

2010 WL 2091256 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

In the Matter of The Construction of The Dorothy L. SHOOT 2005 Revocable Trust Created Under Agreement Dated June 1, 2005 by Dorothy L. Shoot as Trustor and Dorothy L. Shoot and Charlotte Ream Cooper as Trustees as Amended July 14, 2005, and Approval of Actions of the Trustee.

No. 107,481.
April 1, 2010.

Charlotte Ream Cooper, Trustee of the Dorothy L. Shoot 2005 Revocable Trust of June 1, 2005 Appellee/
Petitioner below, William Shoot, James Shoot, Valerie Pettit and Tiffany Clements Appellants/Respondents
below, Appeal From the District Court, Oklahoma County, Oklahoma The Honorable Vickie Robertson, Presiding

Answer Brief of Appellee

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***1 STATEMENT OF THE CASE**

1. Appellee/Petitioner, Charlotte Ream Cooper (“Cooper”), is the sole Trustee of the Dorothy L. Shoot 2005 Revocable Trust (the “Trust”) pursuant to the Trust agreement dated June 1, 2005, and First Amendment dated July 14, 2005, which was executed by the Settlor, Dorothy L. Shoot (“Shoot”).

2. On October 27, 2006, while Shoot was residing at Canterbury Nursing Home, Cooper filed this action for accounting identifying Shoot's sons and their children as necessary parties pursuant to 60 O.S. 175.23, requesting construction of the Trust confirming Cooper's appointment as Trustee of the Trust, providing for appointment of successor Trustee, interpreting provisions for distributions to beneficiaries of the Trust, approval of the actions of Cooper to date, and authorizing sale of Trust property and assets of Shoot. On June 12, 2007, Cooper filed her Supplemental Petition in this matter, acknowledging the death of Shoot on January 4, 2007, providing further accounting of the actions of Cooper to January 22, 2007, and billings for services of Cooper to January 31, 2007. On September 4, 2007, Appellants/Respondents filed *2 their Answer to the Supplemental Petition denying that the services and amount of billings and hourly rate alleged by Cooper were reasonable and necessary, and asking the Court to determine the reasonableness of said services and fees and, if appropriate, order and direct Cooper to reimburse the Trust said fees, including fees paid to Shoot's attorney.

3. This action was initiated to obtain a judicial review of the actions and accounting of Cooper as Trustee performed at the request and for the benefit of Shoot after her son, Bill Shoot, made complaints to the Department of Human Services in July, 2006. The complaints of Mr; Shoot were not substantiated, but the investigation found that Cooper and Shoot's attorney both billed for services during meetings they had with Shoot, at Shoot's request and insistence that they both be present. Though Cooper and the attorney worked on the same matters with Shoot, their individual actions depended on their respective professional roles.

4. Cooper's engagement by Shoot began in March, 2005. At the beginning of her engagement by Shoot in 2005 and at the beginning of a brief prior engagement near the end of 2004, Cooper advised Shoot that she billed \$50 per hour for all services. Cooper's billings clearly confirmed that rate. Cooper reviewed each bill with Shoot, discussed the charges and answered Shoot's questions about the billing. Shoot never questioned the rate or total of any of the billings by Cooper for her services.

5. Because original Trust and Will documents of Shoot could not be found, Shoot's attorney prepared new ones that were signed on June 1, 2005, naming Cooper and Shoot as Co-Trustees. Later, as a result of Shoot's writing some unwise checks to a contractor whom Cooper recognized as a con man who was thought to prey on the elderly, demonstrating a need for greater controls, Shoot, with the help of her attorney and banker, named Cooper as sole Trustee and executed a Durable Power of Attorney naming Cooper as her Attorney-in-Fact.

*3 6. Throughout the year 2005, Shoot made ever increasing requests for Cooper to provide services increasing the scope to include transportation, management of her home, arranging for surgery and medical treatments, arranging for new supervised living arrangements and communication with Shoot's family. Shoot's sons also requested certain services and deferred to Cooper for Shoot's needs. By December, 2005, due to Shoot's deteriorating physical and mental condition, Cooper initiated discussions and sought the appointment of Shoot's sons as Guardians of her person. Although Shoot's sons never personally appeared at the guardianship proceedings, they appeared through counsel and approved the Dispositional Order naming them as Guardians of the person of Shoot and ordering the retention of Cooper to provide "geriatric care management."

7. At all times during Cooper's engagement by Shoot beginning in early 2005, Shoot told her attorney and Cooper that she did not want her sons to be advised of her **financial** affairs. While Cooper served as Trustee and Shoot was alive, Cooper was solely responsible to Shoot and bound to follow Shoot's directions.

8. Cooper is the Trustee of the Trust and, accordingly, had standing to bring this action pursuant to the provisions of 60 O.S. 175.23C. Cooper is a resident of Oklahoma County, Oklahoma and, thus, venue did properly lie in the District Court of Oklahoma County, Oklahoma, pursuant to the provisions of 60 O.S. 175.23B. The Court had jurisdiction of the subject matter of this cause and had authority to grant the relief prayed for pursuant to the provisions of 60 O.S. 175.23A. Pursuant to notice by service on all necessary parties, including all of the known beneficiaries of the Trust, the Trial Court had jurisdiction to excuse Cooper from liability for any violation of her duties as a fiduciary under the Trust or any provisions of the Act. 60 O.S. 175.23E.

*4 9. After hearing the testimony of witnesses presented at trial and review of the documents placed into evidence, the Trial Court made Findings of Fact and Conclusions of Law approving Cooper's accounting, approving her actions as Trustee, her fees and attorney fees for the period covered by the accounting.¹

SUMMARY OF THE RECORD

1. While there had been some preliminary discussions between Cooper, Shoot and her son, Bill Shoot,² the retention of Cooper as a Personal Manager for Shoot actually began on March 2, 2005. (TR 36/3-5, 214/4). Upon such retention, Cooper indicated to Shoot that she would be charging \$50 per hour for her services as a Personal Manager. (TR 36/7-10). This *5 contact was followed with numerous meetings of Shoot, Cooper and the attorney for Shoot, Kent Polley.³

2. Shoot was adamant with Cooper and Kent Polley that she did not want her two sons, Bill and Jim, to know anything about her **financial** affairs and **financial** information. (Exhibit 15; TR 63/17-25), Cooper spent a great deal of time organizing Shoot's records and assessing her **finances** in an attempt to prevent dissipation of her assets so that she could continue to be supported **financially**. There had previously been a 1985 Dorothy L. Shoot Revocable Trust naming Shoot as Trustee. (Exhibits 17 & 37; TR 55/15-25, 56/1-6).

