Case No. 34886

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Estate of Christopher P. Bastien, deceased,
by Elizabeth A. Bastien, Administratrix,

Plaintiff-Appellee,

v.

Elizabeth A. Bastien, an individual; Maxwell H. Bastien, an individual; Tammy R. Huffman, an individual; Bastien & Lacy, LC, a West Virginia Corporation; and Gerald R. Lacy, an individual, Defendants Below,

Maxwell H. Bastien,

Defendant-Appellant.

Appeal from the Circuit Court of Kanawha County, West Virginia,
Case No. 05-C-1877, Special Judge John L. Cummings

BRIEF OF LANE & YOUNG, AS ATTORNEYS FOR DEFENDANT-APPELLANT, MAXWELL H. BASTIEN

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

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June 15, 2009

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I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This is an appeal from an Order of the Circuit Court of Kanawha County which denied Lane & Young's Petition for Additional Attorney Fees.

A Declaratory Judgment action was filed to determine the rights of all parties in the Estate of Christopher P. Bastien, deceased. Matters between the parties, Maxwell Bastien and Whitney Bastien and Elizabeth Bastien were resolved, and an Order Approving and Authorizing Settlement was entered with the Court on September 8, 2006. Following the entry of this Order, a hearing was held on December 27, 2006 to seek the Court's approval for its Motion to Approve Settlement Matters and an Order was entered on February 26, 2007. The Order entered on February 26, 2007 approved Lane & Young's legal fees and costs in the amount of $65,000 and recognized and reserved the right for Lane & Young to petition the Court for additional attorney fees. Lane and Young filed a Petition for Additional Attorney Fees on September 3, 2008 (hereinafter referred to as the "Fee Petition"). An Order was entered on October 8, 2008 by the Honorable John L. Cummings, sitting as Special Judge in the Circuit Court of Kanawha County, West Virginia denying the Fee Petition. Lane & Young filed a petition for an appeal of Judge Cummings order on February 9, 2009 and this Court granted the appeal and ordered the filing of briefs on May 14, 2009. The Appellants seek a reversal of Judge Cummings' Order of this case.

II. STATEMENT OF THE FACTS OF THE CASE

Christopher P. Bastien died intestate on February 24, 2005 leaving as his heirs at law, his second wife, Elizabeth A. Bastien and two children from his previous marriage to Tammy Huffman, namely Whitney E. Bastien and Maxwell H. Bastien (see Appraisement attached as

Exhibit F to the Fee Petition). Christopher Bastien and Elizabeth Bastien entered into an Ante-Nuptial Agreement on or about December 2000. (See Ante-Nuptial Agreement attached as Exhibit A to the Petition for Declaratory Relief filed on August 18, 2005).

At the time of his death, Mr. Bastien was a partner in the law firm of Bastien & Lacy, L.C. along with Gerald R. Lacy. Mr. Bastien and Mr. Lacy were also co-administrators of a qualified retirement plan known as Bastien & Lacy, L.C. Profit Sharing Plan (see Petition for Declaratory Relief in the record from the Kanawha County Circuit Clerk's Office).

Elizabeth Bastien, the second wife of Christopher Bastien, deceased, became appointed as Administratrix of the Estate and obtained an opinion from Paige Hammrick, as Administratrix, that the Ante-Nuptial Agreement was unenforceable against her as a beneficiary of the Estate. See page 5 of the Petition for Declaratory Relief filed on August 18, 2005 in the record from the Kanawha County Circuit Clerk's Office. During her tenure as Administratrix, Elizabeth Bastien filed an appraisement placing low values on certain assets and specifically listing the value of the law firm as $500 (see Appraisement attached as Exhibit F to Fee Petition). The children of Christopher Bastien had no voice in the estate. Lane and Young agreed to represent the children and immediately took action to have Elizabeth Bastien removed and an independent administrator appointed so that the nature and true value of all assets could be determined. Lane & Young quickly attempted to ascertain and freeze all Estate assets. See Objection to Appointment of Administrator and Request for Referral to Fiduciary Commissioner filed on June 24, 2005 in the record from the Kanawha County Commission's Office. After discovery, an evidentiary hearing and briefings, the Kanawha County Commission entered an order removing Elizabeth Bastien as Administratrix and naming William Chambers, CPA as

Administrator of the estate. See Order filed by the Kanawha County Fiduciary Supervisor on March 10, 2006 in the record from the Kanawha County Commission's Office.

