IN THE SUPREME COURT OF NEVADA

KATHLEEN JUNE JONES, Appellant, vs. ROBYN FRIEDMAN; AND DONNA SIMMONS, Respondents.	Supreme Court No. 81799

Appeal from the Eighth Judicial District Court, Clark County

The Honorable Linda Marquis, District Judge

District Court Case No. G-19-052263-A

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

Undersigned counsel certifies the following so the justices may evaluate possible disqualification or recusal:

Kathleen June Jones, the sole Appellant, is a natural person. The law firm of Ballard Spahr LLP has appeared for Ms. Jones in this Appeal. The Legal Aid Center of Southern Nevada, Inc., appeared on appellant's behalf in the district court.

Dated: July 12, 2021.

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SUMMARY OF ARGUMENT

Respondents' Answering Brief offers only arguments that misstate or misunderstand both Appellant's Opening Brief and Nevada statutes and case law. Respondents, in some instances, argue that Appellant presented arguments without specificity and without support from the record, but these arguments are predicated on a refusal to acknowledge that Appellant's Opening Brief did contain specific assertions of error by the district court and references to the record supporting those assertions.

Respondents assert that the record demonstrates that the award of attorney fees was in line with the requirements of NRS 159.344 and supported by substantial evidence. But this ignores entirely the expressed desires of the Appellant and the reality of the situation. In arguing that the Power of Attorney was insufficient and that the guardianship proceedings were necessary, beneficial, and initiated to further Appellant's best interest, Respondents never acknowledge that a guardianship was against Appellant's express wishes and that Appellant is arguably in a *worse* position now.

In other instances, Respondents claim that Appellant's arguments

are not in line with the law. Respondents, for example, claim that Appellant offered factual challenges that cannot be disturbed on appeal. But in doing so, Respondents themselves offer a standard of reviewing evidence for abuse of discretion that is incorrect and unsupported by law.

Respondents further claim that Appellant offered a legal standard contrary to Nevada law and a factor of reasonableness in determining attorney fees that is not present in statute or case law. But these arguments, too, misconstrue and improperly simplify Appellant's arguments.

ARGUMENT

I. This Court Has Appellate Jurisdiction, and This Appeal Should be Presumptively Retained

As an initial matter, Respondents are incorrect in their assertion that this Court does not have appellate jurisdiction over the district court's order because it is not a final, appealable order.

Although NRAP 3A(b)(8), the provision that allows for an appeal from an attorney fees order, requires that the order be entered after a final judgment, the fees order here *was* entered after a final judgment. In their petition for attorney fees, Respondents argued that they were the prevailing party, as required to petition the court for attorney fees and costs under NRS 159.344(9). AA 145. As Respondents note, they were the prevailing party only in the initial petition granting temporary guardianship. *Id.* Were that initial petition not a final judgment, Respondents would not be the prevailing party and would be unable to file a petition for attorney fees in the first place.

And in any event, NRS 159.375 allows for an appeal from an order authorizing the payment of attorney's fees in a guardianship case.

Respondents also incorrectly contend that this case should be assigned to the Court of Appeals, rather than be retained by this Court.

This appeal should be retained by this Court under NRAP 17(a)(11) because it raises, as a principal issue, a question of first impression: namely, whether under NRS 159.344 an actual benefit must have been conferred upon a protected person for a district court to award attorney fees to a party in a guardianship proceeding.

Neither the Nevada Supreme Court nor the Court of Appeals has decided an appeal from an attorney fees order under this statute with this provision. It is important for this Court to construe the "actual benefit" prong of NRS 159.344(5) because there are grave public policy implications in allowing parties to undertake guardianship proceedings with the presumption that they will be awarded attorney fees, a presumption that directly violates the plain language of NRS 159.344.

II. The District Court Erred in Finding that Respondents' Actions Benefitted the Protected Person or Attempted to Advance Her Best Interests

An award of attorney fees is reviewed for abuse of discretion, and will be affirmed only if it is supported by substantial evidence. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1143 (2015). A district court has abused its discretion when its action is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view

adopted by the court. *Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev. 558, 564, 331 P.3d 862, 866 (2014).