3. After not being able to locate the original of Shoot's 1985 Trust, Mr. Polley determined that the proper course was to prepare a new Trust instrument and Will for Shoot. When Mr. Polley started discussing the new Trust with Shoot, in Cooper's presence, he advised Shoot that given her age and the fact that Liberty Bank no longer existed, that she needed to designate a new successor Trustee and a Co-Trustee of her Trust. (TR 63/9-11).

4. Shoot discussed a number of possible alternatives to serve as Trustees of her Trust with Mr. Polley and Cooper. (TR 63/13-14).

5. In discussing whether Shoot might like to name her sons, either both of them or one of them, as a Trustee, Shoot stated to Mr. Polley and Cooper that her son, Jim, had always been very busy with his career and "had very little time for her," and for that reason Shoot did not feel that Jim Shoot should serve, and that Bill had problems managing money and he was not

in good health, and Shoot didn't want either son involved in her **finances**, as she had told Cooper in her first visit with her. (TR 63/17-25, 328/7-20).

*6 6. Shoot did not want her sons, Bill and Jim, to know her **financial** information. Shoot's sons offered little help in any of these matters. (TR 328/7-20, 366/18-21).

7. Bill Shoot, who had lived in Oklahoma City, had previous **financial** problems of his own. He had mental difficulties and had indicated his desire to move to California to live with his daughter. (TR 63/20-25).

8. Jim Shoot is a psychiatrist in Indianapolis, Indiana, and the Trial Court specifically noted that he visited Shoot while in Oklahoma City to remove furniture from her home in May, 2006, which was the only time that he visited her from November 4, 2004 to January 4 of 2007, a period of 27 months. (TR 63/20-21, 128-130).

9. On June 1, 2005, Shoot, as Settlor, executed the new revocable Trust agreement, the 2005 Dorothy L. Shoot Revocable Trust, with Shoot and Cooper as Co-Trustees. (Exhibit 7).

10. The Trust agreement, dated and signed June 1, 2005, between Shoot as Settlor, and Shoot and Cooper as Co-Trustees, provided, in part, as follows:

"4.01 *Distribution of Income During Lifetime of Settlor.* During the lifetime of the Settlor, the Trustee shall distribute all income of this trust to the Settlor in quarterly or more convenient installments, but not less often than annually without reserving any part for depreciation or depletion. The Settlor may, by separate written instructions, direct the Trustee from time to time to retain all or any part of the income of the trust during the lifetime of the Settlor. Income not distributed by the Trustee shall be accumulated and added to the principal of this trust.

4.03 *Invasion of Principal by the Trustee for the Benefit of the Settlor, Dorothy L. Shoot.* The Trustee shall have the power to make distributions to the Settlor, Dorothy L. Shoot, or for her benefit any time during the life of the Settlor, Dorothy L. Shoot, out of the principal of this trust, from time to time, such amounts as the Trustee, in its discretion, shall deem advisable to provide for her health, education, support and maintenance in the manner of living to which she have been accustomed during her lifetime. Said principal distributions shall be made on a liberal basis without any regard for conserving assets for the remainder beneficiaries. Said principal distributions shall be made to Dorothy L. Shoot, or for her benefit, without taking into consideration any personal assets or other **financial** resources that she may have or own individually or in one or more trusts, revocable or irrevocable, that she or others may have established for her benefit.

*7 ***

5.06 *Fiduciary Standard.* To act freely under all or any of the powers given to the Trustee in all matters concerning the trusts herein created, after forming a judgment based upon all the circumstances of any particular situation as to the wisest and best course to pursue in the best interest of the trusts and the beneficiaries hereunder, without the necessity of obtaining the consent or permission of any person interested therein or of any court, and notwithstanding that the Trustee may also be acting as trustee of other trusts, or as agent for other persons or corporations interested in the same matters; provided, however, that the Trustee shall exercise such powers at all times in a fiduciary capacity primarily in the best interest of the beneficiaries hereunder. With respect to statutes contained in Title 60, Oklahoma Statutes (1981), as amended, the provisions of [Section 175.12](#) (Trustee selling to self as trustee of another trust) are waived as to any Trustee and the provisions of [Section 175.9](#) (Trustee lending funds to self, affiliate, etc.), [175.11](#) (Trustee buying from, or selling to, self, affiliate, etc.) and [175.13](#) (Trustee purchasing stock, bond or securities of self, affiliate, etc.) are waived as to any individual Trustee. No Trustee shall deal with any person with respect to any of the trust assets for less than an adequate consideration in money or money's worth.

5.18 *Employment of Attorneys, Accountants and Other Agents.* To retain or employ attorneys, accountants, custodians, clerks, agents and other persons, corporations and organizations as deemed advisable, and to delegate to them such ministerial or discretionary powers and authority as the Trustee, at the Trustee's discretion, shall deem appropriate.

6.01 *Accounting to Court.* The Trustee shall not be required to account to any court for the administration of the trusts but shall furnish periodic reports of the administration to those beneficiaries entitled to receive distribution of income from the trust for which such report is furnished, regardless of whether such income distributions are absolute or in the discretion of the Trustee.

6.02 *Reliance by Third Parties on Trustee's Authority.* No person, firm or corporation dealing with the Trustee with reference to any of the trust assets, if acting in good faith, shall be required to ascertain the authority of the Trustee, nor to see to the performance of the Trustee's duties, nor to be responsible in any way for the proper application of funds or properties paid or delivered to the Trustee for the account of the trusts, but, if acting in good faith, such person, firm or corporation may deal with the Trustee as though the Trustee were unconditional owner of the trust assets.

