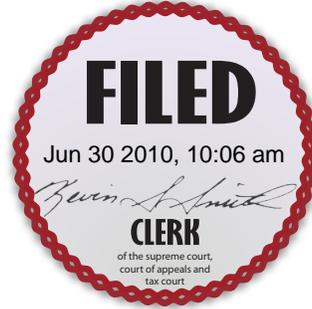


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MARK D. HASSLER  
Terre Haute, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE: THE MATTER OF THE )  
GUARDIANSHIP OF ALICE L. )  
SCHOONOVER, ADULT, )  
)  
MARGARET DITTEON, Individually and )  
as Guardian of Alice L. Schoonover, )  
)  
Appellant, )  
)  
vs. )  
)  
FRANK E. SLAVEN, as Personal )  
Representative of the Estate of )  
Alice L. Schoonover, )  
)  
Appellee. )

No. 84A01-0904-CV-207

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable David R. Bolk, Judge  
Cause No. 84D03-0610-GU-9157

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**June 30, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Margaret Ditteon appeals an order that she reimburse \$15,543.77 to the Estate of Alice L. Schoonover for funds misappropriated by a woman who preceded Ditteon as Schoonover's guardian. She raises four issues in her appeal, which we consolidate and restate as:

1. Does the evidence support finding Ditteon breached her fiduciary duty as Schoonover's guardian?
2. Does the evidence support the reimbursement amount?

We affirm.<sup>1</sup>

### **FACTS AND PROCEDURAL HISTORY**

In October 2006, Ditteon was president of Personal Resource Management, Inc. ("PRM"), a private corporation that, for a fee, assists elderly or incompetent individuals with their finances. An employee of PRM, Jan Riddle, was appointed the temporary guardian of Alice L. Schoonover, who had been placed in a nursing home after an investigation by Adult Protective Services. Prior to that time, Schoonover's son, Frank E. Slaven, was her Attorney in Fact and had managed her finances. On April 16, 2007, over Slaven's objection, Riddle was appointed permanent guardian. Between April 16, 2007, and May 22, 2008, Riddle misappropriated some of Schoonover's funds.

On May 8, 2008, Ditteon discovered funds were missing from Schoonover's

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<sup>1</sup> Our review of this matter was delayed by our need to request a new Appendix from Appellant's counsel. The original Appendix included materials not within the trial court record and excluded relevant materials, such as the Final Accounting and reply to Post-Hearing brief. In addition, the Amended Appendix included items not present in the record, and we will not consider them. Ind. Appellate Rule 2(L) requires the "Record on Appeal" consist of "the Clerk's Record and all proceedings before the trial court." Evidence not presented to the trial court cannot be considered on appeal. *Schaefer v. Kumar*, 804 N.E.2d 184, 187 n.3 (Ind. Ct. App. 2004), *trans. denied*.

account and terminated Riddle's employment with PRM. On May 16, Ditteon filed a "Petition to Remove Guardian, Suspend Authority of Guardian on Emergency Basis, and Appointment of Temporary Guardian Pending Notice and Hearing." (App. at 9.) On May 22, Riddle resigned as guardian and Ditteon was appointed guardian. Riddle was ordered to turn over all guardianship records, financial records, checking statements, and checkbooks to Ditteon within seven days.

Four months later, on September 29, Schoonover died. Slaven opened her estate on November 6, 2008. On December 16, Ditteon filed a final report and accounting, an affidavit in lieu of vouchers, and a petition to terminate guardianship. The Estate filed a motion to compel an accounting, and a hearing was set for February 17, 2009. On February 9, Ditteon filed an amended final report with accounting and an affidavit in lieu of vouchers, which stated she had receipts to support all of the expenses in the accounting. The hearing was rescheduled for March 16. Moments before the hearing, Ditteon filed another amended final report with accounting and an affidavit in lieu of vouchers.

