2012 WL 3117310 (Neb.App.) (Appellate Brief)
Court of Appeals of Nebraska.

In the Matter of the Conservatorship of Pearl R. GIVENTER, a Protected Person.

Nos. A-11-806, A-11-974.
June 29, 2012.

Appeal from the County Court of Douglas County, Nebraska
The Honorable Craig Q. McDermott

Appellee's Brief and Brief On Cross Appeal

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*1 STATEMENT OF JURISDICTION

Appellee-Cross Appellant Marlys Lebowitz (hereinafter "Appellee" or "Marlys") accepts Appellant Pearl Giventer's (hereinafter "Appellant" or "Pearl") Statement of Jurisdiction as supplemented to meet rule requirements. This appeal is brought pursuant to NEB. REV. ST § 25-1902. In addition, Marlys has standing and jurisdiction is proper because she is an "interested person" pursuant to NEB. REV. ST. § 30-2209(21) as the heir and natural child of the protected person, Pearl Giventer.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case including the nature of the case, the issues tried below, how the issues were decided below, and the standard of appellate review.

PROPOSITIONS OF LAW

1. A guardian must apply the least restrictive alternative.

Neb. Rev. Stat § 30-2601.02.

2. An allegedly incapacitated person is entitled to be represented by counsel of his choosing.

Neb. Rev. Stat § 30-2619(b); Neb. Rev. Stat § 30-2619(d).

3. A ward has the right to retain an attorney to challenge the guardianship, the terms of the guardianship, or the actions of the guardian the ward's behalf.

Neb. Rev. Stat. § 30-2620(b).

STATEMENT OF FACTS

Marlys accepts generally the Appellant's statement of facts with the following additions: Pearl Giventer is a 91 year old woman with substantial assets that are currently held in trust. Unfortunately, this has attracted a substantial amount of litigation. Marlys is Pearl's daughter ***2** who has been living in Omaha, Nebraska for three years in order to visit her mother regularly. For the convenience of this Court, Marlys has prepared the following chart identifying the parties involved in the proceedings below:

Person	Role	Attorney(s)
Pearl Giventer	Ward	-
Marlys Lebowitz	Pearl's Daughter	Sherrets Bruno & Vogt, LLC
David Levine	Marlys' Boyfriend	-
Paul Giventer	Pearl's Son	William Seidler
Sally Hytrek	Temporary Guardian	Steven Lefler
William Stevens	Former Guardian	Lisa Line
Mark Malousek	Current Guardian	-
Wells Fargo	Conservator & Trustee	Bryan Hatch

HHS/NAPS	Instituted Investigation	John Baker (Finn & Kosmicki APS Emps.)
Mary Wilson	Guardian Ad Litem	
David Lanpheir	Pearl's Former Attorney	
Pat Betterman	Marlys' Former Attorney	
J. Terry Macnamara	Pearl's Former Attorney	
Paul Gardner	Marlys' Former Attorney	
Ed Fogarty and Jack Gross	Pearl's Current Attorneys	

The First Guardianship/Conservatorship Proceeding (PR09-1547)

Pearl's son, Paul Giventer ("Paul"), instituted proceeding No. PR09-1547 and obtained an Order appointing him the Temporary Guardian of Pearl Giventer. (E101: 56; 460, 463, Vol. III). Great Western Bank was appointed Temporary Conservator of Pearl. (E101, 44:460,463, Vol. III). At the time of the proceeding, Pearl was the trustee of the trust holding her assets. Following his appointment Paul coerced Pearl into agreeing to freeze Paul's interest in her estate as it stood in the last iteration of her trust (providing Paul with 45% of Pearl's considerable estate) in consideration for Paul dismissing the guardianship and conservatorship proceedings he ***3** had initiated. (E102, 1:464,466, Vol. III & E103:1-2; 466, not received, Vol. III). This arrangement was reflected in a Settlement Agreement executed on April 29, 2010, and appointing Wells Fargo Bank, N.A. as trustee of Pearl's trust and providing that Wells Fargo Bank, N.A. could only be removed as trustee by court order. (E103, 1;466 (not received) Vol. III). There is no evidence that Great Western Bank, the conservator at the time of this settlement, was given notice of or consented to this agreement. Once Paul obtained Pearl's signature on the Settlement Agreement the initial guardianship action, PR09-1547, was dismissed on May 17, 2010. (E101,1: 460,463, Vol. III).

The Second Guardianship/Conservatorship Proceeding (PR10-1026)

A second and subsequent Petition for Appointment of Permanent Guardian and Permanent Conservator of Pearl was filed on July 29, 2010, No. PR 10-1026 by Sally Hytrek after an investigation by Adult Protective Services. (ST388). On July 29, 2010, the County Court of Douglas County Nebraska entered an Order declaring an emergency to exist and appointed Sally J. Hytrek the Temporary Guardian and Wells Fargo Bank, N.A. the Temporary Conservator of Pearl. (ST109). The alleged emergency apparently arose out of false allegations that Pearl was being taken advantage of by Marlys, Pearl's daughter. These unfounded allegations are believed to have been the result of actions taken by Paul to undermine Marlys' relationship with Pearl.

In connection with this "emergency" Sally Hytrek and her attorney, Steven Lefler, engaged in a fruitless and unsuccessful campaign, purportedly on behalf of Nebraska Adult Protective Services, in an attempt to discredit Marlys. (ST 174-175). Despite incurring thousands of dollars in fees and causing much anguish and distress to Pearl, Hytrek and Lefler failed to discover any **abuse** or wrongdoing of Marlys. (ST 174-175 & 369). J. Terry Macnamara ***4** purported to represent Pearl in this matter from May through August of 2010. (El, 1: 75,91, Vol. III). Pearl then retained David Lanphier to represent her. (ST133).