Lane & Young agreed to represent Maxwell Bastien and Whitney Bastien on an hourly basis pursuant to a written Fee Agreement dated March 1, 2005. As a practical matter, the fees to Lane & Young could only be paid if there was a recovery in the case. A copy of the Fee Agreement is attached hereto as Exhibit A.

In order to determine the rights of all parties as a result of the death of Christopher P. Bastien, a Petition for Declaratory Relief was filed on August 18, 2005 by Elizabeth Bastien as Administratrix of the Estate of Christopher P. Bastien, prior to her removal. (See Petition for Declaratory Relief).

After extensive discovery, hearings and certain orders occurred in this highly contentious case, a mediation was held and as a result thereof, a settlement was reached among all the parties. That settlement was approved by Judge Cummings on September 8, 2006. See the Order Approving and Authorizing Settlement entered on September 8, 2006 in the record from the Kanawha County Circuit Clerk's Office. As part of the settlement, the children of Christopher Bastien received all of the Estate's interest in Bastien & Lacy L. C. Pursuant to the Order, the Declaratory Judgment action and complaint against Elizabeth Bastien were dismissed, and Maxwell Bastien agreed not to appeal certain orders. However, the judge ordered that the case remain on the docket of the Circuit Court of Kanawha County, in order to consider the issue of attorney fees and the investment and disposition of Maxwell H. Bastien's portion of the Estate proceeds. At that time, Whitney Bastien was an adult and received her share of the estate outright.

On December 27, 2006, a hearing occurred regarding the above outstanding settlement matters. On February 26, 2007, the Court entered an Order regarding the December 27, 2006 Hearing, approving the Settlement Agreement between Gerald Lacy, the Estate of Christopher P. Bastien (the "Estate"), and Whitney and Maxwell Bastien regarding Bastien & Lacy, L.C. ("B&L"), the terms and creation of the Maxwell H. Bastien Irrevocable Trust ("Maxwell's Trust"), distribution of Estate assets to the Trust, payment of $65,000 in legal fees to Petitioner, and other matters. See the Order filed on February 26, 2007 in the record from the Kanawha County Circuit Clerk's.

In the February 26, 2007 Order, a payment in the amount of $65,000 in legal fees was approved to be paid to Lane & Young, although legal fees on an hourly basis greatly exceeded $65,000, but were based upon the liquid funds then available in the amount of $155,000 to be distributed by the Estate to Maxwell's Trust. The balance of the Estate's assets which were to be distributed to Maxwell's Trust were illiquid; given that it consisted of shares of stock in B&L. At the time of the Order, the most valuable asset recovered for Maxwell Bastien was the illiquid stock of B&L, which would take several years to liquidate. As such, the Order stated that if additional amounts over and above the $155,000 were received, additional fees could be requested by Lane & Young. In relation to these legal fees, the Court specifically held:

> "(5) In line with the findings and recommendations of the Guardian *Ad Litem*, that the total amount of fees and costs to be awarded to Lane & Young shall be reduced, the Court finds that the amount of Sixty-Five Thousand Dollars ($65,000), shall be paid to Lane & Young in order to reduce the fees to an amount which is proportional to the amount of approximately $155,000 to be distributed by the Estate to Maxwell H. Bastien." (emphasis added.)
>
> "(6) In the event that future payments may be distributable to the Trust for the benefit of Maxwell Bastien from the Estate (over and above the $155,000 distributable amount and the AIG Annuity), Lane & Young may petition this Court, or a court of competent jurisdiction, to request legal fees in excess of the

$65,000 amount, relating to such additional estate distributions and regarding the work of Lane & Young in this matter."

