**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

IN RE: THE GUARDIANSHIP OF **Case No.: 2004 GA 007565 NC**

EVELYN P. SYPRETT.

Ward.

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ORDER GRANTING THE ESSENSON FIRM'S PETITIONS FOR ATTORNEY'S FEES, AND DENYING THE GUARDIAN'S MOTIONS FOR ATTORNEYS' FEES

This Court conducted an evidentiary hearing that lasted many hours over the course of three different dates. On December 11, 2006, January 11, 2007, and January 12, 2007, multiple attorneys were involved in a highly contested dispute as to attorney fee issues of entitlement, amount, and related legal issues. Testimony, including experts, revealed disagreement as to most issues.

Given the circumstances and the law, there is no way for this Court to "split the baby," and render a lawful decision that would be satisfactory to both parties. It is extremely unfortunate that the issues had to be extensively and publicly litigated. It is recognized that strong emotions and beliefs exist as to all those involved.

A review of the proposed orders of the Essenson Firm and Mr. Syprett reveal that, under the existing facts, it is mandated that the Essenson Firm prevail.

This Court cannot find any legal or significant factual error in the Essenson Firm's proposed Order. Although Mr. Syprett's proposed Order includes much correct information, the ultimate conclusion reached is not supported by the law or the record.

Much of this case revolves around the mediation process and a Settlement Agreement. Although this Court believes that the referrals to mediation were appropriate at the time entered, based upon the apparent status of the case as it appeared to the Court,

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the Court has already noted that, in hindsight, it turned out to have not been helpful given the entrenched opinion of Mr. Syprett. Despite the reasons put forth as to mediation opposition, it is of interest that this case essentially began with the parties successfully mediating and reaching an agreement. Although the Court's precise analysis as to ordering mediation is not recalled, it is probable that the prior success of the parties in resolving a difficult issue played a role in the Court believing that the family should continue to attempt to mediate disputes as opposed to litigating them.

The Court agrees with the analysis of the concept of mediation and the judicial process contained in Litigation Under Florida Probate Code, The Florida Bar Fifth Edition. Section 3.49, indicates

> "The success of mediation...should not be ignored. Many adversary...matters could be resolved through mediation. Mediation has the potential to permit the parties to agree on compromises and solutions that would not be available in a judgment. Face-to-face meetings of the adversaries in mediation may overcome the bitterness and antagonism that otherwise pushes an adversary proceeding to trial. The procedure is generally overlooked, but definitely could be a benefit." (E.A.)

The important "Settlement" signed by the parties on February 9, 2005, contains three pertinent issues. As this Court has already stated, the Plan was well written, fair, and reasonable; however, there was also a reasonable valid basis as to each objection.

MEDICAL/MENTAL CARE

Settlement -- "...Mrs. Syprett agrees to an assessment by Dr. Randy Otto who will make a recommendation...regarding the level of home care. Mr. Syprett's decision will be based upon the recommendations of Dr. Otto."

Plan – The Plan refers to the Settlement and indicates that it is in accordance with the agreement. The Plan discusses Dr. Otto's recommendation that there be a psychiatric referral, and that the re-initiation of anti-psychotic medications be considered. The Plan indicates that Mr. Syprett had located a psychiatrist who would evaluate and, if appropriate, prescribe medication that would be administered if Mrs. Syprett would agree to take it. The Settlement did not address the issues of psychiatric evaluation or medication. It seemed to indicate that the assessment by Dr. Otto was primarily as to the level of home care. The Plan also did not refer to Dr. McClure.

Objection -- The Objection simply noted that Mrs. Syprett objected that the language of the Plan, as worded, could be interpreted to suggest that she agreed to a psychiatric evaluation in the Settlement. She had not. She also objected to Dr. McClure. Her objection was not unreasonable.

The language of the Plan could have been easily amended to clarify that, although Mrs. Syprett had not agreed to this in the Settlement, Mr. Syprett was proceeding as reflected in the Plan. It is quite possible that her paranoia caused her to amplify the importance of the language disagreement. Clarifying the wording of the plan may have been beneficial to her state of mind.