7.05 *Amendment and Revocation.* The Settlor reserves the right at any time, or from time to time, without the consent of any person and without notice to any person other than the Trustee, to revoke or modify the trust herein created in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust assets by written notice of such revocation, modification, change or withdrawal delivered during the Settlor's lifetime to the Trustee. No modification or change, which substantially *8 increases the obligations or duties of the Trustee, shall be binding upon the Trustee then in office without consent. Upon the death of the Settlor, the terms and provisions of this Trust Agreement shall become irrevocable.

7.06 *Compensation of the Trustee.* The Trustee shall be reimbursed for expenses incurred in the management of the trust estates created hereunder and the Trustee shall receive reasonable and customary compensation for its services. Such services and compensation shall be chargeable first to income and, if it is sufficient, then to principal.” (Exhibit 7).

11. Under the terms of the Trust, Shoot, as Settlor of the Trust, was the only beneficiary entitled to receive distributions or benefits from the Trust and was the only person entitled to receive periodic reports of the administration of the Trust during her lifetime. (Exhibit 7, ¶¶4.01, 4.02 & 5.16; TR 409/17-19, 412/15-413/5). Any rights of a beneficiary of a Trust, other than the Settlor, which is revocable by the Settlor, arise only upon the Settlor's death or incapacity. 60 O.S. 175.57E. As Settlor of her Trust, Shoot retained the power to revoke or modify her Trust “without the consent of any person” until her death. (Exhibit 7, ¶7.05) 60 O.S. 175.57E. As the Trustee of the Trust, Cooper was the agent of the Settlor, Shoot, who held the inter vivos right to revoke while she had legal capacity. Charles G. Rounds, Jr., *Loring A Trustee's Handbook*, § 8.11 (2005 ed.) (citing 2 *Scott on Trust*, § 216.2). Where the Settlor, Shoot, has power to control the action of the Trustee in certain respects, the Trustee is under a duty to act in accordance with the exercise of her power as Trustee. Rest. 3rd Trusts, *Prudent Investor Rule*, § 185.

12. Cooper had no duty to provide **financial** information to any beneficiaries of the Trust while Shoot retained the power to revoke the Trust. 60 O.S. 175.57E. In fact, Cooper was under specific instructions from Shoot not to provide her sons any such information. (TR 366/18-21). Therefore, Cooper's duty of loyalty to Shoot prevented her from disclosing any such information. Charles G. Rounds, Jr., *Loring A Trustee's Handbook*, § 6.1.5 (2005 ed.).

*9 13. As Trustee, Cooper had the power, in her discretion under the terms of the Trust, to hire and retain attorneys, agents and other persons as she deemed advisable and/or appropriate. (Exhibit 7, ¶5.18). Although not required by the Trust, Cooper,

as Trustee, is permitted to seek judicial approval of her accounting and upon showing that she acted honestly and reasonably, to obtain a release from liability for her actions. (Exhibit 7, ¶6.01). As Trustee, Cooper was authorized by the Trust to receive reasonable and customary compensation for her services and to be reimbursed for expenses incurred in the management of the Trust. (Exhibit 7, ¶7.06).

14. On June 22, 2005, Cooper was given the ability to sign checks. (Exhibits 18 & 37; TR 68/6-72/2).

15. On July 14, 2005, Shoot was removed as Co-Trustee and Cooper became the sole Trustee. (Exhibit 18; TR 252/25-253/18).

16. On September 10, 2005, while Shoot was planning surgery for a double [hernia](#), Bill Shoot moved to California. (TR 78/25, 79/1-4, 85/10-14).

17. On September 21, 2005, Cooper was made Attorney-in-Fact and given a Durable Power of Attorney over the affairs of Shoot. (Exhibit 19; TR 87/20-25, 88/1-4).

18. On November 14, 2005, Shoot had surgery to repair a double [hernia](#) at Deaconess Hospital in Oklahoma City. (TR 85/25-87/7). Her post-surgical care was at Brighton Gardens where she had “respite care” which was arranged and coordinated by Cooper at Shoot's specific instruction. (TR 89/1-12). On November 23, 2005, Shoot was moved to the Bethany Senior Diagnostic Center. (Exhibit 21; TR 96/6-17).

19. At Shoot's request, Cooper took Shoot to the hospital for surgery, assisted her during admission, stayed with her at the hospital during the surgery, and stayed with her *10 following the surgery. (Exhibit 21; TR 341/1-8, 93/25, 94/1, 94/19-23). Cooper billed a total of \$900 for 18 hours for her services.

20. Lee Holmes, whose testimony was offered as an expert in the area of [elder](#) care law (beginning at TR 400), testified regarding the appropriateness of Cooper's actions on behalf of Shoot (TR 418-435) on cross-examination, that on this occasion Cooper's services and her charges were:

“Very reasonable. The fact that she was there while Mrs. Shoot is undergoing surgery and she is there to get her there and be there for her and be available when there's no family members to be there, absolutely, that's the proper thing to do. And everybody should be happy about that.“...” I sure do not see anything wrong with that. I think it is very appropriate.“...” You know, ...if I could have someone that knows me at the hospital, that's the one I want. I don't want some strangers out there, quote, being my eyes and ears. I want my, my agents to be there. People I know. When the doctors come out or somebody comes out and they've got something to report, you don't want to report to somebody that doesn't even know Mrs. Shoot and says, ‘Well, I don't know who her relatives are’ and ‘I don't know, here's some phone numbers.’ Who's going to be reporting if there's some problems.” (TR Vol II, 432-433, 456-457).

21. On January 3, 2006, a Guardianship was created with a Dispositional Order entered by Judge Larry Jones of the District Court of Oklahoma County. In essence, Shoot was made a ward of the Court. Her sons, Bill and Jim, were appointed as Special Guardians of her person, but not of her estate. (Exhibits 22, 23, 33, 50).

22. The Dispositional Order Appointing Guardian of the Person in the Matter of the Guardianship of Dorothy L. Shoot, an Incapacitated Person, PG-2005-764, recites the appearances of Betty Wood for Jim and Bill Shoot, Kent Polley for Shoot, and Cooper. Paragraphs 12 and 13, provide, in part, as follows:

“12. Charlotte Ream Cooper, Petitioner herein, is the person designated by ward in her durable power of attorney document dated September 21, 2005, at page 4 (a copy of which is filed herein as Exhibit B to the Petition) to serve as her guardian in the event that it is necessary.