Following the February 26, 2007 Order, additional amounts of $668,853 were received over and above the $155,000 received as of the December 27, 2006 hearing date. As such, Maxwell Bastien has received $823,853 to date. Given that the fees of Lane & Young were reduced to an amount proportional to the recovery of $155,000, once the illiquid asset (B&L Stock) had been reduced to cash of an additional $668,853, Lane & Young had the case reopened and filed the Fee Petition on September 3, 2008.

In the Fee Petition, Lane & Young requested fees of $105,416 be paid, in addition to the $65,000 fees already paid.[1] The Order of February 26, 2007 states that the fees of Petitioner were reduced to be proportional to the $155,000 liquid assets at that time, and if future payments became distributable to Maxwell Bastien, Lane & Young could request the balance of fees owed.

In an overview, $65,000 in legal fees have been paid and $73,789.45 are still owed for services rendered and costs advanced to obtain a settlement in this contentious case. Maxwell Bastien has now received $823,853 from the Estate.

It is important to note that the litigation services to obtain the $823,853 amount for Maxwell Bastien was $138,789 ($65,000 + $73.789.45), which represents only 17% of the amount recovered. If the fee agreement had provided for a 1/3 contingent fee, the amount presently due to Lane & Young would be $209,623, as opposed to $73,789.45.

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[1] At the Hearing on the Fee Petition, Judge Cummings ruled that of the total fees requested in the amount of $105,416, fees in the amount of $35,625.55 performed after the settlement was not before the Court and were the responsibility of the Trustee of Maxwell Bastien's Trust. These fees related to overseeing settlement of contingent fee cases, repairs to building, liquidation of Bastien & Lacy, tax and trust matters. However, Lane & Young is still owed $73,789.45 for services performed and costs advanced prior to the December 27, 2006 settlement hearing.

Mark L. French was appointed as Guardian *Ad Litem* for Maxwell Bastien. Mr. French filed an Objection of Guardian Ad Litem to Petition for Additional Attorney Fees on September 10, 2008 (See Objection attached hereto as Exhibit B). It is clear from Mr. French's Objection that he did not review the Fee Petition because he indicates that "no additional time or expenses have been incurred since this Court previously ruled . . ." However, the statement of fees attached to the Petition detailed work completed both before and after the Court's order. Judge Cummings even acknowledged the fact that some of the fees requested were incurred after the order was entered. Mr. French stated that the fees had been resolved, which is clearly contrary to the February 26, 2007 Order. Mr. French did not attend the hearing of the Fee Petition; therefore, he did not hear the arguments of counsel supporting the fee request.

At the time the Fee Petition was filed, the mother of Maxwell Bastien indicated to counsel the she wanted the legal fees paid to Lane & Young. The Affidavit of Tammy Huffman evidences that the sole guardian of Maxwell Bastien agrees that the fee is owed and should be paid. See Affidavit attached hereto as Exhibit C.

All invoices were highly detailed and provided the name of the attorney or legal assistant, date, the hourly rate, the time expended, description of work performed and total charge for each entry. Tammy Huffman could have terminated the services for Lane & Young at any time. She did not do so, and received the benefit of the written contract. She has never questioned any invoice item. Rather, she believes Lane & Young obtained a great result, that the written contract should be honored and that the fees should be paid. (See Affidavit attached hereto as Exhibit C).

Despite clear undisputed documentation demonstrating that extensive legal work was completed on behalf of Maxwell Bastien, Judge Cummings entered an Order on October 8, 2008

denying the Petition for Additional Fees. See Order attached hereto as Exhibit D. The Judge's order failed to provide any explanation as to the reason for the denial of the Fee Petition.

Lane & Young should not be penalized because the primary asset in the Estate subject to litigation was not cash or marketable securities, but rather closely held B&L stock (which took several years to liquidate).

At settlement, opposing counsel valued B&L to be worth at least $1,800,000, meaning the Estate's interest was worth at least $900,000. (See Affidavit attached hereto as Exhibit E) The Estate's interest in B&L turned out to be approximately $1,337,706 (Maxwell was entitled to 1/2 which was $668,853 and Whitney was entitled to 1/2 which was $668,853.)

