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

IN RE: THE GUARDIANSHIP OF
EVELYN P. SYPRETT

Lower Tribunal No. 2004 GA 7565

JIMMY D. SYPRETT, AS
GUARDIAN OF
EVELYN P. SYPRETT,

Appeal No. 2007-2831

APPELLANT/CROSS-APPELLEE,

v.

JAMES L. ESSENSON d/b/a
THE LAW FIRM OF JAMES L.
ESSENSON,

APPELLEE/CROSS-APPELLANT.
_____/

ANSWER AND CROSS APPEAL BRIEF

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

LAW FIRM OF JAMES L. ESSENSON

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STATEMENT OF THE CASE

Jimmy D. Syprett appeals two Final Judgments, both of which were entered on May 24, 2007 and both of which are based on an order dated January 30, 2007 titled "Order Granting the Essenson Firm's Attorney's Fees and Denying the Guardian's Motions for Attorneys' Fees" (hereinafter, the "January Fee Order"). The first May 24, 2007 Final Judgment reduced to final judgment the decretal portions of the January Fee Order that awarded attorney's fees and costs to James L. Essenson d/b/a the Law Firm of James L. Essenson (hereinafter, the "Essenson Firm") and denied attorney's fees and costs to Jimmy D. Syprett, as Guardian (hereinafter, "Syprett"). The second May 24, 2007 Final Judgment set the amount of attorney's fees and costs for the Essenson Firm, the entitlement of which had awarded in the January Fee Order. The Essenson Firm cross-appeals this second final judgment only.

References to the record on appeal are designated (R. p.__). References to the Initial Brief are designated (IB, p.___). References to the Transcript of the trial on December 11, 2006, January 11 and January 12, 2007 are designated (TR. p.____), and references to the exhibits admitted into evidence at trial are designated (Ex. ___, p.____). For the Court's convenience, the January Fee Order, found at R. pp. 1391-1420, is appended as Tab 1 hereto, and is designated (App.1, p.__), using the page numbers therein.

STATEMENT OF THE FACTS

I. Procedural History

Syprett's Statement of the Facts contains distortions and information irrelevant to the issues under review. The undisputed procedural facts of this case are set forth in the January Fee Order. (App.1, pp. 7-8.) The relevant background is as follows:

A petition to determine incapacity was filed by Jim Syprett against his mother, Evelyn Syprett (the "Ward"), on or about August 2, 2004. (App.1, p. 7.) Mediation was conducted between the Ward and her counsel, Ed Boyer ("Boyer"), and the Ward's son and grandson, Jim Syprett ("Syprett") and Troy Syprett, together with their attorney Chris Likens ("Likens"). (Ex. 13, p. 4.) The parties reached a written settlement which was signed on February 9, 2005 (the "Settlement"), and an order was entered on February 11, 2005, approving the Settlement and ordering the parties to comply with its terms. (App.1, p. 7; R. pp. 86-87.) Also on February 11, 2005, Kay Kibbey ("Kibbey") was appointed plenary guardian of the Ward's property and limited guardian of her person. (App.1, p. 7; R. pp. 84-85.)

The Order Determining Limited Incapacity, which attached the Settlement and incorporated the terms therein, was also entered on February 11, 2005 (hereinafter, the "Incapacity Order"). (App.1, p. 7; Ex. 13.) The Incapacity Order and Settlement afforded the Ward certain rights as a partially incapacitated person. The Incapacity Order and Settlement provided that the Ward retained the right to vote, to determine

her residency, and to seek or retain employment. (Ex. 13, p. 1.) The Incapacity Order and Settlement also provided that the Ward shall retain her right to drive "if she successfully completes a driving examination" at a certain facility. (Id. at pp. 2, 4.)

The Settlement provided that the guardian consult with the Ward on certain personal and real property issues. (Id. at p. 4.) The Settlement also provided that the guardian will "consult with [the Ward] on all health care decisions and all property decisions." (Id.) Finally, the Settlement provided for a certain level of home care for the Ward, with an assessment to be conducted by Dr. Randy Otto "who will make a recommendation to Kay Kibbey regarding the level of home care." (Id.) The Settlement did not address the issue of psychiatric or mental health treatment. (Id.)

On or about July 12, 2005, Kibbey filed the Initial Guardianship Plan of the Guardian of the Person (the "Initial Kibbey Plan"). (App.1, p. 8; R. pp. 206-208.) The Initial Kibbey Plan required continued consultation and treatment of the Ward by Dr. Kaplan "pursuant to" the Settlement. (App.1, p. 8; R. p. 207.) On or about August 11, 2005, the Ward, through her counsel Boyer, 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 "Boyer Objection"). (App.1, p. 8; R. pp. 225-226; Ex. X.) Concurrent therewith, Boyer informed the Ward that he could no longer represent her because Likens, who was representing Syprett, was going to be associated or affiliated with Boyer's firm. (TR. p. 666.)

After an initial consultation with the Ward, the Essenson Firm petitioned to be appointed counsel for the Ward. (App.1, p. 8; R. pp. 266-268; Ex. 18.) Kibbey's counsel, Robert Scheb ("Scheb"), objected to the language in the Essenson Firm order of appointment which authorized representation on "all pending and potential issues in this guardianship case." (R. pp. 270-271.) Consequently, a hearing was held on October 31, 2005 at which time the court heard from Barbara J. Welch ("Welch") from the Essenson Firm concerning the Ward's ability to afford counsel and her desire for counsel to address her various concerns. (TR. p. 405.) The court heard objections from Scheb and spoke with the Ward. (TR. p. 405.) The court entered an order on that date appointing the Essenson Firm to represent the Ward in connection with "all pending and potential issues in this guardianship case" (hereinafter, the "October 31, 2005 Order Appointing"). (R. pp. 294-295; Ex. F.)

Also at the October 31, 2005 hearing, Scheb presented a Petition for Order Authorizing Ward to Take Driving Examination (the "Driving Petition") on behalf on Kibbey. (App.1, p. 8; R. pp. 292-293.) Syprett, who was present at the hearing, presented argument against the Driving Petition. (TR. pp. 703-704.) As a result of the hearing, the court entered successive orders on October 31, 2005 and November 8, 2005, giving the Ward the right to take additional driving tests (the "Driving Orders") in order to determine whether she would retain her right to drive. (App.1, p. 8; R. pp. 296, 297.)

On or about February 13, 2006, Syprett, who had succeeded Kibbey as the Ward's guardian, filed the initial plan of the guardian of the person (the "Initial Syprett Plan"). (App.1, p. 8; R. pp. 352-360; Ex. 10.) On February 22, 2006, the court entered a standard Florida Legal Support Services, Inc. ("FLSSI") form order approving the plan and discharging Welch, which order was not copied to Welch. (R. p. 372.)

On or about March 15, 2006, the Ward filed an objection to the Initial Syprett Plan (the "Ward's Objections") through Welch. (App.1, p. 8; R. pp. 389-393; Ex. 9.) After Syprett Moved to Strike or Overrule same, the court ordered the parties to mediation. (R. pp. 394-466; 2763-2766.) Syprett moved to set aside that Order, but the court again ordered mediation after the Ward filed a response to Syprett's motion. (R. pp. 471-475; 476-479; 2769-2770.) Despite two orders for mediation and numerous efforts on Welch's part, Syprett refused to mediate. (App.1, p. 18; TR. p. 105; Exs. H, I, 12, and 3 (pp. 9-10, 12 of Ex. 3).)

Syprett scheduled a hearing on the Ward's Objections while the Ward was hospitalized. (App.1, p. 8; TR. pp. 364-365.) The court overruled the Ward's Objections and discharged Welch, without reference to the February 22, 2006 Order. (App.1, p. 8; R. pp. 524-525.)

Subsequent thereto, on or about July 24, 2006, Syprett moved for attorney fees against Welch under section 744.369(7), which governs objections to guardianship

reports and provides that 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." (R. pp. 534-540.) Syprett also objected to two petitions for attorney's fees filed by the Essenson Firm under section 744.108 for representing the Ward (the "Fee Petitions"). (R. pp. 627-636.)

The Essenson Firm's first Fee Petition was filed on or about January 8, 2006, covering the period from September 6, 2005 to January 6, 2006. (R. pp. 319-328.) [1] The second Fee Petition was filed on or about October 24, 2006 and covered the period from January 11, 2006 to August 25, 2006. (R. pp. 605-623.) The fees and costs for both Fee Petitions, covering the time between September 6, 2005 and August 25, 2006, totaled $10,492.93.

The basis of Syprett's objections to the Fee Petitions were similar to those set forth in the Initial Brief: the Essenson Firm was not entitled to fees for (a) time entries for work predating the October 31, 2005 Order Appointing; (b) time entries for pursuing the Ward's court-ordered driving examination; and (c) time entries for work performed after the court's February 22, 2006 order approving the Initial Syprett Plan, including those involving the Ward's Objections. (IB, p. 38; TR. pp. 22-26.) Syprett argued that these time entries were outside the scope of the Essenson

1 An Order approving the first Fee Petition was entered on January 11, 2006. (R. p. 331.) Syprett refused to pay the fees and successfully moved to vacate the order on July 21, 2006. (R. pp. 529-533.)

Firm's appointment and were not "on behalf of or in the best interest of the Ward." (IB, p. 38; TR. p. 26.)

After an unsuccessful court-ordered mediation, trial was scheduled for December 11, 2006 on the Essenson Firm's two Fee Petitions with Syprett's objections thereto and Syprett's Motion for Attorney Fees.[2] The trial spanned three days: December 11, 2006, January 11, 2007 and January 12, 2007. (App.1, p. 1.) Syprett presented the testimony of eight lay and expert witnesses. (TR. pp. 3 and 126.)

The parties and the court acknowledged that the issue was entitlement: Syprett's entitlement to fees under section 744.369(7) and the Essenson Firm's entitlement to fees under section 744.108. (Tr. pp. 18, 20, 22, 33, 141-142, 731-732.) In his opening statement, Roger Young, attorney for the Essenson Firm, specifically asked the court for fees for the Essenson Firm for litigating entitlement to fees. (TR. p. 18.) The bulk of the trial was devoted to the issues of the propriety of Welch representing the Ward on the Ward's Objections.

2 At the trial, it was revealed that Syprett was seeking approximately $14,000.00 in attorney fees from March 16, 2006 to June 26, 2006. (TR. p. 20.)

II. The Ward's Objections

The Ward objected to the Initial Syprett Plan on three grounds: (A) to language intimating that the Ward agreed to a psychiatric evaluation for treatment and medication; (B) to the level and duration of homecare; and (C) the loss of the Ward's right to drive due to arbitrary timeframes. (App.1, pp. 2-5; Ex. 9.)

A. The Psychiatric Objection.

The Initial Syprett Plan stated that it was based upon, among other things, Dr Randy Otto's August 16, 2005 evaluation of the Ward "which was required as a part of the mediated Settlement which resulted in an agreement dated February 9, 2005…" (Ex. 10, p. 1.) Under mental care, Syprett stated again that "[i]n accordance with the Settlement Agreement" the Ward was examined by Dr. Otto. (Id.) Syprett pointed out that Dr. Otto recommended "a psychiatric referral, to consider the re-initiation of an anti-psychotic medications [sic]" for the Ward. (Id. at 1-2.) Syprett further stated he "has located a psychiatrist who was willing to evaluate and prescribe appropriate medication, if any, for Ms. Syprett…" [3] (Id. at 2.)

Welch testified that the Ward wanted to interpose an objection to the above because the wording implied that the Ward had agreed that Dr. Otto would evaluate

3 Between the time Syprett filed the Initial Syprett Plan and the time Welch filed the Ward's Objections thereto, Syprett arranged an appointment for the Ward. The Ward wanted to select her own psychiatrist. Welch and Syprett's counsel negotiated for the Ward to select her own psychiatrist. (Ex. G; TR. pp. 341-346.) Subsequently, Syprett agreed the Ward could see Dr. Permesly and the Ward did so several times. (TR. p. 346.)

her to determine her need for psychiatric treatment and medication. (Tr. pp. 333-334.) As Boyer testified, psychiatric treatment was discussed at the mediation and rejected by the Ward. (TR. p. 674, 676-677; Ex. 29). Although the Ward agreed to see Dr. Otto for a recommendation on home care only, Dr. Otto's evaluation indicated that the Ward should be forcibly injected with anti-psychotic medications should she refuse to ingest the same. (TR. p. 334). The strained relationship between Syprett and the Ward and Syprett's disregard for the Ward's concerns convinced the Ward that Syprett would, in fact, inject her with medications if she resisted. (TR. pp. 333-334.) Because the approved Initial Plan "constitutes the authority for the guardian to act in the forthcoming year", (§744.369(8), Fla. Stat. (2006)), the Ward was strongly opposed to anything in the Initial Syprett Plan that would give Syprett any appearance of court-approved authority to forcibly inject her with medications. (TR. pp. 334, 355-357.) The Ward also did not want her Initial Plan to mischaracterize the last agreement she had legal capacity to enter into. (TR. p. 369, 642.)