At the hearing, the trial court went through Ditteon's final accounting in detail, questioning any unusual expense during Riddle's time as guardian. The trial court noted Riddle had not filed the paperwork for Schoonover to receive Medicaid, which resulted in higher prescription costs. The trial court noted several large expenditures listed simply as "personal needs," (Tr. at 86), in addition to charges at flower shops and hardware stores that were not explained in the check register. In sum, the court noted, "There are numerous problems that have been in existence throughout this guardianship." (Tr. at

124.) It seems apparent that, during her thirteen month tenure as Schoonover's guardian, Riddle misappropriated guardianship funds for her own benefit.<sup>2</sup>

Despite having stated in her affidavits in lieu of vouchers that she had receipts to support all the expenses in the accounting, Ditteon testified she did not have receipts for many transactions. She also asserted she could not obtain receipts for many transactions because, although the court had ordered Riddle to turn over all Guardianship documents to Ditteon, Riddle had not done so and, according to the record, Ditteon had not used the court's compulsory power to attempt to obtain the missing documents from Riddle. Nor had Ditteon informed the court in the ten months between her appointment and the hearing that Riddle had not complied with the earlier court order.

Slaven objected to Ditteon's final amended report and the court ordered Ditteon to reimburse the money for which she could not account. The court determined that amount was \$15,543.77. Ditteon then asked the court to clarify who was responsible for the payment of the judgment. The court indicated it did not care where the funds came from, only that the funds were returned to Schoonover's Estate: "Whether the current Guardian receives funds through the business entity, Personal Resource Management, through

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<sup>2</sup> The record suggests Riddle had been charged and was considering a plea bargain at the time of the hearing. (Tr. at 113.) The record does not reflect the specific charges or penalties levied against Riddle. Neither does the record before us indicate why Ditteon did not attempt to call Riddle as a witness at the hearing on the final accounting or hold Riddle responsible for the unexplained expenditures within these guardianship proceedings. However, as the trial court noted in response to Ditteon's motion to clarify, Ditteon is free to pursue action against Riddle or any other entity for repayment of the monies she is required to pay to the Schoonover's Estate as a result of this ruling. *See, e.g., Bank of New York v. Nally*, 820 N.E.2d 644, 651 (Ind. 2005) ("Subrogation arises from the discharge of a debt and permits the party paying off a creditor to succeed to the creditor's rights in relation to the debt.").

insurance or through her personal assets or through some other means is immaterial.”<sup>3</sup>  
(*Id.* at 134.)

## DISCUSSION AND DECISION

When reviewing the sufficiency of evidence in a civil case, we determine whether there is substantial evidence of probative value supporting the judgment. *Jamrosz v. Resource Benefits, Inc.*, 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), *trans. denied*. We do not weigh the evidence or judge the credibility of witnesses but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. *Davidson v. Bailey*, 826 N.E.2d 80, 87 (Ind. Ct. App. 2005). We affirm unless the judgment “is against the great weight of the evidence.” *Id.*

Slaven did not file a Brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. Instead, we apply a less stringent standard of review and may reverse the trial court if the appellant establishes *prima facie* error. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). *Prima facie* error is “error at first sight, on first appearance, or on the face of it.” *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006). Still, we are obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Dominiack Mechanical, Inc. v. Dunbar*, 757 N.E.2d 186, 188 n. 1 (Ind. Ct. App. 2001).

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<sup>3</sup> Diteon argues the language of this order indicates PRM as an entity is required to repay the judgment, which shields her from personal liability. We disagree. The court simply noted PRM as one source from which Diteon could seek funds.

1. Breach of Fiduciary Duty

Indiana Code § 29-3-9-6 requires an accounting be made within thirty days of termination of a guardianship. In this final accounting, “a guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith. He must not conceal any material fact, nor untruthfully represent any matter to the court.” *Slauter v. Favorite*, 4 N.E. 880 (Ind. 1886), *reh’g denied*.

When she filed her final accounting, Ditteon filed an Affidavit in Lieu of Vouchers in which she swore “the disbursements listed in said Accounting of the guardianship were paid from the assets of Alice Schoonover and a receipt or voucher for each item is held in the records of Personal Resource Management.” (App. at 29.) But Ditteon later testified she had not received many of the records the court ordered Riddle to provide. Thus, in fact, Ditteon did not have receipts for a number of questionable expenditures listed in the final accounting. Ditteon testified she gave some receipts to a detective investigating embezzlement charges against Riddle<sup>4</sup> and she had not attempted to get a court order to compel uncooperative businesses to release information about the questionable transactions. This all led the trial court to state:

Under Indiana law, you don’t have to submit the bills, you can do an affidavit in lieu of vouchers, which is what you did which is fine. That means you represent to the court that you have all the documents. I mean, you clearly don’t have all the documents; you’ve admitted that here today on numerous occasions.