Elizabeth Bastien received approximately $1,500,000 from insurance and pension assets, which were non-probate assets. The rightful recipient of those non-probate assets is governed by beneficiary designations or federal pension law and is not determined by a will or intestate succession. The Estate had approximately $1,750,000 of assets, which were governed by intestate succession.

Ultimately, of the $1,748,000 of Estate assets, Elizabeth Bastien received only $100,000 (net value of 2 houses) and Maxwell and his sister received $1,648,000, or approximately $824,000 each. Thus, by engaging in extensive litigation, the children, Maxwell and Whitney, received almost all of the probate (estate) assets, and Elizabeth Bastien received only $100,000 of the probate (estate) assets.

If Maxwell Bastien had not had legal representation, he and Whitney would not have received such a significant and sizeable share of their father's estate.

Following the entry of the October 8, 2008 Order, attached hereto as Exhibit D, Judge John L. Cummings, Special Judge for the Circuit Court of Kanawha County denied the Fee Petition. It is from this Order that the Appellant seeks an appeal.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The Honorable John L. Cummings presiding as Special Judge for the Circuit Court of Kanawha County, erred in denying Petitioner's Petition for Attorney Fees and in failing to provide the reasons for the denial in his Order.

IV. POINTS AND AUTHORITIES RELIED UPON

Linda M. Statler, guardian of Destiny Lynn Ware v. VelAnne Dodson, et. al, 195 W. Va. 646, 466 S.E. 2nd 497 (W.Va. 1995)

Erwin v. Henson, 202 W.Va. 137, 502 S.E.2d 712 (W.Va. 1998)

Schrader Byrd & Companion, LLC v. Marks, et. al, 220 W. Va. 502, 648 S.E. 2nd 8 (2007)

The West Virginia Rules of Professional Conduct, Rule 1.5

Judy v. White, 188 W.Va. 633, 425 S.E.2d 588 (1992)

V. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The trial judge's order is reviewed under an abuse of discretion standard. *Erwin v. Henson,* 202 W.Va. 137, 502 S.E.2d 712 (W.Va. 1998).

B. LEGAL ANALYSIS

The fee requested by Lane and Young is $73,789.45. Lane & Young asserts that this fee is fair and reasonable and is based upon the hourly rates for work performed.

The West Virginia Rules of Professional Conduct at Rule 1.5 address fees and provides as follows –

> "Rule 1.5. Fees.
> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.
>
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferable in writing, before or within a reasonable time after commencing the representation . . ."

Petitioner entered into a written Fee Agreement with Tammy Huffman, the mother and sole legal guardian of Maxwell Bastien, to provide legal services on an hourly fee basis, as per Rule 1.5(b). Tammy Huffman has submitted an Affidavit, attached hereto as Exhibit C, in this matter that the recovery received by Lane & Young was very satisfactory, that she was aware that the litigation would be contentious, that she believes that the additional fees requested are fair and reasonable, and she requests that they be paid as provided in the Fee Agreement in the amount of $105,416. Most fee issues arise in contingent fee cases where the percentage exceeds the work performed. In this case, the contractual Fee Agreement provides for payment on an

hourly basis, there is no dispute on the hours worked, extensive detail has been provided, and Tammy Huffman, the sole legal guardian of Maxwell Bastien, has requested that the fee be paid pursuant to the Fee Agreement. It is critical to emphasize that this was an hourly basis billing, and Tammy Huffman could have objected to any item within a reasonable period of time from receipt of the regular billings. She, and Maxwell Bastien, have now received a tremendous benefit from Lane & Young performing on the contract over several years.

Lane & Young went beyond honoring the Fee Agreement, as it continued to work rigorously on this case in spite of the fact that its hourly rate billings were not paid. It obtained a very good result, which generated substantial funds for Maxwell's benefit, and the Fee Agreement should be honored and respected in terms of payment to Lane & Young.

The fee requested clearly meets all of the eight (8) factors contained in Rule 1.5(a).

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly."