LEVEL OF HOME CARE

Settlement – The Settlement reflected that, for a period of one month, Mrs. Syprett would have daily caregivers present for two hours in the morning and two hours in the afternoon. It was agreed that, at the end of one month, there would

be an assessment by Dr. Otto to make a recommendation regarding the level of home care needed at that time. Mr. Syprett's decision as to that issue was to be based upon the recommendations.

Plan – Mr. Syprett's Plan was to provide a caregiver approximately three days a week for approximately four hours each day. The Plan referred to Dr. Otto's opinion that it would be appropriate for Mrs. Syprett to have a caregiver approximately four days a week for "brief check-in visits." The Plan indicated that, despite Dr. Otto's recommendation as to brief visits, Mr. Syprett was planning to have a caregiver in the home two to four times per week. The length of each visit was not expressed.

Objection -- Mrs. Syprett's objection was simply that she preferred the level of home care recommended by Dr. Otto. That was not an unreasonable objection.

DRIVING EXAM

Settlement -- The Settlement indicated that Mrs. Syprett would retain the right to drive if she successfully completes a driving examination at Health South. No time period was referenced as having been agreed.

Plan -- The Plan acknowledged the agreement, but noted that every examining committee member had indicated that the right to drive should be removed. The Plan indicated that, on March 2, 2005, Mrs. Syprett presented herself at Health South for a comprehensive driving evaluation, and that the report prepared

indicated that she should refrain from driving. The Plan reflects that Mrs. Syprett's guardian at the time, the guardian's attorney, and the attorney for Mrs. Syprett, stipulated that the Court should enter an Order authorizing her to take the driving examination again, which was to occur within 30 days of the Order. The Plan reflected that, based upon the results of the testing, the Court would still consider whether or not the right to drive should be retained or removed. (The Court notes that passing a Health South driving examination does not automatically equate to a Court approving actual driving on the highways, as the Court is also required to factor in the safety of the general public.) The Plan notes that Mr. Syprett would not allow the testing to occur again without further Order, but that, if the Court disagreed with that decision, Mr. Syprett would petition the Court for the appropriate Orders.

Objection -- The Objection points out that, through no fault of Mrs. Syprett, the Department of Motor Vehicles had erroneously suspended her driving privileges. This prevented her from taking the exam within the timeframes later set forth. (The Court notes that no one realized that her driving privilege had been erroneously revoked when the timeframes were instituted.) The negotiated right that was to be retained conditionally was removed without the opportunity to take the stipulated second exam because of the inability to have the Department of Motor Vehicles' erroneous revocation set aside. That objection was not unreasonable.

It is important that the Essenson Firm took over Mrs. Syprett's representation well

after the Settlement. Attorney Barbara Welch was simply attempting to have the Settlement issues addressed, and comply with Court Orders. She proceeded in good faith, and any reasonable actions that she took before and after the appointment and discharge would have been approved. By local custom, Orders approving Plans are entered quickly. Good faith objections should be heard.

A position has understandably been taken by Mr. Syprett that Mrs. Syprett's diagnosed paranoia/delusional thinking is important in the analysis of her situation. Reasonable people can differ as to how that condition should be addressed in conjunction with the law. The parties have discussed the use of the phrase "agree to disagree." It is reasonable to suggest that it could have been conducive to Mrs. Syprett's well-being to have re-worded some language in the Plan to make it clear that she did not agree in the Settlement document to the concept of a psychiatric evaluation and anti-psychotic medication; that she be allowed to retake the driving exam; and that her level of home care include persons "visiting" with her in that capacity more often, but for shorter time periods consistent with Dr. Otto's recommendation (which corroborates the reasonableness of her preference).

This Court has no doubt but that Mr. Syprett has nothing but Mrs. Syprett's best interest at heart, and proceeds accordingly. There is no clear answer to this Court as to how to best handle Mrs. Syprett's paranoia/delusions, but the Essenson Firm's handling of their legal obligations was appropriate.

F.S. 744.3215(1)(f) directs that a guardian is to honor a ward's expressed wishes and preferences if the requests are reasonable. This is a legal mandate that all guardians must follow, even if the guardian has a different, but reasonable, opinion. The guardian is in control of major aspects of a ward's life, but must defer to preferences of a ward that are

reasonable. Clearly, if a ward's preferences would be detrimental in some fashion, then it would not be reasonable.

If arguable reasonable wishes of a ward are not honored, the ward must have access to the Court through an attorney to seek a remedy or the right to have reasonable preferences honored and access to the Court would be hollow.

The Court has closely reviewed all of the Essenson Firm fee billings, and finds that the hours expended and rate charged are reasonable. Indeed, the firm could have requested more fees based upon the many entries of time expended where no fee was charged. Attorney Welch expended time in a pro bono capacity. Some of the time charged could arguably be classified as quasi-guardian activities, but the conversations, etc., appear to have been solicited by Mrs. Syprett. It is fair to assume that Attorney Welch would not know exactly what Mrs. Syprett wished to discuss until the conversation had taken place. Attorney Welch could have been acting to the detriment of Mrs. Syprett, due to her paranoia, had she not honored the wish to consult.

I. BACKGROUND

A petition to determine incapacity was filed by Jim Syprett regarding his mother, Evelyn Syprett on or about August 2, 2004. Mediation was conducted. The parties reached a written settlement, which was signed on February 9, 2005. An order was entered on February 11, 2005, approving the Settlement, and ordering the parties to comply with its terms. On the same date, Mrs. Syprett was adjudicated incapacitated, and the Order Determining Limited Capacity, which attached the Settlement and incorporated the terms therein, was entered. Kay Kibbey was appointed plenary guardian of Mrs. Syprett's property, and limited guardian of her person.

On or about July 12, 2005, Mrs. Kibbey filed the Initial Guardianship Plan of the Guardian of the Person (the "Initial Kibbey Plan"). The Initial Kibbey Plan required continued consultation and treatment of Mrs. Syprett by Dr. Kaplan "pursuant to" the Settlement. On or about August 11, 2005, Attorney Edwin Boyer, on behalf of Mrs. Syprett, filed an objection to the Initial Kibbey Plan on the basis that the Settlement did not provide for such consultation and treatment by a mental health professional. The thrust of this objection is essentially the same as Attorney Welch's objection to language regarding psychiatric issues.

Attorney Boyer developed a conflict, and Mrs. Syprett, through her minister, contacted the Essenson Law Firm. After the initial consultation, the Essenson Firm moved to be appointed. A hearing was held on October 31, 2005, at which time the Court entered an order appointing the Essenson Firm.

Also at the October 31, 2005 hearing, Attorney Robert Scheb presented a "Petition for Order Authorizing Ward to Take Driving Examination" agreed to by Ms. Kibbey. The Court entered successive orders on October 31, 2005 and November 8, 2005, regarding Mrs. Syprett's right to take the driving test.

On or about December 14, 2005, Mr. Syprett succeeded Ms. Kibbey as guardian. On or about February 13, 2006, Mr. Syprett filed his Initial Plan. On or about March 15, 2006, Mrs. Syprett filed her objections through Attorney Welch. The parties were ordered to mediate the objections, but mediation never occurred. Mrs. Syprett was hospitalized on or about June 19, 2006. A hearing was held on June 26, 2006, at which time the Court overruled the objections and discharged Attorney Welch. The objections were overruled because Mrs. Syprett's deterioration essentially rendered them moot.

