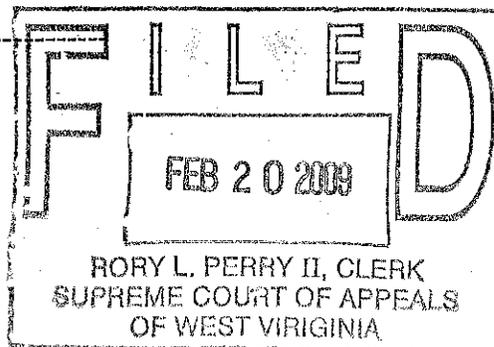


SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEAN HOLLY DANDY,
A Protected Person,
Respondent,
Respondent below,



v. **No.: 37398**
Nicholas County Circuit Court No.: 05-G-13

JAMES WILSON DOUGLAS,
Intervenor in Fact,
Petitioner,
Attorney for Donna Meadows,
The former Attorney-in-Fact, and now Guardian,
For Respondent below.

RESPONSE TO PETITION FOR APPEAL FROM THE CIRCUIT COURT OF
NICHOLAS COUNTY, WEST VIRGINIA
IN CIVIL ACTION NO. 05-G-13, JUDGE GARY L. JOHNSON

BRIEF OF RESPONDENT, JEAN HOLLY DANDY

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF THE FACTS.....	2
III. SUMMARY OF THE ARGUMENT.....	3
IV. STANDARD OF REVIEW	4
V. ARGUMENT	
A. The powers and authority of the protected person’s legal counsel are not limited by West Virginia Code §44A-2-7 and do not terminate upon the appointment of the Guardian and Conservator.....	4
B. The Circuit Court did not exceed its authority by ordering an attorney to refund a portion of his fees to the protected person’s estate.....	6
C. Regardless of whether Mr. Douglas was hired under the authority of a power of attorney, his legal fees must be reasonable.....	8
VI. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page
<i>West Virginia Code §44A-2-2</i>	1
<i>West Virginia Code § 44-1-4(13)</i>	1
<i>West Virginia Code § 44A-1-13(a)</i>	2, 6
<i>West Virginia Code § 44A-1-13</i>	3
<i>Walker v. West Virginia Ethics Com’n</i> , 201 W.Va. 109 (1997).....	4
<i>West Virginia Code § 44A-1-1</i>	4
<i>West Virginia Code § 44A-2-7</i>	4, 5
<i>West Virginia Code § 44A-2-7(b)</i>	4
<i>West Virginia Code § 44A-2-7(c)(20)</i>	5
<i>West Virginia Code § 44A-1-3(a)</i>	6
<i>Aetha Casualty & Surety Co. v. Pitrolo</i> , 176 W.Va. 190, 342 S.E.2d 156 (1986).....	8

I. STATEMENT OF THE CASE

On or about March 7, 2005, Ronald Bowers, the son of Jean Dandy, filed a petition for appointment as a guardian and conservator for Ms. Dandy pursuant to West Virginia Code § 44A-2-2 (hereinafter referred to as Case No. 05-G-6) in the Circuit Court of Nicholas County. The undersigned was appointed as legal counsel for Ms. Dandy. (In most of the orders, the legal counsel for Ms. Dandy is referred to as Ms. Dandy's Guardian *ad litem*.) Upon receiving notice of the hearing, Ms. Meadows hired James W. Douglas, Esq., of Sutton, West Virginia. Subsequently, this petition was withdrawn and dismissed on or about July 7, 2005 due to defects in the petition.

On or about July 15, 2005, Mr. Bowers filed a petition for appointment as guardian and conservator for Ms. Dandy alleging Ms. Dandy to be a protected person (hereinafter referred to as Case No. 05-G-13). The undersigned was again appointed as legal counsel for Ms. Dandy. At that time, Ms. Dandy was a resident of Nicholas County, West Virginia, and was being cared for by her granddaughter, Donna Meadows. Again upon receiving notice of the hearing, Ms. Meadows hired Mr. Douglas.