In the instant case, the detailed records set forth the voluminous amount of time and labor required, which was billed at an hourly rate. The questions involved were quite complex—conflict of interest of Administratrix, breach of fiduciary duty, removal of Administratrix, enforceability and legality of the Prenuptial Agreement and related coercion and disclosure, etc., pension beneficiary, federal ERISA law, pension consent form, state law indemnity under prenuptial agreement, counter-claim for the wrongful taking of assets, wrongful payment of personal attorney fees, credit charges, etc., claim of negligence and fraud in performing fiduciary duty of administering an estate, recovery of child support under divorce decree reopened, federal estate and income tax issues, and the like. Significant skill was required in probate, estate planning and litigation to properly perform this legal service.

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer."

Tammy Huffman, who retained Lane & Young on behalf of her children, both of whom were then minors, knew that Elizabeth Bastien would fight every issue strenuously and that this would be a time-consuming and demanding project.

"(3) the fee customarily charged in the locality for similar legal services."

The hourly fee charged by Gordon Lane was $225, and the hourly fee charged by Kelly Young was $175, fees which are customary in this practice area. These are reasonable charges for attorneys with specialized skills.

"(4) the amount involved and results obtained."

A very large amount was "involved," as B&L alone was worth over $2,650,000, making the Estate's 1/2 interest worth over $1,330,000, and all of this amount was obtained for Maxwell and Whitney Bastien, and none for Elizabeth Bastien. It is clear that Lane & Young achieved an extremely favorable settlement for Maxwell Bastien.

Indeed, it is quite possible that Maxwell Bastien could have received only $88,032, as opposed to $823,853 from the Estate, had Lane & Young not been successful, for the following reason. The worst case scenario for Maxwell Bastien would have been Elizabeth Bastien remaining as Administratrix and distributing all of the B&L stock to herself (valued at $500), while distributing $500 in cash or other assets to Maxwell Bastien and Whitney Bastien. Elizabeth Bastien valued B&L at $500 in the Appraisement of the Estate, filed in Kanawha County, West Virginia (see Appraisement attached as Exhibit F to the Fee Petition). Elizabeth Bastien clearly could have performed this action in her role as Administratrix if no one had challenged her.

"(5) the time limitations imposed by the client or by the circumstances."

The difficulty of this case was caused by the many complex issues, fact gathering and extended litigation required to resolve the many issues, and the highly contentious nature by which Elizabeth Bastien not only disputed every issue, but every detail of every issue. A substantial amount of work had to be performed right away to attempt to ascertain the assets, insurance, pensions, IRAs, etc. to freeze the accounts and prevent Elizabeth Bastien from withdrawing them, until legal issues were resolved.

"(6) the nature and length of the professional relationship with the client."

Although Gordon Lane knew Tammy Huffman, Lane & Young had never before represented her. However, the length of this case was substantial. A written Fee Agreement was executed at inception.

"(7) the experience, reputation, inability of the lawyer or lawyers performing the services."

Gordon C. Lane has practiced in tax, estate, probate and business matters for approximately 27 years. He has a Master of Laws in Taxation from New York University Law School, is a Certified Public Accountant, practiced at the fourth largest firm in the country, and for 12 years at Bowles Rice McDavid Graff & Love. He is listed in Best Lawyers of America, Super Lawyers, Who's Who, etc., and has taught tax and business courses at West Virginia University of Law School as an adjunct professor. He has also engaged in significant litigation in the estate and probate area which provides a specialized background and litigation skill in this area. Kelly M. Young, Esq., who assisted Gordon C. Lane in this case, practiced exclusively in litigation for approximately four years, and for the past 10 years, has practiced in the estate

planning and probate area, and also has performed a significant amount of litigation in the area. As such, the firm is very capable of litigating this particular practice area.

"(8) whether the fee is fixed or contingent."

In the instant case, the fee was neither fixed nor contingent, but rather was performed on an hourly basis, pursuant to the binding Fee Agreement executed by Tammy Huffman, the mother of Maxwell Bastien, and Tammy Huffman has requested that this Court honor the Fee Agreement. As noted in the Fee Petition, if this case had been a 1/3 contingent fee case, the additional fee to Lane & Young would be $209,618, as opposed to the $73,789.45 requested.

