

2010 WL 1321280 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

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

No. 107,481.
February 22, 2010.

Appeal Form the District Court, Oklahoma County, Oklahoma, The Honorable Vickie Robertson, Presiding

Brief of Appellants

Steven M. Ditto OBA #2375, 1800 East Memorial Road, Suite 106, Oklahoma City, Oklahoma 73131, Telephone: (405) 478-3888, Fax: (405) 478-3893, Attorney for Respondents/Appellants.

William Shoot, James Shoot, Valerie Pettit and Tiffany Clements, Appellants/Respondents below

Charlotte Ream Cooper, Trustee of the Dorothy L. Shoot 2005 Revocable Trust of June 1, 2005-Appellee/Petitioner below

February 19, 2010

***i INDEX**

| | |
|---|----|
| STATEMENT OF THE CASE | 01 |
| SUMMARY OF THE RECORD | 03 |
| ARGUMENT AND AUTHORITIES | |
| PROPOSITION I: | |
| A TRUSTEE MAY ONLY COMPENSATE HERSELF FOR ACTIONS AND SERVICES RENDERED IN BENEFIT OF THE TRUST IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY | 12 |
| 60 O.S. §175.2 | 12 |
| PROPOSITION II: | |
| THERE WAS NEVER AN ORAL OR WRITTEN CONTRACT FOR SERVICES BETWEEN THE TRUST OR THE SETTLOR WITH COOPER | 13 |
| PROPOSITION III: | |
| AN ATTORNEY IN FACT MAY NOT PAY HERSELF FOR SERVICES FROM THE PRINCIPAL'S FUNDS IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY | 14 |
| <i>Panama Processes S.A. vs. City Service Co.</i> , 1990 OK 66..... | 14 |
| 58 O.S. §1081 | 14 |
| <i>Isenhower v. Duncan</i> , 1981 OK CIV APP 31..... | 15 |
| <i>Payton v. McAslin</i> , 1966 OK 4..... | 15 |
| PROPOSITION IV: | |
| THE SETTLOR LACKED LEGAL CAPACITY TO CONTRACT FOR SERVICES AFTER SHE WAS DECLARED INCAPACITATED AND A WARD OF THE COURT | 15 |
| 30 O.S. §1-11(A)(I2) | 15 |
| PROPOSITION V: | |

| | |
|--|----|
| THE TRUSTEE'S CLAIM OF GOOD FAITH OR RELIANCE UPON THE ADVICE OF COUNSEL IS NOT A VALID DEFENSE TO THE CHALLENGE OF REASONABLENESS | 16 |
| <i>Robinson v. Kirbie</i> , 1990 OK CIV APP 45..... | 16 |
| PROPOSITION VI: | |
| COOPER'S CLAIM FOR \$50.00 PER HOUR FOR ALL SERVICES IS NOT REASONABLE AND NECESSARY | 16 |
| <i>Buck v. Cavett</i> , 1960 OK 150..... | 17 |
| 60 O.S. §175.48 | 17 |
| §977, <i>Bogert Trusts and Estates</i> | 17 |
| <i>West Coast Hospital Assoc. Vs. Florida Nat'l Bank</i> , 100 S.O. 807 (Ala. 1958) | 17 |
| <i>Pipkin v. Pipkin</i> , 1974 OK 72..... | 17 |
| §980, <i>Bogert Trusts and Estates</i> | 17 |
| <i>In Re Locarno Building and Loan Assoc.</i> , 13 A.2d 791 (N.J. 1940) | 17 |
| <i>Appeal of Chaplin</i> , 177 A. 191 (NE 1935) | 17 |
| <i>Moore v. Cavett</i> , 1961 OK 288..... | 18 |
| Protective Services for Vulnerable Adults Act, 43A O.S. §10401 | 23 |
| CONCLUSION | 25 |
| <i>Collmer v. Collmer</i> , 1952 OK 259..... | 25 |

*1 STATEMENT OF THE CASE

This action for trust accounting and court approval of trustee expenditures and attorney fees was instituted by Charlotte Ream Cooper (“Cooper”), Appellee, as trustee of the Dorothy L. Shoot 2005 Revocable Trust against the four beneficiaries (Appellants/Respondents below) of the Trust. The action was instituted shortly after a finding of the Adult Protective Services of the Department of Human Services which substantiated caretaker (Cooper) **abuse** and caretaker exploitation, citing duplication in services paid for by Cooper from trust funds. Cooper alleged that all of her expenditures were reasonable and necessary to the administration of the Trust.