On December 3, 2010, William Stevens was appointed Permanent Guardian of Pearl and Wells Fargo Bank, N.A. was appointed Permanent Conservator. (ST25-26). Pearl became dissatisfied with Mr. Lanphier and fired him via written fax correspondence on January 2, 2011. (E106, 24(A); 475, 478 (taken under advisement) Vol. II). On January 3, 2011, Pearl hired Ed Fogarty ("Fogarty") and Jack Gross ("Gross") to represent her. Pearl entered into a written retainer agreement with her new attorneys. (ST136).

David Lanphier properly filed a motion to withdraw as counsel and requested the appointment of a guardian ad litem to act in Pearl's best interests. (ST159-161). However, even after he was fired, David Lanphier held himself out as her attorney and charged Pearl for work supposedly performed. (ST273-281). Mr. Lanphier charged Pearl $20,980.00 in attorney's fees for work done after Pearl fired him. (ST273-280 & E106, 26; 475, 478 (taken under advisement) Vol. II).

On January 7, 2011, Paul Giventer filed a motion challenging the authority of Fogarty to act as Pearl's attorney in this matter. (ST88-89). The probate court ordered that Fogarty and Gross "shall not act as attorneys for Pearl S. Giventer, except for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward." (ST352).

William Siedler, attorney for Paul, despite having no basis in law or fact for his actions, requested that Marlys Lebowitz be ordered to pay attorney fees sought by Sally Hytrek, Steve Lefler, Jeff Toberer, Terry Macnamara and David Lanphier. (ST69). Paul Giventer also submitted an Application for Attorney Fees and Costs to be paid by Pearl in the amount of ***5** $37,111.40. Paul was seeking reimbursement for $31,908.50 for attorney fees to Seidler & Seidler; $1,920 to John Mullen for legal services; $1,800 to Dr. Carl Greiner; $570.90 to Lott Reporting for court reporting services; and $912.00 to Paul Giventer for his personal travel expenses. (ST37). David Lanphier, Pearl's former attorney, sought $82,178.44 in fees for his representation of Pearl to be paid by Pearl. (ST249). Sally Hytrek, Temporary Guardian for Pearl, has requested attorney fees from Pearl in the amount of $30, 344.71. (ST282). J. Terry Macnamara, former attorney for Pearl, sought $3,868.50 in attorney fees. Wells Fargo Bank, N.A., sought attorney fees as follows: 1) $1,500 for Temporary Conservator fees; 2) $49,815.49 for attorney fees to Stinson Morrison Hecker as attorneys for Temporary and Permanent Conservator; 3) $7,200 to Stinson Morrison Hecker as attorneys for the successor trustee; and 4) $5.60 in costs. Pearl and Marlys object to payment of all the above fees. (T285). The attorneys' fees and the costs which have been submitted or paid from Pearl's estate are as follows:

Attorney/Applicant	Role	Amount sought
Paul Giventer	Pearl's Son	$1,920 to John Mullen legal svcs $1,800 Dr. Carl Greiner $570.90 Lott Court Reporting $912.00 Paul's personal travel expense
William Seidler Jr.	Paul Giventer's attorney	$31,908.50
Sally Hytrek	Temporary Guardian	$30,344,71
Steve Lefler	Temporary Guardian's attorney	$18,900 (after Fogarty negotiated with Lefler to save Pearl over $10,000)
Bryan Hatch	Wells Fargo, Conservator & Trustee	$57,815.40
David Lanpheir	Pearl's Former Attorney	$82,178.44 (includes $20,980.00 billed after Pearl had terminated his representation)
J. Terry Macnamara	Pearl's Former Attorney	$3,868.50

***6** Wells Fargo Bank is also taking advantage of Pearl. Under the December 3, 2010 Order, nothing remains for Wells Fargo Bank, N.A. to do except locate missing bonds. (ST25-26; ST368-369). These bonds have been found and given to trustee Wells

Fargo Bank, N.A.; thus, it should have been removed as conservator. (ST25-26; ST368-369). Wells Fargo has also offered to pay the cost of Marlys' former attorney, Pat Betterman, as well as the costs of William Seidler Jr., Paul Giventer's attorney. Wells Fargo offered payment even though Pat Betterman has not sought fees or costs from Pearl. (ST305). Wells Fargo also offered to pay the costs of William Seidler Jr., Paul Giventer's attorney. (T13).

Mark Malousek was appointed Pearl's guardian on February 24, 2011, and William Stevens withdrew. (ST235-236). Mr. Stevens' attorney fees are not an assigned error. Mark Malousek, Pearl's guardian, has refused to fight any of the attorney fees or costs that Pearl wishes to contest. (E100, 1-2; 458, 459, Vol. II). The probate court has not allowed Pearl to scrutinize or resist the fees and costs despite her desire to do so. (T29; T40-41). The probate court denied Pearl's Motion for Ad Hoc Orders that would have allowed her to challenge the fees on August 25, 2011. (S41).

David Lanphier's Motion to Withdraw and Appoint a Guardian Ad Litem was granted on June 23, 2011 and Mary Wilson was appointed as Pearl's guardian ad litem. (ST352). The Motion to Remove or Terminate Wells Fargo Bank as Conservator was also denied on June 23, 2011 and Wells Fargo continues to serve as Conservator and Trustee. (ST352). In an Order dated August 24, 2011, the probate court denied Pearl's Motion for a New Trial, Rehearing and Clarification and further denied Pearl's Motion for Ad Hoc Orders to Enable Pearl S. Giventer to Fight Attorney Fees and Costs. (ST376).

*7 SUMMARY OF ARGUMENT

Pearl Giventer has a constitutional and statutory right to retain counsel of her own choice to give preference to Pearl's expressed wishes and protect her legal interests. The proceedings below effectively demonstrate why Pearl needs an attorney as her advocate.

ARGUMENT

I. PEARL HAS A CONSTITUTIONAL AND STATUTORY RIGHT TO COUNSEL OF HER CHOICE.

The ability to be represented by an attorney is a fundamental right in this country. *Grant v. Johnson,* 757 F. Supp. 1127, 1132 (D. Or. 1991) (stating “Procedural due process imposes constraints on governmental decisions which deprive individuals of their liberty within the meaning of the due process clause of the fifth and fourteenth amendments”). This right is so fundamental and so elementary that it obviously extends to everyone even if a person's freedom is controlled by someone else. *See Gideon v. Wainwright,* 372 U.S. 335 (1963) (establishing right to counsel for criminal defendants).