Rule 1.5 Section (b) of West Virginia Rules of Professional Conduct provides that an attorney should communicate the basis or rate of fee within a reasonable period of time, preferably in writing. Lane & Young provided a written fee agreement at the inception of engagement, and provided regular detailed invoices pursuant to the fee agreement. As mentioned, the engagement of Lane & Young could have been terminated at any time and any item of any invoice could have been objected to any time. Lane & Young's performance is now completed and a tremendous result accomplished. As such, the fee requested in the instant case is clearly fair and reasonable under West Virginia Rules of Professional Conduct and should be paid. Additionally, recent cases by the West Virginia Supreme Court of Appeals clearly provide that the fee should be paid in this case.

The case of *Linda M. Statler, guardian of Destiny Lynn Ware v. VelAnne Dodson, et. al,* 195 W. Va. 646, 466 S.E. 2nd 497 (W. Va. 1995), is directly on point with this case. In the case of *Linda M. Statler*, *supra*, the mother of an unborn child entered into a written fee agreement with an attorney to protect the unborn child's right to receive a share of his father's estate. The

attorneys were not paid and suit was filed in the Circuit Court of Jefferson County, West Virginia, seeking attorney fees.

In *Linda M. Statler*, the Circuit Court held that the fee contract with the attorney was not enforceable, as receipt of the share of the father's estate was not a "necessary" (i.e., food, shelter, medical services, *Linda M. Statler*, supra, at footnote 5). The West Virginia Supreme Court of Appeals reversed that decision, holding that infants would be denied access to the legal system if they could not contract for legal services, and stated –

> "Although a common law contract for legal services not for necessaries could not be applied, we need to ensure an infant's access to the judicial system, we find for the reasons discussed hereafter the contracts for legal services between infants and their lawyers will be implied and therefore, enforceable; provided, (1) the employment of a lawyer on behalf of the infant was reasonably necessary; (2) the contract was fair and reasonable at the time it was entered; and (3) the contract was fair in relation to the amount of legal services needed and performed." *Linda M. Statler* at 466 S.E. 2nd at 501.

As such, the written fee agreement which is attached as Exhibit A, is clearly enforceable. In line with the West Virginia Supreme Court in *Linda M. Statler*, to hold that the agreement is not enforceable would seriously undermine and jeopardize the access of infants to the judicial system. The three factors in the Court's decision are clear, which are set forth below:

(1) "The employment of a lawyer on behalf of the infant was reasonably necessary." In this matter, Elizabeth Bastien, the second wife of decedent, had taken control of the Estate, had already taken questionable legal positions contrary to the interest of Maxwell Bastien and in her personal best interest, and ultimately valued very valuable assets extremely low which she could have taken, took Estate funds for her own benefit and improperly paid Estate funds for

items benefiting herself. Clearly, this is a case where it was reasonably necessary for Maxwell Bastien to have legal representation;

(2) "The contract was fair and reasonable at the time it was entered." Bruce Stout testified as to the reasonableness of the fee arrangement and indicated Lane & Young took risk in accepting the case. Further, the case of *Schrader Byrd & Companion, LLC v. Marks, et. al,* 220 W. Va. 502, 648 S.E. 2nd 8 (2007) indicated that for a specialized attorney rate, a fee of $260 per hour was reasonable. Clearly, the fee agreement was fair and reasonable at the time it was entered, which provided for hourly rates of $235 and $185; and

(3) "The contract is fair in relation to the amount of legal services needed and performed." In the instant case, this is not a contingent fee agreement where there was a substantial recovery with limited work involved. This charge was based upon the exact number of hours worked and costs advanced, which were substantial. The Court in *Linda M. Statler* also looked at the reasonableness of the fee based upon the various factors and Rule 1.5, which are also outlined in the original Memorandum. It should also be noted that Mr. Stout testified that the total fee represented only 21% of the recovery which is reasonable. The Affidavit of William Chambers, attached as Exhibit F, attests to the highly contentious nature of this matter. The aggressive pursuit of claims for funds from the Estate by Elizabeth Bastien made the work of the Administrator very time-consuming. The highly contentious and aggressive nature of Elizabeth Bastien, fighting for her removal as Administratrix, and contesting each item made litigation of this case more time-consuming.

