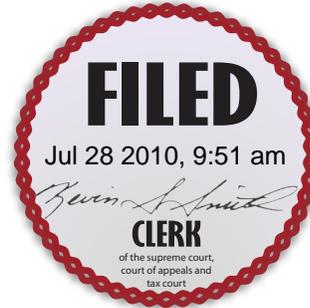


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE GUARDIANSHIP)
OF JOHN JOSEPH BORTKA, II: JOHN)
JERALD BORTKA,)
)
Appellant,)
)
vs.)
)
PAULA BORTKA WELLS,)
)
Appellee.)

No. 88A01-0907-CV-343

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Roger L. Duvall, Special Judge
Cause No. 88C01-0606-GU-10

July 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

John Jerald Bortka (“Jerry”), the former guardian of John Joseph Bortka (“John”) and John’s estate, appeals the trial court’s order that he reimburse the guardianship estate in the amount \$12,034.00 and awarding attorney fees to Paula Bortka Wells (“Paula”).

We affirm and remand with instructions.

ISSUES

1. Whether the trial court abused its discretion in ordering Jerry to reimburse the guardianship estate.
2. Whether the trial court abused its discretion in awarding attorney fees to Paula.

FACTS

John is the adult son of Jerry and Paula. Jerry and Paula divorced in 2001, after John had reached the age of majority. In 2006, John sustained a traumatic brain injury in an automobile accident.

On or about June 7, 2006, the trial court appointed Paula as guardian of John and his estate. Pursuant to an order entered on February 21, 2007, the trial court substituted Jerry as guardian of John and his estate. The trial court also ordered Jerry to “provide an accounting every sixty (60) days” (Paula’s App. 1).

On May 4, 2007, Paula filed her final report and accounting. According to the report, Paula transferred \$20,000.00 from the guardianship estate to Jerry “as new

guardian for John” in February of 2007. (Jerry’s App. 143). In May of 2007, Paula transferred an additional \$7,885.27 from the guardianship estate’s checking account to Jerry.

The trial court conducted a review hearing on June 6, 2007. Jerry, however, had not filed an accounting. On July 5, 2007, Paula filed a motion for contempt and request for attorney’s fees. Thereafter, on July 31, 2007, Paula filed a notice of formal discovery, motion for expedited discovery responses, and a request for a hearing. The trial court held a hearing on August 15, 2007, after which it ordered Jerry to submit an accounting to the trial court.

Jerry filed an accounting on September 17, 2007. On October 19, 2007, Paula filed a “Verified Response to Guardian’s Accounting and Notice of Additional Failure in Duties.” (Jerry’s App. 4).

On December 25, 2007, John was involved in another automobile accident while driving his 1992 Nissan Pathfinder. At the time of the accident, the insurance on the Pathfinder had lapsed.

On January 4, 2008, John filed a petition to terminate the guardianship of his person and estate. Paula filed an objection and response to John’s petition; Jerry filed a motion to withdraw as guardian.

Subsequently, on January 14, 2008, Paula filed a “Second Motion for Contempt and Request for Specific Relief and Attorney’s Fees.” (Jerry’s App. 4). On May 7, 2008,

Paula filed a “Motion for Updated Guardianship Accounting and Hearing.” (Jerry’s App. 5).

The trial court held a hearing on all pending matters on May 21, 2008. On May 28, 2008, Jerry filed an accounting, to which Paula filed a response on June 13, 2008.¹

The trial court entered its order on July 17, 2008. The trial court found as follows:

In late February, 2007, Paula turned over to Jerry by way of two checks, guardianship funds of \$20,000.00 consisting of checks of \$5,000.00 and \$15,000.00. In early May, 2007, Paula turned over the final funds of John’s guardianship in the amount of \$7,885.27 for a total of \$27,885.27. Beginning with April, 2007, Jerry began receiving John’s Social Security check[s].

Jerry did not provide accountings in sixty (60) day intervals as required by the Order of February 21, 2007.

. . . Jerry was ordered to prepare an accounting. That initial accounting was incomplete and supplemented on May 28, 2008.