A. Conferring an Actual Benefit on the Protected Person Should be a Baseline Standard for Recovery of Attorney Fees

Respondents argue that the plain language of NRS 159.344 supports a discretionary standard where courts *may* consider whether the actions undertaken by the party requesting attorney fees benefited the protected person *or* whether the party acted in furtherance of the protected person's best interests. RB 21–23. Respondents further state that under the language of the statute, the district court "was not obligated to make the specific finding that 'the services conferred any actual benefit upon the protected person.'" RB 22. But courts interpreting similar statutes—statutes that contain no requirement of actual benefit in their plain language—have nevertheless read such a requirement into the statutes.

The Florida Court of Appeals, for example, has noted that in construing the provision of the Florida statute allowing for recovery of attorney fees in guardianship cases, "case law . . . uniformly holds that 'an attorney's entitlement to payment of reasonable fees and costs is

subject to the limitation that his or her services must benefit the ward or the ward's estate.'" *Schlesinger v. Jacob*, 2018 Fla. App. LEXIS 2486, 43 Fla. L. Weekly D 419, 2018 WL 988292 (quoting *In re Guardianship of Ansley*, 94 So. 3d 711, 713 (Fla. 2d DCA 2012)).

The Arizona Court of Appeals has also found an inherent requirement that guardianship proceedings and litigation must actually benefit the protected person. *In re Guardianship of Sleeth*, 226 Ariz. 171, 176, 244 P.3d 1169, 1174 (Ct. App. 2010). In *Sleeth*, the court acknowledged that such a requirement is not contained within the state's statute but said, "We cannot agree that the legislature intended that courts overlook whether an attorney's or a fiduciary's services produced any value or benefit to the protected person." *Id.* The court went even further in noting that "judges play a vital role in fulfilling the legislature's intent . . . ." *Id.* at 1175.

The *Sleeth* court was particularly concerned with the vulnerability of protected persons and their inability to hire or control the attorneys pursuing guardianship. Here, Appellant did not choose Respondent's attorneys and did not have any say in their actions or fees. Requiring her to pay those fees for actions that in no way benefitted her or served her

best interest—and were in fact *against her direct wishes*—surely cannot be what the legislature intended.

B. Even Under Discretionary, Either/Or Standard That Respondents Proffer, the District Court Abused Its Discretion

Respondents contend that Appellant made only general arguments and did not identify specific error in the district court's decision. RB 17. But as Appellant noted in the opening brief, the district court erred in finding that the guardianship proceedings initiated by Respondents benefitted Appellant in any way *or* furthered her best interests. OB 20.

Respondents further contend that Appellant presented factual challenges that cannot be disturbed on appeal. RB 20. Respondents claim that Appellant is asking this Court to believe "contrary assertions." *Id.* Respondents also argue that "this Court must only look to any evidence that supports the District Court's award." *Id.* at 21. This is entirely false.

The case Respondents cite in making this assertion makes no such claim that an appellate court is limited to looking only to evidence that supports the district court's determination, but rather states the correct standard of review, which is that a district court has abused its discretion

if its findings are not supported by *substantial evidence*. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

The evidence in this case does not support the district court's findings that the guardianship proceedings initiated by Respondents benefited Appellant. The evidence in this case *does* demonstrate that Appellant executed a Healthcare Power of Attorney naming Kimberly Jones (Ms. Jones) as her Attorney-in-Fact. AA 123. Appellant executed a Financial Power of Attorney naming Ms. Jones as her Attorney-in-Fact. *Id.* Appellant executed a will naming Ms. Jones as her personal representative and chosen guardian. *Id.* And Ms. Jones was appointed guardian of Appellant by the district court. *Id.*

All of this evidence demonstrates that Appellant had already chosen Ms. Jones as her guardian, Ms. Jones was already acting as Appellant's protector, decision-maker, and POA agent, and the only difference in Appellant's position after the guardianship proceedings is that she is now in a restrictive guardianship that she had taken

alternative action to avoid and has accrued a veritable mountain of costs and fees to which Respondents seek to add.[1]

Respondents also claim that Appellant omitted relevant portions of the record, but Respondents make no mention as to *what* portions of the record have been omitted. Instead, Respondents make the sweeping claim that relevant portions have been omitted and that Appellant has not presented corresponding portions of the record without themselves pointing to any specific documents or filings they believe should be included. Further, Respondents could have, themselves, submitted any portion of the record that was not included in Appellant's Appendix with their response brief. NRAP 10(b)(1).

Finally, Respondents further contend that the POA was ineffective, and the record reflects that, so the district court did not abuse its discretion in making such a finding. RB 28–29. But the district court made no finding that the POA was not valid or that the POA was not

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[1] Respondents attempt to assert that Appellant may not "rehabilitate" the opening brief by raising new issues or evidence in the reply brief. But Appellant is not raising new issues or new evidence; rather, Appellant is expanding upon issues raised in the opening brief and responding to arguments made in the response brief using evidence contained in Appellant's Appendix.

what Appellant had expressly desired. As noted above, the overwhelming evidence in this case shows that, regardless of the effectiveness of the valid, legal, and binding POA, the guardianship proceedings arguably *harmed* Appellant and certainly did not benefit her. And Respondents, being fully aware of Appellant's wishes, were in no way advancing the Appellant's best interest by initiating such proceedings.

III. The District Court Abused Its Discretion by Awarding an Improper Amount of Fees, and Respondents Make No Serious Argument to Support the Amount Awarded

Even assuming, for the sake of argument, that the district court's findings that the guardianship proceedings benefited Appellant and furthered her best interests were supported by substantial evidence, the district court erred in awarding fees generated before and after the initial guardianship petition proceedings and fees for time that was block billed and tasks that should have been delegated to a paralegal.

First, as noted in Appellant's opening brief, if Respondents are awarded fees, it should only be for work done between when Respondents initially drafted their petition for guardianship on September 9, 2019 and when the district court appointed Ms. Jones as general guardian on October 15, 2019. Respondents argue that duration of litigation is not a

factor in determining the reasonableness of attorney fees under NRS 159.344 or *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

But Appellant is not suggesting that it is. Rather, the duration is relevant to the amount of time Respondents, as they argue, conferred a benefit on Appellant. Any action taken after Ms. Jones was appointed as Appellant's general guardian cannot reasonably be argued to have benefited Appellant or to have furthered her best interests. Further, as argued above, if Respondents are claiming to be the prevailing party—as they must to be awarded attorney fees under NRS 159.344(9)—they were only the prevailing party in their initial petition for guardianship. Respondents cannot recover fees for any contested issue in which they are not the prevailing party.

The district court made no findings regarding the appropriate amount of time for which to award fees, so it did not exercise its discretion at all. But the district court allowing Respondents to recover $57,742.16 in fees over just a thirty-seven day period cannot be considered to be supported by substantial evidence.

Further, the district court abused its discretion in finding that fees should be awarded for prior work simply because it was tangentially related to the guardianship matter. Though the district court held that the prior proceedings were pre-petition efforts that advanced Appellant's interest, Respondents themselves admit that the prior work was for a separate POA matter initiated by Ms. Jones. RB 26. Thus, there is not substantial evidence to support the district court's conclusion that "the pre-petition fees were reasonably incurred for the sole-purpose of resolving all issues regarding guardianship prior to filing." AA 298.

Second, Respondents failed to respond to the argument that even within that thirty-seven day period, the fees awarded were excessive due to block billed time and tasks that should have been performed by a paralegal, other than to claim that Appellant's comprehensive response to all problematic billing entries should be disregarded and stricken from the record.

Though Appellant included a copy of this response at AA 300–337, this was merely a duplicate. The response is also located in Appellant's objection to Respondents' petition for attorney fees at AA 174–200. So

Respondents are incorrect in their assertion that the response was not filed in the district court and should not be included in the record.

Appellant chose to attach these tables as an exhibit, rather than copying it directly into the opening brief, for the convenience of the court so that it would be easier to analyze each problematic billing entry. This is different than stating in the opening brief that Appellant incorporates any legal arguments made below, as Respondents attempt to argue.

CONCLUSION

For the foregoing reasons, Appellant asks the Court to reverse the district court's August 17, 2020 Order Granting Robyn Friedman's and Donna Simmons' Petition for Attorney Fees.

Dated: July 12, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in normal 14-point Century font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,351 words excluding the items exempted by NRAP 32(a)(7)(C).

3. Finally, I certify that I have read this appellate brief. To the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

Dated: July 12, 2021.

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CERTIFICATE OF SERVICE

I certify that on July 12, 2021, I served the foregoing **APPELLANT'S REPLY BRIEF** electronically through the Court's electronic filing system on the following attorneys for the Respondents:

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