Accordingly, the Ward objected to this portion of the Initial Syprett Plan. (App.1, p. 2-3; Ex. 9, p. 1-2.) This objection mirrored Boyer's objection to the language in Kibbey's Initial Plan that stated that the parties agreed in mediation that the Ward would undergo a psychiatric evaluation by Dr. Kaplan. (App.1, p. 8.) The Ward's then-counsel, Boyer, had objected to Kibbey's Initial Plan, on the basis that

the Settlement Agreement did not, in fact, provide for treatment with Dr. Kaplan. (Ex. X.) Boyer testified at trial that he believed that objection had merit. (TR. pp. 667-668.)

B. The Home Health Care Objection

The Ward also had ongoing issues with the frequency and duration of the caregivers. The Initial Syprett Plan intended to provide a care-giver for the Ward three (3) days a week for four (4) hours per day. (Ex. 10, pp. 2-3.) Dr. Otto, who evaluated the Ward for the purpose of recommending the level of home care, noted that, at the time of his evaluation, the Ward had caregivers for four (4) hours a day, six (6) days a week, which he believed could be reduced to shorter visits once every other day (or, four days a week). (Id. at 3.) The Ward, who lived by herself, preferred more frequent visits of a shorter duration, as recommended by Dr. Otto, for her safety, her well-being, and her social stimulation. (TR. p. 335.). Accordingly, the Ward objected to the homecare plan and requested Dr. Otto's recommendation. (App.1, pp. 3-4; Ex. 9, p. 2.)

C. The Driving Right Objection

Finally, although not a significant objection, since an Objection was going to be filed, the Ward wanted to lodge an objection to selling her car. (TR. p. 325.) The Ward thought that Syprett, who should be helping to protect any rights retained, had not assisted in any way her attempts to retain her driving privileges. (Ex. 9, pp. 2-3.)

As noted above, the Ward was permitted to retain her driver's license subject to the Ward passing a driving examination. (Id.) Pursuant to the Driving Orders, the Ward was permitted to take another driving examination provided that the Ward pass a state driver's examination first. (Id.) The order imposed deadlines within which the Ward had to take the examinations. (Id.)

Scheduling the driver's examination proved difficult, and the Ward sought and was granted an extension by the counsel for Syprett, who had been appointed successor guardian by that time. (Id.) The parties discovered that the Ward's driver's license had been mistakenly revoked by the state due to her adjudication. (App.1, p. 4-5; TR. p. 331; Ex. 9, 2-3.) Accordingly, the Ward could not sit for a driver's course, let alone an examination and did not have the time to obtain a license for that purpose. (Ex. 9, p. 2-3.)

As a consequence, the Ward's right to drive was removed from her with no finding that she lacked this capacity or that she was incapable of exercising this right. (App.1, p. 5; Ex. 9, p. 3.) The Ward wanted to register an Objection to losing her right to drive based on an inability, beyond her control, to meet an artificial deadline. (Id.) The Ward wanted to register an objection to Syprett's lack of effort to help her with respect to a right she strongly desired to retain. (Id.) Finally, the Ward felt that the Syprett should not plan to sell her car without getting a proper appraisal and the highest price. (Ex. 9, p. 3.)

III. The January Fee Order

At the end of the trial, the court requested proposed orders from Syprett and the Essenson Firm and permitted both to submit closing arguments as well as a timeline. (TR. pp. 727-732.) On January 30, 2007, the court entered the January Fee Order, consisting of 20 pages, which granted the Essenson Firm's Fee Petitions and denied Syprett's motion for attorney fees. (R. pp. 1391-1410; App.1, pp. 1-20)

The January Fee Order thoroughly analyzed the issues presented at trial, and contained numerous findings of fact by the trial judge. The court devoted five pages to an analysis of each of the Ward's Objections and found that, as a matter of fact and as a matter of law, each objection was reasonable and thus was not meritless within the meaning of section 744.369(7). (App.1, pp. 2-7, 16-18.) The court went on to analyze Syprett's legal theory of entitlement under section 744.369(7) and concluded, as a matter of law, Syprett could not sanction court-appointed counsel for attorney's fees under section 744.369(7). (App.1, pp. 11-16.) Accordingly, the court denied Syprett's motion for attorney's fees against the Essenson Firm on both factual and legal grounds. (App.1, pp. 16, 18, 20.)

With regard to the Essenson Firm's entitlement to fees for its Fee Petitions, the January Fee Order states that the court "closely reviewed all of the Essenson Firm's billings" and found "the hours expended and rate charged are reasonable." (App.1, p. 7.) The January Fee Order found that, among other things, the Essenson Firm was

acting as an advocate for its client, proceeded in good faith, attempted to comply with court orders and handled its legal obligations appropriately. (App.1, pp. 6-7.)

The decretal portion of the January Fee Order awarded the Essenson Firm fees and costs under section 744.108(1) and (2) in the total amount of $10,392.93, to be paid within 20 days of the Order (App.1, p. 19, paragraphs 1 and 2); denied Syprett's motion for fees under section 744.369(7) (Id. at 20, paragraph 3); awarded entitlement to the Essenson Firm for litigating entitlement under 744.108(8) (Id., paragraph 4); and reserved jurisdiction for the guardianship judge to determine the amount to be awarded to the Essenson Firm under 744.108(8) (Id. at paragraph 5).[4]

IV. The Orders Subsequent to the January Fee Order.

Twenty-three days after the January Fee Order was entered, Syprett filed a "Motion for Reconsideration, Rehearing, or Clarification of the Court's Order Dated January 30, 2007." (R. pp. 1443-1473.) The court ordered a response from the Essenson Firm and permitted a reply thereto from Syprett. (R. pp. 1516-1517.) After receiving the requested documents, the court denied Syprett's Motion for Reconsideration, Rehearing, or Clarification of the Court's Order Dated January 30, 2007. (R. pp. 1518-1519.)

4. In accordance with the judge's rotation, the Honorable Andrew D. Owens, Jr. succeeded the Honorable Robert McDonald on the Probate/Guardianship bench.

Thereafter, the Essenson Firm petitioned for attorney fees and costs under section 744.108(8) in accordance with the January Fee Order. (R. pp. 1525-1554.) Having received no payment from Syprett for its fees under section 744.108(1) and (2) in accordance with the January Fee Order, the Essenson Firm also filed a Motion for Enforcement. (R. pp. 1474-1475.) On April 12, 2007, a hearing was held on the amount of fees for the Essenson Firm pursuant to section 744.108(8). On April 13, 2007, at the hearing on the Essenson Firm's Motion for Enforcement, the court interpreted the January Fee Order to limit the Essenson Firm's remedies for nonpayment of its fees under 744.108(1) and (2) to a reduction to final judgment only. (R. pp. 1736, 2758-2759.)

Pursuant to the above hearings, the court entered two Final Judgments dated May 24, 2007. The first Final Judgment reduced to final judgment paragraphs 1, 2, and 3 of the decretal portion of the January Fee Order (the "First Final Judgment"). (R. p. 1740.) The second Final Judgment set the amount of attorney's fees and costs for the Essenson Firm, pursuant to paragraph 4 and 5 of the decretal portion of the Fee Order (the "Second Final Judgment"). (R. pp. 1738-1739.) Syprett appeals the First Final Judgment and Second Final Judgment as well as the underlying January Fee Order. The Essenson Firm cross-appeals the Second Final Judgment.

STANDARD OF REVIEW

Syprett argues that the denial of attorney's fees to Syprett under section 744.369(7) should be reviewed *de novo*, since these issues involve entitlement to fees based on an interpretation of statute. (IB. p. 20.) Syprett further argues that the trial court's order awarding the Essenson Firm entitlement to attorney's fees under section 744.108(1) is to be reviewed *de novo* and only the amount under section 744.108(2) should be reviewed under an abuse of discretion standard. (Id.) The Essenson Firm disagrees that the appropriate standard for review of these decisions is *de novo*.

This court has recognized that, when it comes to attorney fee awards, to the extent that a trial court has discretion, "appellate courts apply an abuse of discretion standard in reviewing a trial court's award of attorney's fees, most often in regard to the amount of an award rather than the actual entitlement to an award." Gibbs Const. Co. v. S. L. Page Corp., 755 So. 2d 787, 790 (Fla. 2d DCA 2000). However, this court in Gibbs clarified that when entitlement to attorney's fees is based on the interpretation of contractual (or statutory provisions) as a "pure matter of law," the court will undertake a *de novo* review. Id.; see also Allstate Ins. Co. v. Regar, 942 So. 2d 969, 971 (Fla. 2d DCA 2006). Otherwise, as this court recognized two years after Gibbs, "[a]ppellate courts apply an abuse of discretion standard in reviewing a trial court's determination on the *entitlement* of attorney's fees." Discovery

Experimental and Development, Inc. v. Department of Health, 824 So. 2d 195, 196 (Fla. 2d DCA 2002) (emphasis added).

Entitlement to attorney's fees under section 744.108(1) and (2) and entitlement to attorney's fees under section 744.369(7) are not pure matters of law. Whether the Essenson Firm is entitled to fees under 744.108(1) and (2) turns on the scope of the Essenson Firm's appointment and, under Syprett's theory, whether the Ward's Objections were meritless, both of which are factual determinations. (Indeed, even under Syprett's erroneous interpretation of entitlement to fees under section 744.108(1) and (2), the particular actions Welch took on behalf of the Ward must first be analyzed to determine whether Welch's services were rendered on behalf of the ward, to benefit the ward, or in the ward's best interests in order to determine whether the Essenson Firm is entitled to fees under section 744.108(1) and (2).) (IB, p. 37-38.) Accordingly, as this court has acknowledged in In re Guardianship of Bockmuller, 602 So. 2d 608, 609-610 (Fla. 2d DCA 1992), the standard of review of an order awarding entitlement to fees for an attorney for an incapacitated person is the abuse of discretion standard.

Similarly, in order for section 744.369(7) to apply to the Ward's Objections, Syprett first has to establish that, on the facts of the case, the Ward's Objections were devoid of merit. (IB, p. 41-45.) In fact, Syprett's legal interpretation of section 744.369(7) need not be addressed unless the Ward's Objections are determined to be

meritless under the facts and circumstances of this case. Additionally, the denial of attorney's fees to Syprett under section 744.369(7) is, by the terms in the statute, discretionary. Thus, even if the trial had found the Ward's Objections to be without merit, the trial court could decline to award attorney's fees.

Accordingly, the abuse of discretion standard of review applies to the award of fees to the Essenson Firm under 744.108(1) and (2) and the denial of fees to Syprett under section 744.369(7). "The standard of review for an award of attorney's fees, whether based on contract or statute, is abuse of discretion." See e.g. Discovery Experimental and Development, Inc. v. Department of Health, 824 So. 2d 195, 196 (Fla. 2d DCA 2002); Universal Beverages Holdings, Inc. v. Merkin, 902 So. 2d 288, 290 (Fla. 3d DCA 2005); Black v. Bedford at Lake Catherine Homeowners Ass'n, Inc., 801 So. 2d 252, 253-54 (Fla. 4th DCA 2001).

The abuse of discretion standard of review turns on reasonableness. Canakaris v. Canakaris, 382 So .2d 1197, 1203 (Fla. 1980). 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 trial court's determinations are arbitrary, fanciful, or unreasonable, the trial court's rulings in paragraph 1, 2, and 3 of the January Fee Order must be affirmed. Canakaris, 382 So. 2d at 1203.

SUMMARY OF THE ARGUMENT

With respect to the attorney fee award under section 744.108(8), Syprett's reliance on Stockman v. Downs, 573 So. 2d 835, 837-38 (Fla. 1991) is misplaced because there was no technical "pleading" in the instant case. Even if Stockman were applicable, Syprett has waived any objections to the Essenson Firm's alleged failure to plead under Stockman since Syprett received notice of the Essenson Firm's claim for attorney's fees at the commencement of trial and failed to object thereto. Finally, the language of section 744.108(8) which mandates attorney's fees if a proceeding is instituted to review or determine fees under section 744.108, provides constructive statutory notice that fees "shall be" automatically awarded.

Additionally, Syprett's interpretation of section 744.108(8), which would specifically exclude a ward's attorney from recovering fees in proceedings involving a determination of fees, effectively leaves an incapacitated person unrepresented in proceedings involving fees that must be paid from her estate, even if those proceedings are initiated by a ward's own objection. This is contrary to legislative intent, results in a denial of due process to an incapacitated person, and leads to an absurd result. Syprett's interpretation is also inconsistent with the plain language of the statute, and should therefore be rejected.

With respect to the Essenson Firm's fees and costs awarded under section 744.108(1) and (2), this court, in a 2003 guardianship case, specifically rejected a

similar argument to the one advanced by Syprett in the instant case: that a ward's court-appointed attorney's fees under section 744.108 could be denied based on a benefit theory. This court has held that a Ward's court-appointed counsel is entitled to fees under section 744.108 as long as the court-appointed counsel did not exceed the scope of his or her employment. Accordingly, the trial court's order awarding the Essenson Firm fees under section 744.108(1) and (2) must be affirmed.

With respect to the denial of Syprett's fees under section 744.369(7), the lower court found as a matter of fact and as a matter of law that Syprett was not entitled to attorney's fees under section 744.369(7). The trial court found that, under the facts, the Ward's Objections had merit under section 744.369(7) and thus attorney fees were not warranted. Additionally, the court found the rules of statutory construction, public policy, and the plain language in the statute preclude an award of attorney's fees to Syprett from the Essenson Firm under this statute. Finally, even if section 744.369(7) permitted an award of attorney fees against a court-appointed counsel for a ward for filing meritless objections, the trial court had discretion under the statute to deny an award of attorney fees. For the foregoing reasons, the trial court's order denying Syprett's motion for attorney's fees under section 744.369(7) must be affirmed.

ARGUMENT

I. THE COURT BELOW CORRECTLY AWARDED ENTITLEMENT TO THE ESSENSON FIRM FOR THE FEE PROCEEDINGS UNDER 744.108(8).

A. THE ESSENSON FIRM DID NOT WAIVE ITS CLAIM UNDER STOCKMAN.

1. The Stockman Rule is inapplicable to the Essenson Firm's Petition for Fees.

Syprett cites to Stockman v. Downs, 573 So. 2d 835, 837-38 (Fla. 1991) for the general rule that a claim for attorney's fees, whether based on statute or contract, must be pled (the "Stockman Rule"). The Stockman Rule is inapplicable in this case inasmuch as the rule's use of the phrase "must be pled" limits the rule to pleadings within the meaning of Fla. R. Civ. P. 1.100(a), to wit: a complaint, an answer, and a counterclaim. Green v. Sun Harbor Homeowners' Ass'n, Inc., 730 So. 2d 1261, 1263 (Fla. 1998).

Syprett argues that the Green analysis is limited to cases in which the time for filing an answer has not matured and there is a dismissal of the case. (IB. p. 25.) Alternatively, Syprett argues that petitions in guardianship proceedings are equivalent to complaints within the meaning of Green. Syprett misreads Green entirely.

In Green, Sun Harbor filed a complaint against Green, who filed in response, a motion to strike, a motion to dismiss, and a motion to compel. Id. Green then moved

to dismiss for failure to prosecute and, after the order of dismissal was entered, moved for attorney's fees. Id. at 1262. The Fourth District Court of Appeal denied Green's attorney fees, holding that Stockman's requirement that a fee claim "must be pled" is not limited to technical pleadings and thus includes motions as well. Id. at 1262.

The Florida Supreme Court, reversing that decision, specifically rejected the Fourth District Court's interpretation of the phrase "must be pled" as "erroneous". Id. at 1263. Holding that the Stockman rule does not apply to motions, the Supreme Court clarified as follows:

> This Court's use of the phrase "must be pled" is to be construed in accord with the Florida Rules of Civil Procedure. Complaints, answers, and counterclaims are pleadings pursuant to Florida Rule of Civil Procedure 1.100(a). A motion to dismiss is not a pleading. Stockman is to be read to hold that the failure to set forth a claim for attorney fees in a complaint, answer, or counterclaim, if filed, constitutes a waiver. However, the failure to set forth a claim for attorney fees in a motion does not constitute a waiver.

Id. at 1263.

Moreover, the Florida Supreme Court in Green stated that it adopted the view of Justice Hauser of the Fourth District Court of Appeal, the author of the dissenting opinion in Green below. Green, 730 So. 2d at 1262. In his dissent, Justice Hauser concludes:

> Rather than creating this procedural nightmare, I respectfully suggest that we create a bright line test that in order to comply with Stockman, a party that requests attorney's fees by either motion or notice will not be

> entitled to attorney's fees if that party has failed to plead for attorney's fees in the complaint or answer. Furthermore, a party need not plead for attorney's fees if the time period to answer the complaint has not yet ripened.

Green v. Sun Harbor Homeowners' Ass'n, Inc., 685 So. 2d 23, 27 (Fla. 4th DCA 1996).

Accordingly, Green does hold that a party need not plead for attorney's fees if the time period to answer the complaint has not yet ripened, but Green also holds that, in any event, a claim for attorney's fees must be set out in an "complaint or answer" within the meaning of Fla. R. Civ. P. 1.110. Thus, Green is not just limited to cases where the time to file an answer has not ripened, as argued by Syprett. By its own wording, however, Green does limit the Stockman Rule strictly to "pleadings pursuant to Florida Rule of Civil Procedure 1.100(a)" such as complaints, answers, and counterclaims. Green, 730 So. 2d at 1263.

In the instant case, no party filed a complaint, answer, or counterclaim pursuant to the Florida Rules of Civil Procedure. In fact, the Florida Rules of Civil Procedure do not apply in guardianship cases unless a proceeding is an adversary proceeding within the meaning of Fla. Prob. R. 5.025 and 5.010. Interim Healthcare of Northwest Florida, Inc. v. Estate of Ries, 910 So. 2d 329, 330 n.1 (Fla. 4th DCA 2005). The instant matter was never declared or determined adversary.

Syprett argues that the "very definition" of a petition under the civil procedure rules and the probate rules demonstrate that a petition in guardianship is a pleading

under Green. (IB, pp. 25-26.) Syprett urges this court to regard the name of the Essenson Firm's Fee Petitions ("Petition for Order Authorizing Payment of Attorney's Fees and Costs") as dispositive on this issue. An analysis of Fla. R. Civ. P. 1.110(b), 1100, and Fla. Prob. R. 5.020, as Syprett urges, actually supports the fact that petitions in guardianship practice are more akin to motions in civil practice.

A "Petition" under Florida Probate Rule 5.020(b) and "Claims for Relief" under Fla. R. Civ. P. 1.110(b) are distinguishable. Fla. R. Civ. P. 1.110(b) specifically describes a "pleading" that sets forth a claim for relief (such as an original claim, counterclaim, cross-claim, etc.) and requires the same to state a cause of action and must contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends (unless the court already has jurisdiction); (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief; and (3) a demand for judgment for that relief. Fla. R. Civ. P. 1.110(b).

By contrast, under the probate rules, a petition merely requires a "short and plain statement of the relief sought, the grounds therefor," and the court's jurisdiction, unless already shown. See Fla. Prob. R. 5.040(b). The requirements for petitions under Fla. Prob. R. 5.040(b) mirror the requirement for motions under Fla. R. Civ. P. 1.100(b), which is defined as an "application" and "shall state with particularity the ground therefor, and shall set forth the relief and order sought."

Moreover, pleadings under Fla. R. Civ. P. 1.110(b) are intended to present, define and narrow issues as well as to form foundation of, and to limit, proof to be submitted on trial, and the objective sought is to reach issues of law and fact in one affirmative and one defensive pleading. Hart Properties, Inc. v. Slack, 159 So. 2d 236, 239 (Fla. 1963). This does not describe a petition for fees in a guardianship court.

Unlike pleadings under Fla. R. Civ. P. 1.110, guardianship petitions do not frame all of the issues sought to be resolved and do not specify all of the relief sought in the proceeding. See Fla. Prob. R. 5.020(b). Beyond the initial guardianship petitions in guardianship practice, nearly all petitions, including a petition for attorney's fees, are brought under Fla. Prob. R. 5.630, which requires that when "authorization or confirmation of any act of the guardian is required, application shall be made by verified petition…". Fla. Prob. R. 5.630(a). Accordingly, in guardianship practice, nearly all rulings by the court are sought through petitions.

A petition for fees in guardianship proceedings is thus an application, under Fla. Prob. R. 5.630, for an order authorizing the guardian to pay the fees and costs. See also section 744.108(5), (6), and (7), Fla. Stat. (2006) (describing a petition for fees therein). Such petitions do not require an answer and, in many cases, do not require a hearing. Contrary to Syprett's assertion, a petition in the probate and guardianship court is not analogous to a complaint in circuit civil court.

Guardianship petitions are thus more analogous to motions, which are defined by Black's Law Dictionary (West Group, 7th Ed.) as a "written or oral application requesting a court to make a specified ruling or order." Accordingly, under Green, the Stockman Rule does not apply to this case, and the Essenson Firm has not waived its right to attorney fees. The court's order awarding fees to the Essenson Firm for the proceedings under section 744.108(8) should thus be affirmed.

2. Even if applicable to a guardianship petition for fees, the Stockman Rule contains an exception applicable to this case.

Assuming *arguendo* that the Stockman Rule applies to the Essenson Firm's Fee Petitions, the Stockman Rule, which is predicated on notice concerns, also provides that where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees (hereinafter, the "Stockman Exception"). Stockman, 573 So. 2d at 838.

Syprett's claim that the Stockman Exception does not apply because it had no notice of the Essenson Firm's claim for attorney fees under section 744.108(8) since the Essenson Firm raised the issue for the "first" time in its closing argument

or proposed order is misleading. (IB. pp. 21 and 26.)[5] The record reveals otherwise.

The Essenson Firm provided notice to Syprett of its claim for attorney's fees in its opening statement on December 11, 2006, the first day of the trial on the matter, nearly two months prior to the entry of the January 30, 2007 Fee Order, giving Syprett both an opportunity to object and an opportunity to be heard on the issue.

On December 11, 2006, in open court, with Syprett and his attorney present, the attorney for the Essenson Firm, Roger Young, Esq. stated the following in his opening:

> And finally, since the guardian is contesting their entitlement to fees, you should award fees to the Essenson firm - - or you should reserve jurisdiction to the Essenson firm for the issue of litigating entitlement to fees, for having to hire a lawyer on the issue of entitlement and bring in an expert on the issue of entitlement.

(TR. p. 18.) (The December 11, 2006 proceedings were transcribed and provided to both parties prior to the January 11 and January 12 hearing dates, and the parties stipulated to the entry of that December 11, 2006 transcript into evidence as counsel anticipated using portions of the transcript in their closing arguments. (TR. pp. 523-524; Ex. V.)) Accordingly, Syprett had actual notice that the Essenson Firm claimed

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5 Furthermore, Syprett, throughout his argument, refers to the fees under 744.108(8) erroneously as "fees to recover fees", encasing the phrase with scare quotes. This is a misnomer that neither the Essenson Firm nor the court used at any time below.

an entitlement to attorney's fees for the proceedings, and Syprett failed to object to the Essenson Firm's alleged failure to plead entitlement in its Fee Petitions.

Syprett, by insisting that the Essenson Firm did not file a written claim of entitlement to fees (IB, p. 23), misapprehends the notice requirement under the Stockman Exception. The Stockman Exception does not require written notice. See e.g. Allen Morris Const. Co., Inc. v. Salazar, 766 So. 2d 360 (Fla. 3d DCA 2000) (concluding that discussing who was the prevailing party at arbitration satisfied the Stockman Exception); Storob v. Sphere Drake Ins., 730 So. 2d 375 (Fla. 3d DCA 1999) (concluding that an oral agreement at the end of trial to include a reservation of jurisdiction for attorney's fees invoked the Stockman Exception); Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993) (applying the Stockman Exception where HRS had notice of appellee's request for fees, and at the hearing, made no objection to any failure on appellee's part to plead entitlement); Sandoval v. Banco de Comercio, S.A., 585 So. 2d 934 (Fla. 1991) (finding that all parties knew that recovery of attorney's fees was an issue and even stipulated that the trial court should determine whether prevailing party attorney's fee were available under Venezuelan law).

Thus, under the Stockman Exception, Syprett has, by his conduct, recognized or acquiesced to the Essenson Firm's claim for attorney's fees or has otherwise failed to object to the Essenson Firm's alleged failure to plead entitlement, and by doing so,

Syprett has waived any objection to the alleged failure of the Essenson Firm to plead a claim for attorney's fees under Stockman.

3. The Stockman Rule does not generally apply to non-discretionary fee statutes.

Finally, the Stockman Rule is inapplicable to non-discretionary fee statutes. See Longmeier v. Longmeier, 921 So. 2d 808 (Fla. 1st DCA 2006) (holding that a request for fees must be specifically pled under section 61.16, which is a discretionary fee provision.); Desocio v. Sonic Automotive, 894 So. 2d 1064, 1066 (Fla. 2d DCA 2005) (recognizing that under whisleblower statute, section 448.104, fees are not an "automatic entitlement provision" and, as such a whistleblower claimant would not be on notice of an actual threat of a fee judgment unless the respondent pleaded to those fees).