It also became clear that by August, 2007, . . . the funds of John had been depleted as testified to by Jerry and John and as subsequently disclosed in the accounting by Jerry. By August 15, 2007, the funds on deposit totaled \$627.17 in a guardianship checking account and money market account. When considering social security deposits totaling \$3,790.00 and interest income of \$1.20 then there was a decrease in value of guardianship funds of \$31,049.30 in approximately five and one-half (5 ½) months.

The Court notes the following expenditures during the first few months of Jerry’s tenure as John’s guardian:

1. Criminal bail of \$2,000.00 on April 23, 2007.
2. Jeep purchase of \$1,300.00 on May 22, 2007.
3. Criminal fines and costs of \$600.00 on July 2, 2007.
4. New vehicle purchase of \$500.00 on July 13, 2007.

¹ The parties have not provided this court with copies of the aforementioned pleadings.

5. TV and equip. of \$2,151.74 on March 16, 2007.
6. Attorney fees for criminal case of \$2,000.00 on May 22, 2007.

The Court also notes that through the end of 2007, . . . John made withdrawals from the account in excess of \$5,600.00 . . . noted in the accounting with “personal expense: John withdrawal.” The Court assumes these to be situations where John withdrew money without any supervision by Jerry. There is evidence before the Court that John may have spent some of his money at night clubs There are also bank charges for overdrafts totaling \$334.00. There are other withdrawals from the guardianship accounts which may also be questioned which the Court will not detail further.

Finally, the Court notes that Jerry received \$20,000.00 initially from [sic] Paula when assets were first transferred from Paula to Jerry. The accounting by Jerry shows \$16,500.00 deposited into the money market account on March 1, 2007. This account then shows transfers to the guardianship checking account. That checking account notes two deposits as being transfers from the money market account, one for \$1,000.00 on March 1, 2007 and \$400.00 on March 9, 2007. There is no record in the money market accounting of such transfers being made from that account to the checking account. Giving Jerry credit that these were guardianship funds even though not clearly accounted for, there remains \$2,100.00 in guardianship funds unaccounted for (\$20,000.00 less \$16,500.00, less \$1,000.00, less \$400.00).

John was involved in a motor vehicle accident after Jerry became guardian The insurance for John had lapsed. The value of the vehicle is estimated at \$8,000.00, representing the trade-in/sale of the jet-ski for \$6,800.00 and the \$1,300.00 expenditure on May 22, 2008.

(Paula’s App. 1-2).

The trial court further found that Jerry had “breached his fiduciary duty to the detriment of the guardianship in the amount of \$16,034.00”² by failing to fully account

² The trial court based this amount on “the \$8,000.00 automobile loss, the \$2,100.00 in unaccounted funds, \$5,600.00 in funds draw[n] upon by John without any apparent supervision, and bank charges of \$334.00.” (Paula’s App. 3).

for the funds turned over to him; allowing John “unsupervised access to those funds”; and failing to “keep guardianship property insured.” (Paula’s App. 3). The trial court also found Jerry in contempt “for failing to comply with the initial order . . . to provide an accounting at sixty (60) day intervals.” (Paula’s App. 3). Finally, the trial court found the “actions taken by Paula to enforce the previous Court order and review the use and expenditure of guardianship assets” to have merit. (Paula’s App. 3).

Accordingly, the trial court ordered Jerry “to reimburse and replenish the guardianship account in the amount of \$16,034.00” and awarded Paula \$2,000.00 in attorney fees. (Paula’s App. 4). The trial court further ordered that the guardianship of John’s person be terminated and that Paula resume guardianship of John’s estate.

Jerry filed a motion to correct error on August 18, 2008. Paula filed a response on September 2, 2008. On September 23, 2008, the trial court denied the motion to correct error in part and “modified the judgment of the Court in part”³ (Jerry’s App. 7). That modification therefore became an appealable final order pursuant to Trial Rule 59(F), which provides that “[a]ny modification . . . of a final judgment or an appealable final order following the filing of a Motion to Correct Error shall be an appealable final judgment or order.”

On September 25, 2008, Jerry filed his “Motion to Set Aside Order on Motion to Correct Error[] and to Request Final Evidentiary Hearing and Verified Motion to Reconsider Pursuant to Indiana Trial Rule 53.4.” (Jerry’s App. 131). In this motion, he

³ The parties have not provided a copy of this order.

sought to set aside and reconsider both the July 17, 2008 and September 23, 2008 orders, asserting that the trial court's orders "are not supported by the facts and law applicable to this case." (Jerry's App. 132). Specifically, Jerry argued that "[u]sing the purported \$6,800 value of a jet-ski . . . to arrive at the value for an automobile loss of \$8,000 makes no sense whatsoever; further no evidence related to the jet-ski's value has been presented" to the trial court; requiring Jerry to reimburse the guardianship estate for funds withdrawn by John "is unduly punitive"; "ordering Jerry to pay an additional \$2,000.00 in attorney fees . . . is far in excess of that dictated by equity and good conscience . . ."; and "a finding of contempt against Jerry on the accounting issue . . . appears to be an inequitable application of the law," where Paula purportedly failed to provide a timely accounting. (Jerry's App. 132-33). The trial court did not rule on the motion to set aside and reconsider within five days.

Without objection from Paula and with Jerry's acquiescence, the trial court considered Jerry's motion as a motion for relief from judgment and subsequently held a hearing on the motion on May 6, 2009.⁴ The trial court entered its order on June 16, 2009, finding as follows:

6. The Court again notes the previous finding that the guardianship bank account, while under the supervision of Jerry, expended \$31,049.30 in funds in a five and one-half (5 1/2) month period. This previous finding has not been disputed.

⁴ It appears that the trial court considered Jerry's motion as one for relief from judgment in order to circumvent Trial Rule 53.4(A), which provides that a motion to reconsider "shall not delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules"; and Trial Rule 53.4(B), which provides that "[u]nless such a motion is ruled upon within five (5) days it shall be deemed denied"

7. As related to the bank accounts alone, Jerry has only been ordered to reimburse the guardianship in the amount of \$8034.00. . . . [T]his figure represents three items. The \$2,100.00 in funds which is reflected as the difference between what Paula turned over to Jerry and the amount Jerry deposited in the guardianship account that he supervised. The Court in its order on the motion to correct error[] gave Jerry further opportunity to explain this difference. He did not do so. Another basis for the order for reimbursement was bank charges and overdraft fees of \$334.00. An account, properly supervised on a minimal level, would have been able to avoid these charges.

8. The final area is the \$5,600.00 in unsupervised withdrawals by . . . John. In making this original finding, the Court extensively reviewed the accounting that had been filed with the Court. The Court limited this finding to just those withdrawals from the account that were by John alone and not any expenditure to or on behalf of John by Jerry. . . . [P]ayment of utility charges, rent and other reasonable charges . . . are not part of the Court's total of \$5,600.00. However, the Court's finding is based on those charges to the bank accounts that reflect "Personal expense: John Withdrawal." These amounts are unreasonable and given everyone's perception as to John's ability to manage his financial affairs should have been closely monitored by Jerry. By way of further example, those charges for one month alone . . . totaled \$1865.50. Given this review the Court does not find its previous ruling unreasonable.

9. The final issue for which the Court ordered Jerry to reimburse the guardianship is in regard to the wrecked automobile for which there was no insurance. The Court valued this vehicle at \$8000.00. The best evidence available to the Court at the original hearing on May 21, 2008 was the cash paid for the vehicle on May 22, 2007 and the trade-in value of the jet ski. The Court now receives evidence that the vehicle was a 1992 Nissan Pathfinder with very high mileage. Based upon the evidence now available to the Court, the value of the vehicle could be within a range of \$1,150.00 (the value of a comparable vehicle on May 5, 2009) to \$8000.00 (the value previously claimed by Paula []as reflected by the cash of \$1300.00 on May 22, 2007 and the trade-in value of the jet ski). An adjustment of this previous finding is appropriate. The Court now values the vehicle, and therefore the loss to the guardianship due to Jerry's failure to insure the vehicle at \$4,000.00.