*11 13. At this time, Charlotte Ream Cooper declines to serve as guardian of the person in favor of the ward's sons, James L. Shoot and William W. Shoot. That Charlotte Ream Cooper has been and will continue to be retained by James L. Shoot and William W. Shoot to provide geriatric care management on behalf of the ward." (Exhibit 49).

Neither Jim Shoot nor Bill Shoot attended the hearing in which they were appointed as Guardians of the person of their mother, Dorothy L. Shoot, nor did they seek clarification of the wording of the Dispositional Order or plan of care filed on their behalf by their attorney in the Guardianship proceeding. (Exhibit 49).

23. Thereafter, Cooper remained Trustee of the Trust, Attorney-in-Fact and a Geriatric Care Manager for Shoot.

24. Mr. Holmes also testified that it is common for family or Guardians to get a Geriatric Care Manager involved in the care of a ward or **elderly** nursing home resident to step in and help the family or serve as Attorney-in-Fact or Trustees for individuals; that there are no specific limitations on what a Geriatric Care Manager does; and that Geriatric Care Managers frequently become the persons who are providing the services they recommend. He testified that among things that Geriatric Care Managers do for their **elderly** clients are providing assistance in moving between healthcare facilities, offering counseling and support to the **elderly** and their families, providing crisis intervention, and reviewing **financial**, legal and medical issues with regard to the **elderly** person. He testified that many of the things Cooper did for Shoot throughout her engagement by and for Shoot fell within the purview of someone like a Geriatric Care Manager, and that in Oklahoma City, people charge from \$25-\$30 an hour, up to \$75 an hour, to perform the types of services provided by a Geriatric Care Manager, depending upon who it is, their education, experience, training, etc. (TR 419/12-423/14).

25. Mr. Holmes also testified that it was appropriate for Cooper, as Trustee, to check and to drive Shoot's car to assure it was in operating condition for use, if needed, or for possible *12 sale, to avoid potential liability from someone else driving the care and to avoid the time, cost and expense of identifying, interviewing, hiring, supervising and gathering information reports from a third party hired for this purpose. He further testified that it was appropriate for Cooper, as Trustee, to check and pick up mail at Shoot's house regularly to identify any problems or damages that develop, to diminish exposure to theft and vandalism, to diminish the exposure to the house being declared vacant and unoccupied, resulting in loss of insurance, and for Cooper to visit and maintain relationships with Shoot's neighbors who can serve as her eyes and ears regarding any unusual or unauthorized activity at the house and report the same, and for Cooper to obtain and maintain information as to the value of Shoot's house and comparable sales of homes in the area in order to assure that the property is properly insured and to be able to sell the property should that become in the best interest of the Trust beneficiary. Cooper did perform all of these functions. (TR 428/4-16, 433/13-435/12).

26. That the proposed plan for care and treatment of the ward filed in the matter of the Guardianship of Dorothy L. Shoot, an incapacitated person, No. PG-2005-764, provides, in part, as follows:

"2. Those services will be obtained and provided as follows: The wards' assets are sufficient to obtain such service for the foreseeable future. We shall supervise the care the ward receives, and shall maintain frequent communications with the ward, her assistant, Charlotte R. Cooper, the ward's health care providers and her care givers. This proposed plan for care and treatment of the ward by James L. Shoot and William W. Shoot as guardians of the person of Dorothy L. Shoot is filed in separate counterparts signed separately by James L. Shoot and William W. Shoot." (Exhibit 47).

27. Cooper is entitled to reasonable compensation for such services as Trustee of the Trust, as Geriatric Care Manager, appointed by the Guardian Court, and as Shoot's Attorney-in-Fact. 60 O.S. 175.48; Michael L.M. Jordan, *Durable Powers of Attorney and Health Care Directives*, § 5.4 (4th ed. 2006).

*13 28. In December 2005, Shoot fell and broke her hip. (Exhibits 22 & 33). On December 18, 2005, Bill Shoot emailed Cooper, saying, "Please exercise your best judgment in getting my mother's **hip fracture**, abdominal pain, and any other medical

issues addressed.” (Exhibit 63; TR 105/3-29, 106/1-5, 513/11-20, 105/6-107/7). On December 20, 2005, Shoot had [surgery for her fractured hip](#) at Deaconess Hospital. None of her family was present.

29. Subsequent thereto on January 5, 2006, Shoot was moved to Canterbury Skilled Nursing Center for physical therapy and subsequently, as she failed to participate in therapeutic activity, to The Springs Nursing Home at Canterbury. (Exhibit 23). During the time that she was at the Canterbury Skilled Nursing Center, the family did not ever attend any Care Plan Meetings. (Exhibits 23-32, 33; TR 119/15-25, 120/20, 142/25, 143/1-20).

30. In January, 2006, Jim Shoot requested a complete **financial** record of Shoot's accounts from Cooper. On January 28th Cooper responded to Jim Shoot with a copy to Bill Shoot, indicating a willingness to share information with Jim and Bill Shoot in the near future and outlining information regarding Shoot's condition and activities. Cooper received a response from Bill Shoot stating, “Thanks again for your proactive involvement and friendship.” (Exhibit 67).

31. Cooper discussed with Shoot, Jim Shoot's request for **financial** information, in light of Shoot's explicit instructions directing Cooper to not share information with Shoot's sons. After Shoot's initial objection and Cooper's explanation of the sons' serving as Co-Guardians, in April, 2006, Shoot agreed for Cooper to provide information. (Exhibit 69; TR 122/15-25).

32. Cooper continued to manage the assets in order to pay the expenses and the bills for Shoot's care.

***14** 33. A review of Cooper's billing statements regarding Shoot (Exhibits 23 and 24), DayTimer reports (Exhibit 33) and emails between Cooper and the Shoots indicates no further contact between Cooper and any of Shoot's family from January 29, 2006 until April 27, 2006, when Bill Shoot emailed Cooper that his “former wife (i.e., the mother of Tiffany and Valerie) has just expressed an interest in purchasing my mother's home, if she can qualify, since she plans to vacate her present location at some future date. Your assistance in this matter will be greatly appreciated by all.” (Exhibit 69). Cooper forwarded their email to Jim Shoot. (Exhibit 70). After Cooper sent **financial** packets and statements to Jim and Bill Shoot on May 21 (Exhibit 73), Jim Shoot indicated he would be coming to Oklahoma City to pickup items from Shoot's home. (Exhibit 74).

34. On May 25th Cooper sent an email to James Shoot, with a copy to Bill Shoot, inquiring as to the expected time of his arrival in Oklahoma City and indicating that Cooper would be in Shoot's home from 9 to 1 on May 27th with the housekeeper, and otherwise he could contact her at her home to arrange access to the home. (Exhibit 76; TR 128/22-25, 129/1-25, 130/1-3).

35. While awaiting Mr. Jim Shoot's call to her home, Cooper received notification that a van and trailer were at Shoot's home. (Exhibit 26).

36. Upon going to the home, Cooper found Jim Shoot, Carol Shoot and Christa Shoot removing furniture and property from the house and that they entered via a key provided by Bill Shoot. Jim Shoot asked Cooper for his mother's good jewelry. (Exhibit 26; TR 129/17-25, 130/1-3).

37. In August, 2006, Agnes Tobler, with Adult Protective Services (“APS”), following a telephone complaint from Shoot's son, Bill Shoot, conducted an investigation ***15** regarding three specific complaints by Mr. Shoot alleging that Cooper and Shoot's attorney were taking money that did not belong to them, issuing undocumented checks on Shoot's account and committing fraud. (Exhibit 14; TR 607/4-17). That paperwork was forwarded to the District Attorney, Oklahoma County. (TR 611/15-16). Detective Snead of the Oklahoma City Police Department (“OCPD”) subsequently investigated this report and a complaint submitted by Bill Shoot, and no charges were ever filed against either Cooper or Shoot's attorney. (TR 137/15-17, 138/9-13, 139/13-139/21; 615/1-616/17). Ms. Tobler testified that the specific complaints were “unsubstantiated,” (TR 613/3-616/17) but, based upon the fact that Cooper and the attorney each billed for time they were together, their descriptions of matters worked on were “kind of duplicated.” (TR 608/1-15, 609/2-9).

38. On or about July 26, 2006, Cooper hired attorney Jon Trudgeon, HCCN, to obtain information regarding the APS and OCPD investigations and seek an approval of her accounting and actions as Trustee of Shoot's Trust.

39. In late 2006, Shoot had numerous medical problems, including, but not limited to, [pneumonia](#), [high blood pressure](#), and difficulty swallowing. (Exhibit 95; TR 143/21-144/18, 148/13-152/22). During that period of time, her son Bill, who had moved to California, did not come to Oklahoma City. He had planned a trip to Japan, which, apparently, did not come to fruition, and then eventually took a trip to Las Vegas, Nevada. (Exhibit 98; TR 152/1-22).

40. On January 4, 2007, Shoot died. (Exhibit 30; TR 153/5-7, 155/19).

41. The only legal fee expert to testify in this case was Lee Holmes. He testified that Kent Polley's rate of \$140 per hour was quite reasonable and that his office usually charged \$200 per hour or more for their attorney time and \$50 an hour for assistants for services similar to those performed by Cooper. He also testified that he had reviewed the billings of HCCN *16 regarding their services on behalf of Cooper as Trustee of the Trust and were consistent with those required in a trust accounting matter, the hourly rates reflected in the billings were reasonable for attorneys with their experience and reputation, and the total fees were reasonable for the services performed. (TR Vol II, 439-441, 415, 419, 421-424).

42. In connection with services provided by Cooper to Shoot, Cooper maintained a number of different records and files used in connection with those services and the preparation of billings for her services. (Exhibit 1-notebook of handwritten notes; Exhibit 2-handwritten notes; Exhibit 3-list of assets; Exhibit 4-list of assets on April 17, 2000; Exhibit 33-Day Timer calendar; Exhibit 34-Fred Borden file; Exhibit 37-Kent Polley invoices; Exhibit 50-Shoot legal guardianship file; Exhibit 51-Shoot medical file #1; Exhibit 52 Shoot medical file #2; Exhibit 53-Deaconess documents, 11/23/05 admission to Senior Diagnostic Center; Exhibit 55-Shoot-Canterbury Gardens; Exhibit 56-Shoot Canterbury; Exhibit 57-Canterbury Springs; Exhibit 104-Shoot medicare; Exhibit 105-Shoot house; Exhibit 10 -Shoot funeral arrangements, Vondel Smith; Exhibit 108-investments, BankOne; Exhibit 109- Shoot Social Security; Exhibit 110-Shoot Quail Creek account; Exhibit 111-Shoot Chase Bank; Exhibit 112-Shoot Chase checking statements; Exhibit 113-Shoot taxes 2004; Exhibit 114-Shoot taxes 2005; Exhibit 115-Shoot 2006 tax worksheets; Exhibit 116-Shoot annuity-Transamerica Chase Bank).

43. The detail contained in Cooper's entries into her DayTimer calendar (Exhibit 33) and work records (Exhibits 1 & 2) are often substantially copied and included in subsequently rendered billings for services. (Exhibits 33, 14-32; TR 338/4-340/16).

44. Cooper's entries in her notebook (Exhibit 1), handwritten notes (Exhibit 2) and DayTimer calendar record the beginning and ending time of the activity and other reference to time involved for the matter, consistent with the actual bills. (TR 338/4-340/16).

*17 45. In her testimony, Cooper indicated that it was her practice, with respect to each billing statement rendered to Shoot from her initial billing dated November 31, 2004 through October 31, 2005, to review the billing in detail with Shoot, line by line, listing and explaining each charge. Cooper indicated that Shoot loved the exercise of reviewing these billings. (TR 34/8-23, 45/24-46/5, 52/16-22, 89/16-22, 92/17-21, 332/10-16).

46. Cooper thereafter reviewed the billings with Shoot at the time she issued herself a check in payment. (TR 107/18-108/7, 118/9-17, 123/24-124/6, 131/7-13, 141/3-17, 140/1-11).