In contrast to many statutory attorney fee provisions, section 744.108(8) is a non-discretionary fee provision. Section 744.108(8) provides as follows:

> (8) When court proceedings are instituted to review or determine a guardian's or an attorney's fees under subsection (2), such proceedings are part of the guardianship administration process and the costs, including fees for the guardian's attorney, *shall be determined by the court and paid from the assets of the guardianship estate* unless the court finds the requested compensation under subsection (2) to be substantially unreasonable. (Emphasis added.)

Accordingly, unless the court finds the requested compensation to be substantially unreasonable, the costs of proceedings *shall be determined* by the court and paid from the guardianship estate. Although there is no fixed construction of the

word "shall," it is normally meant to be mandatory in nature. S. R. v. State, 346 So.2d 1018, 1019 (Fla. 1977). Since the fundamental concern of Stockman is one of notice, and section 744.108(8) mandates that costs, including attorney's fees, are to be paid from the guardianship estate, the notice requirement is satisfied. See also Betancourt v. U.S. Sec. Ins. Co., Inc., 823 So. 2d 201, 202 (Fla. 3d DCA 2002).

Accordingly, if the court finds that Mr. Young's reference to seeking fees for the proceeding in his opening statement on December 11, 2006 is legally insufficient notice for an exception under Stockman, then the mandatory nature of section 744.108(8) provides the requisite notice as a matter of law. Accordingly, the Essenson Firm has not waived any claim for attorney's fees under Stockman, and the notice requirements of Stockman were satisfied.

B. THE RULES OF STATUTORY CONSTRUCTION TOGETHER WITH THE LEGISLATIVE INTENT BEHIND CHAPTER 744 COMPEL A READING OF SECTION 744.108(8) THAT WOULD AUTHORIZE PAYMENT OF ATTORNEY'S FEES TO THE WARD'S ATTORNEYS FOR LITIGATING FEES UNDER SECTION 744.108.

Syprett argues that section 744.108(8) does not apply to court-appointed attorneys for incapacitated persons. (IB, p. 26.) Under Syprett's theory, only the guardian's attorney is entitled to fees under section 744.108(8). Syprett acknowledges that section 744.108(8) superseded the common law restriction on attorney's fees articulated by Zepeda v. Klein, 698 So. 2d 329 (Fla. 4th DCA 1997), but argues that Zepeda is superseded by section 744.108(8) only for the guardian's

attorney. (IB, pp. 34-35.) Syprett's interpretation of Florida Guardianship Law defies basic tenets of statutory construction, and cripples the rights of incapacitated persons in contravention of the legislative intent of Chapter 744 by elevating the rights of guardians above the rights of wards.

The fundamental rules of statutory construction require that the language of a statute is to be given its plain and ordinary meaning. Critical Intervention Services, Inc. v. City of Clearwater, 908 So. 2d 1195, 1196 (Fla. 2d DCA 2005). The doctrine of *in pari materia* requires the courts to construe related statutes together, harmonizing them, and giving effect to each. Marks v. State, Dept. of Legal Affairs, 937 So. 2d 1211, 1214 (Fla. 4th DCA 2006). Moreover, in matters of statutory construction, it is fundamental that legislative intent is the polestar by which the court must be guided. Badaraco v. Suncoast Towers V Associates, 676 So. 2d 502, 503 (Fla. 3d DCA 1996). Courts "determine legislative intent by considering a variety of factors, including the language used, the subject matter, the purpose designed to be accomplished, and all other relevant and proper matters." Id. Finally, a basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would lead to an absurd or ridiculous result. Green v. Department of Highway Safety and Motor Vehicles, 905 So. 2d 922, 923 (Fla. 1st DCA 2005).

1. A Ward's attorney is entitled to fees under a plain reading of section 744.108(8) *in pari materia*.

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 (that is, those persons entitled to compensation as identified in subsection (1)). Finally, section 744.108(8) provides that when proceedings are initiated to determine and review fees for a guardian or an attorney under subsection (2), the costs, including the guardian's attorney's fees, shall be determined by the court and paid for from the guardianship estate.

Section 744.108(8) does not state that its application is limited to the guardian's attorney's fees, but only that it *includes* the guardian's attorney fees. The generic reference to "an attorney's fees", and the reference to subsection (2) of the statute - which, by its own reference, includes subsection (1) - renders inescapable the plain reading of the statute to include "an attorney who has rendered services to the ward" as being encompassed by subsection (8). Reading the above subsections *in pari materia*, recoverable costs of the proceedings under subsection (8) include fees for a ward's attorney.

Syprett fails to note that a distinction is made in section 744.108(1) between the guardian's attorney and the ward's attorney, since both are paid out of the guardianship estate. A guardian's attorney is only paid from the estate under section 744.108 if the services are rendered to the guardian "on the ward's behalf". §744.108(1). No such requirement exists for the ward's attorney, who renders services *directly to* the Ward. Thus, under section 744.108(8), *even* the guardian's attorney gets paid for fee proceedings, even though under section 744.108(1), the guardian's attorney could not get paid for services rendered to the guardian unless those services were rendered on the ward's behalf. [6]

The above analysis illustrates, in part, why the court in Zepeda v. Klein, 698 So.2d 329 (Fla. 4th DCA 1997) concluded that a guardian's attorney could not establish that time spent "collecting" his fee was compensable from the ward's estate under section 744.108: because those services were not rendered to the guardian, let alone to the guardian on the ward's behalf. If section 744.108(8) specifically

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6 Indeed, prior to the 2003 enactment of section 744.108(8), Syprett's attorneys would not have been entitled to payment from the Ward's estate for the trial below. In fact, Syprett's attorneys, if they are entitled to payment from the Ward's estate for the trial, would only be entitled to payment from the Ward's estate because the trial involved a determination, under section 744.108(8) of the Essenson Firm's fees under section 744.108(1). A guardian's attorney's fees for attempting to sanction the Essenson Firm under section 744.369(7) are not compensable from the Ward's estate under section 744.108(8). In the instant case, the record reflects an absence of attorney fee petitions from Syprett's attorneys, so whether those attorneys can establish that they were rendering services to Syprett alone rather than to Syprett on the Ward's behalf remains to be seen.

supersedes Zepeda's restriction on guardian's attorney fees for litigating entitlement to fees, it does so because Zepeda held that such entitlement cannot be established by an attorney for a guardian, who can only be compensated for services rendered to a guardian on the ward's behalf. Zepeda's analysis did not involve a ward's court-appointed attorney's right to fees for establishing entitlement to fees for representing a ward.

Failing to appreciate the distinction in section 744.108 between services rendered by attorneys for wards and attorneys for guardians, Syprett conflates the inclusion of the phrase "guardian's attorney" with the exclusion of all other attorneys. Under Syprett's literal reading theory, not only would the ward's court-appointed attorney not be entitled to fees under section 744.108(8), but also any former attorney for the guardian would not be entitled to fees under section 744.108(2). Syprett's confusion is illustrated by his reference to Judge Villanti's specially concurring opinion in King v. Fergeson, Skipper, Shaw, Keyser, Baron, and Tirabassi, P.A., 862 So. 2d 873 ((Fla. 2d DCA 2003). (IB, p. 30.)

Syprett argues that King holds that an attorney must show that it performed services "on behalf of the ward" in order to be entitled to an award under section 744.108. (IB, p. 29-30.) King, however, was discussing attorney fees for an attorney for an interested party in a guardianship proceeding, not an attorney for the ward. Thus, the more logical reading of the phrase "including fees for the guardian's

attorney," is to read the same as being inclusive, rather than exclusive, in the context of the entire statute.

2. Legislative intent compels the conclusion that a Ward's attorney is entitled to fees under section 744.108(8).

Syprett's interpretation contravenes the legislative intent behind the entire Florida Guardianship Law.[7] Under Syprett's interpretation of section 744.108(8), the purpose and intent of Chapter 744 of the Florida Statutes, as described in 744.1012, are eviscerated because only the guardian is guaranteed representation at a fee proceeding, whether the ward's attorney fees, the guardian's fees, or the guardian's attorney fees are challenged. The legislature, throughout Chapter 744, explicitly provides for the promotion of rights and participation, to the extent possible, of incapacitated persons under a guardianship. See e.g. § 744.3215, Fla. Stat. (2006). The attorney fee statute itself requires that the ward, unless totally incapacitated, is to receive notice of all petitions for fees. § 744.108(6), Fla. Stat. (2006). The legislature also specifically preserves due process rights for incapacitated persons through sections 744.3215(1)(k) and (l) by explicitly providing the right to counsel and the right to access the courts. These rights have a constitutional dimension, and

7 Reviewing a "white paper" purportedly submitted to the Legislature by the Real Property, Probate and Trust Section of the Florida Bar, as urged by Syprett in his Initial Brief, is neither recommended nor mandated under any rule of statutory construction.

have been affirmed by this court. In Re: Thelma King/Essenson v. Lutheran Services Florida, Inc., 862 So. 2d 869 (Fla. 2d DCA 2003).

Under Syprett's interpretation, if a ward objected to fees submitted by a guardian or a guardian's attorney and a proceeding under section 744.108(8) was initiated to review and determine the fees, the guardian's attorney would recover fees for the proceeding but the ward's attorney would not. (In fact, there is no evidence in the record that Syprett's attorneys were not paid for their work on the case.) Syprett's reading of section 744.108(8) would have a chilling effect on whether a ward would have representation at a proceeding under section 744.108(8) at all. This effectively guarantees that incapacitated persons, for whom the Florida Guardianship Law was enacted, will not be adequately represented, if represented at all, during a fee proceeding, even if the incapacitated person was the person objecting to the fees. This renders meaningless the legislative mandate that incapacitated persons have access to the courts and to counsel.

Syprett's interpretation leads to an absurd result that cannot be intended by the legislature. Nothing in Chapter 744 indicates that the Legislature intended guardians to enjoy legal primacy over wards. Syprett's interpretation of section 744.108(8) would afford the ward no voice in fee proceedings under section 744.108, contrary to legislative intent. Syprett acknowledges that the public policy in guardianship law is "best interest of the ward" (IB, p. 36) but wrongfully concludes that it is somehow in

the Ward's best interest not to be represented by counsel at fee proceedings. Syprett's misplaced concern notes the "chilling effect" on guardians, rather than the chilling effect Syprett's interpretation would have on ward's attorneys and thus on a ward's due process rights.

Moreover, Syprett's interpretation leads to a particularly incongruous result in the instant case. Syprett, who, as guardian and with no authority by the court, initiated – and lost – litigation that culminated in a three-day trial against the ward's attorney, would be able to recover fees from the ward's estate for his unauthorized and expensive foray. The ward's attorney, however, who promoted and preserved the Ward's right to be heard, and who successfully defended not only its entitlement to fees for representing the Ward but also defended against the guardian's attempt to sanction the Ward's attorney for giving voice to the Ward, would recover no fees for these lengthy and contentious proceedings. This absurd conclusion cannot be the result intended by the legislature. For the foregoing reasons, the Essenson Firm's award of fees under section 744.108(8) for the proceedings to determine whether the Essenson Firm was entitled to fees should be affirmed.

II. THE TRIAL COURT'S DECISION TO AWARD FEES TO THE ESSENSON FIRM UNDER SECTION 744.108(1) AND (2) SHOULD BE AFFIRMED.

A. SYPRETT'S APPEAL OF THE ESSENSON FIRM'S ATTORNEY FEES UNDER SECTION 744.108(1) AND (2) IS UNTIMELY AND SHOULD BE STRICKEN.

As detailed in the Essenson Firm's Motion to Strike or Dismiss Appeal as Untimely filed in this proceeding, Syprett's appeal of the final orders contained in the January Fee Order is untimely. The January Fee Order contains five decretal paragraphs. Paragraphs 1 and 2 grants the Essenson Firm's two fee petitions, awarding attorney's fees and costs to the Essenson Firm in the total amount of $10,392.93, and gives the Essenson Firm *the option* to reduce the order to a final judgment for collection purposes if payment is not made within 20 days of the order. (App.1, p. 19.) Paragraph 3 denies the motion and amended motion for attorneys' fees filed by Syprett. (App.1, p. 20.) Paragraph 4 determines that the Essenson Firm is entitled to an award of attorney fees and costs for the proceedings resulting in the orders embodied in paragraphs 1 through 3. (Id.) Finally, paragraph 5 reserves jurisdiction to determine the further amount of fees and costs to be awarded to the Essenson Firm, pursuant to paragraph 4. (Id.)

Paragraphs 1, 2, and 3 of the decretal portions of the January Fee Order awarded both the entitlement and amount of attorney's fees and costs to the Essenson Firm under section 744.108(1) and (2) and denied Syprett's motion and amended

motion for attorneys' fees under section 744.369(7). The Essenson Firm's Fee Petitions and Syprett's motion for attorney fees were the main adjudication between the parties resulting in the January Fee Order. Accordingly, that portion of the Fee Order is final. See e.g. Caufield v. Cantele, 837 So. 2d 371, 375 (Fla. 2002); Fabing v. Eaton, 941 So. 2d 415, 417 (Fla. 2d DCA 2006); Scott ex rel. Scott v. Women's Medical Group, P.A., 837 So. 2d 577 (Fla. 1st DCA 2003).