Denial of a person's right to retain an attorney is a violation of due process. Persons in legal captivity, even where the state or law authorizes the abridgement or denial of certain rights, are still entitled to retain personal counsel. As stated by one author, “[G]uardianship proceedings must comport with constitutional notions of substantial justice and fair play.” Joan L. O'Sullivan, “Role of the Attorney for the Alleged Incapacitated Person,” 31 Stetson L. Rev. 687, 702, 706 (2002).

The underlying proceedings here involve the restriction of a person's liberty, to wit: a proceeding to appoint a guardian/ conservator to take control over the life and substantial property of Pearl Giventer. Such a proceeding implicates the United States' and Nebraska's Constitution Due Process provisions and creates the opportunity for **abuse**. This opportunity for ***8 abuse** is evidenced in the record particularly by the hoard of lawyers seeking fees and costs for actions taken against the reasonable wishes of Pearl.

The Nebraska legislature recognizes that substantial personal liberty rights are at issue in guardianship and conservatorship proceedings and has declared its intent to require the “least restrictive alternative possible on the impaired person's exercise of personal and civil rights.” Neb. Rev. Stat § 30-2601.02. Accordingly, the person alleged to be incapacitated enjoys the fundamental, constitutional, and statutory right to be represented by counsel to ensure that the least restrictive alternatives are utilized and the ward's preferences are taken into consideration. From the onset the person is entitled to “be present at the hearing

in person and to see and hear all evidence bearing upon his or her condition. He or she is entitled to be present by counsel, to compel the attendance of witnesses, to present evidence, to cross-examine witnesses." NEB. REV. Stat § 30-2619(d). The person alleged to be incapacitated also has the right to retain "counsel of his or her own choice." Neb. Rev. Stat § 30-2619(b). Pearl has been denied these rights.

This fundamental right continues even after a finding of incapacity as Neb. Rev. Stat. § 30-2620(b) provides "Affter appointment, the ward may retain an attorney for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward."

Article 26 of Nebraska's statutory scheme must be construed in a manner to give them effect that is consistent, harmonious, and sensible. Vokal v. Nebraska Accountability & Disclosure Commission, 276 Neb. 988, 759 N.W.2d 75 (2009). Bear in mind that Neb. Rev. Stat § 30-2620 is contemplated to apply after the person alleged to be incapacitated was already afforded the opportunity to retain "counsel of his or her own choice." The language "terms of the guardianship or the actions of the guardian on behalf of the ward" is broad and ***9** common sense dictates that it covers all matters at issue in the guardianship/ conservatorship proceedings. In the case at bar, it necessarily entails fee applications made against Pearl's assets and all other matters incidental to the ligation. Yet Pearl has been deprived of counsel of her own choice and her rational preferences have been ignored by a hoard of lawyers purporting to act in her best interest.

The Supreme Court in *Vitek v. Jones* determined that a prisoner had the opportunity for hearing, with the aid of legal counsel, to challenge the relocation of an inmate to a mental institution. 445 U.S. 480 (1980). An individual determined to be in need of care due to a mental incapacity is one in legal captivity. The Supreme Court has held that such an individual has a right to an attorney. *Id.* at 494-95. It follows that when a guardian or conservator has been appointed, the "protected person" has a right to a personally retained attorney.

The Supreme Court of Missouri addressed these principles and wrote the following well-reasoned analysis:
The beneficial motives behind guardianship obscured the fact that guardianship necessarily entails a deprivation of the fundamental liberty to go unimpeded about one's ordinary affairs. By contrast, while similar rights are involved in criminal proceedings, there has been no comparable facade of beneficence, and exercise of the police power has always been tempered with strict procedural safeguards.

The procedural "deficiency" in the exercise of the parens patriae power began to receive judicial attention following two 1967 decisions by the United States Supreme Court. *In In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed.2d 527 (1967), the Court ruled that the Fourteenth Amendment's procedural due process protection applied to juvenile delinquency proceedings long considered civil in nature. The Court held that it is not the characterization of the proceedings which determines whether constitutional guarantees normally utilized ***10** only in criminal matters apply, but rather, what is at stake for the individual. *Id.* at 26, 87 S. Ct. at 1442. In Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed.2d 326 (1967), the Supreme Court held that a mental illness commitment proceeding, "whether denominated civil or criminal," is subject to the constitutional guarantee of due process. *Id.* at 608, 87 S. Ct. at 1211; see also *Kent v. United States*, 383 U.S. 541, 555, 86 S. Ct. 1045, 1054, 16 L. Ed.2d 84 (1966) ("[T]he admonition to function in a 'parental' relation is not an invitation to procedural arbitrariness.").

Following the Supreme Court's lead, courts began to scrutinize proceedings conducted pursuant to the parens patriae power more closely. See, for example, *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wisc. 1972); *Quesnall v. State*, 83 Wash. 2d 224, 517 P.2d 568 (1974); *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974); *Lynch v. Baxley*, 386 F. Supp. 378 (N.D. Ala. 1974); *Doremus v. Farrell*, 407 F.Supp. 509 (D. Neb. 1975); Suzuki v. Quisenberry, 411 F.Supp. 1113 (D. Haw. 1976).

The uniform conclusion reached by these courts was that

> [I]t matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. Where ... the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process ... [and] due process requires that the infirm person ... be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.

Heryford, supra at 396.