II.
FEE ISSUES

The Essenson Firm filed two petitions seeking attorney's fees for services rendered pursuant to §744.108, Fla. Stat. (2006). The first petition, filed on or about January 9, 2006, seeks fees and costs in the amount of $3,797.59 for services rendered for the period from September 6, 2005 to January 6, 2006. The second Essenson petition, filed on or about October 24, 2006, seeks fees and costs in the amount of $6,675.34 for the period from January 11, 2006 to August 25, 2006.

Kimberly Bald, the attorney retained by Mr. Syprett to handle litigation in the guardianship, filed a Motion for Attorney's Fees and an Amended Motion for Attorney's Fees, on July 24, 2006, and December 4, 2006, respectively, seeking fees as a sanction against Attorney Welch and the Essenson Firm under § 744.369(7), Fla. Stat. (2006).

The Court must first determine the issue of entitlement to fees and, if there is entitlement, the amount of fees.

A. ENTITLEMENT.

Section 744.108(1), Fla. Stat. (2006) states as follows:

> "A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward". (Emphasis added.)

Because the fees of the attorney for the guardian are also paid out of the guardianship estate, the reference to "on the ward's behalf" in the statute refers to services rendered by the attorney for the guardian, not to services rendered by the Ward's attorney, who renders services directly to the Ward. The statute also provides for reimbursement of costs incurred "on behalf of the ward". Accordingly, § 744.108 (1) provides that a Ward's

attorney is entitled to reasonable fees for services rendered to the Ward, as well as reimbursement for costs incurred on behalf of the Ward.

The word "benefit" does not appear in § 744.108, Fla. Stat. (2006). While the "results obtained" are one of nine factors the Court may consider in setting an amount (see § 744.108(2), Fla. Stat. (2006)), "benefit" is not an element of entitlement. See also Edward A. Shipe, "Fees and Other Costs in Guardianship Proceedings", Florida Guardianship Practice, § 3.19 (5th ed. 2005)(citing to Judge Villanti's specially concurring opinion in King v. Fergeson, Skipper, Shaw, Keyser, Baron, & Tirabassi, P.A., 862 So.2d 873 (Fla. 2d DCA 2003)).

In In Re: Thelma King/Essenson v. Lutheran Services Florida, Inc., 862 So.2d 869 (Fla. 2d DCA 2003), Attorney Essenson was the court-appointed attorney for the ward. Following a bench trial adjudicating the ward incapacitated and appointing Lutheran Services Florida, Inc., as her guardian, Attorney Essenson was appointed to prosecute an appeal. The trial court decision was affirmed per curiam by the Second District Court of Appeal. When Attorney Essenson applied for fees for prosecuting the appeal, the Guardian argued that there was no possible benefit to the ward, and that the prosecution of the appeal was not in the ward's best interests. In that case, the trial court agreed with the Guardian, finding that the appeal of the determination of incapacity and appointment of guardian were not in the ward's best interests.

The Second District Court of Appeal reversed, finding that if Attorney Essenson did not exceed the scope of his employment as the ward's counsel for the appeal, he was entitled to a fee under § 744.108(1), Fla. Stat. (2003). The case reaffirmed the statutory right of an incapacitated person to have access to the courts and to counsel (§ 744.3215(1) (k) & (l)), and established that these rights are due process rights of constitutional

dimension.

In the instant case, the Essenson Firm obtained an order appointing the firm to represent the ward in connection with "all pending and potential issues in this guardianship case." This order was obtained after notice and an opportunity for the Court to hear the objections. Because the issues of both the Driving Exam Petition and the Objection to the Initial Kibbey Plan filed by Attorney Boyer already existed, the Court entered the broader order to avoid unnecessary pleadings and hearings if related issues arose. (In addition, the adjudication of incapacity itself was the product of the Settlement, which rendered the case somewhat atypical.)