10. The Court will not alter the finding of contempt. As previously found, an earlier accounting could have preserved some of the funds as John's prolific habit of accessing his account could have been discovered at an earlier time and before the complete depletion of the bank accounts.

11. The Court will not change the ruling on attorney fees.

(Jerry's App. 8). Thus, the trial court ordered Jerry to reimburse the guardianship estate in the amount of \$12,034.00 and awarded Paula \$2,000.00 in attorney fees. Jerry filed his notice of appeal on July 16, 2009.

Additional facts will be provided as necessary.

DECISION

All findings and orders of the trial court in guardianship proceedings are matters within the trial court's discretion. Ind. Code § 29-3-2-4; *Carr v. Carr*, 685 N.E.2d 92, 97 (Ind. Ct. App. 1997). Furthermore, we review a trial court's denial of a motion for relief from judgment for abuse of discretion. *Case v. Case*, 794 N.E.2d 514, 517 (Ind. Ct. App. 2003). A trial court abuses its discretion when its denial is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just." *G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999).

Trial Rule 60(B) provides, in pertinent part, as follows:

On motion and upon such terms as are just the court may relieve a party . . . from an entry of default, final order, or final judgment . . . for the following reasons:

(1) mistake, surprise, or excusable neglect;

- (2) any ground for a motion to correct error, including, without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
- (3) fraud . . . , misrepresentation, or other misconduct of an adverse party;
- (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
- (5) . . . the record fails to show that such party was represented by a guardian or other representative . . . ;
- (6) the judgment is void; [or]
- (7) the judgment has been satisfied, release, or discharged . . . ;
- (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

A motion for relief from judgment pursuant to Trial Rule 60(B) may not be used as a substitute for a direct appeal. *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002), *reh'g denied*. Rather, Trial Rule 60(B) “affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant.” *Id.* “When making a determination regarding a T.R. 60(B) motion, a trial court is required to ‘balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation.’” *In re Adoption of T.L.W.*, 835 N.E.2d 598, 601 (Ind. Ct. App. 2005) (quoting *Crafton v. Gibson*, 752 N.E.2d 78, 83 (Ind. Ct. App. 2001)). The “proper function of a T.R. 60(B) motion is to afford relief from circumstances which could not have been discovered during the [thirty] day period in which a T.R. 59 motion to correct error[] could have

been filed with the trial court.” *Snider v. Gaddis*, 413 N.E.2d 322, 324 (Ind. Ct. App. 1980); *see also* T.R. 60(B)(2) (stating that a trial court may relieve a party from a judgment for “any ground for a motion to correct error . . . which by due diligence could not have been discovered in time to move for a motion to correct error[] under Rule 59”).

Among those reasons for relief set forth in Trial Rule 60(B), we discern that Jerry sought relief from the trial court’s September 23, 2008 order for mistake; namely, the trial court’s purported mistake in denying his motion to correct error “prematurely.” (Jerry’s App. 131). Specifically, in his motion, he argued that “[u]nder the Indiana Trial Rules, [he] had twenty-three (23) days to file a reply to Paula’s” response to this motion to correct error. (Jerry’s App. 131). The trial court, however, denied the motion to correct in part before Jerry could file a response to Paula’s reply.

A trial court’s discretion in this area is necessarily broad because any determination of mistake, surprise, or excusable neglect turns upon the particular facts and circumstances of each case. Because the circumstances of each case differ, there are no fixed rules or standards for determining what constitutes mistake, surprise, or excusable neglect. In making its determination, the trial court must balance the need for an efficient judicial system with the judicial preference for resolving disputes on the merits.

Fitzgerald v. Cummings, 792 N.E.2d 611, 614 (Ind. Ct. App. 2003) (internal citations omitted).

Regarding responsive filings, Trial Rule 59(E) provides that “[f]ollowing the filing of a motion to correct error, a party who opposes the motion may file a statement in opposition to the motion to correct error not later than fifteen [15] days after service of the motion.” Trial Rule 59, however, does not provide for the filing of a reply. We

therefore find no mistake in the ruling on Jerry's motion to correct error on September 23, 2008. Accordingly, we cannot say that the trial court abused its discretion in denying Jerry relief pursuant to Trial Rule 60(B)(1).

We next consider Jerry's motion as one filed under Trial Rule 60(B)(8), which allows that a motion for relief from judgment may be filed for "any reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4)."⁵ Again, "[t]he trial court's residual powers under subsection (8) may only be invoked upon a showing of exceptional circumstances justifying extraordinary relief." *Brimhall v. Brewster*, 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007), *trans. denied*.

Here, Jerry argues that he is entitled to relief regarding the trial court's order that he reimburse the guardianship account for the following: 1) a "\$2,100.00 shortfall in unaccounted funds between monies that were transferred from Paula to Jerry and the expenditures and/or balances that were notated in Jerry's accounting," (Jerry's Br. at 6); 2) \$5,600.00 in unauthorized withdrawals made by John; and 3) the value of John's vehicle, which the trial court valued at \$4,000.00. Jerry also argues that the trial court abused its discretion in ordering him to pay Paula's attorney's fees in the amount of \$2,000.00.

⁵ It appears that the trial court considered the motion under subsection (2), which provides for relief for "any ground for a motion to correct error . . . which by due diligence could not have been discovered in time to move for a motion to correct error[] under Rule 59[.]" Jerry, however, asserted no such grounds in his motion.

1. Shortfall

Jerry argues that the trial court abused its discretion in ordering him to reimburse the guardianship estate for the shortfall in the amount of \$2,100.00. Specifically, he maintains that he “exercised the care and diligence of a reasonably prudent person” by delegating “the preparation of the accounting to his wife, who had worked in a bank and thus had specialized knowledge regarding the preparation of financial statements.” Jerry’s Br. at 6, 7.

The record shows that Paula transferred \$20,000.00 of estate funds to Jerry in February of 2007. On March 1, 2007, Jerry deposited \$16,500.00 of these funds to the guardianship estate’s money market account (“Account #315”). The March 15, 2007 statement for guardianship estate’s checking account (“Account #200”) reflects deposits in the amounts of \$1,000.00 and \$400.00 on March 1, 2007, and March 9, 2007, respectively.⁶ Thus, including the \$16,500.00 deposited into Account #315 and the \$1,400.00 deposited into Account #200, the guardianship estate’s accounts received \$17,900.00 in March of 2007, following the initial transfer of \$20,000.00 from Paula to Jerry.⁷

Jerry had several opportunities during the course of these proceedings to account for these funds. He, however, failed to present evidence regarding the disposition of the

⁶ The trial court presumed that these amounts were from the \$20,000.00 initially transferred from Paula to Jerry although Account #315 does not reflect corresponding withdrawals.

⁷ The May 15, 2007 statement for Account #315 reflected a deposit in the amount of \$7,886.79, which reflects the last of the guardianship estate funds transferred from Paula to Jerry.

remaining \$2,100.00. The trial court specifically documented the known deposits and withdrawals in calculating the unaccounted \$2,100.00. We find no abuse of discretion in ordering Jerry to reimburse the guardianship estate in the amount of \$2,100.00.

2. Unauthorized Withdrawals

Jerry asserts that the trial court abused its discretion in ordering him to reimburse the guardianship estate in the amount of \$5,600.00 for unauthorized withdrawals made by John. We disagree.

A guardian is “a person who is a fiduciary . . . responsible as the court may direct for the person or the property of an incapacitated person” I.C. § 29-3-1-6. “[A] guardian has a statutory duty to manage the estate for the ward’s best interest,” *Wells v. Guardianship of Wells*, 731 N.E.2d 1047, 1051-52 (Ind. Ct. App. 2000), *trans. denied*, and is “responsible for the incapacitated person’s care and custody and for the preservation of the incapacitated person’s property” I.C. § 29-3-8-1(b).

Several statutes define a guardian’s duties and powers. For example, a guardian shall do the following:

- (1) Act as a guardian with respect to the guardianship property and observe the standards of care and conduct applicable to trustees.
- (2) Protect and preserve the property of the protected person subject to guardianship
- (3) Conserve any property of the protected person in excess of the protected person’s current needs.
- (4) Encourage self-reliance and independence of the protected person.
- (5) Consider recommendations relating to the appropriate standard of support, care, education, and training for the protected person

I.C. § 29-3-8-3.

A guardian also may exercise certain powers required to perform his or her responsibilities, including, “[i]f reasonable, the power to delegate to the [incapacitated person] certain responsibilities for decisions affecting the [incapacitated person]’s business affairs and well-being.” *See* I.C. § 29-3-8-2(b) (incorporating subsection (a)); *see also* I.C. § 29-3-8-4(2). Furthermore, pursuant to Indiana Code section 29-3-8-4, a guardian may pay to the protected person “a reasonable amount to be expended for the support” of the protected person,⁸ with due regard to the following:

(A) The size of the guardianship property, the probable duration of the guardianship, and the extent to which the protected person in the future may be self-sufficient and able to manage the protected person’s financial affairs and property.

(B) The accustomed standard of living of the protected person

(C) Other funds or sources used for the support of the protected person

(7) To distribute income and discretionary amounts of principal in one (1) or more of the following ways as the guardian believes to be in the best interests of the protected person:

(A) Directly to the protected person.

Jerry admitted that John had “unfettered access” to his funds for a “brief time” (Tr. 46). During this time, John withdrew over \$5,000.00. Most of the individual withdrawals exceeded \$100.00 and several exceeded \$200.00. These withdrawals were in addition to those made for rent, groceries, utilities, household items, clothing, vehicle maintenance, and pocket money. Thus, the trial court ordered that Jerry reimburse the guardianship estate only for those amounts withdrawn by John for unidentified personal expenses and did not include those amounts withdrawn for John’s support and care.

⁸ A “‘protected person’ means an individual for whom a guardian has been appointed” I.C. § 29-3-1-13.

We cannot say that the trial court abused its discretion in ordering Jerry to reimburse the guardianship estate, where Jerry failed to conserve John's funds by allowing unlimited access to said funds; did not show John's access to the funds to be reasonable; and failed to show the funds expended were in an amount reasonable for John's support.

3. Vehicle Valuation

Jerry asserts that the trial court abused its discretion in ordering him to reimburse the guardianship estate \$4,000.00 for failure to insure John's Pathfinder by "utilize[ing] a method of valuation which is at best puzzling, and at worst, absurd." Jerry's Br. at 10. He maintains that "in determining the vehicle's value, the trial court nonsensically reasons that the \$6,700 value of a jet-ski, a wholly unrelated item of property, should be included in arriving at the vehicle's value. *Id.* at 10-11.

Generally, the "measure of damages for the destruction of personal property is the fair market value at the time of loss." *Lachenman v. Stice*, 838 N.E.2d 451, 466 (Ind. Ct. App. 2005), *trans. denied*.

Here, John sustained the loss of his 1992 Pathfinder on December 25, 2007. Jerry testified that the Pathfinder had "about a hundred ninety-seven or ninety-eight" thousand miles on it at the time of the accident. (Tr. 36). The trial court admitted into evidence a print-out from Kelley Blue Book, showing that a 1992 Pathfinder similar to John's had a value between \$1,150.00 and \$1,775.00 in 2009, two years after John's accident. The

trial court, however, did not give the evidence full weight “given the fact that [the] valuation represents two years after the relevant dates in question.” (Tr. 39).

The trial court further noted that during a prior hearing, on May 21, 2008, it heard evidence that John sold his jet-ski for \$6,800.00, the proceeds of which, along with \$1,200.00 in cash,⁹ he applied toward the purchase of the Pathfinder in May of 2007.¹⁰ Therefore, the evidence presented at the prior hearing demonstrated that John paid \$8,000.00 for the Pathfinder.