To its credit, however, the Missouri legislature recognized the need for procedural protection of the alleged incompetent long before courts in other states began finding fault with their own laws. Since at least 1939, Missouri law has provided for notice, the right to be present at the hearing, the right to be ***11** represented by counsel, including provisions for the appointment of counsel if an attorney did not appear on the individual's behalf, and the right to a jury trial. See, e.g., §§ 447, 449, RSMo 1939; §§ 458.020, 458.060, RSMo 1949; and § 475.075, RSMo 1955. Nonetheless, as suggested by the earlier discussion of the interpretation given these rights, there remained in Missouri law a predisposition toward the beneficial aspects of guardianship - a predisposition which contained the potential for inadequate attention to due process guarantees.

[T]he purpose of the statutory and due process requirement of the appointment of counsel is to protect the rights and interests of the alleged incompetent. To accomplish this task it is essential that appointed counsel act as an advocate for the individual. The right to counsel becomes a mere formality, and does not meet the constitutional and statutory guarantee absent affirmative efforts to protect the individual's fundamental rights through investigation and submission of all relevant defenses or arguments.

While the discussion thus far has focused on the interaction between the alleged incompetent, the court, and *appointed* counsel, the same principles, rules and duties apply when private counsel is employed. Such private counsel must engage in the same preliminary evaluation of the individual's capacity, *give equal respect to the client's wishes*, and vigorously advance the client's rights as appointed counsel. Such behavior is required by the constitution, the statute, and the Rules of Professional Conduct. [Emphasis added].

In re Link, 713 S.W.2d 487, 493-98 (1986) (some internal citations omitted) (footnotes omitted).

Nebraska courts would do well to follow the direction of the Missouri courts.

***12 CONCLUSION**

The probate court erred in limiting Pearl's fundamental right to retain a personal attorney to challenge the fees sought from her estate, the guardianship, its terms, and actions of her guardian/conservator.

CROSS-APPEAL STATEMENT OF JURISDICITION

Cross-Appellant Marlys Lebowitz adopts the Statement of Jurisdiction set forth in Appellant's brief as supplemented in Appellee's opening brief.

STATEMENT OF THE CASE

Cross-Appellant incorporates the Statement of the Case set forth above.

ASSIGNMENT OF ERRORS

1. The probate court erred in approving the annual conservatorship accounting and attorney fees.

2. The probate court erred by depriving Pearl of her right to her own attorney.

3. The probate court erred by not removing Wells Fargo Bank, N.A. as Conservator and Trustee.

4. The probate court erred in approving attorneys' fees and costs without proof they were necessary or reasonable.

5. The probate court erred by approving fees to which the ward objected even if the guardian did not object.

PROPOSITIONS OF LAW

1. The court has the duty to determine the necessity and reasonableness of fees charged to an estate.

***13** Neb. Rev. Stat. § 30-2620.01.

2. A guardian ad litem may not waive the substantive rights of the ward.

In re Interest of Burbanks, 209 Neb. 676, 310 N.W.2d 138 (1981).

3. A ward may retain an attorney to challenge the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward.

Neb. Rev. Stat. § 30-2620(b).

4. A probate court should honor the choice of counsel of the individual subject to guardianship proceedings.

In re Guardianship and Conservatorship of Larson, 270 Neb. 837, 856, 708 N.W.2d 262, 277 (2006).

5. A guardian ad litem cannot also serve as an advocate for a client.

In re Guardianship of Robert D., 269 Neb. 820, 833, 696 N.W.2d 461, 472 (2005).

6. A guardian must apply the least restrictive alternative.

Neb. Rev. Stat. § 30-2628(a)(1).

7. A ward has the right to appeal any final orders or judgments.

Neb. Rev. Stat. § 30-2619(d).

8. Conservator fees are discretionary and the reasonable value of services is a question of fact.

In re Guardianship and Conservatorship of Cordel, 274 Neb. 545, 553, 741 N.W.2d 675,681 (2007).

STATEMENT OF FACTS

Cross-Appellant accepts the Statement of Facts as set forth in Appellant's opening brief and incorporates be reference the Statement of Facts set forth above.

*14 SUMMARY OF ARGUMENT

The probate court erred in limiting Pearl's right to retain private counsel to protect her legal interests and fight attorneys fees sought from her estate. A ward of a guardianship or conservatorship has the right to retain a personal attorney and the denial of such a right is a violation of due process. Furthermore, Nebraska law specifically authorizes a ward to retain an attorney to challenge the guardianship, its terms, or actions taken by the guardian. Neb. Rev. Stat. § 30-2620. The legislative history and Nebraska guardianship and conservatorship laws also require a ward's liberty interests to be hindered as minimally as possible and contemplate that the "least restrictive alternative available" always be utilized. *See*, Neb. Rev. Stat. § 30-2620.

The probate court also violated Pearl's due process rights in not allowing her to present her case in support of her choice of attorneys, legal needs, and how the retainer contract with her attorneys addressed those needs.

It was also error not to remove Wells Fargo Bank, N.A. as conservator and trustee when good cause existed for its removal. Wells Fargo Bank, N.A.'s conservatorship fees should be forfeited because it has breached the fiduciary duty it owed to Pearl and because a conservator is not necessary under the circumstances.

Despite the Guardian's failure to do so, Pearl had the right to challenge attorney fees being charged to her estate because there is a material question of fact regarding the necessity and reasonableness of the fees. The probate Court erred in ignoring Marlys' and Pearl's objections to the attorney fees and cost applications. Sally Hytrek's fees associated with her role as Temporary Guardian should be limited solely to actions taken addressing the emergency. NEB. REV. ST. § 30-2626.

*15 ARGUMENT

I. THE ATTORNEY FEE AND COST APPLICATIONS MUST BE ALLOWED TO BE SCRUTINIZED AND MUST BE FAIR AND REASONBLE.

A. The Court Should Not Force Pearl to Pay Excessive and Unreasonable Attorney Fees Not Incurred For Her Benefit.

The probate court erred in approving the conservator's annual accounting and associated fee applications and in ignoring the challenges made in January and May of 2011 to the fees and costs allegedly owed. Nebraska follows what is commonly referred to as the "American Rule," which generally provides that a prevailing party may not also recover attorney fees from his opponent because "[A] defendant should not be unduly influenced from vigorously contesting claims made against him." *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007) (citing *Holt County Co-op. Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983)). The general rule regarding attorney fees and expenses is that they "may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees." *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005) (emphasis added). Neb. Rev. Stat § 30-2620.01 authorizes "reasonable fees and costs of an attorney, a guardian ad litem, a physician, and a visitor appointed by the court for the person alleged to be incapacitated shall be allowed, disallowed, or adjusted by the court.... The court may assess attorney's fees and costs against the petitioner upon a showing that the action was frivolous." Neb. Rev. Stat. § 30-2620.01. Neb. Rev. STAT. § 30-2643 provides a similar authorization for attorney fees with respect to conservatorships. Neb. Rev. Stat. § 30-2654(a)(2) restricts a conservator to expenditures "reasonably necessary for the support, education, care or benefit of the

protected person." A Temporary Guardian's role is limited to actions "necessary to address the emergency" (***16** Neb. Rev. Stat. § 30-2626) and therefore is properly paid only fees for actions necessary to alleviate the emergency.

The Supreme Court of Nebraska has held that the probate code allows payment from the ward's estate for only the cost of initiating a good faith petition for the appointment of a guardian or conservator if the appointment is *"in the best interests of the protected person, constitutes a necessary expenditure on behalf of the protected person."* *In re Guardianship of Donley*, 262 Neb. 282, 289, 631 N.W.2d 839, 844-45 (2001) (emphasis added). Therefore, any attorney fees and costs to be paid out of Pearl's estate must result from "good faith actions" necessary to protect Pearl's interests. Because of the restriction on what fees may be paid from an estate, a court must require evidence that the fees resulted from actions that were necessary and for Pearl's benefit. If there is no such showing, it is not proper for the court to award attorney fees and costs. In its opinion *in In re: Donley*, the Nebraska Supreme Court stated as follows:

> To determine proper and reasonable fees, it is necessary for the court to consider the nature of the proceeding, the time and labor *required*, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

In re Guardianship of Donley, 262 Neb. 282, 291, 631 N.W.2d 839, 846 (2001) (emphasis added).

The application of these factors to the facts of this case at bar demonstrate that payment of all the requested fees would be improper. Certain fee applications show grossly inflated, unnecessary, and unreasonable fees. There were only a few narrow issues that needed to be decided, including but not limited to whether Pearl was sufficiently incapacitated to require a guardian/conservator; who should be the guardian/conservator; and which fee applications ***17** should be approved and for what amounts. These issues are not novel, the questions raised were no more complex than any other guardianship/conservator proceeding involving a large estate. Yet tens of thousands of dollars in attorney's fees have been sought by a hoard of lawyers.

The extravagance of the fee requests is highlighted by the fact that there was never a trial on the issue of competency. The permanent guardian and conservator were appointed upon the consent of the parties. The time and labor necessary for that result and the time and labor supposedly expended are vastly different. Unfortunately, the record is replete with improper and unprofessional antics of the attorneys, including irrelevant banter, personal posturing, and unprofessional conduct. The same attorneys who behaved worse than children in a schoolyard fight are the same attorneys seeking substantial fees. None of this behavior was actually necessary or even nominally to benefit Pearl.

Contrary to the assertion of Wells Fargo Bank, N.A., Conservator, the propriety and reasonableness of the numerous fee applications were objected to by both Ed Fogarty on behalf of Pearl and by Marlys. (See Wells Fargo Bank, N.A. Brief at page 14; ST305-310; ST332-349). The court was required, therefore, to conduct an evidentiary hearing to provide an opportunity for Pearl and Marlys to present evidence and argument and for the court to apply the Donley fee factors.

Pearl should be able to challenge the attorney fees that she purportedly owes. At the very least, she is entitled to a detailed itemization of the fees charged. The probate court violated Pearl's right to due process by refusing to allow her to conduct discovery or to have a hearing giving her an opportunity to be heard. This is a clear violation of her rights of due process. The probate court's ruling denying Pearl the Constitutional and statutorily-protected right to counsel and its refusal to entertain Marlys' objections results in a windfall for the attorneys at Pearl's ***18** expense. The fees and costs will be paid from her estate without any judicial scrutiny of the necessity and reasonableness of the alleged fees and costs. Nebraska law requires that all attorney fees be reasonable for the work performed. Prime Home Care, LLC v. Pathways to Compassion, LLC, 283 Neb. 77, 809 N.W.2d 751 (2012).

Even though a plethora of people have been appointed to "act in the best interest" of Pearl, all of whom are or have their own lawyers, not one of them demanded scrutiny of the fee applications. Wells Fargo Bank even volunteered to pay various attorneys'

"costs" despite Pearl's expressed and reasonable preferences. (ST305-306). Even though Pearl herself, who is supposed to need a guardian and a conservator, has objected to the amount and necessity of the attorneys' fees billed to her, none of her so-called advocates even acknowledges her concerns. Allowing payment of the fee applications without any scrutiny and without allowing Pearl to challenge them constitutes a taking in violation of Pearl's rights to due process. Pearl is entitled to an opportunity to be heard. U.S. Const. amend. XIV, § 1; Neb. Const art. I, § 3.

At a minimum, due process requires that Pearl be allowed to use her own money and an attorney of her choice to challenge these fees as to their reasonableness. This is especially true in this case because serious factual questions exist regarding the reasonableness of the fees. Mr. Lanphier claims to be owed $82,178.44 in fees and costs. (ST249). However, many descriptions of the professional services rendered by Lanphier are vague and lack sufficient detail to determine their necessity. See (ST252-281). For instance, on August 31, 2010, Lanphier charged $360.00 for research conducted for a hearing. (ST261). On November 29, 2010, Lanphier charged $360.00 to review the file and prepare for a hearing. (ST270). Any client should have the right to challenge unspecified time entries such as "review of file" or "legal research" and Pearl's protected status does not deprive her of that right. Pearl should have the ***19** opportunity to contest the necessity and reasonableness of these charges because the lack of detail makes it difficult to tell whether these are valid and reasonable expenses. This Court should remand this case with instructions that Pearl and Marlys are entitled to a hearing to challenge the fees allegedly owed to Lanphier, Hytrek, Wells Fargo, N.A. and Siedler or, at a minimum, require the attorneys to provide detailed support for their charges.