47. Shoot enjoyed the line-by-line review of bills, she responded to the discussion and asked questions. (TR 330/23, 332/15-16).

48. The Court found that the accounting of Cooper as Trustee of the Dorothy L. Shoot 2005 Revocable Trust through January 31, 2007, was complete, accurate and sufficient and was approved. (Post Trial Findings of Fact and Order).

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE TRIAL COURT'S JUDGMENT IN REVIEWING OF A TRUSTEE'S DISCRETIONARY ACTS OR FOR ACCOUNTING WILL NOT BE DISTURBED ON APPEAL UNLESS CLEARLY AGAINST THE WEIGHT OF EVIDENCE.

This Proposition, supported by the Restatement of Trust 2d, §§ 197-199, is found in *Robinson v. Kirbie*, 1990 OK CIV APP 45, 793 P.2d 315. See also *Peyton v. McCaslin*, 1966 OK 4, 417 P.2d 316.

When the appeal raises an issue of the reasonableness of any attorney fees awarded by the Trial Court, then the standard of review is whether there has been an **abuse** of discretion by the Trial Judge. *Green Bay Packaging v. Preferred Packaging*, 1996 OK 121, 932 P.2d 1091; *18 *State ex rel Burk v. Oklahoma City*, 1979 OK 115, 598 P.2d 659; *In re Estate of Jack Lee Fields*, 1998 OK CIV APP 129, 964 P.2d 955. The Appellants must show that the Trial Court made a clearly erroneous conclusion and judgment, against reason and evidence, before such an award may be reversed. *Green Bay Packaging v. Preferred Packaging*, supra; *Broadwater v. Courtney*, 1991 OK 39, 809 P.2d 1310; *Abel v. Tisdale*, 1980 OK 161, 619 P.2d 608; *In re Estate of Jack Lee Fields*, supra. The Appellants have not done this, as the findings and orders of the Trial Court are overwhelmingly supported by the evidence.

PROPOSITION II

THE FACT OF COOPER'S ENGAGEMENT TO PROVIDE PERSONAL SERVICES TO SHOOT IN WHICH SHOOT AND HER FAMILY DEMONSTRATED EVER INCREASING RELIANCE UPON COOPER TO CARE FOR SHOOT, AND ARRANGE FOR HER HEALTH, LIVING AND **FINANCIAL NEEDS CLEARLY ESTABLISHES A CONTRACT AND THE BASIS OF COOPER'S COMPENSATION.**

Cooper was engaged, not by the Shoot Trust, but by Shoot herself, to perform personal services. Over a period of time, the scope of those services expanded as a result of ever increasing requests and requirements of Shoot, Shoot's declining health and the abandonment of Shoot by the only family member from whom Shoot had received continuing assistance. At Shoot's request, the scope of Cooper's services expanded from assistance with **financial** recordkeeping to personal assistance, transportation, geriatric and health care management, as well as her roles as Trustee of Shoot's Trust and as agent under Shoot's Durable Power of Attorney. Only after this contractual relationship was established over months of working together and a level of trust developed did Shoot act to name Cooper as Trustee of her Trust and her Attorney-in-Fact under the Durable Power of Attorney. (See Summary of the Record pgs. 5-10 above & authority cited).

*19 Certainly a trust relationship existed between Shoot and Cooper. In their relationship, Cooper was absolutely and unconditionally subject to Shoot's orders with respect to the Trust and as her agent in performing personal services, making living arrangements and medical care and looking after and maintaining Trust property. Cooper was obligated to perform the requested services. Whatever Cooper did for Shoot was as if Shoot performed the act herself. In doing what she did for Shoot, from the time she was hired until Shoot's death, Cooper was responsible to Shoot and to no one else. *Mertz v. Owen*, 1942 OK 165, 126 P.2d 720 (¶34).

We think it cannot be doubted that Shoot knew what Cooper was doing, since she acted as her agent, and Cooper's actions and her billings for services were done with Shoot's full approval and acquiescence.

PROPOSITION III

COOPER IS ENTITLED TO A DISCHARGE OF LIABILITY BY MEANS OF JUDICIAL SETTLEMENT OF ACCOUNTS REGARDING ALL TRANSACTIONS COVERED BY THE ACCOUNTS.

Citing [Bogert, *Trusts and Trustees*, §§ 970-974](#), Charles G. Rounds, Jr. states in *Loring A Trustee's Handbook*, § 6.1.5 (2005 ed.): “The trustee is entitled periodically to a discharge of liability by means of the judicial settlement of accounts. The trustee is discharged of any liability for transactions covered by the account. A judicial settlement of a trust account entails the filing of the account in a court that has jurisdiction over the trust, properly notifying by service or otherwise those who may have an interest in the trust, and requesting the court to render an approval or allowance of the account that is binding on all persons who are interested, or may become interested, in the trust once the applicable appeal period has run.” Charles G. Rounds, Jr., *Loring A Trustee's Handbook*, § 6.1.5 (pg. 286) (2005 ed.).

Settlement of the Trustee's accounting is the method by which the Trustee seeks the court's approval of fees charged and incurred by the Trustee in the performance of her duties on behalf of the Settlor of the Trust. [Swanson v. Bates, 1949 OK 231, 202 Okl. 128, 211 P.2d 781](#).

***20** Paragraph 6.01 of the Trust provides direction to the Trustee in seeking a judicial determination of the Trustee accounting (Exhibit 7). Once a complaint was filed, not with her personally, but with APS and OCPD, it became apparent that a judicial determination was prudent to determine any monetary liability or surcharge and obtain an approval and discharge for the Trustee actions. The request for approval not only included billings for Cooper's services as Trustee, in the direct administration of the Trust and exercise of discretion in making distribution to or for Shoot, as the sole beneficiary; but also, charges for personal services under the engagement of Cooper that predated her appointment as Trustee of the Trust and as Attorney-in-Fact under Shoot's Durable Power of Attorney.

Paragraphs 4.01, 4.03 and 5.06 of the Trust make clear that such expenses were authorized and expected when incurred...“after forming a judgment based upon all the circumstances of any particular situation as to the wisest and best course to pursue in the best interest of the trusts and the beneficiaries hereunder...” (Exhibit 7). While Shoot was living, she was the sole beneficiary of the Trust.

It is within the discretion of the Trial Court to allow as a charge against the Trust principal the attorney fees and other expenses reasonably and necessarily incurred in the proper administration of the Trust. [Moore v. Cavett, 1961 OK 288, 368 P.2d 224](#).

The Guardianship Court named Cooper as Geriatric Care Manager out of recognition that she was already performing those functions by agreement with Shoot, and no member of her family was present or asked to assume that responsibility. This appointment of Cooper as Geriatric Care Manager followed the statutory preference for the “least restrictive dispositional alternative” for the plan of care. [30 O.S. 1-111.A.13](#). Indeed, Shoot's sons asked for Cooper to keep those functions so they would not have to accept them. The overwhelming evidence in this ***21** case supports the Trial Court's findings that a contract existed for Cooper to provide personal services to Shoot at all relevant times covered by these proceedings. After examining all of the evidence presented, the Trial Court approved Cooper's billings and ordered that they be paid, approved payments to Shoot's attorney, and approved for payment of fees of the Trustee's attorney in this action seeking the Court's approval of the administration of the Trust and the Trustee's accounting. Such action for accounting serves to protect the entire Trust res from improper depletion and assures that Trust assets are not diverted from providing benefits to the Trust beneficiary, in accordance with the terms of the Trust. [Robinson v. Kirbie, supra](#); [Buck v. Cavett, 1960 OK 150, 353 P.2d 475](#); and [Cavett v. Buck, 1964 OK 265, 397 P.2d 901](#). Appellants' Proposition II is patently wrong and unsupported by the evidence.

For the reasons stated herein, supported by the record in this case and authorities cited, Appellants' Proposition II and III must fail.

PROPOSITION IV

COOPER IS ENTITLED TO REASONABLE COMPENSATION FOR HER SERVICES TO SHOOT AS TRUSTEE OF THE TRUST, AS GERIATRIC CARE MANAGER, APPOINTED BY THE GUARDIAN COURT, AND AS SHOOT'S ATTORNEY-IN-FACT COMMENSURATE WITH HER SKILL, EDUCATION AND EXPERIENCE.

Under [60 O.S. 175.48](#), a Trustee is entitled to receive such compensation as provided in the Trust agreement or other contract, and if such compensation is not regulated by or stipulated in the Trust agreement, the Trustee may charge and deduct reasonable compensation for the service rendered and the responsibility assumed. *Swanson v. Bates*, supra.

Here, paragraph 7.06 of the Trust, in providing for payment and regulating the Trustee's fee, provides:

***22** 7.06 *Compensation of the Trustee.* The Trustee shall be reimbursed for expenses incurred in the management of the trust estates created hereunder and the Trustee shall receive reasonable and customary compensation for its services. Such services and compensation shall be chargeable first to income and, if it is sufficient, then to principal.” (Exhibit 7).

Where a provision in a Trust provides that the Trustee shall be entitled to reasonable compensation for services in performance of the Trust, and in case of disagreements between the Trustee and the beneficiaries, such compensation shall be fixed by any Court of competent jurisdiction, where the Trustee files her reports claiming compensation in a given sum, and a beneficiary protests the claim, then compensation shall be fixed by the District Court. *Swanson v. Bates*, supra.

As discussed above, Shoot determined the scope and responsibilities delegated to Cooper under their engagement. Shoot set and agreed to the terms of Cooper's engagement by her instructions to her attorney that he contact Cooper to begin her engagement in 2005, by her ever increasing requests and demands upon Cooper broadening the scope of her engagement and by her acquiescence to billings after they were presented to Shoot and discussed. Shoot chose to request the services from Cooper rather than any other available source. In these circumstances, Cooper is entitled to reasonable compensation for the services performed and by a person with the skill, education and experience of Cooper. (TR 21-23). Michael L.M. Jordan, *Durable Powers of Attorney and Health Care Directives*, § 5.4 (4th ed. 2006) (stating most states have a judicial rule of reasonableness). (See Summary of the Record, pgs. 11 & 12 above and authorities cited).

For the reasons stated herein, supported by the record in this case and authorities cited, Appellants' Propositions I, II and VI must fail.

***23 PROPOSITION V**

THE TRIAL COURT MAY, IN JUDICIAL PROCEEDINGS INVOLVING A TRUST, SUCH AS AN ACTION TO APPROVE AN ACCOUNTING BY A TRUSTEE, AWARD THE TRUSTEE ATTORNEY FEES, COSTS AND EXPENSES, INCLUDING EXPERT WITNESS FEES.

Title 60 O.S. 175.57D specifically provides for the award of attorney fees and costs in judicial proceedings involving a trust, as follows:

“In a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust which is the subject of the controversy.” See [Corr v. Smith](#), 2008 OK 12, 178 P.3d 859.

It is in the discretion of the Trial Court to fix a reasonable fee and, in doing so, to take into consideration factors such as the character, ability and experience of the attorneys, the amount involved, the time necessary to prepare for trial, the responsibility assumed in connection therewith by counsel, the difficulties of the propositions involved, the results obtained and the customary

charge for services of like character. *Moore v. Cavett*, supra; citing *Re Atwood's Trust*, 227 Minn. 495, 35 N.W.2d 736, 9 A.L.R.2d 1126, as follows:

“It is the duty of courts in fixing reasonable attorneys' fees as a charge against the trust corpus to protect trust estate from ‘vicarious generosity.’ In determining the reasonableness of attorneys' fees, the character, ability, and experience of the attorneys, the amount involved, the time necessary to prepare for trial, the responsibility assumed in connection therewith by counsel, the difficulties of the propositions involved, the results obtained, and the amount customarily charged for service of like character are all to be considered. *Hempel v. Hempel*, 225 Minn. 287, 293, 30 N.W.2d 594, 598; *Blackhurst v. Johnson*, 8 Cir., 72 F.2d 644, 648.”

Compensation claimed by the Trustee and allowed and approved by the Court, measured by the services rendered and responsibilities assumed, is reasonable and not exclusive. *Swanson v. Bates*, supra.