In its order, the trial court valued the Pathfinder, as of December 25, 2007, at \$4,000.00, which was \$4,000.00 less than the May 2007 purchase price and \$2,225.00 to \$2,850.00 more than the 2009 valuation. Given the evidence presented, we cannot say that the trial court abused its discretion.

4. Attorney’s Fees

Jerry further asserts that the trial court abused its discretion in ordering him to pay Paula’s attorney’s fees in the amount of \$2,000.00 as a sanction for failure to submit accounts pursuant to court order. We disagree.

⁹ Although the trial court stated that \$1,200.00 was applied to the purchase, the order entered on July 17, 2008, states that \$1,300.00 was applied to the purchase.

¹⁰ We note that “the consideration of evidence presented at a previous proceeding in that very same action is sometimes permitted.” *Arms v. Arms*, 803 N.E.2d 1201, 1209 (Ind. Ct. App. 2004). Generally, “a trial court may take judicial notice of proceedings that have taken place in that court, and in that cause of action.” *Id.* Incorporating by reference evidence presented in an earlier hearing is permitted when doing so would prevent redundancy. *Id.* “That is, courts allow it when it will minimize needless and time-consuming duplication of effort that results in nothing more than the presentation of evidence that is identical to or cumulative of evidence previously placed before the court in the same case.” *Id.* at 1209-10.

“Contempt of court involves disobedience of a court which undermines the court’s authority, justice, and dignity.” *Srivastava v. Indianapolis Hebrew Congregation, Inc.*, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002) (quoting *Carter v. Johnson*, 745 N.E.2d 237, 240 (Ind. Ct. App. 2001)), *trans. denied*. “It includes any act which tends to deter the court from the performance of its duties.” *Id.* A person can be held in indirect contempt of court for the willful disobedience of any order lawfully issued:

- (1) by any court of record, or by the proper officer of the court;
- (2) under the authority of law, or the direction of the court; and
- (3) after the process or order has been served upon the person[.]

I.C. § 34-47-3-1.

Whether a person is in contempt is a matter left to the trial court’s discretion. *Bartlemay v. Witt*, 892 N.E.2d 219, 227 (Ind. Ct. App. 2008). Accordingly, we will reverse a finding of contempt only when a trial court’s decision is against the logic and effect of the facts and circumstances before it or is contrary to law. *Id.* “When reviewing a contempt order, we will neither reweigh the evidence nor judge the credibility of witnesses, and unless we have a firm and definite belief a mistake has been made, the trial court’s judgment will be affirmed.” *Id.* at 227-28. For there to be a finding of contempt, “there must be an order commanding the accused to do or refrain from doing something.” *Id.* at 228. “To hold a party in contempt for a violation of a court order, the trial court must find that the party acted with willful disobedience.” *Id.*

In this case, the trial court, on July 17, 2008, ordered Jerry to pay attorney fees in the amount of \$2,000.00 after finding Jerry in contempt for “failing to comply with the

initial order . . . to provide an accounting at sixty (60) days intervals.” (Paula’s App. 3). In the June 16, 2009 order, the trial court declined to “alter the finding of contempt,” again finding that “an earlier accounting could have preserved some of the funds as John’s prolific habit of accessing his account could have been discovered at an earlier time and before the complete depletion of the bank accounts.” (Jerry’s App. 8).

Citing to Indiana Code section 29-3-9-6, Jerry maintains that “the trial court unreasonably ordered Jerry to provide accountings every two months” and that “Indiana law simply does not place such an onerous accounting burden on a guardian[.]” Jerry’s Br. at 12. Thus, he argues that the order was unlawfully issued. We disagree.

Indiana Code section 29-3-9-6(a) provides as follows:

Unless otherwise directed by the court, a guardian . . . shall file with the court:

- (1) at least biennially, not more than thirty (30) days after the anniversary date of the guardian’s appointment; and
- (2) not more than thirty (30) days after the termination of the appointment;

a written verified account of the guardian’s administration.

(Emphasis added). Accordingly, contrary to Jerry’s assertion, it was within the trial court’s discretion to order Jerry to provide more frequent accountings.

As to the evidence that Jerry willfully disobeyed the trial court’s order, on or about February 21, 2007, the trial court ordered Jerry to provide an accounting of the guardianship estate every sixty days. Jerry filed an “incomplete,” accounting six months later, in August of 2007; Jerry supplemented the accounting in May of 2008. (Paula’s

App. 2). The evidence shows that Jerry failed to obey the trial court's order; accordingly, we find no abuse of discretion in the trial court finding Jerry in contempt of court.

Regarding the amount of attorney's fees, Jerry argues that \$2,000.00 is unreasonable given the amount of attorney fees already incurred in the case.¹¹

Once a party has been found in contempt of court, monetary damages may be awarded to compensate the other party for injuries incurred as a result of the contempt. In determining an amount of damages the trial court may take into account "the inconvenience and frustration suffered by the aggrieved party. . . ." The determination of damages in a contempt proceeding is within the trial court's discretion, and we will reverse an award of damages only if there is no evidence to support the award.

City of Gary v. Major, 822 N.E.2d 165, 172 (Ind. 2005) (internal citations omitted).

The record shows that in February of 2007, the trial court ordered Jerry to provide an accounting every sixty days. On May 31, 2007, Paula, by counsel, filed a motion to enforce the trial court's order and a request for attorney's fees. By July 5, 2007, Jerry had not filed an accounting; therefore, Paula, by counsel, filed a motion for contempt and request for attorney's fees. Following a hearing in August of 2007 on Paula's motion for contempt, the trial court ordered Jerry "to submit an accounting to the Court in writing." (Jerry's App. 4). Jerry filed an accounting on September 17, 2007; however, on October 19, 2007, Paula filed a response "and Notice of Additional Failure in Duties." (Jerry's

¹¹ Jerry, however, does not argue that the trial court failed to take evidence on reasonable attorney fees. *See, e.g., Reed Sign Service, Inc. v. Reid*, 755 N.E.2d 690, 699 (Ind. Ct. App. 2001) (stating that "while taking of evidence on reasonable attorney fees is a preferable practice, . . . the trial court may take judicial notice of what constitutes a reasonable amount of attorneys fees"), *trans. denied*. Thus, this issue is waived. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied*.

App. 4). Paula filed a second motion for contempt and request for attorney's fees on January 14, 2008; and on May 7, 2008, filed a motion for an accounting and hearing thereon. The trial court held a hearing on May 21, 2008. Thereafter, Jerry filed an accounting on May 28, 2008.

Jerry clearly was dilatory in complying with the trial court's order, causing Paula to file several motions to compel Jerry's compliance, for the benefit of the guardianship estate. Given the evidence, we cannot say that the trial court abused its discretion in awarding Paula attorney fees in the amount of \$2,000.00.¹²

We note that Paula seeks costs pursuant to Indiana Appellate Rule 67(C), which provides that "[w]hen a judgment or order is affirmed in whole, the appellee shall recover costs." We hereby determine that Paula is entitled to costs and remand with instructions to the trial court to calculate the amount of appellate costs pursuant to Indiana Appellate Rule 67 and order Jerry to pay that amount.

Affirmed and remanded with instructions.

BAKER, C.J., and CRONE, J., concur.

¹² Citing to Indiana Code section 29-3-4-4, Jerry argues that Paula's attorney's services were not "provided in good faith" and therefore should not be paid from the guardianship estate. Indiana Code section 29-3-4-4 provides that any "attorney . . . whose services are provided in good faith and are beneficial to the protected person or the protected person's property is entitled to reasonable compensation and reimbursement . . ."; and "[t]hese amounts may be paid from the property of the protected person as ordered by the court." Here, the trial court did not order that Paula's attorney be reimbursed from the guardianship estate; rather, the trial court ordered that Jerry reimburse Paula's attorney from his own funds.