Attorneys are not entitled to charge excessive and unreasonable attorney fees. *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wright*, 277 Neb. 709, 764 N.W.2d 874 (2009). Unless Pearl & Marlys can challenge the fees there is no way to gauge the propriety of the fees. The right to challenge the fees and expenses is a substantial right and cannot be taken away by Pearl's guardian. *See*, *In re Interest of Burbanks*, 209 Neb. 676, 310 N.W.2d 138 (1981) ("A guardian ad litem may not waive the substantive rights of the ward, but must require proper legal proof.... A guardian ad litem may not waive substantive rights in the cases of incompetent or mentally deficient person, for to do so would prevent effective judicial review.").

In this instance, serious factual questions were raised as to the reasonableness of fees and the care and diligence exercised by the guardian and the court in determining the amount, if any, of fees that should be awarded and who should receive fees. The probate court **abused** its discretion by denying Pearl's Motion to Fight the Attorney Fees because that decision "unfairly depriv[ed] [Pearl] of a substantial right and den[ied] just results in matters submitted for disposition." *Schirber v. State*, 254 Neb. 1002, 1005, 581 N.W.2d 873, 875 (1998). The probate court erred by approving the annual accountings and associated fee applications without requiring substantiation.

II. PEARL SHOULD HAVE AN OPPORTUNITY TO PRESENT HER CASE IN SUPPORT OF HER CHOICE OF ATTORNEYS, HER LEGAL NEEDS, AND THE SCOPE OF HER CONTRACT FOR REPRESENTATION.

***20** Marlys incorporates the foregoing argument in her main brief as if fully set forth. Pearl was denied due process when the probate court did not allow her to present evidence or demonstrate the extent of her legal issues that were to be addressed by her attorneys, Fogarty and Gross. The Motion to De-authorize Fogarty and Gross to act as Pearl's attorneys deprived Pearl of her due process rights. The only testimony provided on the Motion incorrectly attempted to show that Marlys was the driving force behind Pearl's decision to fire Lanphier and retain Fogarty and Gross. This was merely another assertion in the campaign of Marlys' brother to discredit his sister. His allegations of undue influence, which are false, were not at issue in the proceedings, and had already been properly rejected by the court on March 4, 2011. (11,397:2-17). Pearl was deprived of her right to present evidence regarding her legal needs or how the retainer agreement with Fogarty and Gross addressed, protected, and covered her legal needs. Due process requires that Pearl be given an opportunity to be heard. The probate court denied Pearl due process by refusing to allow her to retain her choice of counsel without even hearing evidence regarding her choice of attorneys and legal needs.

A. A Ward Has the Right to Retain a Personal Attorney.

1. Denial of Right to Retain Attorney is a Violation of Due Process.

Persons under state control still have the right to retain personal counsel. Pearl was under state control as she was the ward of a court-ordered guardianship and conservatorship. The Supreme Court has held that even a prisoner, in legal captivity for a violation of the law, has the opportunity to a hearing, with the representation of counsel, to challenge a decision to move the inmate to a mental institution. *Vitek v. Jones*, 445 U.S. 480, 494-95 (1980). *In Vitek v. Jones*, an administrative decision was made to move inmate Jones to a state mental institution. The Court asked "whether the involuntary transfer of a Nebraska state prisoner to a mental hospital ***21** implicates a liberty interest that is protected by the Due Process Clause." *Id.* at 487. Holding that the transfer "implicated a liberty interest protected by the Due Process Clause," the Court affirmed the district court's finding of minimum procedures necessary to afford an inmate due process in a transfer to a mental hospital. One specific requirement is the "availability of legal counsel." *Id.* at 495. Denying Pearl the right to retain her own counsel, at her own expense, was a violation of her due process rights. Therefore, the probate court erred in limiting Pearl's right to an attorney.

2. A Ward May Retain a Personal Attorney.

NEB. Rev. Stat. § 30-2620(b) specifically provides a ward the right to retain a personal attorney to challenge a guardianship or its terms.

> After appointment, the ward may *retain an attorney* for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward.

Neb. Rev. Stat. § 30-2620(b) (emphasis added).

In *In re Guardianship and Conservatorship of Larson*, the Nebraska Supreme Court held that it was plain error to disallow a ward's personal choice of counsel. 270 Neb. 837, 856, 708 N.W.2d 262, 277 (2006). Rather the probate court was instructed to "honor his election as to whom he wishes to represent him," and allow him to select his own attorney. *Id.* Clearly, a ward may retain his or her own counsel to challenge the guardianship and matters incidental to the guardianship. Pearl is statutorily afforded the right to retain counsel of her choice, after the appointment of a guardian, to challenge "the guardianship, the terms of the guardianship, or the actions of the guardian." NEB. REV. ST. § 30-2620. Nowhere does this statute suggest that a ward must obtain permission or notify the guardian or the court that the ward intends to retain ***22** counsel to challenge the guardianship. Rather, the ward is entitled to retain an attorney on his or her own and in his or her sole discretion. That is what Pearl has done in this instance. Pearl retained her own attorney to challenge the guardianship, its terms, and certain actions her guardian and conservator have taken. Pearl has the right to retain her own attorney at her own expense, regardless of her status as a ward. Neb. Rev. Stat § 30-2620 allows Pearl to retain a lawyer of her choice to challenge her guardian's refusal to contest the vague and excessive attorney fee applications. She is also entitled to contest the terms of the guardianship to the extent that it hinders her ability to engage in estate planning. Pearl's desire to challenge the payment of unreasonable attorney's fees, to engage in estate planning, and have input into her living arrangements (such as having access to kosher meals) is a reasonable goal which must be allowed under Nebraska's laws of "least restrictive alternatives." If the statutes are not honored by her appointed representatives, Pearl should be allowed to hire her own attorney to have her voice heard.

Some appellees incorrectly argue that the *Larson* case suggests that once a determination of incapacity has been made, the ward no longer has the right to personally retain an attorney. Such a contention is clearly contrary to Nebraska law which specifically provides that a ward may retain personal counsel to challenge a guardianship after the ward has been deemed incapacitated. *See* Neb. Rev. Stat § 30-2620(b). Pearl does have a right to retain a personal attorney even after adjudication of her incapacity. The probate court erred in limiting her right to counsel.

B. A Ward May Retain an Attorney to Serve as an Advocate.

1. A Ward is Still Entitled to an Attorney Even if a GAL is Appointed.

***23** Neb. Rev. Stat § 30-2619(b) provides that a guardian ad litem is to act for the "best interests" of its ward. The Nebraska Supreme Court has held that it is error for a guardian ad litem to serve both as guardian ad litem and as an advocate for a ward. *In re Guardianship of Robert D.*, 269 Neb. 820, 833, 696 N.W.2d 461, 472 (2005). Pearl was entitled to retain a personal attorney to serve as an advisor, advocate, and negotiator. *See, Mazza v. Pechacek*, 233 F.2d 666, 666-67 (D.C. Cir. 1956) (acknowledging that under the laws of the District of Columbia, persons for whom a conservator is sought has the right to select private counsel of their own choosing to advocate their position). There is a distinction between a personal attorney who serves as an advocate and the guardian or guardian ad litem who is supposed to consider the best interests of the ward. Similarly, the existence of a conservator who monitors the ward's money does not preclude the ward's choice of an attorney advocate. As a result, even if one is appointed a guardian, one should still be able to retain an attorney to serve as an advocate on his or her behalf.

2. Being a Ward Does Not Preclude Testamentary Capacity

Nebraska law allows a ward to make a will. NEB. REV. STAT § 30-2637(3). Appointment of a guardian does not, without more, remove a ward's testamentary capacity. Neb. Rev. Stat § 30-2673(5). The right to dispose of property as one sees fit has existed for centuries. The Supreme Court of Nebraska has recognized that "[T]he power of disposing of property in anticipation of death has ever been regarded as one of the most valuable rights incidental to property." *In re Bose's Estate*, 136 Neb. 156, 285 N.W. 319, 325 (1939). The ability to create a will and make estate planning decisions must be made through a ward's personal attorney who may advocate on the ward's behalf to fulfill the ward's choices without the GAL's statutory duty to look only at the "best interests" of their ward in the guardianship and ***24** conservatorship contexts, The probate court's June 23, 2011, Order could be construed as eliminating Pearl's right to make a will or plan her estate with the assistance of her own attorney. The probate court erred in not allowing Pearl to retain personal counsel to serve as an advocate on her behalf.

3. Allowing a Ward to Retain a Personal Attorney is Consistent with Nebraska Law and Public Policy.

A state's public policy is established by its statutes and common law. *New Light Co., Inc. v. Wells Fargo Alarm Services*, 247 Neb. 57, 525 N.W.2d 25 (1994). Statutes on a particular subject should be construed to determine the intent of the legislature and to insure provisions of an act are interpreted consistently, harmoniously, and sensibly. *Vokal v. Nebraska Accountability & Disclosure Commission*, 276 Neb. 988, 759 N.W.2d 75 (2009). The expressed legislative intent for surrounding guardians and conservators in Nebraska is "to encourage the least restrictive alternative possible on the impaired person's exercise of personal and civil rights." Neb. Rev. Stat. 30-2601.02.

The guardianship statutes emphasize protecting the ward while maintaining the ward's civil and due process rights to the fullest extent possible while imposing the fewest restrictions on the ward's liberty. First, a ward's healthcare power of attorney made prior to a guardianship would take precedence over a guardian's medical decision-making power. Neb. Rev. Stat § 30-2628(c). These rights are meant to be protected by the ability of a ward or interested party to challenge a guardian's decision and "to appeal any final orders or judgments." NEB. Rev. Stat. § 30-2619(d). Nebraska guardianship and conservatorship law favors restricting a ward's liberty as minimally as little as possible. Such an intent indicates a ward should be allowed to retain her own counsel to serve as an advocate in protecting her liberties and interests. Pearl has the right ***25** to appealing a final order, as authorized by statute, and the court erred in limiting her right to retain personal counsel.

III. CONSERVATOR AND TRUSTEE WELLS FARGO SHOULD HAVE BEEN REMOVED.

Wells Fargo Bank, owes Pearl fiduciary duties both as conservator and trustee. Trustees are strictly prohibited from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and

personal interests" except in certain discreet circumstances. *In re Estate of Hedke*, 278 Neb. 727, 775, 775 N.W.2d. 13, 36 (2009) (citing the Restatement (Third) of Trusts). In addition, the duty of loyalty for trustees is particularly strict even when compared to the standards of other fiduciary relationships." According to the Nebraska Supreme Court, "a trustee 'must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries,' even if the trustee does not profit by the transaction." *Id* at 756, 775 N.W.2d at 36. In addition, Nebraska law requires a conservator to adhere to "its fiduciary duty to prudently assemble, manage, and conserve the protected person's estate." *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 906, 566 N.W.2d 783, 787 (Neb. App. 1997). Because "conservators serve as fiduciaries for persons who are unable to manage their affairs... conservators are held to a higher standard of care than... in handling their own property." *In re Guardianship of Bourn*, 2004 WL 2282314, No. A-03-1066, at *11 (Neb. App. Oct. 12, 2004).

Wells Fargo Bank should have been removed as conservator and trustee. Pearl requested a Jewish guardian/conservator, which Dr. Chesen recommended. Under the requirements of NEB. Rev. Stat § 30-2627(c): "[w]hen appointing a guardian, the court shall take into consideration the expressed wishes of the allegedly incapacitated person." The probate court, ***26** however, ignored Pearl's desire for a Jewish guardian/conservator and refused to remove Wells Fargo Bank as Conservator. An individual conservator/guardian would also be less expensive than retaining Wells Fargo Bank, N.A. as Conservator and, because Pearl's assets are already in a trust, the conservator is superfluous.

Further, Wells Fargo Bank has a conflict of interest that precludes it from serving as both trustee and conservator. (ST170-172). The same corporation serving as both the trustee and conservator is an inherent conflict of interest. Wells Fargo Bank as conservator monitors and approves the quality of the trustee services it provides, a practice colloquially known as the fox guarding the henhouse. It is highly unlikely that Wells Fargo would criticize its own services or take any action if funds were mismanaged or fees inflated. It is Wells Fargo's role as conservator to monitor and, if necessary, object to trustee Wells Fargo's accounting and fees and to exercise Pearl's powers to revoke, amend, and distribute property in the trust. (ST107-171). Wells Fargo Bank obviously has a fundamental conflict of interest in serving as the conservator when it is also serving as the trustee. Such a conflict cannot be waived.

Wells Fargo has also failed to prudently conserve the estate by charging excessive amounts for attorney fees as conservator and offering to pay "costs" of other attorneys without being requested to do so. Wells Fargo Bank also sought approval to pay fees that Pearl disputes. Wells Fargo's conduct constitutes a breach of the fiduciary duties owed to Pearl. (ST171). Wells Fargo Bank charged approximately $68,000 in attorneys' fees (ST285; T57). Wells Fargo Bank also paid doctors' fees without Pearl's approval and failed to take issue with hours billed to Pearl by Hytrek which had nothing to do with the supposed "emergency" for which Hytrek was appointed. Pearl clearly and consistently expressed her wish to contest these matters. Wells Fargo's conduct constitutes a breach of the fiduciary duties owed to Pearl. (ST172). Pearl spent ***27** her whole life building her **financial** assets and she is entitled to participate in deciding how her assets are disposed of.

Wells Fargo also attempted to deny Pearl's right to an appeal by refusing to pay $2,300 for the Bill of Exceptions on this appeal, despite the fact that Pearl has approximately $6,000,000 on deposit with Wells Fargo and had clearly expressed her desire to appeal. Wells Fargo also received $9,430 in fees without itemizing the charges or attesting to the reasonableness of the charges. (T57). Wells Fargo has also refused to communicate with Pearl's chosen attorney, increasing the costs incurred by Pearl and causing unnecessary conflict and expense. (ST 172). If Wells Fargo was prudently conserving Pearl's estate and exercising a higher degree of care of than it would with its own property it would not have engaged in the above-described behavior such as gratuitously offering to pay cost that have not even been sought and approving un-itemized attorney fee applications.

Wells Fargo has not even kept its express promises to Pearl. On October 5, 2010, Wells Fargo promised Pearl that it would end its conservatorship when the missing bonds were replaced. On March 7, 2011, Wells Fargo promised it would end the conservatorship when Marlys, Paul, and Pearl all agreed to release them. Wells Fargo Bank has not yet ended the conservatorship.

The standard for removal of a conservator has been explained in *In re Conservatorship of Estate of Marsh,*

> [G]ood cause for removal of a conservator exists (1) when removal would be in the best interests of the protected person's estate, (2) if the conservator or the person seeking his or her appointment intentionally misrepresented material facts in the proceeding leading up to the appointment, (3) if the conservator has disregarded the court, (4) if the conservator has become incapable of discharging the duties of the office, (5) if the conservator has mismanaged the estate, or (6) if the conservator has failed to perform any duty pertaining to the office.

***28** 5 Neb. App. 899, 907 566 N.W.2d 783, 788 (Neb. App. 1997).

Wells Fargo should be removed based upon the first, fifth, and sixth factors set forth in Marsh.

Wells Fargo Bank, N.A. has been unprofessional as conservator and should be removed for cause under the factors set forth in *Marsh.* A new trustee and conservator should be appointed. In addition, this Court should order that Wells Fargo Bank's fees to be forfeited. The Nebraska Supreme Court has held that "the allowance of conservator fees is largely a matter of discretion, and the reasonable value of services is a question of fact." *In re Guardianship and Conservatorship of Cordel*, 274 Neb. 545, 553, 741 N.W.2d 675, 681 (2007). If a conservator or fiduciary breaches his duty, the estate is not liable for his fees. *In re Guardianship of Bremer*, 209 Neb. 267, 274, 307 N.W.2d 504, 273 (1981). *See also Walker Land and Cattle Co. v. Daub*, 223 Neb. 343, 351, 389 N.W.2d 560, 566 (1986) (holding that an agent was not entitled to management fees as after materially breaching his duties); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003) (recognizing that if a fiduciary breaches a duty or is order to account to the estate, the estate is not liable for the fiduciaries attorney fees). As a result of Wells Fargo's breach of its fiduciary duties to Pearl, it is not entitled to receive its fees.

CONCLUSION

As often happens, a substantial estate belonging to an **elderly** individual has become a point of contention not only for her children, but also for multiple "representatives" of her interests and their attorneys. To help remedy this situation, Appellee and Cross-Appellant, Marlys Lebowitz, respectfully requests this Court:
(1) Declare that Pearl has the right to select counsel of her choosing to represent her in the Guardianship/Conservatorship proceedings;

***29** (2) Vacate the June 23, 2011, Order limiting Pearl's ability to use of Fogarty & Gross;

(3) Declare that Pearl may use her chosen counsel to challenge attorney fees, sue, plan her estate, and otherwise pursue her legal rights;

(4) Remove Wells Fargo as conservator and trustee, declare it has forfeited all right to fees and require it to disgorge attorney fees already paid; and

(5) Reverse and remand the case for a full evidentiary hearing on the matter of fee applications of Hytrek, Lanphier, and Siedler.