The In Re: Thelma King case is now well-settled law, and is discussed in Chapter 3 of the Florida Guardianship Practice, in an article entitled "Fees and other Costs in Guardianship Proceedings". See Edward A. Shipe, "Fees and Other Costs in Guardianship Proceedings", Florida Guardianship Practice, § 3.14 et. seq. (5th ed. 2005). Even if this Court were to agree with Mr. Syprett's contention that there was no benefit to Mrs. Syprett, and that the Driving Exam Petition and the Objections were not in Mrs. Syprett's best interests, the Essenson Firm would still be entitled to the determination of a reasonable fee under § 744.108(2), Fla. Stat. (2006).

B. THE GUARDIAN'S MOTIONS FOR ATTORNEYS' FEES

Mr. Syprett argues that he is entitled to an award of fees against the Essenson Firm under §744.369(7), Fla. Stat. (2006), which states the following:

> If an objection has been filed to a report, the court shall set the matter for hearing and shall conduct the hearing within 30 days after the filing of the objection. After the hearing, the court shall enter a written order either approving, or ordering modifications to, the report. If an objection is found to be without merit, the court may assess costs and attorney's fees against the person who made the objection. (emphasis added).

Mr. Syprett argues that the generic statutory definition of the word "person" under § 1.01(3), Fla. Stat. (2006) includes the word "firms" and, therefore, the Court may award attorney's fees in his favor and against the Essenson Law Firm.

Mr. Syprett's legal argument is not supported by applicable law.

i. First, the Court must give a statutory term its plain and ordinary meaning. Critical Intervention Services, Inc. v. City of Clearwater, 908 So.2d 1195, 1196 (Fla. 2d DCA 2005); United Auto. Ins. Co. v. Viles, 726 So.2d 320, 321 (Fla. 3d DCA 1998).

ii. Second, a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. Psychiatric Institute of Delray, Inc. v. Keel, 717 So.2d 1042, 1043 (Fla. 4th DCA 1998). See also McKendry v. State of Florida, 641 So.2d 45, 46 (Fla. 1994).

iii. Third, under the doctrine of expressio unius est exclusio alterius, the expression of one thing is the exclusion of the other. St. Johns v. Coisman, 799 So.2d 1110, 1113, n.3, (Fla. 5th DCA 2001). See also Young v. Progressive Southeastern Ins. Co., 753 So.2d 80, 85 (Fla. 2000). That is, when a law expressly describes a situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. St. Johns v. Coisman, 799 So.2d 1110, 1113, n.3, (Fla. 5th DCA 2001).

Although the definitions in § 1.01, Fla. Stat. (2006) are generally incorporated into the guardianship rules by rule 5.015 of the Florida Probate Rules, these definitions are applicable to the Florida Probate Rules, "unless otherwise defined in these rules." See Fla.

Prob. R. 5.015. Section 744.1025, Fla. Stat. (2006) provides that definitions contained in the Florida Probate Code shall be applicable to the Florida Guardianship Law, "unless the context requires otherwise, insofar as such definitions do not conflict with definitions contained in this law". § 744.1025, Fla. Stat. (2006). § 731.201, Fla. Stat. (2006), provides that the general definitions contained in that section apply to Chapter 744, "[s]ubject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires . . .". § 731.201, Fla. Stat. (2006).

Fla. Prob. R. 5.700 identifies who has standing to object to a guardianship report, and states that the "ward, or any other interested person," may file an objection to any part of a guardianship report. Fla. Prob. R. 5.700(a). Section 731.201 defines "interested person" in subsection (21) as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." See also Hayes v. Guardianship of Thompson, 31 Fla. L. Weekly S763, 2006 WL 3228916, *6-7 (Fla. November 9, 2006)(observing that the term "interested person" under Fla. Prob. R. 5.700(a) is defined under § 731.201(21)). Accordingly, an interested "person" could theoretically be a corporation or a "firm", if the court so determines their threshold standing under § 731.201(21) as an "interested person". (For example, a charity which is a residuary beneficiary in the ward's will, and operates in a corporate form, could be an interested "person" in a guardianship proceeding because they might reasonably be expected to be affected by particular proceedings involved in the guardianship, such as a final accounting and petition for discharge following the death of the ward, for example, or regarding a fee petition. See Hayes v. Guardianship of Thompson, 31 Fla. L. Weekly S763, 2006 WL 3228916, *6-7 (Fla. November 9, 2006).)