Fla. R. App. P. 9.110, which governs, *inter alia*, appellate proceedings to review final orders of lower tribunals, specifies that the rule applies to proceedings that "seek review of orders entered in probate and guardianship matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code." See Fla. R. App. P. 9.110(a)(2). Accordingly, in probate and guardianship proceedings, orders awarding both entitlement and amount of attorney's fees are final, appealable orders. See e.g. King v. Fergeson, Skipper, Shaw, Keyser, Baron, and Tirabassi, P.A., 862 So. 2d 873 (Fla. 2d DCA 2003); In Re: Thelma King/Essenson v. Lutheran Services Florida, Inc., 862 So. 2d 869 (Fla. 2d DCA 2003).

That the January Fee Order reserves jurisdiction to set an amount of fees to the Essenson Firm for the proceedings under section 744.108(8) does not render the January Fee Order non-final. Travelers Indem. Co. v. Hutchins, 489 So. 2d 208, 209-210 (Fla. 2d DCA 1986). A judgment on the merits of a suit is final and appealable

even if it reserves jurisdiction to later determine a party's entitlement or amount of attorney's fees. Ulrich v. Eaton Vance Distributors, Inc., 764 So. 2d 731 (Fla. So. 2d DCA 2000); McGurn v. Scott, 596 So. 2d 1042, 1044 (Fla. 1992).

Moreover, the fact that paragraphs 1 and 2 of the January Fee Order afford the Essenson Firm the option of reducing the order to a final judgment does not detract from the finality of the January Fee Order. The reduction is merely an option to be elected –or not– by the Essenson Firm. Entering a final judgment that conforms to an earlier order is a purely ministerial act, requiring no discretion of the trial court. Purely ministerial acts are not considered judicial labor affecting the finality of an order. Stowe v. Universal Property & Cas. Ins. Co., 937 So.2d 156, 159 (Fla. 4th DCA 2006) (noting in dicta that entering a "final judgment that conformed with the order" is a "largely ministerial act"); Connell v. City of Plantation, 901 So.2d 317, 319 (Fla. 4th DCA 2005) (noting that entry of a judgment in accordance with an arbitrator's decision is a ministerial act requiring no discretion).

In addition, the ministerial, non-discretionary act of reducing the January Fee Order to a Final Judgment is for the purpose of enforcement and collection. In Florida, "a judgment is final where nothing further remains to be done to fully effectuate termination of the cause between the parties directly affected *except by enforcement by execution or otherwise*." GEICO Financial Services, Inc. v. Kramer, 575 So. 2d 1345, 1346 (Fla. 4th DCA 1991) (emphasis added).

To hold otherwise would permit litigants to revive judgments for the purpose of appeal by necessitating enforcement procedures through non-compliance. Not only would such a rule encourage non-compliance of court orders, which is against public policy, but it would also allow the thirty-day jurisdictional timeframe in which to file an appeal of an otherwise final order to be expanded unnecessarily by non-uniform, arbitrary, and indefinite lengths of time. Also, to start the running of a timeframe of an appeal from the optional reduction to final judgment date of an earlier written order would render meaningless the definition of "rendition" under Fla. R. App. P. 9.020(h), which states, "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal."

For all the foregoing reasons, this Court should find that paragraphs 1, 2, and 3 of the January 30, 2007 Fee Order constitute a final order, which Syprett failed to appeal within 30 days, and thus, this Court is without jurisdiction to entertain its appeal. (The Essenson Firm nevertheless will argue the appeal of its fees on the merits.)

B. UNDER THE FACTS AND APPLICABLE LAW, THE TRIAL COURT CORRECTLY FOUND THAT THE ESSENSON FIRM WAS ENTITLED TO FEES FOR REPRESENTING THE WARD UNDER SECTION 744.108(1) AND (2).

1. The Essenson Firm did not exceed the scope of representation of the Ward and was thus entitled to fees for services rendered to the Ward.

Syprett argues that the court erred by awarding attorney fees to the Essenson

Firm under sec. 744.108(1) and (2) because, Syprett claims, most of the Essenson Firm's time entries were outside the scope of the Essenson Firm's court appointment and were not "on behalf of or in the best interest of the Ward." (Initial Brief, p. 38; TR. p. 26.) Syprett misconstrues section 744.108 and the applicable case law.

Syprett argues that the word "behalf" in relation to the Ward in section 744.108 is synonymous with the Ward's "best interest." (Initial Brief, p. 38-39.) Accordingly, Syprett urges this Court to engraft a new criterion in the above section that would require a court, in determining entitlement under section 744.108(1), to analyze each entry of Ward's court-appointed attorney to determine whether the service was in the Ward's "best interest" or provided "a benefit". Syprett cannot and does not cite to any authority for this proposition.

This argument was rejected by the lower court. As the January Fee Order correctly noted (and, as argued herein *supra*), 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. (App.1, p. 9.) Section 744.108(1) also provides for reimbursement of costs incurred "on behalf of the ward". (Id.) Thus, the January Fee Order concluded that section 744.108 (1) provides reasonable fees to a Ward's attorney for *services rendered* to the Ward as well as reimbursement for *costs*

incurred on behalf of the Ward. (App.1, pp. 9-10.)

The January Fee Order also rejected Syprett's argument about "benefit". (Id. at p. 10.) The word "benefit" does not appear in section 744.108, Fla. Stat. (2006). While the "results obtained" are one of nine factors the court may consider in setting an amount (see section 744.108(2)(f), 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)).

Accordingly, under section 744.108(1), only services rendered by a guardian's attorney to a guardian must be analyzed to determine whether those services rendered were "on the Ward's behalf." The cases cited by Syprett, King v. Fergeson, Skipper, et al., 862 So. 2d 873 (Fla. 2d DCA 2003) and Butler v. Guardianship of Peacock, 898 So. 2d 1139 (Fla. 4th DCA 2005), both discuss that analysis to reject fees under section 744.108 for an interested party's attorney and a putative guardian's attorney, respectively. No such analysis is required for a court-appointed attorney for the Ward.

The January Fee Order relied on this court's decision in the case captioned In Re: Thelma King/Essenson v. Lutheran Services Florida, Inc., 862 So. 2d 869 (Fla. 2d DCA 2003). In King, the lower court denied Essenson, the court-appointed

attorney for the Ward, fees for prosecuting an appeal of the order determining the ward incapacitated and appointing a professional guardian. King, 862 So. 2d at 870. (On appeal, those orders were affirmed *per curiam* by this Court. Id.) The order, which denied Essenson all fees, stated ". . . the appeal of the determination of incapacity and appointment of guardian were not in the ward's best interests". Id.

This Court reversed, finding that if Essenson did not exceed the scope of his appointment as the ward's counsel, then he was entitled to a fee under section 744.108(1), Fla. Stat. (2003). Id. 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. Id. at 870-871.[8]

In this case, the Essenson Firm followed the King court's recommendation of the "better practice" for ward's attorneys, id. at 871, by obtaining an order specifically appointing it to represent the Ward in connection with "all pending and potential issues in this guardianship case." (R. pp. 294-195.) Since the Essenson Firm did not exceed the scope of the order appointing it as attorney for the Ward, the lower court concluded correctly that the Essenson Firm was entitled to its fees. Accordingly, the order awarding the Essenson Firm fees for representing the Ward

8 Although "benefit" is not an element of entitlement to fees under sec. 744.108, the Essenson Firm provided a benefit to the Ward in that she was represented by counsel and had access to the courts, where her concerns and preferences were heard.

should be affirmed.

2. The trial court's findings regarding the Essenson Firm's entitlement to fees under sec. 744.108(1) and (2) were based on competent, substantial evidence and should thus be affirmed.

The January Fee Order contains nearly twenty pages of analysis and findings based on the law and the evidence presented at trial. Nevertheless, Syprett argues that the lower court's findings, with regard to the Essenson Firm's entitlement to fees, lack competent substantial evidence. (IB, p. 38.) The time entries contested by Syprett include (a) time entries for work predating the October 31, 2005 Order Appointing; (b) time entries for pursuing the Ward's court-ordered driving examination; and (c) time entries for work performed after the court's February 22, 2006 order approving the Initial Syprett Plan, including those involving the Ward's Objections. (IB, p. 38.)

In the instant case, the trial court heard three days of testimony from ten witnesses, eight of whom testified at the behest of Syprett. (TR. pp. 3 and 126.) When a probate court receives testimony regarding fees under section 744.108, "it may assess the credibility of that testimony in light of the court's experience and common sense, and this court must defer to the probate court's credibility assessment." In re Guardianship of Shell, 978 So. 2d 885, 890-91 (Fla. 2d DCA 2008). Factual conclusions of a trial court are presumed correct and the burden is on the appellant to demonstrate reversible error. Sorrels v. Rebecca's Ice Cream, Inc.,

696 So. 2d 1313, 1315 (Fla. 2d DCA 1997). The appellate court may not substitute its judgment for that of the trial court on findings of factual issues. First Federal Sav. and Loan Ass'n of Palm Beaches v. Bezotte, 740 So. 2d 589 (Fla. 4th DCA 1999).

The court heard evidence from at least three experts on the issues, including the issue of the Essenson Firm's entitlement to fees. (R. p. 1391.) The court also heard from the former guardian of the Ward, Kibbey, who testified that the Ward had a "very strong, firm personality" (TR. p. 181), that the Ward was articulate, able to have a coherent conversation, dressed appropriately, and was able to communicate clearly. (TR. pp. 210-211.) Kibbey also characterized this guardianship case as "difficult." (TR. pp. 211-212.) The trial court also heard testimony from Welch, who was cross-examined for several hours regarding nearly each entry in her itemized billsheets. (TR. pp. 405-427, 559-659.)

The January Fee Order devotes three pages to the determination of the entitlement to the Essenson Firm's Fee Petitions (App.1, pp. 9-10) and another three pages to the determination of the amount of the Essenson Firm's fees. (App.1, pp. 16-18.) In the January Fee Order, the trial court noted that it had "closely reviewed all of the Essenson Firm billings" and found that the "hours expended and the rate charged are reasonable." (App.1, p. 7.) The court further found that the Essenson Firm's billings were conservative, noting that the Essenson Firm "could have requested more fees based on the many entries of time

where no fee was sought" and that Welch "expended time in a pro bono capacity." (App.1, p. 7, emphasis in original.)

With regard to the time entries predating the order appointing the Essenson Firm, and following her discharge on June 26, 2006, the Court found that Welch proceeded in good faith, and "any reasonable actions that she took before and after the appointment and discharge would have been approved." (App.1, p. 6.)

With regard to entries involving action taken by Welch after the Initial Syprett Plan was approved by an order dated February 22, 2006 that also discharged Welch (the "February 22, 2006 order"), Welch testified that she had not received a copy of the February 22, 2006 order. (TR. pp. 613-615.) Burchett testified that the February 22, 2006 order does not appear to have been copied to Welch, and the February 22, 2006 order itself does not contain any indication that Welch was copied on it. (TR. p. 540; R. p. 372.) Moreover, before Syprett filed his Motion for Attorney's Fees and Objection to the Essenson Firm's Fee Petitions, neither Syprett nor his counsel, in their various communications with Welch, mentioned to Welch that she had been discharged. (TR. pp. 150, 540.)

Syprett argues that Welch should not be compensated for representing the Ward on her Objections. As court-appointed counsel, Welch was charged by Florida Guardianship Law to review the initial guardianship plan and represent the Ward during an objection thereto, if any. § 744.362(2), Fla. Stat. (2006).

Statutorily, this review is the last act of the court-appointed counsel in a guardianship case. Id. In the January Fee Order, the court noted that "[b]y local custom, Orders approving Plans are entered quickly" and so, "[g]ood faith objections should be heard." (App.1, p. 6.) In fact, at trial, the court clarified on the record that orders approving reports are entered quickly and often the "Judge never even sees it." (TR. p. 615.) Additionally, the Essenson Firm's order appointing it as court-appointed counsel was broader than usual, considering the Ward's concerns and the significant participation by the Ward in decisions affecting herself and her property afforded to her in the Incapacity Order. The January Fee Order devoted seven pages to an analysis of the reasonableness of the Ward's Objection. (App.1, pp. 2-7, 17-18.) This finding should not be disturbed on appeal.

Syprett also argues that Welch should not have pursued the Ward's driving examination, the two Driving Orders notwithstanding. The January Fee Order correctly concluded that Welch was obligated to comply with court orders and had Welch willfully disregarded those Driving Orders, Welch could have exposed herself to sanctions for the same. (App.1, pp. 16-17.) The January Fee Order specifically found that Welch was "simply trying to have the Settlement issues addressed, and comply with Court Orders." (App.1, p. 6.) The January Fee Order correctly found that the Essenson Firm handled its legal obligations appropriately

(App.1, p. 6) and Welch performed her duties as an advocate for the Ward. (App.1, p. 18.)