On December 15, 2005, the Circuit Court of Nicholas County determined Ms. Dandy to be a protected person as defined by West Virginia Code § 44-1-4(13). During the same hearing, Ms. Meadows was appointed as temporary guardian and the Nicholas County Sheriff was appointed temporary conservator. Thereafter, the Circuit Court heard additional evidence on May 22 and 23, 2006, to determine who should serve as permanent guardian and conservator. At the conclusion of the hearing, Ms. Meadows was appointed permanent guardian and the Nicholas County Sheriff was appointed permanent conservator.

During the May hearing, the Circuit Court required that Ms. Meadows and her attorney, James W. Douglas, provide to Ms. Dandy's legal counsel an accounting of any compensation paid from Ms. Dandy's estate, pursuant to West Virginia Code § 44A-1-13(a). This statute requires that all compensation and reimbursement for costs advanced must be approved by the court. However, Ms. Meadows, who was Ms. Dandy's attorney-in-fact prior to being appointed guardian, had compensated herself and paid Mr. Douglas's retainers to represent her from Ms. Dandy's estate. Once provided with Ms. Meadows's and Mr. Douglas's documentation, the Circuit Court ordered Ms. Dandy's legal counsel to present a report and recommendation to the court regarding the reasonableness of the expenses and compensation.

On December 18, 2006, the Circuit Court conducted a hearing relating to the expenditures outlined in Ms. Dandy's legal counsel's report. The Circuit Court approved some expenses, but required Mr. Douglas and Ms. Meadows to file memoranda with the Court justifying the additional compensation they received. After the memoranda of both Mr. Douglas and Ms. Dandy's legal counsel were filed, the Circuit Court issued its order entered March 12, 2008, *nunc pro tunc* October 10, 2007.

II. STATEMENT OF THE FACTS OF THE CASE

In 2001, Jean Dandy¹ while a resident of Kentucky executed a power of attorney naming her granddaughter, Donna Meadows, as her attorney-in-fact. As her attorney-in-fact, Ms. Meadows had control of Ms. Dandy's estate. Ms. Meadows employed Mr. Douglas's services to represent her, not Ms. Dandy, when Ronald Bowers initiated the petition dated March 7, 2005. Mr. Douglas represented Ms. Meadows throughout the proceedings of both Case Nos. 05-G-6 and 05-G-15.

¹Ms. Dandy is now deceased.

Between April 13, 2005 and December 15, 2005, Ms. Meadows paid Mr. Douglas from Ms. Dandy's funds a total of Eighteen Thousand Dollars. According to the billings supplied by Mr. Douglas, Five hundred Fifty-two and 50/100 Dollars (\$552.50) was paid for expenses and the remainder (\$17,447.50) was attorney's fee.

Mr. Douglas supplied detailed billing entries for the time spent on Case Nos. 05-G-6 and 05-G-13. According to the records provided the Circuit Court and Ms. Dandy's legal counsel, Mr. Douglas reported that he had been compensated at the rate of \$195.00 for 50 hours and 50 minutes spent representing Ms. Meadows in Case Nos. 05-G-6 and 05-G-13, totaling Nine Thousand Nine Hundred Twelve Dollars and 50/100 (\$9,912.50). See Statements from James W. Douglas, Esq., Exhibit A. Mr. Douglas further reported that he was paid a non-refundable retainer of Seven Thousand Five Hundred Dollars (\$7,500.00) for the Petition of a Writ of Prohibition² filed with the West Virginia Supreme Court of Appeals in Case No. 05-G-13. *See id.* It is the payment of the non-refundable retainer from Ms. Dandy's estate to Mr. Douglas **for the benefit of Ms. Meadows** which is now in question.