Mr. Sypret's use of the definition of "person" from § 1.01 to include "firm" in order to

engraft "attorney" or "law firm" into the term "person" in § 744.369(7) violates the above rules of statutory construction. Statutes authorizing an award of attorney's fees are in derogation of the common law, and therefore must be strictly construed. Glover v. School Bd. of Hillsborough County, 462 So.2d 116, 117 (Fla. 2d DCA 1985). Statutes and common law awarding fees against lawyers representing clients are subject to even more scrutiny.

First, the plain and ordinary meaning of the phrase "person who made the objection" would refer to the party who made the objection, not the attorney for that party. Under Fla. Prob. R. 5.700(a), only the Ward or an interested person has standing to make an objection. In the instant case, Mrs. Syprett is the "person" or party who objected to the guardianship Plan. In the Florida Statutes, attorneys-at-law are not referred to generically, but are specifically designated as "attorneys" or words of similar import.

Second, the probate rules and statutes make it clear that § 731.201(21)) defines "interested person" as used in Fla. Prob. R. 5.700(a). See also Hayes v. Guardianship of Thompson, 31 Fla. L. Weekly S763, 2006 WL 3228916, *6-7 (Fla. November 9, 2006). Accordingly, the definition of "person" under § 1.01, Fla. Stat. (2006) does not apply to § 744.369(7). Fla. Prob. R. 5.015 makes it clear that the definitions in § 1.01 apply only to the probate rules, not the statutes. Statutory construction dictates that the more specific definition of "interested person", found here in § 731.201(21), Fla. Stat. (2006), controls over the more general definition, found in §1.01, because the context so requires.

Section 744.369(7) does not state that the court may award attorney's fees against the ward's court-appointed attorney for following a ward's request to object to a guardianship Plan. Since § 744.369(7) refers to a "person" and omits any reference to "attorney" (or a word of similar import), the doctrine of expressio unius est exclusio alterius

requires the conclusion that § 744.369(7) permits an assessment of fees and costs against a party, not sanctions against that party's attorney.

In order to sanction an attorney, or award attorney's fees against an attorney, there is a specific statutory enactment, § 57.105, Fla. Stat. (2006), which is the definitive method of obtaining attorney's fees against a lawyer for taking frivolous actions in a lawsuit. The only other way that an attorney representing a party in a proceeding may be sanctioned for legal fees under common law is if an attorney fails to comply with orders of the court, Ferguson v. Ferguson, 504 So. 2d 541, 542 (Fla. 1st DCA 1987), or for bad faith and egregious conduct. Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998). See also Moakley v. Smallwood, 826 So. 2d 221, 226 (Fla. 2002); James C. Hauser, Attorney's Fees in Florida, 2d ed., §§ 6.06 and 9.05 (2006). The Court notes that there are no reported cases where a court-appointed attorney for the ward has ever been sanctioned for attorney's fees under § 744.369(7), and no treatise or authority has been presented to the Court that suggests that this statute should be interpreted in such a manner.

Accordingly, the argument that the term "against the person who made the objection" includes the court-appointed attorney for the Ward, because the generic term "person" under § 1.01(3) may include a "firm", and an attorney may practice in a "firm", or utilize a fictitious name that includes the term "firm", is not supported by existing cases, rules, statutes, or other authorities. Florida statutes that refer to attorneys-at-law use the word "attorney", not firm, partnership, professional corporation or other generic nomenclature. In this case, Mrs. Syprett was the legal "person" who made the objection, not her counsel.

Trial courts are without authority to legislate, State v. Wershow, 343 So.2d 605, 607 (Fla.1977)(citing to, inter alia, Art. II, § 3, Fla. Const.). Section 744.369(7) Fla. Stat. (2006)

does not grant the court the authority to award attorney's fees against a court-appointed attorney for the Ward. Accordingly, Mr. Syprett's Motion for Attorney's Fees and Amended Motion for Attorney's Fees must be denied, as he is not entitled to fees from Attorney Welch, or the Essenson Firm, as a matter of law.

C. AMOUNT

1. FIRST ESSENSON PETITION

The First Essenson Petition predates the objection to the Initial Syprett Plan. Mr. Syprett seems to object only to the billings relating to the Driving Exam Petition.

Sandra F. Diamond, an expert witness for Mr. Syprett, wrote the chapter entitled "Role of the Attorney in Guardianship Proceedings", which appears in the publication of the Florida Bar known as the Florida Guardianship Practice, (5th ed. 2005). In Section 25.12 of that article, entitled "Attorneys' Duty To Represent Client's Wishes", Diamond stated the following about the role of the Ward's attorney:

> Generally, the attorney's responsibility in representing a client is to provide the client with an informed understanding of his or her legal rights and obligations and to act as an advocate to assert the client's position. See Preamble to Rules Regulating The Florida Bar, Chapter 4. The attorney must abide by a client's decisions (to the extent those decisions do not conflict with other rules of ethics). Rule 4-1.2.

Mrs. Diamond acknowledged that this is the standard for counsel for the ward. Attorney James Knowles, another expert witness for Mr. Syprett, agreed that this is the appropriate standard for counsel for the ward. Attorney Theodore Gollnick, an expert witness for the Essenson Firm, indicated that it was appropriate, if not required, for Attorney Welch to follow through on the Driving Exam Orders, which granted Mrs. Syprett an opportunity to take the driving exam.

Lawyers who willfully or negligently fail to comply with court orders risk the imposition of sanctions, see e.g. Hernando County School Bd. v. Nazar, 920 So.2d 794 (Fla. 5th DCA 2006), or the initiation of disciplinary proceedings. See e.g. The Florida Bar v. Gersten, 707 So.2d 711, 713-14 (Fla. 1998); The Florida Bar v. Mims, 501 So.2d 596, 597 (Fla. 1987). Whether Mrs. Syprett was able to drive or not, or pass the tests or not, is not the issue. Attorney Welch had a duty to advocate for Mrs. Syprett, and to follow the intent of the order of the Court to the extent practicable. The fact that Mrs. Syprett did not take the second test does not diminish the role of Attorney Welch in assisting with her request to have the opportunity to do so.

No witnesses were presented who indicated that the hourly rate ($200.00 per hour) for Attorney Welch was unreasonable, or that any of the time expended in the First Essenson Petition was unreasonable. Attorney Gollnick testified that both the rate and the amount of time were reasonable, and that the work was necessary in connection with the representation. The Court finds that 18.20 hours at a rate of $200.00 per hour, for a total fee of $3,640.00, is reasonable for the First Essenson Petition. Costs of $27.59 are also awarded, for a total of $3,667.59.

2. SECOND ESSENSON PETITION

The major objection to the Second Essenson Petition made by Mr. Syprett is to the time spent concerning the Objection. The Objection basically had three facets: 1) Mrs. Syprett objected to the proposed level of home healthcare, and wanted shorter periods of time on a more frequent basis; 2) it was alleged that the Initial Syprett Plan was inconsistent with the Settlement, with regard to the medical plan; and 3) Mrs. Syprett's loss of her agreed-upon right to take the driving exam was challenged.

Under § 744.3215(1)(f), Fla. Stat. (2006), Mrs. Syprett retains the right to remain as

independent as possible, including having her preference as to place and standard of living honored. The duration and frequency of home healthcare comes under the ambit of this section, and she had a statutory right to have her point of view considered. Although this issue had recently become moot at the time of the June 26, 2006 hearing due to Mrs. Sypretts recent deterioration and hospitalization, up until that time it was a viable issue.

Mr. Syprett testified that he refused to mediate after being ordered to do so by the Court, and he refused to meet with Attorney Welch to discuss the objections.

An attorney is an advocate for her client's position, and this is no different for a ward's attorney, unless the client's decisions put the attorney in a position where she is violating applicable ethical rules. The Rules of Professional Conduct mandate that a lawyer representing a client under a disability shall, as far as reasonably possible, maintain a normal client-lawyer relationship. Rule 4-1.14(a), Rules of Professional Conduct. There is no allegation in the instant case that Attorney Welch did anything unethical. She represented her client to the best of her ability.

Attorney Welch acted reasonably with regard to the time entries in the Second Essenson Petition. The Essenson Firm presented expert evidence corroborating the reasonableness of the time expended and the hourly rate through Attorney Gollnick. Therefore, the Court finds that 32.80 hours at a rate of $200.00 per hour, for a total fee of $6,560.00, is reasonable for the Second Essenson Petition. Costs of $165.34 are also awarded, for a total of $6,725.34.

3. FEE STATEMENTS OF ATTORNEY BALD AND ATTORNEY BURCHETT

Because the Court finds that there is no entitlement to fees for Mr. Syprett as a matter of law, the reasonableness of these billings is not relevant for the Court's determination in this particular proceeding.

D. FEES FOR THE PROCEEDINGS LITIGATING FEES

The legislature added subsection (8) to § 744.108, Fla. Stat. (2006) in 2003. This subsection provides that the fees and costs incurred to review an attorney's fee petition under subsection (2) are compensable from the assets of the guardianship estate unless the Court finds the requested compensation under subsection (2) to be substantially unreasonable. See Edward A. Shipe, "Fees and Other Costs in Guardianship Proceedings", Florida Guardianship Practice, § 3.16 (5th ed. 2005); Cincinnati Equitable Insurance Co. v. Hawit, 933 So. 2d 1233 (Fla. 3rd DCA 2006). Because the Court finds the First and Second Essenson Petitions to be reasonable, the Court finds that the Essenson Firm is entitled to legal fees and costs for this proceeding.

Accordingly, based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. The First Essenson Fee Petition is granted. Mr. Syprett is ordered to pay the Essenson Firm fees of $3,667.59 on the First Essenson Fee Petition out of the assets of the guardianship estate within twenty (20) days of the date hereof. If payment is not made within twenty (20) days of the date hereof, upon motion and notice of the Essenson Firm, this order may be reduced to Final Judgment, which shall accrue interest at the rate of 11% per annum, the statutory rate, from the date of entry of this Order.

2. The Second Essenson Fee Petition is granted. Mr. Syprett is ordered to pay the Essenson Firm fees of $6,725.34 on the Second Essenson Fee Petition out of the assets of the guardianship estate within twenty (20) days of the date hereof. If payment is not made within twenty (20) days of the date hereof, upon motion and notice of the Essenson Firm, this order may be reduced to Final Judgment, which shall accrue interest at the rate of 11% per annum, the statutory rate, from the date of entry of this Order.

3. Mr. Sypret's Motion for Attorney's Fees and Amended Motion for Attorney's Fees are denied.

4. The Essenson Firm is entitled to an award of attorney fees and costs for proceedings concerning its fee petitions, and defending against Mr. Syprett's Motion and Amended Motion for Attorney's Fees.

5. The Court reserves jurisdiction for the guardianship judge to conduct a hearing to determine the further amount of fees and costs to be awarded to the Essenson Firm, and the amounts to be paid to experts for testifying.

DONE AND ORDERED in chambers, in Sarasota County, Florida on this 30th day of January, 2007.

BOB McDONALD, CIRCUIT JUDGE

MBC
1-30-07

✓cc: James L. Essenson, Esq.
Barbara Welch, Esquire
Roger L. Young, Esq.
Kimberly A. Bald, Esq.
Charles Sniffen, Esq.
Charla Burchett, Esq.
Edwin Boyer, Esquire
Robert Scheb, Esquire