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THE SUPERIOR COURT OF WASHINGTON STATE FOR KING COUNTY

In re the Guardianship of:)	
)	Cause N° 97-4-02227-1
<u>Mabel M. Miller</u>)	
)	Findings of Fact and
)	Conclusions of Law
)	Regarding Sanctions
)	

Findings of Fact In Support of Award of Sanctions

On or about May 27, 2002, this matter came before the court with the presentation of an ORDER ON SHOW CAUSE AGAINST FORMER GUARDIAN OF ESTATE. In that order, Northwest Guardianship Services (NWGS), a Certified Professional Guardianship Agency, was agreeing to pay \$146,605.82 together with additional monies for interest and legal fees to the beneficiaries of the Estate of Mabel M. Miller. This amount had been agreed as due and owing to the Estate since approximately August, 1998, from the Guardianship Estate of Mabel Miller, for which the agency had been acting as fiduciary. After reviewing the matter, the undersigned entered an ORDER ON CASE REVIEW, setting a review hearing before the court on June 26, 2002. At that hearing and the series of hearings that followed thereafter, the following became evident:

1. NWGS deposits certain of the funds which it holds as a fiduciary into a consolidated or "pooled" account. When the funds are deposited in a pooled account, it is difficult for a court reviewing the interim or final accountings of a guardianship estate to determine when funds may be missing from the pooled or the individual sub-accounts, or if the accountings presented to the court are inaccurate.
2. An employee of NWGS apparently had embezzled a portion of the trust funds from the pooled account. This loss was not reported to the court. The court could not ascertain from reviewing any of the individual accountings filed by NWGS that the total of the

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funds.

3. When NWGS, as guardian, received the proceeds from the redemption of a deposit belonging to Mabel Miller, these funds were deposited into the pooled trust account. However, NWGS did not credit them to Ms. Miller's guardianship estate or to the Estate's sub account in the pooled account, in what appears to be an unexplained and unacceptable accounting practice. Consequently, (1) the inventory of the Miller Estate became short by the amount of the proceeds, which was never reported to the court, and (2) the pooled trust account became "overbalanced" by the unattributed deposit. This caused an inability to make a reconciliation of the sub-accounts possible for an extended period of time. The "mystery deposit" was not discovered or the loss to the estate noted until sometime in early 2002.

4. The guardianship estate accounting presented to the court by NWGS did not reveal that a substantial asset had been removed from the inventory with no compensating substituted asset shown (certificate out; cash in) or expenditure in that amount made on behalf of the ward. NWGS asserted that it only discovered the loss to the estate in 2002, and that occurred because of the adverse litigation arising out of the administration of the now-deceased Mabel Miller's probate estate.

5. After the loss to the estate and before its report to the court, NWGS' pooled trust account showed an overage of \$95,045.09. After noting this unexplained overage for 2 months, rather than make any serious effort to reconcile the account or ascertain the source of the funds, NWGS transferred the unaccounted surplus money to its own business line of credit account. NWGS explained that there was an "expectation of funds" to cover the prior embezzlement of approximately \$40,000.00 from their trust account. However, NWGS could offer no explanation why such a deposit would be made without paperwork from the payor -- who would voluntarily pay \$95,000 into another's account without contacting them or even getting the account number? Nor was NWGS able to explain why it might be entitled to receive a \$95,000 reimbursement for a \$40,000 loss; nor why it would treat an unexplained influx of \$146,605.82 into its trust account as its own money rather than money held in trust. Its answer appears to be more of a self-serving attempt to explain the unacceptable removal of the money after the fact -- and even that raises more questions than it answers. The narrative report of the guardian presented at the 1/07/03 court hearing indicated that each of the three individuals who had authority to authorize use of the line of credit account assumed that the \$146,605.82 was placed in the trust account by another of them (for unknown reasons?); but no one sought to verify this. The court finds this explanation to be incredulous at best, and an admission of negligence at worst.

6. When the unexplained overage was found in the trust account, the money was drawn out for deposit to the NWGS business line of credit, which is used by NWGS to cover expenses of clients whose money has not yet been transferred to the control of the guardian. However, this was a withdrawal from a trust account and the guardian, as

fiduciary, had a higher duty to understand and have control over the funds from the account. Significantly, the deposit into the line of credit account was not related to any particular withdrawal. This apparent failure to use a double-entry accounting system (for every debit of one account there is a compensating credit entry for another) is very unusual, and demonstrates a lack of internal financial controls, either of an accounting nature or of a guardian's oversight. There is no indication that the deposit to the line of credit was related or referenced to the withdrawal from the account of the \$146,605.82. There was no cross-referencing or other attempt to tie the deposit to a line of credit account with any earlier debit from that account.

7. No notice was given to the court that an employee had stolen any money from the trust accounts of the incapacitated persons for which NWGS, as a Certified Professional Guardian Agency was a fiduciary. It is clearly established that the Professional Guardian did not report the thefts from its pooled trust account for the incapacitated persons. Thefts of funds from one pooled account, in fact, constitutes a theft from all clients whose funds are in the trust account. The individual Certified Professional Guardian stated in her narrative presentation to the court on January 7, 2003 that no report of missing funds was made in any guardianship report filed with the court. To the contrary, the guardian reported that all funds were present in all reports made to the court under the bizarre theory that there were sufficient funds in the pooled account to make any individual client whole at the closing of the estate or as of the time of the report. It was not disputed that the total balance in the pooled trust account was insufficient to make all of the clients whole. Nor did it address the potential loss of interest income to each of the client accounts, which were not fully funded or thus earning interest to which they were otherwise entitled. At the hearing the court commented that this type of report seemed to be no more than an esoteric form of a Ponzi scheme.

8. NWGS claims that it has now taken 94 hours of a CPA's time to trace the lost money into and out of the pooled account. Yet the court still does not have adequate answers: (1) the accountant determined that the trust account on December 31, 1997 was \$4,517.27 greater than the balance of the individual trust ledgers; (2) the guardian repeatedly insisted that it was not aware that the bank had deposited the CD into the pooled account, and (3) the letter of August 12, 1997 has an attached a listing of the accounts at Seafirst Bank, (including the \$142,875.60 CD) which *requested a transfer to their trust account*.

Conclusions of Law

1. The Guardian failed to maintain and protect funds of Mabel Miller entrusted to it, as her fiduciary, by:
 - "Losing" \$142,875 from the Guardianship Estate of Mabel Miller
 - Causing the guardianship estate to lose interest income on the missing funds, which the estate would have otherwise received or been entitled.
 - Providing a Final Accounting and closing the Guardianship, omitting mention of the missing \$142,875.

- There is no evidence that the Guardian obtained the permission of the court to pool the ward's funds with those of others.
2. The Guardian failed to maintain accurate records by:
 - Allowing an asset to be redeemed, without crediting the funds received therefrom to the proper estate in its books of account.
 - Allowing the total balance in the pooled trust to differ from the sum of the combined client accounts maintained therein for a period of time.
 - By failing to reconcile the agency's stated balance for the pooled account balance with that reported by the bank, which would have revealed the embezzlement, the overage, and the proper source/ownership of the funds in the pooled account.
 3. The Guardian failed to provide accurate reports to the court:
 - It made no report of the unauthorized removal (embezzlement) of trust funds from the pooled account, a change of circumstances in each account.
 - Losses to the pooled trust fund (first through the embezzlement and later by the inappropriate withdrawal of \$142,875) represent an undivided, non-contingent (and/or proportionate losses) to each of the fiduciary estates then having funds in the pooled account. NWGS's failure to disclose the shortfall and the unjustified withdrawal from the pooled trust fund in any (and all?) of the fiduciary estates suffering such loss constitutes a failure to accurately report to the court in each of them. Failure to report to the court prevented the court from (1) ordering a termination of the pooled account, (2) increasing the security required for the guardian in each of its fiduciary cases, (3) accurately reviewing the Accountings submitted, and (4) determining whether NWGS was suitable to remain as fiduciary in each case.
 - The reported Inventories and Cash flow statements of the Mildred Miller were out of balance in the amount of \$142,875.
 - The stated assets and balances of the Mildred Miller Estate were not and could not be reconciled at the time of the Final Accounting.
 4. The Guardian misappropriated trust funds by:
 - Withdrawing funds from the pooled trust account and applying them to its own commercial line of credit.
 - Failing to disclose in its accounting books that the source of payment on the commercial line of credit was an unaccounted withdrawal from the pooled trust account.
 5. The Guardian failed to maintain and protect the funds of others (than the Mildred Miller Estate) entrusted to it by:
 - Not having sufficient management controls in place to allow an embezzlement of trust funds to occur.

- Not having sufficient management oversight in place to detect an embezzlement that occurred.
- Allowing the transfer of \$142,875 from the pooled trust account without any explanation or knowledge of its actual source and ownership.
- Depositing and diverting trust funds to its own account, with no knowledge of the source of funds other than that they had been "found unaccounted for" in the pooled client trust account.

6. The court has made a complaint to the Certified Professional Guardian Board regarding NWGS's failure to report the embezzlement of funds from client accounts (since they were commingled into a pooled account with other fiduciary funds), the guardian's failure to maintain records sufficient to prevent the inappropriate transfer of client funds from the pooled account, and that while the guardian has made certain parties whole (including principal, interest and attorney fees as a result of the embezzlement and the misappropriation of client funds), that others have expended considerable amounts in determining and proving the loss of the ward's funds and procuring the repayment of the embezzled funds. These actions do not mitigate against the imposition of a fine against the professional guardian as a necessary inducement and sanction for the professional guardian's failure to report to the court with complete candor or comply with its statutory or ethical obligations.

Dated and signed in open court this _____ day of _____

CARLOS VELATEGUI
COURT COMMISSIONER
JUN 24 2003



Carlos Y. Velategui,
Court Commissioner