Petitioner asserts that the fully detailed invoices of time spent and costs advanced as attached to the Fee Petition should be paid under the clear authority of the West Virginia Supreme Court of Appeals and in the cases of *Schrader Byrd & Companion, LLC v. Marks, et. al*

and *Linda M. Statler*. Note also, the mother and legal guardian of the minor objected to the fees in *Linda M. Statler*. In this instant case, the mother and legal guardian of Maxwell Bastien recognizes that the fees should be paid and requests that the Court enter such an Order. See the Affidavit attached hereto as Exhibit C.

If an attorney that represents a minor is unable to collect on a reasonable fee agreement, attorneys will be unwilling to undertake the representation of minors. Minors must have access to the judicial system. Judge Cummings decision to arbitrarily deny fees under a valid and reasonable fee agreement will clearly act as a deterrent to attorneys from representing minors. In the instant case, Tammy R. Huffman, as sole legal guardian, and Gordon C. Lane, Esq., executed a fee agreement and both parties believe it should be honored and enforced.

In the case of *Erwin v. Henson,* 202 W.Va. 137, 502 S.E.2d 712 (W.Va. 1998), the circuit court arbitrarily reduced the fees of a guardian ad litem even after finding that the hourly fee was reasonable and the work was exceptional. After setting forth the factors to be examined when determining the fees for a guardian ad litem, the Court went on to say that the circuit court must provide some explanation if there is going to be a reduction in a fee request. As the Court said, "this will provide the attorney a meaningful opportunity to address the specific concerns of the court and present evidence to support his claim." 202 W.Va. at 143, 502 S.E. 2d at 718. See also *Judy v. White*, 188 W.Va. 633, 425 S.E.2d 588 (1992). The *Erwin* Court further held that "trial courts must give an explanation on the record for any order reducing the amount of fees or costs claimed by an attorney appointed as guardian ad litem by the court. The explanation must provide enough guidance for the guardian ad litem to respond meaningfully by petitioning the trial court for reconsideration of the reduction order and allowing the attorney to submit

additional supporting written documentation or explanation for the fees and costs." 202 W.Va. at 143, 502 S.E. 2d at 718.

The same should be true in this case. Judge Cummings' order simply stated that the Petition for Additional Attorney Fees was denied without any further explanation. This places Lane and Young at a disadvantage because they cannot meaningfully respond and request a reconsideration. Therefore, Judge Cummings should have provided the basis for the order that denied Lane & Young's attorney fees.

The ultimate effect of Judge Cummings' order is to deprive minor children of the right to have their interests represented by attorneys. The circuit court's order should be reversed and the Petition for Additional Attorney Fees should be approved.

V. RELIEF PRAYED FOR

The Appellant prays that Judge John L. Cummings' order be reversed and remanded with directions to approve the Petition for Additional Attorney Fees in the amount of $73,789.45.

RESPECTFULLY SUBMITTED,

MAXWELL H. BASTIEN,
By Counsel

Gordon C. Lane by KMY

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ESTATE OF CHRISTOPHER P. BASTIEN, DECEASED, by
ELIZABETH A. BASTIEN, Administratrix

Plaintiff- Appellee,

v. Case No. 34886

ELIZABETH A. BASTIEN, an individual; MAXWELL H. BASTIEN, an individual; TAMMY R. HUFFMAN, an individual; BASTIEN & LACY, LC, a West Virginia Corporation; and GERALD R. LACY, an individual,

Maxwell H. Bastien,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, Gordon C. Lane, Sr., of Lane & Young, counsel for Maxwell H. Bastien, a minor, do hereby certify that I have this 15th day of June, 2009, served a copy of the foregoing ***"Brief of Lane & Young as Attorneys for Defendant-Appellant, Maxwell H. Bastien"*** upon all parties of record by mailing a true copy thereof, by First Class United States Mail, postage prepaid, as follows:

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Gordon C. Lane

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE