250.00 per hour for professional services rendered to LSF. This testimony was received with no objection or cross examination. Ms. Boyle confirmed that LSF was liable for the Essenson Law Firm legal fee of \$750.00 as an expense of administration of the guardianship estate.

Policichio's argument that he was "surprised" by the billing statement because it was received after the Ward's death was explored on cross examination with Ms. Boyle, and was considered by the trial court. Policichio called no witnesses of his own.

At the conclusion of the evidentiary hearing, the Honorable Deno Economou entered the Fee Order on appeal which states:

The Court has examined the file in this proceeding, has conducted an evidentiary hearing, considering the evidence presented regarding the criteria established by Section 744.108(2), Florida Guardianship Law, and heard the arguments of James L. Essenson, counsel for LSF, and T. Michael Doyle, Esq., appearing for Trustee, Piero Policichio. Based on the foregoing, the Court finds that the material allegations of

the petition are true and LSF is entitled to reasonable fees for guardianship services.

([APP 1.](#))

The Fee Order awarded the amount sought for fees and costs by LSF; to wit, \$19,385.870, plus \$170 to LSF for attendance at and preparation for the hearing.

([APP 1-2.](#)) The Fee Order awarded LSF's attorney \$750 for attendance at and preparation for the hearing, under section 744.108(8), Florida Statutes. ([APP 2.](#))

The Fee Order directed Policichio to pay the total of \$20,305.87 within ten days.

(Id.)

SUMMARY OF THE ARGUMENT

The standard of appellate review of orders awarding guardian's fees and attorney's fees is abuse of discretion by the trial court. The abuse of discretion standard of review applicable herein turns on reasonableness. Unless an error of law is apparent on the face of the judgment, failure to provide a transcript of a hearing is fatal to an appeal. The absence of a transcript is particularly fatal to an appellant if the hearing was evidentiary in nature. Since the Fee Order states that it was entered after an evidentiary hearing and based on the evidence presented regarding the criteria established under section 744.108(2) of the Florida Guardianship Law, this Court must affirm the Fee Order under the applicable standard of review.

The Fee Order is based on Florida Statutes 744.108 and the Court heard competent substantial evidence to support the fees to the Guardian. The admissibility of the billing statements was not only established by Ms. Boyle as a records custodian, but she also had actual personal knowledge of the Ward's case and of the billing entries related thereto. Appellant presented no witnesses and offered no testimony. The right to fees was proven by competent evidence adduced at trial, and Appellant has demonstrated no grounds for reversible judicial error. No abuse of discretion has been demonstrated by the Appellant.

ARGUMENT

A. Under an Abuse of Discretion Standard, the Lack of a Transcript of the Proceeding Compels Affirmance of the Order on Appeal.

Appellate review of orders awarding guardian's fees and attorney's fees is for abuse of discretion. *Thorpe v. Myers*, 67 So.3d 338, 341 (Fla. 2d DCA 2011) (citing to *In re Guardianship of Sitter*, 779 So.2d 346, 348 (Fla. 2d DCA 2000)). As this Court has stated, “[d]iscretionary judicial acts are subject to the test of reasonableness; i.e., they must be supported by logic and justification for the result, founded on substantial competent evidence.” See *In re Guardianship of Sitter*, 779 So.2d 346, 348 (Fla. 2d DCA 2000) (citing to *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980)).

The *Canakaris* Court stated the following with respect to a judge's discretionary power:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris at 1203 (quoting *Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942)).

That discretionary acts must be supported by logic and justification and founded on competent, substantial evidence is just another way of stating that

discretionary acts must be reasonable. *In re Guardianship of Sapp*, 868 So. 2d 687, 693 (Fla. 2d DCA 2004). Accordingly, unless the lower court's determinations are arbitrary, fanciful, or unreasonable, the lower court's rulings must be affirmed. *Canakaris*, 382 So. 2d at 1203.

In the instant appeal, the Appellant's sole argument against the Fee Order is that the lower court did not have enough evidence to support its order. (IB 6, 8, 10.) However, the Appellant has not provided this Court with any of the evidence adduced below. The Appellant did not direct to Clerk to include in the Record on appeal the sixty-two page Petition for Order Authorizing Payment of Compensation and Expenses of Guardian ("Fee Petition"), which was the petition that resulted in the Fee Order on appeal. Appellant also did not direct the Clerk to include the sixty-four page Evidence Record from the hearing which resulted in the Fee Order on appeal. Most significantly, Appellant failed to designate to the court reporter present at the hearing to transcribe the hearing and file the transcript of the hearing for this appeal.

Unless an error of law is apparent on the face of the judgment, failure to provide a transcript of a hearing is fatal to an appeal. *Henderson v. Henderson*, 905 So.2d 901, 903 (Fla. 2d DCA 2005). See also *Chirino v. Chirino*, 710 So.2d 696 (Fla. 2d DCA 1998).

Likewise, without knowing the factual context that a record of proceedings provides, an appellate court cannot “reasonably conclude that the trial judge so misconceived the law as to require reversal.” *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla. 1979). The absence of a transcript makes it impossible to determine if the lower court abused its discretion in awarding fees to LSF.

The absence of a transcript is particularly fatal to an appellant if the hearing was evidentiary in nature. *Ferguson v. Ferguson*, 54 So.3d 553, 556 (Fla. 3d DCA 2011). When an appeal involves underlying issues of fact, without a record of the proceedings, a court cannot properly resolve such issues so as to conclude that the trial court’s judgment is not supported by the evidence. Because the Fee Order does not on its face contain a reversible error (and Policichio has not argued that it does), this Court must therefore affirm the Fee Order. *Chirino*, 710 So.2d at 697.

B. The Appellant has Failed to Demonstrate that the Award of the Lower Court is an Abuse of Discretion and is Not Supported by Competent, Substantial Evidence.

In his Initial Brief, Policichio mischaracterized the witness, Kathleen Boyle, her role within LSF, her qualifications, and her knowledge of the services performed for Ward and of the billing practices of LSF. Moreover, Policichio omitted any reference about the documents admitted into evidence. Fatally,

Appellant has chosen to exclude from the record the transcript, the evidence record and LSF's Fee Petition, providing this court with no basis upon which to ascertain the sufficiency or competency of the evidence adduced at the hearing. LSF incorporates the legal argument from subsection (A) above.

The decision of the Lower Court after an evidentiary hearing comes to this court clothed in a presumption of correctness, and the burden is on the appellant to demonstrate reversible error. *Chirino v. Chirino*, 710 So.2d 696, 697 (Fla. 2d DCA 1998). Policichio has failed to carry that burden and, thus, the Fee Order must be affirmed.

C. The Fee Order is Based on Competent, Substantial Evidence and Must Be Affirmed.

Section 744.108 governs fees in guardianship proceedings. Subsection 744.108(1) identifies the class of persons entitled to compensation under section 744.108: guardians, attorneys for the guardians, and attorneys for the ward, provided that the attorneys rendered services to the ward or to the guardian on the ward's behalf. Subsection 744.108(2) provides the criteria for the court to consider when determining fees for an attorney or a guardian. Finally, section 744.108(8) provides that when proceedings are initiated to determine and review fees under subsection (2) (that is, for a guardian or an attorney), the costs, including the guardian's attorney's fees, shall be determined by the court and paid for from the guardianship estate.

The criteria set forth in 744.108(2) are as follows:

- (a) The time and labor required;
- (b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;
- (c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;
- (d) The fee customarily charged in the locality for similar services;
- (e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
- (f) The results obtained;
- (g) The time limits imposed by the circumstances;
- (h) The nature and length of the relationship with the incapacitated person; and
- (i) The experience, reputation, diligence, and ability of the person performing the service.

The Fee Order states that the Lower Court examined the file in the proceeding. As the record indicates, Policichio, in his individual capacity filed the Petition to appoint LSF as plenary guardian for the Ward. (R. 1-3.) LSF was appointed Emergency Temporary Guardian on March 9, 2011. (R. 5-6.) The Order appointing LSF as Emergency Temporary Guardian provided that the Ward may remain in her home as long as reasonably necessary. (Id. at 6.) The authority of LSF as Emergency Temporary Guardian was extended on June 3, 2011. (R. 10-11.)

On July 29, 2011, Policichio, as Petitioner in his individual capacity, through his attorney, entered into a Stipulation with the Ward's court-appointed counsel, regarding the hearing on incapacity and appointment of guardian. (R. 15-16.) On that same date, LSF was appointed Plenary Guardian of the Person and Property, and the Ward was adjudicated totally incapacitated. (R. 14.) The Order Appointing Guardian of Person and Property again specifies that the Ward may remain in her home as long as reasonably necessary. (Id.) As LSF's petition for discharge indicates, the Ward died on August 11, 2012. (R. 24.)

The Fee Order also states that the Lower Court considered the evidence presented regarding the criteria established by Section 744.108(2), Florida Guardianship Law.

Finally, as detailed in the fact section of this Answer Brief, LSF carried its burden "to establish through appropriate proof that the services claimed were actually performed and that the fees claimed for those services are reasonable." *In re Guardianship of Shell*, 978 So.2d 885, 889 (Fla. 2d DCA 2008).

Accordingly, the Fee Order was based on competent, substantial evidence and should be affirmed on appeal.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that this Court conclude that the Lower Court neither erred nor abused its discretion when it granted the March 12, 2013 Order Authorizing Payment of Compensation and Expenses of Guardian. The March 12, 2013 Order Authorizing Payment of Compensation and Expenses of Guardian should be affirmed.

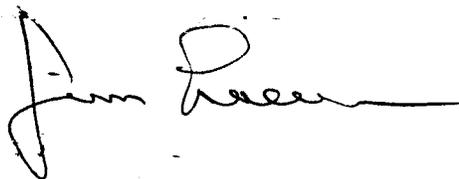
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 19th, 2013, the foregoing document was electronically filed with the Second District Court of Appeal using the Florida Courts E-Filing Portal and served on all counsel of record via the Portal, which constitutes compliance with service requirements of Fla. R. Jud. Admin 2.516, pursuant to AOSC13-49.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2).

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