III. SUMMARY OF ARGUMENT

The Circuit Court of Nicholas County did not abuse its discretion: (i) by directing Ms. Dandy's legal counsel to review the legal bills of Mr. Douglas which were paid out of Ms. Dandy's estate for the representation of Ms. Meadows and not approved by the court, pursuant to West Virginia Code § 44A-1-13; or (ii) by ordering Mr. Douglas to refund Ms. Dandy's estate the non-refundable retainer of \$7,500.00 for the Petition for a Writ of Prohibition filed with the West

²The Petition for a Writ of Prohibition focused on whether Ms. Dandy was properly notified of the proceedings. It was a total of seven page at 14 point font. This Court denied the petition.

Virginia Supreme Court of Appeals in Case No. 05-G-13 upon the Circuit Court's finding that it was not a reasonable fee for the services provided.

IV. STANDARD OF REVIEW

When reviewing challenges to the findings and conclusions of the circuit court, this Honorable Court must apply a two-prong deferential standard of review. This involves reviewing both the Final Order and the ultimate disposition under an "abuse of discretion" standard and the circuit court's underlying factual findings under a "clearly erroneous" standard. Questions of law are subject to a *de novo* review. Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 109 (1997).

V. ARGUMENT

A. THE POWERS AND AUTHORITY OF THE PROTECTED PERSON'S LEGAL COUNSEL ARE NOT LIMITED BY WEST VIRGINIA CODE § 44A-2-7 AND DO NOT TERMINATE UPON THE APPOINTMENT OF THE GUARDIAN AND CONSERVATOR.

In 1994, the West Virginia Legislature enacted the "West Virginia Guardianship and Conservatorship Act." *West Virginia Code* § 44A-1-1, et seq. Upon the filing of a petition for the appointment of guardian or conservator for an alleged protected person, the Circuit Court in which the proceeding is commenced shall appoint legal counsel for the alleged protected person. *West Virginia Code* § 44A-2-7. The legal counsel is required to investigate, among others, the following areas of concern: (1) whether or not a guardian is needed; (2) if so, the degree and the role of such guardian; (3) if needed, the best person/entity to fulfill that role; (4) if needed, the adequacy of the bond; and (5) if needed, the proper placement. *West Virginia Code* § 44A-2-7(b). This statute does not limit the role of the protected person's legal counsel, but emphasizes areas of major concern.

Further, the statute does not terminate the role of legal counsel upon appointment of a guardian and/or conservator. In fact, West Virginia Code § 44A-2-7(c)(20) contemplates that the protected person may “file a motion for modification of an order or a petition for a writ of habeas corpus if a change of circumstances occurs which warrants a modification or termination” which by definition would occur after the guardian or conservator was appointed.

Mr. Douglas argues in his Petition for Appeal that the duties and authority of the protected person’s legal counsel terminates upon the appointment of the guardian and conservator and therefore, the undersigned should not have been ordered to review his legal fees. Mr. Douglas bases his argument on *Sowa v. Huffman, et al.*, 191 WV 105, 443 S.E.2d 262 (1994) because it states that upon the determination that an individual is a protected person and is appointed a guardian and conservator, as needed, the role of the protected person’s legal counsel terminates as a matter of law. However, the Court in *Sowa, supra*, was interpreting West Virginia Code § 27-11-1(b) (1990). This code section was replaced by West Virginia Code § 44A-2-7 by the West Virginia Legislature in 1994.

In fact, after a long discussion of the inadequacy of the then-current law and why the protected person’s Guardian *ad litem* should continue to serve after the appointment of a guardian, the Court in *Sowa, supra*, stated:

However, “[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded.” [citation omitted.] **Therefore, although we recognize that the current statutes may not adequately protect the incompetent, it is the legislature which must rectify the problem. (Emphasis added.)**

The *Sowa* decision was published on April 4, 1994 and almost simultaneously, the West

Virginia Legislature enacted the current West Virginia Guardianship and Conservatorship Act. This statute does not provide a termination date for the legal counsel appointed for the protected person. Therefore, Ms. Dandy's legal counsel representation is not terminated. Further, the undersigned was not prohibited in anyway from investigating the compensation paid to Mr. Douglas out of Ms. Dandy's estate or objecting to said payments, even if she had not been ordered to do so by the Circuit Court.

B. THE CIRCUIT COURT DID NOT EXCEED ITS AUTHORITY BY ORDERING AN ATTORNEY TO REFUND A PORTION OF HIS FEES TO THE PROTECTED PERSON'S ESTATE.

The West Virginia Guardianship and Conservatorship Act allows any guardian or conservator, whether full, temporary, or limited, to be reimbursed for costs advanced upon approval by the court. *West Virginia Code* § 44A-1-3(a). In the present case, Ms. Meadows paid Mr. Douglas out of Ms. Dandy's estate without the Circuit Court's approval. Mr. Douglas spends much of his petition for appeal discussing whether or not Ms. Meadows had the authority as Ms. Dandy's attorney-in-fact to hire him.

The undersigned believes that Ms. Meadows was entitled to hire Mr. Douglas. However, under the West Virginia Guardianship and Conservatorship Act, the proper procedure would have been for Ms. Meadows to pay Mr. Douglas out of her own funds and then upon being appointed guardian, to submit the costs advanced for reimbursement for the court's approval or to have sought prior court approval for such payment. *West Virginia Code* § 44A-1-13(a). Regardless of whether the proper procedure was followed, the statute requires the expenditures to be reasonable. Therefore, the Circuit Court must review the expenses for reasonableness and order a refund, if needed.

According to his billing, Mr. Douglas's hourly rate was \$195.00 (in 2005) and he performed

50 hours and 50 minutes of work on Case Nos. 05-G-6 and 13. The undersigned cannot disprove that Mr. Douglas spent this amount of time on the case or that \$195.00 per hour is completely unreasonable. However, the fact that Mr. Douglas charged Ms. Dandy's estate a non-refundable retainer of \$7,500.00 to file a Petition for a Writ of Prohibition to this Court without any documentation of his time is inappropriate.

The Circuit Court, by Order entered July 6, 2006, ordered Mr. Douglas to provide his billing and expense records regarding his representation of Ms. Meadows in the Petition for a Writ of Prohibition. *See Order entered July 6, 2006.* In its Final Order, the Circuit Court found

that the costs and fees charged by Mr. Douglas to Ms. Dandy's estate should not include those incurred for the Writ of Prohibition. The decision to file the Writ of Prohibition was made by Ms. Meadows and her counsel. It was no way beneficial to Ms. Dandy and it would not be fair that her estate be charged for it. **Further, Mr. Douglas did not itemize the charges for the Writ and the Court does not award attorney's fee on a flat rate basis. (Emphasis Added.)**

See Order dated March 12, 2008, nunc pro tunc, October 10, 2007.

Non-refundable retainers are not strictly prohibited by the Rule of Professional Conduct, but are highly suspect. Many jurisdictions have banned this type of retainer. L.E.I. 99-03 Non-Refundable Retainers. In an earlier "Informal Opinion" (2/93), the West Virginia Committee on Legal Ethics stated that there is technically no such thing as a "non-refundable retainer" because if a fee does not meet the test of reasonableness, the attorney is in violation of Rule 1.5. See Exhibit B.

The reasonableness of attorney's fees sought against a third party is based on broad factors such as:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6)

whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Aetna Casualty & Surety Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

Mr. Douglas did not submit any billing to the Court for the time he spent on the writ, as ordered. Assuming he was charging \$195.00, he would have had to spend over 38 hours drafting a 7 page Petition for Writ of Prohibition. If a standard work week of time was spent, it is difficult to understand why Mr. Douglas did not keep detailed records of his time given the level of detail he was able to provide for the work done on Case Nos. 05-G-06 and 05-G-13. In his Petition for Appeal, Mr. Douglas did not provide this Court an explanation of how this fee is reasonable. Therefore, the fee must be deemed unreasonable and refunded to Ms. Dandy's estate. In addition, because Mr. Douglas refused to address the issue before the Circuit Court, he should be estopped from presenting any evidence of reasonableness upon appeal.

C. REGARDLESS OF WHETHER MR. DOUGLAS WAS HIRED UNDER THE AUTHORITY OF A POWER OF ATTORNEY, HIS LEGAL FEES MUST BE REASONABLE.

This Court has repeatedly held that all attorney's fees must be reasonable for services provided. Furthermore, where attorney's fees are to be paid by a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. *Aetna Casualty & Surety Co.*, 176 W.Va. at 195, 342 S.E.2d at 161 (1986). In the instant case, Ms. Meadows hired Mr. Douglas to represent herself. Ms. Meadows believed that she was the most appropriate person to be Ms. Dandy's guardian and conservator. The issue argued in the Petition of a Writ of Prohibition was not whether this proceeding was necessary, but was arguing

a technical issue of service on the alleged protected person. Therefore, the primary reason for Mr. Douglas's representation was to represent Ms. Meadows in her quest to become guardian and/or conservator.

Mr. Douglas wants to argue that his contract is between Ms. Meadows and himself and therefore, should not be reviewed by the Circuit Court because Ms. Meadows did not object to his fees. This argument would be appropriate if Ms. Meadows had paid him out of her own funds. However, because Ms. Meadows chose to pay Mr. Douglas out of a third parties funds, even if this Court accepts that it was proper, the payments are subject to review for reasonableness regardless of the fee arrangement between Mr. Douglas and Ms. Meadows.

Mr. Douglas has had ample opportunity to justify his flat rate fee of \$7,500.00 for the Petition for a Writ of Prohibition. However, his only explanation is that \$7,500.00 is what he has charged other clients. The other factors outlined in *Aetna, supra*, are not explained. Mr. Douglas argues that the Circuit Court did not apply the *Aetna* factors to his "flat rate fee." However, Mr. Douglas complains in his Petition that "No such evidence was taken before the trial court." The only reason it was not taken was that Mr. Douglas did not present it. Further, Mr. Douglas has not provided this Court with any justification. Therefore, the non-refundable retainer of \$7,500.00 must be deemed unreasonable and returned to the estate of Ms. Dandy.

VI. CONCLUSION

The legal counsel is given the task of representing the protected person and investigating issues that arise during the proceedings and after. Regardless of Mr. Douglas's arguments, if he wants to be paid by Ms. Dandy's estate, he must be able to justify his fees. The non-refundable retainer of \$7,500.00 to file a Petition for a Writ of Prohibition cannot be justified and must be

refunded. The alternative for Mr. Douglas would have been to be paid from Ms. Meadows's personal funds.

The Circuit Court of Nicholas County also required Mr. Douglas to refund the fees charged after an incapacity issue was determined (December 15, 2005). This amount would be \$2,687.50 of the \$9,912.50 paid for the representation of Ms. Meadows in Case Nos. 05-G-6 and 13. However, the undersigned believes that an individual who is appointed guardian or conservator may be reimbursed for reasonable expenses and therefore, did not address this issue.

**Respectfully submitted,
Estate of Jean Dandy, a protected person,
now deceased.
By counsel,**


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re:

JEAN DANDY, AN ALLEGED PROTECTED PERSON

No.: 34398

Nicholas County Circuit Court No. 05-G-13

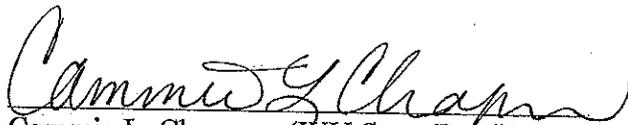
CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served a true and accurate copy of the foregoing **RESPONSE TO PETITION FOR APPEAL FROM THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA IN CIVIL ACTION NO. 05-G-13, JUDGE GARY L. JOHNSON, BRIEF OF RESPONDENT, JEAN HOLLY DANDY**, upon the parties in the above-styled action, by depositing the same in an envelope and mailing, United States Mail, postage fully paid, upon all parties, counsel of record, this the 19th day of February, 2009, addressed as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE