IN THE SUPREME COURT OF FLORIDA

FSC CASE NO. SC05-675
3DCA CASE NO. 04-985
L.T. CASE NO. 03-2125 GD

WILLIAM F. HAYES, JR., ET AL.

vs.

IN RE: THE GUARDIANSHIP OF
MAE THOMPSON, etc.,

REPLY BRIEF OF APPELLANT

Submitted by:

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III. INTRODUCTION

The Appellants, WILLIAM F. HAYES, JR., WILLIAM F. HAYES, III ("Billy") and VIVIAN HAYES ("Vivian"), interested parties in the trial court below, will be referred to herein alternately as the "Appellants", "Interested Parties" or "The Hayeses." The lower court case is a guardianship matter of an incapacitated person, MAE E. THOMPSON. Ms. Thompson will be referred to herein alternately as "The Ward" or "Ms. Thompson." The lower court appointed counsel for the Ward, Stephen Fuller, shall be referred to herein as "Fuller" or "Appellee." References to the Record filed by the Clerk will be referred to by the symbol "R" followed by the appropriate number(s). The transcript of the proceedings of March 31, 2004, found in the appendix attached to the Initial Brief, and specific references to same are referred to as "Trans.; [date], [page]; [line number]." References to the Initial Brief shall be referred to as IB followed by the Page numbers and to the Appendix to Appellant's Initial Brief shall be referred to as A-IB followed by the Page numbers. References to the Appellee's Amended Answer Brief shall be referred to as AB followed by the Page numbers and to the Appendix to Appellee's Amended Answer Brief shall be referred to as A-AB followed by the Page numbers.

IV. REPLY TO STATEMENT OF THE CASE AND THE FACTS

Appellants agree that Fuller was appointed by the lower court in the Mental Health file to represent Ms. Thompson's interests. However, Appellants do not agree that Fuller properly represented her interests at every stage of the Adult Protective Services proceedings, nor the Mental Health and Guardianship proceedings. In fact, Appellants contend that Fuller deferred to the actions and recommendations of the Guardian, the Guardian's attorney, or the court-appointed monitor, and took very little independent action on behalf of the Ward.

Appellee's Statement of the Case and Facts contains background which is irrelevant to the appeal at hand, whether or not the lower court erred in granting Fuller's attorney's fees on March 31, 2004, and whether Appellants had standing to challenge same. However, this Court should note that the December 12, 2003, Order is currently the subject of a Motion for Rehearing (R-428-474; A-IB 19-28), and there have been two subsequent Orders amending said Order, as more specifically detailed in the Appellant's Initial Brief.

Appellee claims that as a result of Vivian's actions, there were gross misappropriations from the Ward's financial accounts including Vivian's use of the

Ward's money to purchase a home for the exclusive use of Billy. Again, there have been two subsequent orders wherein many of these "misappropriations" were found not to be misappropriations (R-753-756; A-IB 33-36). In addition, it was later agreed that not all of the monies held in joint accounts by Vivian and the Ward belonged to the Ward, and certain accounts were agreed to be the Ward's while others were agreed to belong to Vivian. In fact, a Judgment against Vivian in excess of $90,000.00 deemed to belong to the Ward was set aside by court order dated July 21, 2004. The only lower court document which states that Vivian admitted that all of the monies in the joint accounts were the Ward's, as alleged by Appellee, is in the December 12, 2003, Order which is subject to a Motion for Rehearing, and has been partially corrected whereby it was found that some of the funds belonged to Vivian. Appellants never admitted to misappropriating nor did they misappropriate or convert any of the Ward's sums to themselves.

It is relevant, however, that the lower court froze all of the Appellants' accounts until a forensic accounting could be accomplished. The court's actions in freezing the Appellants' funds and transferring them to the Ward in the underlying proceedings made Appellants, Vivian Hayes, William Hayes, Jr., and William Hayes III, Interested Parties in the Guardianship proceedings. Vivian was further incarcerated by the lower court for five months, and funds and property rightfully

belonging to Vivian and Billy have still not been properly returned to them. Appellants therefore became interested parties entitled to due process, notice of proceedings, and an opportunity to be heard.

Most of the facts set forth in the Answer Brief are irrelevant to the within appeal in that Fuller never gave testimony at the attorneys' fee hearing and, therefore, these facts could not form a basis for the fees. Further, those facts were perhaps subject to prior fee applications, but not the fee application in question.

Appellants have standing to seek the reversal of the attorney's fees granted to Fuller in that said fees were paid from those funds which Vivian and/or Billy contend belong to them, not by virtue of inheritance, but by virtue of said funds being improperly transferred to the Ward. The issues concerning the Interested Parties' assets transferred to the Ward by court order dated December 12, 2003, are still pending upon the Interested Parties' Motion for Rehearing.

On page 7 of the Answer Brief, Appellee alleges that the court at no time entertained any other petitions for legal fees on behalf of the Ward so therefore there could be no duplication of fees. This is inaccurate; throughout the course of the lower court proceedings, the Guardian, Guardian's counsel, forensic accountants, and attorney Fuller, have applied for and received large sums for guardian's and attorneys' fees and costs without hearing, and at times without

notice. Specifically, the October 23, 2003, order granted the Guardian's attorney fees and costs of $19,807.00 for the period of February 21, 2003, through June 27, 2003, ex-parte (R-253-254) and the November 13, 2003, order granted Diverse Professional Guardianship Services (the Guardian) compensation and costs of $8,950.35 for the period of April 14, 2003 through November 12, 2003 (R-413-414). Fuller's fees duplicate the efforts of the Guardian and or the Guardian's attorney.

Appellee further states that the Guardian nor the Guardian's attorney or the court monitor objected to his fees. However, Appellants not only objected to Fuller's fees on the record, but filed objections to further petitions for attorneys' fees and other reimbursements (R-808-809).

Appellee contends that Appellants did not file a Request for Notices and Copies required by Fla. Rule of Probate 5.060. Appellants filed a Motion to Declare the lower proceedings Adversary, and filed a Motion for Sanctions (R-504-506) requesting notice and copies of all pleadings. The undersigned filed a notice of appearance on December 5, 2003, and Appellants were represented by counsel prior thereto. The lower court and all parties considered Appellants and treated Appellants as Interested Parties when to do so served their purposes.

V. REPLY TO THE SUMMARY OF THE ARGUMENT

Appellants have standing to challenge the lower court's order of fees to Fuller, and therefore have standing to appeal same. Furthermore, as outlined in the Initial Brief, the lower court erred as a matter of law in awarding Fuller attorney's fees and costs. Said fees were paid with funds confiscated from the Interested Parties' accounts.

Appellants did not mistreat or financially exploit the Ward, and Appellants do not have unclean hands. Appellants agree that standing must be considered on a case-by-case basis, and that in this case, Appellants have standing.

VI. REPLY TO ARGUMENT

A. THE APPELLANTS DO HAVE STANDING TO ADDRESS THE ISSUE OF ATTORNEY'S FEES AT THE LOWER TRIBUNAL/TRIAL COURT LEVEL, AND THEY HAVE STANDING TO RAISE THE ISSUE ON APPEAL

Appellee's allegations that the Ward suffered at the hands of Vivian and Billy are based upon lower court findings in the Order of December 12, 2003, which is currently subject to rehearing (R420-27). The conditions of the apartment in which the Ward lived with her nephew, Billy, were unknown to the Ward's sister, Vivian. The real property purchased jointly by Vivian, Billy, and the Ward was a joint investment that Billy intended to live in with Mae as they had in the apartment.

Vivian, partially due to her age of 81, and partially due to the circumstances of her sister and friend being placed in a nursing home, was confused, and was not properly represented by prior counsel, (also approximately 80-years-old with a hearing aid that sometimes functioned). In fact, Vivian believed that the Ward cared for Billy as had as a second mother throughout his lifetime. Vivian and the Ward were best friends and sisters, and shared or commingled their funds during their lifetimes. Vivian did not willfully refuse to abide by court orders, rather she merely wanted to visit her sister and make sure she was being properly cared for, and that her sister knew that her family cared after she was placed in a nursing home by the lower court. Fuller and the Guardian launched an unwarranted investigation and lynching of Appellants' finances, necessitating them to become involved and defend themselves in the Guardianship proceedings.

None of the cases cited by Appellee in his Answer Brief include facts where a party who was found to be disinterested also had his or her assets frozen by the court later declared to belong to the Ward and given to the Ward. The cases cited by Appellee are not on point with the case at hand. For example, in *Ash v. Coconut Grove Bank*, 448 So.2d 605 (Fla. 3d DCA 1984), the Appellate Court held that the mother of the Ward was not entitled to participate regarding fees to the Guardian because her only financial interest was as the Ward's heir at law. Appellants do not

claim to be Interested Parties merely due to inheritance rights. Appellants' Motion for Rehearing of the lower court's order transferring Appellants' funds and real property to the Ward is still under review. Accordingly, the very funds used to pay Fuller's fees were partially owned by the Appellants prior to the Ward's death.

Appellee also cites *Maceda v. Duhig*, 474 So.2d 292 (Fla. 3d DCA 1985) to support his position that Appellants do not have standing. In *Maceda*, the next friends of two minor children did not have standing in the children's mother's estate to contest a settlement made by the Personal Representative of the Estate/Guardian of the Property of the children. However, unlike the case at hand, the next friends in *Maceda* did not have all of their personal assets frozen, nor were their rights hindered, nor were they in jail for five months at the hand of the lower court. The M*aceda* court cited *Ash v. Coconut Grove Bank, supra*, to support its position, which has been previously distinguished from the case at hand.

Appellee alleges that Appellants failed to assert the argument regarding the commingling of funds between Vivian and the Ward in the appeal to the Third District Courts of Appeal. To the contrary, Appellants did make said argument in pages 5-6 of its Reply Brief to the Third District Court of Appeals.

On pages 12, 14 and 15 of Appellee's Amended Answer Brief, Appellee attempts to distinguish *Bachinger v. Sunbank/South Florida, N.A.*, 675 So. 2d 186

(Fla. 4th DCA 1996) to only permit standing to relatives/heirs "because they were relatives and were taking care of decedent before she was declared incompetent," and that by virtue of the allegations that Appellants did not properly care for the Ward that they therefore do not have standing. Nowhere in the *Bachinger* is opinion there a discussion that the standard of care allegedly given to the Ward determines the relatives' standing. Rather, the *Bachinger* court correctly notes that the relatives had standing because they "alleged that, in addition to being heirs, they were relatives and were taking care of decedent before she was declared incompetent. If they do not have a sufficient interest to question how her funds were spent, there is probably no one who does, and we do not think that should be the case." *Id.* at 188. Appellants alleged they cared for the Ward prior to her being declared incompetent, and therefore have standing.

B. ON A CASE-BY-CASE BASIS, THE LOWER TRIBUNAL ABUSED ITS DISCRETION IN DETERMINING APPELLANTS/INTERESTED PARTIES LACK STANDING

Appellants filed a Motion to Declare the lower proceedings Adversary, and filed a Motion for Sanctions (R-504-506) requesting notice and copies of all pleadings. The undersigned filed a notice of appearance on December 5, 2003, (attach?), and Appellants were represented by counsel prior thereto. The lower

court and all parties considered them and treated Appellants as Interested Parties when to do so served their purposes.

Appellee quotes the *McGinnis* court, wherein the court stated that it is "only concerned with the welfare of the ward himself in the administration of what are, after all, **only his funds**". *McGinnis v. Kanevsky*, 564 So.2d 1141, 1144 (emphasis added). The court concluded that heirs and beneficiaries of a ward have no standing to question the administration of a guardianship, and the Appellee therefore concludes that Appellants have no standing as heirs.

As stated in Appellants' Initial Brief and herein, the case at hand is clearly distinguishable from the *McGinnis* case (IB-16-17), in that the Ward's funds were not the only funds considered by the lower court herein; rather, the Appellants' funds were taken and given to the Ward and still remain in the Guardianship estate.

C. APPELLANTS DO NOT HAVE UNCLEAN HANDS AND ARE NOT ESTOPPED FROM CLAIMING STANDING

The allegations which have been made throughout the underlying proceedings suggesting that Appellants acted improperly, or have "unclean hands", is the exact basis as to why they are entitled to standing in this matter. Appellants dispute any bad acts, and maintain they acted in what they perceived to be the Ward's best interests, and in a manner that the Ward desired. As previously stated and shown to the court, the Ward and Vivian had joint accounts. The Ward requested that

Vivian protect her funds by transferring the $43,000.00 to her account, which was later voluntarily provided to the Guardianship. The Ward chose to purchase a home jointly with her sister and nephew, and had every intention of living there and owning same jointly.

The case cited by Appellee, *Doherty v. Traxler et al.*, 66 So.2d 274 (Fla. 1953), have very specific, egregious facts and is otherwise distinguishable from this case. In *Doherty*, a man claiming to be sole heir of his murdered wife's estate sought appointment as the Personal Representative. Mr. Doherty married the deceased and left her the following day without consummating the marriage, and thereafter remarried without divorcing the deceased and remained married for twenty years and through the proceedings. The bigamous, repulsive husband was not precluded "standing" in his deceased Wife's probate proceedings, rather he was rightfully estopped from being appointed as her personal representative or as inheriting as her heir **after he defended himself** (and therefore had standing) and was found by his own testimony to have "violated the laws of God and man and every principle of right, justice, decency, public policy, and sound morals." *Id.* at 277. The so-called husband never contributed to the deceased's support and never contributed to the accumulation of her estate, and the deceased was survived by her 82-year-old, infirm brother in desperate need of care. The *Doherty* opinion further

states that "desertion or abandonment is generally held to be a bar to any right to share in the estate of the deceased spouse," *Id.* at 276, and denied the husband his petition to be personal representative or heir of his "wife's" estate.

The Appellants did not come to the court with unclean hands and did not treat the Ward horribly or even in an intentionally negligent manner, nor did they exploit her as maintained by Appellee. This was an unfortunate case whereby a nephew, Billy, suffered from medical conditions whereby he was unable to care for himself much less his elderly aunt, and whereby the Ward's sister, Vivian, was unaware of the conditions and unintentionally, due to lack of knowledge, permitted her sister to live with her son. Vivian took care of her sister by accompanying her to all of her doctor's appointments, to the grocery store and other errands, spending most of their time together, and attempting to maximize their joint funds. They did not deplete nor convert the Ward's funds to their own.

The initial proceeding which removed the Ward from the apartment she shared with her nephew was warranted, although same was not due to any intentional acts of the Appellants. However, the actions of the lower court, the Guardian and her attorney, and the Appellee thereafter were not warranted, and were in fact horrific. As detailed in the Initial Brief, the freezing of all of Appellants' funds so they were left with nothing to eat, the prevention of the Ward from seeing

her closest family while thrown into a nursing home she did not want to be in, the prevention of the Appellants from insuring the Ward's medical needs were properly met, which eventually led to her death, and Vivian's five month incarceration are examples of these actions taken by Appellee and others, which did not benefit the Ward or her estate. The Appellants truly loved Mae Thompson, and their actions were in good faith, whereby they were forced to spend tens of thousands of dollars to defend themselves and Mae in a court which then deemed them not to have standing.

VIII. CONCLUSION

Appellants clearly were and are Interested Parties to, with standing in, the Guardianship proceedings due to the lower court's taking of their property which it then transferred to the Ward, and other actions of the lower court. The lower court's findings and award to Mr. Fuller of any attorney's fees or costs are erroneous as a matter of law, in that a full hearing was not conducted, the required factors of the Florida Statutes were not considered, and no testimony of an expert nor of Mr. Fuller was taken. The Appellants did not come to the lower court with unclean hands, and are not estopped from claiming standing. Accordingly, Appellants must be deemed to have standing and the order awarding Fuller's fees must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the of the foregoing Reply Brief of Appellant was furnished by first class mail this _____ day of September, 2005, to: Enrique Zamora, Esq., Guardian of the Property, Zamora & Hillman, 306 Aviation Avenue, Unit 4C, Coconut Grove, Florida 33133; and Stephen B. Fuller, Esq., 424 Zamora Avenue, Coral Gables, Florida 33134.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that I have complied with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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