(Tr. at 123.)

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<sup>4</sup> Based on her testimony, it does not seem Ditteon kept a copy of any of these records.

Whether a guardian breaches her fiduciary duty by providing an inaccurate accounting appears to be a question of first impression in Indiana. However, we find instructive *Willbanks v. Mars*, 588 P.2d 118 (Or. 1978), which discusses the duty of a “conservator.”<sup>5</sup> That court opined, “It is well settled that a conservator is a fiduciary, and as such has a duty to accurately account for expenditures of funds entrusted to her.” *Willbanks*, 588 P.2d at 120 (internal citations omitted). The conservator in *Willbanks* breached her duty as a fiduciary by intentionally providing an inaccurate accounting. We adopt that reasoning and hold that by intentionally providing an inaccurate accounting for the funds in Schoonover’s account, Ditteon breached her duty as guardian.

A guardian also has a responsibility to act in the ward’s best interests. Ind. Code § 29-3-8-1(b). Guardians may institute proceedings on behalf of their wards, Indiana Code § 29-3-8-2(a)(3), and a guardian’s duty to collect her ward’s debts implies the right to sue to enforce such collection. *See Shepherd v. Evans*, 9 Ind. 260, 260 (1857). Ditteon gave information and documentation to a detective to further criminal proceedings against Riddle, but nothing in the record indicates Ditteon used her authority as guardian to pursue recovery from Riddle or PRM. Her failure to pursue recovery of the misused funds, without explanation *and* her falsification of the accounting were a breach of Ditteon’s duty to act in Schoonover’s best interest. *See* Ind. Code § 30-4-3-13(b) (A successor trustee is “liable for a breach of trust of his predecessor” if he “fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor

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<sup>5</sup> A “conservator” is a “guardian.” Black’s Law Dictionary at 300 (8<sup>th</sup> Edition 2004).

trustee.”).<sup>6</sup>

Because Ditteon filed a false Affidavit in Lieu of Vouchers, provided an inaccurate final accounting of Schoonover’s Estate, did not pursue recovery of Schoonover’s misappropriated funds, and did not ask the court to compel Riddle or uncooperative businesses to produce receipts for questionable expenditures, we cannot hold the trial court erred when it found Ditteon personally responsible for the funds missing from Schoonover’s estate.<sup>7</sup>

## 2. Amount of Reimbursement

Ditteon asks us to reconsider the amount of the judgment levied against her, as she claims there was insufficient evidence to support the court’s calculation. The court’s order was based on Slaven’s accounting. The trial court granted reimbursement of all losses noted by Slaven with the exception of fees paid for Riddle’s and Ditteon’s services. (*See* Tr. at 128) (request by Slaven for reimbursement of all fees paid to PRM, totaling \$9,171.62, which amount is not included in the final judgment).

Ditteon asks us to reweigh the evidence regarding the validity of the remaining losses, which we cannot do. *See Davidson*, 826 N.E.2d at 87 (we may not reweigh the evidence). The losses include money Riddle used to buy lawn furniture, clothing, and personal items that Ditteon could not prove were for Schoonover’s benefit; a discrepancy between the amount withdrawn from Schoonover’s life insurance account and the amount from that withdrawal deposited into her checking account; checks written to a former

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<sup>6</sup> A guardian must “observe the standards of care and conduct applicable to trustees.” Ind. Code § 29-3-8-3.

<sup>7</sup> Ditteon argues the trial court cannot make her responsible for the debt of PRM by “piercing the corporate veil.” As the court’s order held Ditteon personally responsible, and not her corporation, *see supra* n.3, we need not address PRM’s corporate form.

client of Riddle's with no explanation; multiple excessive amounts for the cleaning and removal of items from Schoonover's house; and a fee to board Schoonover's dog when arrangements could have been made with Slaven for such services. There was ample evidence to support the trial court's calculation of the reimbursement amount.

### **CONCLUSION**

We find no error in the determination Ditteon breached her fiduciary duty as Schoonover's guardian. Neither has Ditteon demonstrated error in the court's calculation of the Estate funds to be reimbursed. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.