For all of the foregoing reasons, the trial court's comprehensive and thorough January Fee Order finding, *inter alia*, that the Essenson Firm is entitled to its fees and costs under 744.108(1) and (2) for representing the Ward, should be affirmed.

III. UNDER BOTH THE FACTS OF THIS CASE AND THE APPLICABLE LAW, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION TO DENY ATTORNEY'S FEES TO SYPRETT UNDER SECTION 744.369(7).

Section 744.369(7) provides that "if an objection is found to be without merit, the court may assess costs and attorney's fee against the person who made the objection." § 744.369(7), Fla. Stat. (2006). In order to award fees under section 744.369(7), a trial court must first find that the objection interposed is devoid of merit. If the objection is devoid of merit, the court, in its discretion, may award attorney fees against the person who interposed the objection. In the instant case, the trial court was urged by Syprett that section 744.369(7) authorizes a sanction of attorney's fees against a Ward's court-appointed attorney for filing an objection for the Ward. Syprett argues that the word "person" in section 744.369(7) includes "law firms" because "person" is defined in general definition under Florida Statute section 1.01(3) as "firms". (IB, p. 46.)

In the instant case, the court found, after three days of trial, that the Ward's Objections, though partially rendered moot by the Ward's deteriorating medical condition, were not without merit. The court also found that, as a matter of law, the word "person" in this case refers to the party who interposed the objections, rather than the party's counsel. Accordingly the trial court's ruling must be affirmed.

A. THE TRIAL COURT CORRECTLY FOUND AS A MATTER OF FACT THAT THE WARD'S OBJECTIONS HAD MERIT.

In the January Fee Order, the trial court analyzed each one of the Ward's Ojections and found that each of the Ward's Objections to the Initial Syprett Plan were reasonable and thus not devoid of merit. (App.1, pp. 2-7.)

Specifically, the court found that the Ward's objection directed to the level and duration of home healthcare came under the ambit of section 744.3215(1)(f), Fla. Stat. (2006). (App.1, pp. 3-4, 6-7, 17-18.) Section 744.3215(1)(f), Fla. Stat., which states that a person who is adjudicated incapacitated retains the right:

> To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable.

Accordingly, the trial court found that this portion of the objection had merit, although it was rendered moot by the incapacitation and hospitalization of the Ward, which occurred just one week prior to the hearing on the Ward's Objections on June 26, 2006. (App.1, p. 8.)

In addition, the court found that the portion of the Ward's Objections which related to the provision in the Initial Syprett Plan that stated that the Settlement made in mediation included a provision for mental healthcare treatment was very similar in substance to the objection filed by the Ward to the Initial Kibbey Plan when she was represented by attorney Boyer. (App.1, p. 8.) Boyer testified that his objection had merit. (TR. p. 668.) Accordingly, the trial court found that the objection to the language used in the Initial Syprett Plan had merit in this case and that "[c]larifying the wording of the [Initial Syprett Plan] may have been beneficial to [the Ward's] state of mind." (App.1, p. 3.)

The trial court also found that the portion of the Ward's Objection related to the loss of her driving privileges because of external events beyond her control was not unreasonable. (App.1, p. 4-5.) The objection noted that, although the court permitted the Ward to re-take her driving examination, due to a circuit court clerk's inclusion of the Ward's name on a list sent to the Department of Motor Vehicles, the Ward no longer had a license and could not sit for a driver's examination within the timeframes ordered previously by the court. As the January Fee Order concluded: "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." (App.1, p. 5.)

In summary, the trial court found that, as a matter of fact, the Ward's Objections did have merit when filed, and the fact that changed circumstances rendered a portion of the Ward's Objections moot at the time of the hearing, and the fact that the Ward's Objections were not sustained by the court, does not render the Ward's Objections meritless. The court's findings of fact should not be disturbed on appeal. Accordingly, the court's denial of attorney's fees to Syprett under section 744.369(7) should be affirmed.

B. THE RULES OF STATUTORY CONSTRUCTION REVEAL THAT SECTION 744.369(7) DOES NOT PERMIT SANCTIONS AGAINST ATTORNEYS FOR FILING OBJECTIONS ON BEHALF OF THEIR CLIENTS.

Even though the trial court found that the Ward's Objections were reasonable within the meaning of section 744.369(7), the court went on to analyze and reject Syprett's legal theory. Syprett argued below, as he does in his Initial Brief, that the generic statutory definition of the word "person" under section 1.01(3), Fla. Stat. (2006) includes the word "firms" and, therefore, the court may award attorney's fees in favor of the guardian and against the Essenson Law Firm under section 744.369(7). (IB, p. 46.) Syprett's theory that section 744.369(7) permits a court to sanction a court-appointed attorney for the Ward is untenable.

The original Motion for Attorney's Fees filed on or about July 24, 2006 by Syprett sought fees against Barbara J. Welch only. The Amended Motion for Attorney's Fees filed on or about December 4, 2006 by Syprett substituted the

"Essenson Law Firm" as the real party in interest, arguably to fit the term "firm" within the definition of "person" under section 1.01(3), Fla. Stat. (2006).

The trial court found that Syprett's legal argument is not supported by applicable law and fails to comport with significant rules of statutory construction. (App.1, pp. 11-16.) The trial court's careful and detailed analysis of Florida Probate Law and the Probate Rules in the January Fee Order compelled the court to reject Syprett's argument, as a matter of law. (Id). The trial court found that the rules of statutory construction compel the conclusion that the definition of "person" under section 1.01, Fla. Stat. (2006) does not include a party's attorney as applied to section 744.369(7). (Id. at 14-16.) The Essenson Firm relies on the court's analysis in the January Fee Order. (App.1, pp. 11-12.)

The trial court further noted "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 which suggests that this statute should be interpreted in such a manner." (App.1, p. 15, emphasis in original.) The trial court correctly concluded that the Ward was the legal "person" who objected to the plan under Florida Probate Rule 5.700 and section 744.369(7). Accordingly, the trial court concluded that section 744.369(7) does not, as a matter of law, grant the court the authority to award attorney's fees against a court-appointed attorney for the Ward. The trial court's denial of fees to

Syprett under section 744.369(7) should be affirmed, as a matter of law.

C. EVEN IF SECTION 744.369(7) PERMITTED THE SANCTIONING OF A WARD'S COURT-APPOINTED ATTORNEY FOR FILING A MERITLESS OBJECTION FOR THE WARD, AN AWARD OF ATTORNEY'S FEES UNDER SECTION 744.369(7) IS STILL DISCRETIONARY.

Even if the trial court found, as a matter of fact, that the objection was "without merit", and further found, under the law, that "the person who made the objection" is the Ward's attorney, the trial court still has discretion as to whether to award costs and attorney's fees under section 744.369(7), which provides that the "court *may* assess costs and attorney's fees…" (emphasis added). In the instant case, the court's decision did not reach the discretionary portion of section 744.369(7). Nevertheless, because the statute is discretionary, the court's decision should not be disturbed unless the decision is "arbitrary, fanciful, or unreasonable" in that "no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). In the instant case, the "superior vantage point of the trial judge" should be recognized, and the court's ruling on the denial of fees to Syprett under section 744.369(7) should be affirmed. See id.

From a policy point of view, awarding fees against a lawyer who is court appointed to represent an incapacitated person would have a chilling effect on lawyers agreeing to court assignments, for which experienced lawyers are compensated generally at below market rates. Reviewing the initial guardianship

reports and representing the ward in connection with an objection thereto, if any, is a statutory duty of court-appointed counsel for the ward. § 744.362(2), Fla. Stat. (2006). Such a ruling would set a chilling precedent for court-appointed attorneys, which would, in turn, result in an evisceration of an adjudicated person's statutory right to have access to the courts and to counsel under sections 744.3215(1) (k) & (l), Fla. Stat. (2006). The Ward in this case not only desired to have a voice in the proceedings, but was guaranteed, by law and by agreement, a voice in the decisions affecting her. The trial court reached the correct decision to deny Syprett his attorney fees under section 744.369(7) based on both the facts and the law. Nonetheless, section 744.369(7) is discretionary and, thus, the trial court's decision to deny Syprett fees must be affirmed on appeal.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that this Court conclude that the court below neither erred nor abused its discretion when it (a) granted the Essenson Firm attorney's fees under 744.108(8); (b) granted the Essenson Firm attorney's fees for representing the Ward under section 744.108(1) and (2); and (c) denied Syprett his attorney fees against the Essenson Firm under section 744.369(7). The January 30, 2007 Fee Order should be affirmed, and the May 24, 2007 Final Judgments thereon should be affirmed (subject to the cross-appeal below).

CROSS APPEAL

STATEMENT OF THE CASE

The Essenson Firm appeals the Second Final Judgment dated May 24, 2007, which awarded fees and costs to the Essenson Firm under section 744.108(8), pursuant to the January Fee Order.

References to the record on appeal are designated: (R. p._____). References to the Transcript of the trial dated December 11, 2006, January 11, 2007, and January 12, 2007 are designated (TR. p.__). References to the Transcript of the hearing dated April 12, 2007 are designated (APR. TR. p.___). For the Court's convenience, the Second Final Judgment on cross-appeal is appended as Tab 2 hereto and will be referred to as (App.2, p.___) using the page numbers therein. References to the exhibits admitted into evidence at the hearing on April 12, 2007 are designated (APR. Ex. ____).

STATEMENT OF THE FACTS

Syprett's July 24, 2006 Motion for Attorney's Fees under section 744.369(7) sought an order awarding attorney's fees "against Barbara Welch, Esquire, of the Law Office of James L. Essenson." (R. p. 534). Syprett's Amended Motion for Attorney Fees was brought against the Essenson Firm (R. p. 637), and indicated by its attachments that Syprett was seeking nearly $40,000.00 in attorney's fees from the Essenson Firm. (TR. p. 20). Additionally, Syprett was objecting to the Essenson Firm's entitlement to its fees for representing the Ward. (R. pp. 627-636.) The hearing on the above issues were scheduled for December 11, 2006. (It was only near the end of that hearing that the court and parties realized that the hearing would have to be continued further to an additional day. (TR. pp. 111-112, 113-114.))

James L. Essenson was not available on December 11, 2006. (TR. p. 138). Because the hearing on the above issues would necessarily require substantial testimony from the Essenson Firm's associate attorney Barbara J. Welch, the Essenson Firm retained Roger Young, Esq., for the hearing, who filed a Notice of Appearance on behalf of Barbara J. Welch on or about November 20, 2006. (R. p. 626.) On December 6, 2006, Roger Young ("Young") signed a stipulation authorizing the use of teleconferencing at the trial as "attorney for Barbara J. Welch and the Law Firm of James L. Essenson." (R. p.755.)

On the date of the trial, December 11, 2006, Young clarified that he was appearing on behalf on Barbara Welch ("Welch") and on behalf of the Essenson Firm. (TR. p. 6). On the second day of trial, on January 11, 2007, James Essenson ("Essenson") was able to appear. Accordingly, Essenson filed a Notice of Appearance on behalf of the Essenson Firm on or about January 8, 2007. (R. p. 837.)

On January 11, 2007, Essenson clarified that he was representing himself, as sole proprietor of the Essenson Firm, and that Young would continue to represent Welch. (TR. p. 137.) Subsequently, there ensued a discussion about the threat of sanctions against Welch, the issue of entitlement to fees, and the possibilities of multiple repetitious questions on cross by Young and Essenson together. (TR. pp. 137-142.) In the end, counsel for Syprett insisted that the record reflect that Essenson and Young are appearing as co-counsel for the Essenson Firm. (TR. p. 142.) This was agreed to in open court by Essenson. (Id.)

The Essenson Firm prevailed at trial and the January Fee Order awarded fees to the Essenson Firm for the fee proceedings under section 744.108(8) (hereinafter the "Fee Proceedings"). (APP.1, p. 20.) A hearing was held on April 12, 2007 on the Essenson Firm's Amended Petition for Attorney Fees and Costs Pursuant to Court Order Dated January 30, 2007 to determine the amount of fees for the Fee Proceedings (the "Amended Petition"). (R. pp. 1525-1554.)

The Essenson Firm's Amended Petition sought as follows:

1. An amount of $4,680.00, representing 20.80 hours, for services rendered by Theodore Gollnick, Esq., as expert for the Essenson Firm in connection with the Fee Proceedings. (R. p. 1528.)

2. An amount of $22,035.00, representing 73.45 hours for services rendered by Roger Young, Esq. in connection with the Fee Proceedings. (R. p. 1526.)

3. An amount of $50,140.00 for services rendered by the Essenson Firm in connection with the Fee Proceedings. That amount represents 94.1 hours for Essenson; 94 hours for Welch; and 8.3 hours for the firm's paralegal. (R. p. 1526-1527.)

At the April 12, 2007 hearing, the Essenson Firm's fee petitions, attached to its Amended Petition, were admitted into evidence as Exhibits 3 and 4. Essenson testified at the April 12, 2007 hearing that he was not available for the December 11, 2006 hearing; that he was aware that Syprett, an attorney himself, would have two attorneys from the law firm of Harllee & Bald at the hearing; and that Welch would be the primary witness, so an attorney besides Welch, appearing for Welch and the Essenson Firm had to be present. (APR. TR. pp. 107-109.) Essenson further testified that, upon his availability, he appeared as co-counsel for the Essenson Firm

because Young did not have a lot of experience with guardianship matters. (APR. TR. p. 108.)

The Essenson Firm's expert, Thomas Valentine, testified that he had been provided a file which included the memoranda filed in connection with the Fee Proceedings. (APR. TR. p. 28.) Mr. Valentine looked at the various memoranda, research, and pleadings that were prepared by the Essenson Firm and concluded that the work was "high-quality." (APR. TR. p. 36.) Mr. Valentine concluded that the rates charged by Young were reasonable, under the factors set forth in section 744.108(2), and the services rendered by the Essenson Firm were reasonable and necessary, with the exception of 12 hours for Welch's time. (APR. TR. pp. 30-33, 35-36, 37-38.) Mr. Valentine reasoned that the trial lasted approximately 16 hours and that Welch testified for 4 hours. (APR. TR. pp. 32-33.) Accordingly, Mr. Valentine deducted the remaining 12 hours of Welch's attorney time. Mr. Valentine reviewed the Essenson Firm Fee Matrix (entered into Evidence as Exhibit 1), which summarized and categorized the Essenson Firm's billings, and found the time spent was necessary and rates were reasonable. (APR. TR. pp. 31-38.)

Syprett's expert, Barry Spivey, testified that Roger Young should not be paid at all for his services from the guardianship estate under section 744.108(8). (APR. TR. pp. 142-43, 146.) Mr. Spivey so opined because he understood that section 744.108(8) was enacted to reverse the court's ruling in Zapeda v. Klein "to allow

attorneys for guardians to be able to get fees for having to litigate their fees." (APR. TR. p. 136.) Mr. Spivey also deducted time from Welch for being a "client to Roger Young." (APR. TR. p. 146.)

From Essenson and Welch's total hours, Mr. Spivey initially deducted 46.4 hours that he deemed "duplicative." (APR. TR. p. 147.) Mr. Spivey also deducted time spent by the Essenson Firm for defending against Syprett's motion for fees, notwithstanding the language of the January Fee order to the contrary. (APR. TR. p. 147-148.) Eventually, Mr. Spivey reached a total of 124.2 hours total for the Essenson Firm, or $32,000.00. (APR. TR. p. 148.)

Mr. Spivey then reviewed a few of the factors under section 744.108(2). (APR. TR. pp. 148-149.) Mr. Spivey concluded that there was nothing novel or complex about this case, stating "there's nothing magical about fee proceedings." (APR. TR. p. 149.) In the end, Mr. Spivey opined that a total of 40 hours would be a reasonable time spent for a firm on the Fee Proceedings. (APR. TR. p. 150.)

Mr. Spivey admitted to the trial court that his testimony was premised on his own interpretation of section 744.108(8), which, according to Mr. Spivey, does not allow an incapacitated person's attorney to recover fees for Fee Proceedings. (APR. TR. pp. 138-140.) Accordingly, Mr. Spivey selected "40 hours" as a reasonable amount, which he thought was a "generous allowance of time" for what Mr. Spivey considered "compensable" for the Essenson Firm. (APR. TR. p. 150.) Mr. Spivey

also based the amount of 40 hours on the amount in controversy at the underlying Fee Proceedings. (Id.)

Nevertheless, Mr. Spivey found no fault with the rate charged (APR. TR. pp. 149-150); the results obtained (APR. TR p. 155); or the quality of the Essenson Firm's work (APR. TR. pp. 155-156). Mr. Spivey acknowledged that the January Fee Order adopted about 90 percent of the proposed order the Essenson Firm submitted to the court. (APR. TR. p. 155.)

Syprett testified about the nature and value of the Ward's assets, under section 744.108(2)(e). (APR. TR. p. 173.) Syprett testified that the liquid assets amounted to $74,300.00. (APR. TR. pp. 173-174.) Syprett testified that those assets did not include the Ward's real property which was approximately valued at $825,000.00. (APR. TR. p. 175.) (Syprett testified that the Ward resides in an assisted living facility. Id.) Syprett also testified that the recently filed Annual Accounting from which he was testifying, did not include the "two or three hundred thousand" antique and collectible pieces the Ward owns. (APR. TR. pp. 176-177.)

The Annual Accounting, entered as Exhibit D at the hearing on April 12, 2007, (the "Accounting") shows that the Ward's estate is valued at nearly one million dollars. (See also R. p. 1574.) However, the Accounting does not appear to include any value for the Ward's furniture, furnishings, several insurance policies, or the Ward's jewelry and other valuables contained in two safe deposit boxes. (See R. p.

1581, APR. Ex. D.) (The Ward's safe deposit boxes were inventoried by the Ward's previous guardian, Kibbey, and the inventories are filed with the court at R. pp. 139-154, 157-195.)

It was also revealed at the hearing on April 12, 2007, that Syprett paid his attorneys Harllee & Bald and Charla Burchett a total of $31,000.00 in fees from the Ward's assets for the year 2006. (APR. TR. pp. 177-178.) Syprett acknowledged that the Accounting filed with the court and admitted at the hearing as Exhibit D was missing the itemized list of expenditures referred to on Schedule B of the Accounting. (APR. TR. pp. 179-180.) The list of expenditures, admitted into evidence on April 12, 2007, shows that Syprett expended $31,000.00 in attorney fees from the Ward's assets for the year 2006. (APR. TR. pp. 177-178.) [9]

At the conclusion of the hearing, the court requested proposed orders. On May 24, 2007, the court entered the Second Final Judgment that denied the Essenson Firm entitlement to fees for Young's "services rendered to the Essenson Firm or Barbara Welch" (App.2, p. 1.) The Second Final Judgment awarded fees for Essenson, Welch, and their paralegal, but reduced Essenson's time by 37.1 hours and reduced Welch's time by 54 hours. (Id.) The Second Final Judgment also awarded $6,308.65

9 Notably, the order authorizing Syprett to pursue the instant appeal contains a provision, evidently agreed to by Syprett, that if this appeal is unsuccessful, Syprett will personally pay the attorney's fees and costs incurred on the appeal. (R. p. 1492.)

in costs, which included $3,082.50 for 13.7 of Theodore Gollnick's time. (App.2, p. 2..)

Essenson appeals the Second Final Judgment because the same denied the Essenson Firm entitlement to Young's fees under section 744.108 and significantly reduced the hours expended by the Essenson Firm.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

When entitlement to attorney's fees is based on the interpretation of a statutory provision as a "pure matter of law," the court will undertake a *de novo* review. Allstate Ins. Co. v. Regar, 942 So. 2d 969, 971 (Fla. 2d DCA 2006). When reviewing the amount of a trial court's award of attorney's fees, appellate courts apply an abuse of discretion standard." Gibbs Const. Co. v. S. L. Page Corp., 755 So. 2d 787, 790 (Fla. 2d DCA 2000). Discretionary judicial acts are subject to the test of reasonableness; that is, they must be supported by logic and justification for the result, founded on substantial, competent evidence. In re Guardianship of Sapp, 868 So. 2d 687, 693 (Fla. 2d DCA 2004).

The Final Order denying Roger Young entitlement to fees for time spent in connection with the Fee Proceedings, under section 744.108(8) and pursuant to the January Fee Order, should be reviewed under a *de novo* standard. The amount of attorney's fees awarded to the Essenson Firm in the Final Order should be reviewed under an abuse of discretion standard.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING THE ESSENSON FIRM ATTORNEY'S FEES FOR ITS COUNSEL.

A. THE ESSENSON FIRM IS ENTITLED TO FEES UNDER SECTION 744.108(8) FOR THE FIRST DAY OF THE FEE PROCEEDINGS.

Prior to the hearing on December 11, 2006, it appeared that Syprett was seeking nearly $40,000.00 in attorney fees from the Essenson Firm and seeking to deprive the Essenson Firm of the approximate amount of $10,000.00 the Essenson Firm was seeking in fees for representing the Ward. (See TR. p. 20.) It was also expected at the hearing on December 11, 2006 that Welch would be extensively cross-examined on her billing entries. Because Essenson was unavailable on December 11, 2006, the Essenson Firm had to hire an attorney to prepare for and attend the December 11, 2006 hearing.

To deny the Essenson Firm attorney's fees for Young, for the time Young spent preparing for and attending the hearing on December 11, 2006, is to deny any and all attorney fees to the Essenson Firm for the December 11, 2006 hearing. (The Essenson Firm's entitlement to fees under section 744.108(8) for the Fee Proceedings was argued *supra* at page 20 and is incorporated here.)

Florida courts hold that attorney fees should be awarded to an attorney representing himself or his firm in a case where the fees would be recoverable by the same party if represented by independent counsel. Albritton v. Ferrera, 913 So.2d 5,

10 (Fla. 1st DCA 2005); McClung v. Posey, 514 So. 2d 1139, 1140 (Fla. 5th DCA 1987). The corollary of that proposition is where the fees would be recoverable by a party who is an attorney representing himself, those fees should be equally recoverable by an attorney representing the party.

McClung v. Posey, 514 So.2d 1139 (Fla. 5th DCA 1987) discussed the rationale and policy reasons for permitting attorney fees to a party who represents himself:

> (1) attorneys who represent themselves expend the same professional time, knowledge and experience as they would have if hired by another party;
>
> (2) the services rendered by attorneys who represent themselves are presumably as valuable as the same services would have been in the defense or prosecution of another's suit;
>
> (3) attorneys are paid for their time and services and if they render them in their own case, it may cause as much loss or damage to them as if they had paid an attorney to represent them; and
>
> (4) it makes no difference to a party who by law is bound to pay costs, including attorney's fees, whether the fees are to be paid to an attorney representing himself or to another attorney employed by him.

McClung v. Posey 514 So. 2d at 1140 (citing to the Oklahoma Supreme Court in Weaver v. Laub, 574 P.2d 609, 612-13 (Okla. 1977).) Under the above rationale, in

cases where attorney fees would be recoverable by an attorney representing himself, those fees should be awarded if that party was represented by independent counsel.

In the instant case, Essenson and Young charged the same hourly rate. Since Welch performed most of the underlying services to the Ward, both Essenson and Young required review of the file and consultations with Welch in order to prepare for the trial. If the fees are recoverable to the Essenson Firm under section 744.108(8), the fees are recoverable to an attorney Essenson hires in lieu of his own representation of the Essenson Firm.

The trial court cited to In Re Good, 696 So. 2d 876 (Fla. 4th DCA 1997) to support the finding that Young was not entitled to fees from the estate. Good is inapposite. In Good, the personal representative, Sitomer, who was the attorney for the decedent, sought personal representative's attorney's fees for himself in the amount in excess of $265,000.00. Sitomer v. First of America Bank-Central, 667 So.2d 456, 457 (Fla. 4th DCA 1996). The trial court found that $60,000.00 was reasonable. Good, 696 So. 2d at 877. While Sitomer was on appeal, the trial court awarded Sitomer's counsel attorney's fees under section 733.6171(7). Good is an appeal of those attorney fees to Sitomer's attorneys for their representation of Sitomer in his claim seeking an attorney's fee from the estate.

The Good court acknowledged that Sitomer obtained "separate counsel to represent him in his effort to secure an attorney's fee from the estate." Good, 696 So.

2d at 877. The court also observed that any such fees "necessarily reduce the funds otherwise available to the beneficiaries." Id. The court concluded that the language in section 733.6171(7), Fla. Stat. (1993) does not justify the distinct award of attorney's fees in favor of Sitomer's attorneys. Id.

In the instant case, however, the Essenson Firm did not simply hire counsel to secure its attorney's fees. The Essenson Firm, due to both Essenson and Welch's unavailability to represent the firm at the hearing on December 11th, had to hire counsel to defend against a sanction in the apparent amount of nearly $40,000.00 in addition to defending its entitlement to approximately $10,000.00 in fees for representing the Ward. The Essenson Firm's counsel, Young, participated in the first day of the three-day long Fee Proceeding in Essenson's stead.

That the fees are to be paid from the Ward's estate should have been a concern to the trial court at the inception of Syprett's unauthorized foray against the Essenson Firm. Nevertheless, the justifications articulated by Welch during the trial for the propriety of the Essenson Firm's actions for the Ward in this case, upon which the court relied in awarding fees to the Essenson Firm under section 744.108(1) and (2) to the Essenson Firm, clearly spelled out the Ward's position and the Ward's concerns. Under these circumstances, the Essenson Firm preserved and promoted the Ward's right to counsel and right to access the courts. Accordingly, the Essenson Firm is entitled to compensation for the services of its attorney, Roger Young, for his

preparation and attendance of the first day of trial, and the case should be remanded for a determination of an appropriate amount.

B. UNDER COMMON LAW, THE ESSENSON FIRM IS ENTITLED TO FEES FOR ITS ATTORNEY FOR LITIGATING ENTITLEMENT TO FEES.

Under State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 832 (Fla. 1993), the Essenson Firm is entitled to fees for litigating its entitlement to fees. As acknowledged herein and in Syprett's Initial Brief (IB, p. 32), section 744.108(8) reverses Zepeda v. Klein, 698 So.2d 329 (Fla. 4th DCA 1997), which held that attorneys were not entitled to recover fees for determining either the entitlement or the amount of fees under section 744.108.

In analyzing the claim for fees, the Zepeda court cited to State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993), in which the Florida Supreme Court found that time spent litigating *entitlement* to fees under a statute was compensable, but that time spent litigating the *amount* of fees was not compensable. Id. The Zepeda court noted that the Palma court looked at the purpose of the statute in question, sec. 627.248, Fla. Stat. (1993), which purpose was to "discourage the contesting of valid claims against an insurance company by reimbursing insureds who successfully brought suit to enforce their contracts." Id. at 330. The Zepeda court adopted the Florida Supreme Court's rationale in Palma, concluding that

entitlement to fees under sec. 744.108, unlike the statute in Palma, does not inure to the client's benefit, and thus, fees for litigating even entitlement are not compensable.

In the instant case, the Essenson Firm is entitled to fees for litigating its entitlement to fees for services rendered to the Ward under Palma.

In Palma, the Florida Supreme Court noted that several of the district courts permitted fees for litigating the issue of fees. See Palma, 629 So.2d at 831, citing to Ganson v. State, Dep't of Admin., 554 So. 2d 522, 525 (Fla. 1st DCA 1989), Tiedeman v. City of Miami, 529 So. 2d 1266, 1267 (Fla. 3d DCA 1988), and Gibson v. Walker, 380 So. 2d 531 (Fla. 5th DCA 1980). Palma clarified that time spent litigating *entitlement* to fees under a statute was compensable, but time spent litigating the *amount* of fees was not, unless provided for by the statute.

The holding in Palma has evolved into the rule that, in Florida, "generally, 'statutory fees may be awarded for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees.'" (the "Palma Rule"). Hamilton v. Ford Motor Co., 936 So. 2d 1203, 1207 n. 2 (Fla. 4th DCA 2006) (quoting Palma). See e.g. Wight v. Wight, 880 So. 2d 692, 693-94 (Fla. 2d DCA 2004) (applying the Palma Rule to fees in a dissolution proceeding); North Dade Church of God, Inc. v. JM Statewide, Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003) (applying the Palma Rule to fees for a mortgage foreclosure); Barron Chase Securities, Inc. v. Moser, 794 So. 2d 649, 650 (Fla. 2d DCA 2001) (applying the Palma Rule to fees under Florida

Statutes, Chapter 682); National Portland Cement Co. v. Goudie, 718 So. 2d 274, 275 (Fla. 2d DCA 1998) (applying the Palma Rule for award of fees under sec. 448.08, Fla. Stat.).

The Zepeda court did not read Palma so broadly. The Zepeda court held that the purpose behind section 744.108 did not permit fees for determining either entitlement or amount. Zepeda, 698 So. 2d at 330. The Zepeda case is distinguishable from the instant case on several grounds.

First, the Zepeda case involved an attorney seeking compensation from a ward's estate for time spent "collecting" his fees. Id. at 319. Although the Zepeda court does not elaborate on the term "collecting", it is unlikely that the term, as used in Zepeda, contemplated a three-day trial with 10 witnesses that resulted in a 20-page order that granted entitlement to the Ward's court-appointed attorney to fees for representing the Ward (and, not incidentally, denied fees to Syprett's attorneys for attempting to sanction the Ward's attorney).

Second, and most notably, Zepeda involved fees for a guardian's attorney, who, as section 744.108(1) reads, is only entitled to fees for services rendered "to the guardian on the Ward's behalf." §744.108(1), Fla. Stat. (2006). The Zepeda court recognized this by stating ". . . section 744.108(1) more narrowly circumscribes the scope of recoverable attorney's fees to those incurred for 'services rendered ... on behalf of the ward.'" Zepeda, 698 So. 2d at 330. Accordingly, as argued *supra,*

under section 744.108(1) a guardian's attorney has to establish first, that the services were rendered to the guardian; and second, that the services were rendered to the guardian on the Ward's behalf. Zepeda concluded that a guardian's attorney could not establish that time spent "collecting" his fee was compensable from the ward's estate under section 744.108, because those services were not rendered to the guardian on the ward's behalf.

Zepeda recognized that "the supreme court has allowed fees where the time spent in securing the fee resulted in 'a substantial benefit' for the client and the award was consistent with statutory language and purpose." Id. Accordingly, Zepeda denied fees, reasoning that under section 744.108, unlike Palma, the "issue of entitlement to attorney's fees does not inure to the benefit of the client", when sought by the guardian's attorney.

In the instant case, the time spent by the Essenson Firm did result in a substantial benefit to the Ward. The issue of entitlement to the Essenson Firm's fees turned largely on whether the Ward's Objections to the Initial Syprett Plan -along with the Ward's concomitant concerns, preferences and wishes- were reasonable or meritless. Extensive testimony was received that articulated the Ward's position on issues involving, among other things, home care, mental health care, the rights retained under the Incapacity Order, her participation in the decisions affecting her,

her statutory right to participate in the guardianship proceedings itself, and the Ward's concerns about her guardian. (TR. pp. 328-340, 363-370, 417-426, 559-659.)

Under Palma then, the time spent in this case inured to the benefit of the Ward. Since the paramount concern in guardianship proceedings is the incapacitated person, who is entitled to counsel and to access the courts, fees for proceedings to determine the entitlement of the Ward's counsel to fees for rendering services directly to the Ward should be permitted under Palma.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING THE AMOUNT OF THE AWARD TO THE ESSENSON FIRM WITHOUT ANY REASONABLE BASIS.

Although the appellate courts review the amount of an award of attorney's fees under an abuse of discretion standard, the probate court's discretion is not unbridled. In re Guardianship of Shell, 978 So.2d 885, 889 (Fla. 2d DCA 2008). While the probate court has both the duty and the right to protect the interests of the ward . . . the probate court is not at liberty to award anything more or less than fair and reasonable compensation for the services rendered or monies expended in each individual case. Id. at 889-90 (internal citations omitted).

Moreover, section 744.108 requires that the court consider certain enumerated factors when determining whether the fee requested is reasonable, including the time and labor involved, the results obtained, the difficulty or novelty of the matter, and the experience, reputation, diligence, and ability of the person performing the

services, among other factors. See § 744.108(2), Fla. Stat. (2006). Although section 744.108 does not require findings of fact, even in the absence of statutory directives, the appellate courts have required findings to support discretionary rulings on specific kinds of issues when the absence of such findings might create a perception of arbitrariness or deprive the parties of meaningful appellate review. In re Guardianship of Sitter, 779 So. 2d 346, 348 (Fla. 2d DCA 2000).

When it is clear that a probate court has considered the statutory factors and has based its ruling on competent, substantial evidence in the record, appellate courts are unable to conclude that a probate court's ruling is arbitrary, fanciful, or unreasonable and thus an abuse of discretion. Shell, 978 So.2d at 890. However, when the hours billed are reduced by over half, with no findings of fact and no support in the record, those amounts could be deemed arbitrary, fanciful, or unreasonable and thus an abuse of discretion.

In the instant case, the court reduced the fees for Essenson Firm's attorneys, Essenson and Welch, by nearly half, with no explanation. Essenson billed 94.1 hours and Welch billed 94 hours, for a total of 188.1 attorney hours expended between September 5, 2006 and March 27, 2007. (R. pp. 1525-1554; APR. Ex. 1.) The court awarded only 57 hours to Essenson and 40 to Welch, for a total of 97 attorney hours. (This portion of the brief is limited to Essenson and Welch's hours and does not discuss Roger Young's hours.)

At the hearing on April 12, 2007, the Essenson Firm's matrix of the breakdown of its fees on time spent on the Fee Proceedings was entered into evidence as Exhibit 1 (the "Fee Matrix"). (APR. Ex. 1.) As the Fee Matrix indicates, the Essenson Firm billed for mediation time, pursuant to the order referring Syprett and the Essenson Firm to mediation. (R. pp. 602-604.) After mediation, as the Fee Matrix indicates the Essenson Firm billed for the research and general preparation for December 11, 2006 trial. Included in the Essenson Firm's preparation was a 25 page memorandum of law submitted to the court, which memorandum reviewed the facts of the case and the relevant law. (R. pp. 708-753.) At the conclusion of the trial on January 12, 2007, the court permitted a written closing argument from counsel. (TR. p. 726.) The court requested a timeline and a proposed order. (TR. pp. 726, 728). The court also instructed counsel on the issues the court wanted addressed in the proposed orders. (TR. pp. 730-732.)

As the Fee Matrix indicates, the Essenson Firm spent nearly 55 hours preparing the proposed order and the associated documents designed to aid the court's understanding of the facts and issues, together with any and all authority in support of the Essenson Firm's position. (APR. Ex. 1.) The time was both reasonable and necessary since the court's January Fee Order adopted the Essenson Firm's proposed order.

The January Fee Order acknowledges that a review of the proposed order from Syprett and the proposed order from Essenson reveal that "it is mandated that the Essenson Firm prevail." (App.1, p. 1.) The court further noted that the proposed order from the Essenson Firm contained no "legal or significant factual error." (Id.) By contrast, the court noted that although Syprett's proposed order contained "much" factual information, the conclusion reached by Syprett's proposed order was "not supported by the law or the record." (Id.)

Thereafter, Syprett filed a "Motion for Reconsideration, Rehearing, or Clarification of the Court's Order Dated January 30, 2007." (R. pp. 1443-1473.) The court ordered a response from the Essenson Firm and permitted a reply to the Essenson Firm's response from Syprett. (R. pp. 1516-1517.) Pursuant to the court's order, the Essenson Firm prepared and filed an 18-page response to Syprett's motion. (R. pp. 1496-1515.)

According to the Fee Matrix, the Essenson Firm spent 29.6 hours in connection with Syprett's motion. (APR. Ex. 1.) After receiving the requested documents, the court denied Syprett's Motion for Reconsideration, Rehearing, or Clarification of the Court's Order Dated January 30, 2007. (R. pp. 1518-1519.)

Accordingly, the time spent in connection with the Fee Proceedings were reasonable and necessary, and, in many cases, specifically ordered by the court. The time spent resulted in repeated rulings favorable to the Essenson Firm. The Second

Final Judgment does not specify what time spent by the Essenson Firm was not reasonable or necessary, but determined nonetheless that nearly half the time spent by the Essenson Firm was not compensable. The record of the hearing on April 12, 2007 does not support the court's Second Final Judgment.

The Essenson Firm's expert deducted only 12 hours from Welch's time at trial. Syprett's expert, after deducting several categories of time, reached a total of 124.2 hours for the Essenson Firm, before plucking out of the air the number 40 to allegedly represent a reasonable time for the Essenson Firm. Accordingly, the Final Order is not based on substantial, competent evidence.

Deducting nearly half of the time spent by the Essenson Firm without justification is unreasonable. With no justification in the record or articulated in the Final Order, this court should find that that the trial court abused its discretion by reducing so substantially the fees recoverable by the Essenson Firm in the May 24, 2007 Second Final Judgment.

CONCLUSION

For the reasons set forth above, Cross-Appellant, the Essenson Firm, respectfully requests that this Court conclude that the court below erred when it denied fees to the Essenson Firm for Roger Young's preparation for, and attendance at, the trial on December 11, 2006, and that the court abused its discretion when it reduced the fee recoverable by the Essenson Firm for the Fee Proceedings by nearly half of the hours actually expended by Essenson and Welch. The Essenson Firm requests that this case be remanded for the entry of an order awarding an appropriate amount of fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was delivered by regular U.S. Mail to **Richard R. Garland, Esq**., Dickinson & Gibbons, P.A., 401 N. Cattlemen Road, Suite 300, Sarasota, FL 34232, counsel for appellant, **Scott Westheimer, Esq. and Jimmy D. Syprett**, Syprett Meshad, et al., 1900 Ringling Blvd., Sarasota, FL 34236, counsel for the successor limited guardian, Jimmy D. Syprett, on this ___23nd____ day of May, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(9)(2).

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