*24 The Trial Court approved the Trustee's reports and set the attorney's fees, determined they were reasonable and ordered they should be paid.

PROPOSITION VI

APPELLANTS' PROPOSITION IV FAILS IN ITS BASIS IN FACT AND APPLICATION OF THE LAW.

Appellants' Proposition V fails in its basis in fact and application of the law. A careful reading of Title 30 will show that a ward surrenders her capacity to contract only in the case of the appointment of a Conservator. 30 O.S. 3-219. No Conservator was appointed in this case. A Guardian of an incapacitated person is appointed by the Court to “assure that the essential requirements for health safety” of the ward are met. 30 O.S. 1-111.A.7. Special Guardians of the person, as the Shoot sons in this matter, do not ever manage **financial** resources. 30 O.S. 1-111.A.7. Title 30 O.S. 1-111.A.12.b makes it clear that an “incapacitated person” may be able to manage his **financial** resources, i.e., enter into contracts. In this case, the Guardianship Court made no finding with regard to Shoot's ability to manage **financial** assets or to enter into contracts. In the case of Shoot, the Guardianship Court appears to have adopted the least restrictive dispositional alternative, 30 O.S. 1-111.A.13, to allow Shoot's property, **financial** resources, and affairs to be managed pursuant to the structure and personnel that Shoot herself put in place prior to being adjudged incapacitated. Appellants' reference to 30 O.S. 1-11(A)(12) appears to refer to 1-111.A. 12, but is misplaced as that section does not limit Shoot in her capacity to contract.

****25 PROPOSITION VII***

APPELLANTS' PROPOSITION V MISSTATES THE FACTS AS DISCLOSED IN THE TESTIMONY PRESENTED AT TRIAL.

The evidence in this case clearly establishes that Cooper engaged counsel on July 26, 2006, after being contacted by APS regarding their investigation and providing information requested to Agnes Tobler. There is no indication that Cooper received legal advice regarding the reasonableness of her charges to any client, before or after, engaging counsel to pursue this Trustee accounting action, and to defend against Bill Shoot's multiple attacks on her integrity and professional reputation. Counsel was not engaged to defend “objections” to her charges. No objections were raised to her until well after the APS examination was completed; indeed, until she received the Response to the Amended Petition for her accounting. The reasonableness of her charges is not based upon advice of counsel; it stands upon her standard business practices and her contract and engagement for personal services over a period of several months and the approvals received from Shoot for billings rendered for services performed. The Trial Court found those charges reasonable based upon the evidence presented at trial. *Robinson v. Kirbie*, supra, cited by Appellants and by Appellee, above, establishes the standard for review of such findings by the Trial Court.

CONCLUSION

Based upon the entire record of the proceedings, as before the Court in this appeal, the Findings of Fact and Conclusions of Law of the Trial Court are overwhelmingly supported by the weight of the evidence and should be affirmed. The Trial Court did not **abuse** its discretion in approving the reasonableness of the fees of the Appellee, or those of the Appellee's counsel.

***26** The Trial Court should proceed to hear Appellee's pending application to approve her further accounting, including Appellee's fees during the course of this litigation and for Appellee's attorney fees and costs.

Footnotes

1 The Trial Court's Post Trial Findings and Order states:

FNa. The accounting of Cooper as Trustee of the Trust through January 31, 2007 was complete, accurate and sufficient and was approved.

FNb. That all services and billings by Cooper, Kent Poltey, and Jon Trudgeon, and his firm Hartzog Conger Cason and Neville ("HCCN"), were reasonable and necessary.

FNc. There was no evidence regarding fraud, waste, self-dealing, conversion, or any violation of fiduciary duty.

FNd. All other bills that are presently due and owing will be paid by the Trust.

FNe. Cooper's outstanding billings for services to January 31, 2007, in the amount of \$5,737.50 shall be paid from the funds of the Trust.

FNf. The outstanding billings of HCCN for services to July 24, 2007, in the amount of \$32,037.60 and expenses of this action, including witness fees and discovery costs, shall be paid from the assets of the Trust.

FNg. The firm of HCCN may file an additional application for fees and expenses of this action, including witness fees and discovery costs, incurred after July 24, 2007.

FNh. Cooper should be discharged from liability for her actions as Trustee through January 31, 2007.

FNi. The prior order of the Court restricting Cooper from making payments from the Trust funds is hereby dissolved.

FNj. Cooper expects and intends to file an additional accounting in this matter asking for approval and discharge from liability for actions through final distribution of the Trust and approval of attorney fees and costs in this action incurred after July 24, 2007, and to defend Cooper in this accounting action and from any charges of violation of fiduciary duty and responsibility for services performed for Shoot.

FNk. Cooper is directed to take all actions necessary to wind-up administration of the Trust and to file such further actions as shall be required to approve her accounting. Further compensation or reimbursement of expenses by Cooper or counsel shall be withheld pending approval of the Court.

FNl. Cooper is discharged regarding her actions as Trustee through January 31, 2007 and may file a supplemental accounting for the period from that date to final distribution of the Trust.

2 Transcript pages 26-34 cover Cooper's prior engagement on behalf of Shoot in which Cooper was hired to review Shoot's **finances** to see if she could afford to retain Fred Borden, who had been Bill Shoot's "spiritual advisor" at a cost of \$6,000 per visit (TR 33/13-21) and provider of "holy water" or "anointed water" for consumption at \$600 per liter. Shoot had already paid billings of well over \$20,000 to Borden for Bill. (TR 31/21-32/10). Bill recommended Mr. Borden to his mother so that she could pay for Borden's services to both Bill Shoot and Dorothy Shoot. Cooper recommended against this engagement.

3 This series of meetings began on March 2, 2005, and continued, sometimes weekly, through the summer of 2005. The purpose of these meetings, the procedures they followed and the matters discussed are covered in the Transcript, beginning at page 36 and continuing through page 52, and elsewhere throughout the Transcript and are summarized in Cooper's billings, Exhibits 14-19, which were received by Cooper and Shoot before payment. (TR 34, 45-46, 52, 67 & 89; Cooper's Post Trial Proposed Findings of Fact and Conclusions of Law, ¶ 81).