Cooper had only recently met the Settlor (Dorothy L. Shoot—“Dorothy”) and was first consulted in her role as “financial advisor.” At the time of their first meeting, Dorothy’s estate plan was the 1985 Dorothy L. Shoot Revocable Trust. However, after a few months, Cooper, with the aid of an attorney, became a Co-Trustee on Dorothy’s Trust and, two months thereafter, the old trust was revoked and Cooper became the sole trustee of the Dorothy L. Shoot 2005 Revocable Trust.

Approximately six months later, Dorothy was declared incapacitated pursuant to a *2 guardianship initiated by Cooper and became a ward of the court. No guardian of the estate was appointed and Cooper continued to act pursuant to a Durable Power of Attorney executed by Dorothy when the new trust was created. Dorothy’s two sons, William W. Shoot (“Bill”) and James L. Shoot (“James”), primary beneficiaries under the Trust, were appointed guardians of Dorothy’s person.

Following the establishment of the Guardianship, repeated requests were made by Bill and James for an accounting. Six months after the first request was made, Cooper, for the first time, revealed information which indicated the nature of the services that she was performing and her demanded compensation of \$50.00/hour for such services. Shortly after receiving this information, and after his review thereof, Bill reported to the Adult Protective Services that the documents revealed that Cooper and Dorothy’s attorney, Kent Polley (“Polley”) had performed what appeared to be duplicate services for Dorothy at the rates of \$50.00/hour and \$140.00/hour, respectively. An investigation was undertaken. The final report substantiated caretaker exploitation. Although no further action was taken by APS, the primary beneficiaries and Bill’s daughters, Valerie Pettit (“Valerie”) and Tiffany Shoot Clements (“Tiffany”), contingent beneficiaries, found themselves sued in district court.

Dorothy died on January 4, 2007 after the filing of this litigation.

Following the filing of this action, Appellants requested that Cooper be removed as Trustee. The trial court reserved the issue for trial.

Various distributions have been made to the primary beneficiaries, including proceeds from the sale of the residence. However, an order was entered by the trial court restraining the disposition of \$150,000.00 in cash proceeds from the Trust pending the outcome of the trial.

***3** Trial was held over a three day period and the Court approved Cooper's expenditures as reasonable and necessary and authorized or approved 858 hours or \$42,900.00 for Cooper, Polley's attorney fees of \$11,095.00 and Cooper's attorney fees of \$32,037.60. Compensation for Cooper's services was approved through January 31, 2007 and an additional application has been filed for approval of services rendered thereafter. The trial court has stayed prosecution of that application pending the outcome of this appeal. Attorney fees approved by the Court were for legal services performed through July 24, 2007, and do not include attorney fees for the trial. Cooper has filed an additional application for post-July 24, 2007 attorney fees and the application has been stayed pending the outcome of this appeal.

SUMMARY OF THE RECORD

1. Dorothy L. Shoot (Dorothy) was eighty-six years old in 2004 and had lived alone in the same residence in Oklahoma City since 1977. TT 472¹
2. Dorothy had many friends in her neighborhood who assisted her as needed. She had many friends in church who also assisted her. TT 473, 474 Through August, 2005, Dorothy had a solid support system exclusive of family and relatives. TT 475
3. Dorothy had two adult sons. William Shoot (Bill) lived in Oklahoma City and saw his mother at least once per week for years. TT 473 He took her on errands, took her to church, took her to restaurants and otherwise assisted her wherever necessary. TT 473
4. Dorothy's other son, James Shoot (James), was a psychiatrist living and working in Indiana. TT 361
5. Bill had two daughters, Valerie H. Pettit, (Pettit) and Tiffany Clements (Clements). Pettit ***4** lived in Virginia but kept in very close contact with Dorothy. TT 380, 384 It had been her desire for many years to move her grandmother to Virginia when her grandmother was no longer able to take care of herself. TT 385 Clements lived in California and was also very close to her grandmother, TT 463
6. In 1985, Dorothy created the Dorothy L. Shoot 1985 Revocable Trust of August 9, 1985. EX 15.² All of her assets were owned by the Trust. Her sons were primary beneficiaries and her granddaughters were contingent beneficiaries. Dorothy was the settlor and sole trustee.
7. Dorothy's assets and liabilities consisted of her mortgage-free residence in Oklahoma City, her paid-for car, household goods and furnishings and other personal property, her Chase Bank checking accounts, Chase Security/JP Morgan investor balance Class B accounts, Chase Security/JP Morgan Investor growth and income Class B account, a Transamerica annuity and GNMA Pool/MidFirst account. She received monthly electronic payments from her teachers' retirement and from Social Security. Her investments and financial accounts were handled through her financial advisor at Chase Bank and all information detailing her assets and expenditures was contained in her periodic bank statements. TT 181, 182, 218, EX 13
8. Dorothy wrote between 5 and 10 checks per month, 4 of which were donations to her church. Her utilities were paid either by check or electronically from her bank account. TT 184

9. Dorothy was diagnosed with [dementia](#) on November 17, 2004, after having failed cognitive examinations administered by Dr. Powar, her personal physician. TT 179. There is no dispute, however, that she was able to live alone and conduct her own business affairs in *5 November, 2004.

10. In late 2004, Bill suggested to his mother that she may want to consult with a "spiritual advisor," Fred Borden. TT 478 Since little was known about her ability to compensate him, Borden located and contacted Appellee herein, Charlotte Cooper (Cooper), owner and sole employee of Charlotte Ream Cooper and Associates, LLC, who held herself out as a financial advisor or, according to her brochure, a "personal financial manager." TT 187 Dorothy had her own Certified Public Accountant for years who prepared her tax returns. TT 217

11. A meeting was held with Cooper, Bill and Borden on November 6, 2004. TT 481 It was unknown at the time whether Dorothy could afford to pay Borden for services and it was decided that Cooper would need Dorothy to look over her finances with a view to providing financial oversight. TT 479 A second meeting was held involving Borden, Dorothy and Cooper on November 7, 2004.

12. Cooper did not indicate to Bill that she would charge \$50.00/hour to "look over" Dorothy' finances. TT 481 No contract for services was signed at the time, or was ever presented or signed, by Cooper and Dorothy. TT 189 Cooper recalls no other conversations with Bill concerning the \$50.00/hour rate.

13. That in November and December, 2004, Cooper met with Dorothy and her bankers. TT 188 Cooper became totally familiar with Dorothy' financial condition, including all assets, income and liabilities through these meetings. TT 182, TT 220 No other assets were ever discovered. TT 183

14. At Dorothy's request, Dorothy signed an authorization prepared by Cooper for release of *6 financial and administrative information to her two sons, Bill and JS, on November 26, 2004 (EX 33). The authorization remained in force and effect unless revoked in writing. Dorothy never revoked the authorization in accordance with its terms. TT 200 The document, however, was never revealed to her two sons.

15. Cooper had some knowledge and training with regard to the symptoms of dementia and older people. She knew some of the symptoms of problems with memory, ability to understand daily events and fear of being alone late in life and not having enough money to support themselves. From her contact with Dorothy in November, 2004, Cooper noticed that Dorothy had memory lapses and did not like being alone.

16. Cooper considered that the bulk of the services she was performing for Dorothy were services that would be performed by a "personal manager" or a "personal financial manager." TT 186, 187

17. No bill for services was presented by Cooper for her work in November and December, 2004, until March, 2005. EX 11 Cooper did not present bills on a monthly basis. TT 198

18. Kent Polley (Polley) had performed legal services for Dorothy for many years. In early March, 2005, Polley contacted Cooper and requested that Cooper perform financial and administrative services for Dorothy, although Cooper characterized herself as a "personal manager" after the filing of this litigation although there was never any reference to same in Cooper's billing statements.

19. Beginning in March, 2005, Polley met with Dorothy and Cooper for hours and hours at Dorothy' residence. In early March through the end of May, Cooper and Polley performed identical "services" many times with both of them present and with Polley charging *7 \$140.00/hour. These tasks included reviewing filed for legal documents, sorting, filing, reviewing bank and investment statements, opening mail, paying bills, reviewing other statements and other correspondence, making plans for visiting the bank and safety deposit box for the purpose of doing an inventory to the contents, transporting Dorothy to medical

appointments, transporting Dorothy to the bank, reconciling check register balances, etc., as set forth in Appellant's Exhibit 11. Cooper billed for 77.25 hours from March through June 16, 2005 and Polley billed for 49.75 hours during the same time frame. Cooper invoiced her billing statements for \$3,862.50 and Polley \$6,965.00 at \$140.00/hour. EX 11

20. Cooper's billing statements (Exhibit 11) are extremely meticulous and detailed. There is no reference whatsoever, however, to any discussion that Cooper had with Dorothy, Bill, James, Pettit or Clements concerning Cooper's charging \$50.00/hour or that Cooper had any discussions with Dorothy at all relating to her billing statements.

21. In late May, 2005, Polley and Cooper determined that Dorothy needed a new will and trust for the reason that the original 1985 will and trust could not be found. TT 235

22. Polley never contacted the attorney who had prepared the 1985 will and trust, to wit, Cynda Ottoway, who is still in practice in Oklahoma City. TT 625. When contacted by Appellants' attorney, however, Cynda Ottoway produced the original trust (EX 15).

23. Polley's billing records (EX 6) from June 2, 2005, indicate that he, along with Cooper, discovered the 1985 will in Dorothy's safety deposit box and promptly destroyed it. TT 232

24. On June 1, 2005, Polley prepared and Dorothy executed a new will and trust naming Cooper and Dorothy as co-trustees and retaining the same beneficiaries as the previous trust. Polley also prepared and Dorothy executed a Power of Attorney naming Cooper as attorney-in-fact. *8 EX 1 Polley wrote Bill on June 29, 2006, that neither Dorothy's 1985 will or trust could be found. EX 12

25. None of the Appellants were informed by either Polley or Cooper about the new estate plan documents. TT 482, 384, 466, 467

26. On June 29, 2005, 28 days after the new trust was created, Polley decided that Cooper should be the sole trustee of the new trust and Dorothy's name be removed in order to protect Dorothy from herself. Dorothy executed bank documents on that date which removed her as an authorized signatory on her own bank account and authorized Cooper to be the exclusive check writer. An amendment to the trust was prepared by Polley and signed by Dorothy which removed Dorothy as a co-trustee on July 14, 2005. TT 4

27. On June 29, 2005, the day that bank records were changed removing the authority of Dorothy to write a check on her own bank account, Cooper wrote a check out of the Dorothy personal bank account to "cash" for \$604.00 and paid Polley \$1,155.00 for three months legal services. EX 11, 22

28. On September 21, 2005, Dorothy executed a Durable Power of Attorney in favor of Cooper exclusively. EX 18

29. Dorothy continued to reside in the residence and Cooper continued to perform the same type of services. TT 11

30. Dorothy had [hernia](#) surgery on November 13, 2005, and entered Brighton Gardens to convalesce. Cooper continued to provide similar services although Dorothy was never to return to the residence. (Dorothy had [hip surgery](#) on December 19, 2005.) TT 289

31. On December 5, 2005, after communication with Bill and JS, Cooper hired attorneys to file *9 a Petition for Guardianship of Dorothy. The Petition, verified by Cooper, indicated that Dorothy was impaired and that she had an inability to receive and evaluate information effectively, to meet the essential requirements for her physical health and safety, had a complete lack of insight to her condition, lack of orientation as to time, place and day, confusion, and lacked sound judgment. Further, Cooper indicated that Dorothy had an inability to recognize her need for assistance with medications and nutrition and unable to

remember to take her prescription medications as prescribed and denied that she needed assistance with her medication. Cooper further indicated Dorothy was unable to prepare her meals and to eat without assistance. A special guardian was appointed and, on January 3, 2006, Bill and JS were appointed guardians of the person. Cooper continued to exercise oversight of the estate pursuant to the Durable Power of Attorney. No guardian of the estate was appointed. EX 10

32. In late November, 2006, Dorothy was moved into a nursing home in the Fountains at Canterbury in Oklahoma City where she would remain for the rest of her life.

33. On January 26, 2006, shortly after Dorothy was declared an incapacitated person and a ward of the court, Cooper received an email (EX 39) requesting a current accounting of Dorothy' entire financial condition to include accounting and expenses for more general activity to the present and to further include charges incurred and current financial resources and bank balances. Cooper replied that she would be happy to share the information with him in the "near future" (EX 38).

34. Cooper billed 149.75 hours, or \$7,487.50 from June 15, 2005 through October 31, 2005.

35. From November 11, 2005, the month in which Dorothy spent the last night in her residence, *10 through March 30, 2007, Cooper billed 637 hours (almost 16 full weeks/4 months) at \$50.00/hour, or \$31,850.00.

36. Cooper did not send any financial information as requested until late May, 2006, 3 1/2 months after the initial request. Cooper did not, however, send information regarding her fees, services or billing statements until July 7, 2006, after Bill sent a letter (EX 20) demanding an accounting for Cooper's and Polley's expenses. TT 482, 496

37. Jennifer Sullivan, Appellants' expert, is a vocational rehabilitation counselor who had extensive experience in testifying as a witness with regard to vocational issues, including transferable skills, exertion levels and current employment statistics. Ms. Sullivan characterized the various tasks set forth by Cooper in Cooper's billing statements and assigned job classifications to each. In Exhibit 43, Sullivan described many of the tasks performed by Cooper as house sitter, companion, home attendant, accounting clerk, and financial planner. She testified that house sitters, employees or contract workers, average \$8.64/hour +/- \$0.32/hour. That companions earn \$7.45/hour +/- \$0.15/hour. That home attendants earn \$9.34/hour +/- \$0.04/hour nationally and \$9.09/hour +/- \$0.16/hour in the State of Oklahoma. That an accounting clerk earns \$14.76/hour +/- \$0.03/hour on the national level and \$13.27/hour +/- \$0.15/hour in Oklahoma. That financial planners earn \$31.44/hour +/- \$2.74/hour. All of the wage statistics were from calendar years 2005 and 2006. TT 542-569

38. Louise Jennings testified that she had been the owner for 22 years of BAE, Inc., a company which provides services for the **elderly** or needy on a contract/hourly basis. She testified that her company provides many of the services Cooper provided and/ or billed for in *11 Respondents' Exhibit 21. She testified that her company had 9 or 10 competitors in the Oklahoma City area in 2005 and 2006. All of the companies were under the same listing in the telephone book. She testified that she always obtained a written service agreement before any services are performed. Her "stewards" keep time cards and her company invoices every two weeks or monthly. The company charges \$ 15.00/hour and at its peak had over 60 clients. Services were provided to clients who lived at home, in nursing homes and assisted living conditions. Among the services provided by her company are driving vehicles, delivering mis-delivered mail, visiting with neighbors, carrying food items from the refrigerator, cleaning out cabinets and closets, cleaning of debris and limbs from the yard, meeting physical therapy teams to review a care plan, attending family counsel meetings, helping to locate documents concerning taxes or bank accounts, helping to balance a checkbook, running errands, transporting clients to and from medical appointments, the grocery store and church, etc., as gleaned from EX 21. TT 569-589

39. Cheryl Winslow is the social services director at the Fountains at Canterbury where Dorothy lived from January, 2006 until her death. She testified that care plan meetings were held quarterly, neither the resident nor the family were required to attend and that each took 15 minutes. Some meetings were accomplished by telephone. She testified that family council meetings were done monthly, usually took an hour, and set forth general information applicable to all of the residents. Neither residents nor

family were required to attend. She also testified that laundry services were provided to the resident and that transportation was also provided to and from medical appointment and to and from hospitals. TT 589-602

40. Agnes Tobler is a 27 year employee of the Department of Human Services, the last 8 1/2 years ***12** in the Adult Protective Services Division. She received a complaint regarding Dorothy on July 13, 2006 from Bill. She interviewed Dorothy and found that Dorothy was indeed impaired and was unable to answer her questions. Her written findings were reported in Exhibit 14 signed on August 10, 2006. Her report indicated that Cooper, the caretaker, was guilty of caretaker exploitation, that Dorothy was impaired in ability to provide self-care and custody, to meet the essential requirements for mental or physical health or safety, was impaired in her ability to manage property and affairs and to protect herself from **abuse** without assistance. The report also indicated that Cooper had been condescending when demands for information were made concerning an explanation regarding why duplicative checks were written and why the checks were so high. She also testified that Cooper and Polley billed for opening mail, paying bills, reviewing bills, reviewing reconciled check registers, reconciling bank register to statements, etc. and submitted duplicate billings thereof for May 11, May 26, June 22, July 20, June 26, September 14 and September 21, all in 2005. TT 602-625

ARGUMENTS AND AUTHORITIES

PROPOSITION I

A TRUSTEE MAY ONLY COMPENSATE HERSELF FOR ACTIONS AND SERVICES RENDERED IN BENEFIT OF THE TRUST IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY

The powers and duties of a Trustee under an express trust are regulated by the trust instrument itself or by operation of law, as generally set forth in [60 O.S. §175.2](#).

It is clear from the 2005 Trust that Cooper had a variety of powers with regard to administration of the assets and liabilities of the Trust. It is also clear that the trust assets were few: ***13** a residence, a car, several financial accounts administered by the bank, and two monthly income payments. Liabilities were minimal and pertained to Dorothy's personal liabilities rather than trust liabilities. Article 5 of the 2005 Trust set forth the powers of the trustee and those provisions relate exclusively to assets, income and liabilities of the Trust.

The 2005 Trust also allows the Trustee to make distributions to or on behalf of Dorothy during Dorothy's lifetime (Article 4).

The 2005 Trust also requires that the Trustee exercise her powers in a fiduciary capacity (Article 5).

The 2005 Trust also provides for compensation of the Trustee as follows:

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

While Cooper was within her trust authority to make payments on behalf of the beneficiary, she was certainly not at liberty to pay herself tens of thousand of dollars in compensation for services rendered outside of the administration of the Trust estate.

PROPOSITION II

THERE WAS NEVER AN ORAL OR WRITTEN CONTRACT FOR SERVICES BETWEEN THE TRUST OR THE SETTLOR WITH COOPER

Cooper claims that her actions after June 1, 2005 were undertaken in her role as Trustee of the newly created Trust. Simultaneously, Cooper claims that at all times she had a contact with Dorothy for “personal services” as a “personal manager.” In support of her claim that she had a contract with Dorothy for \$50.00/hour for any and all types of services, Cooper testified that she discussed the matter with Bill in the November, 2004 meeting. Bill absolutely and categorically ***14** denied the discussion. Even if the hourly rate was discussed, clearly, the scope of services to be performed by Cooper at that time were related exclusively to a financial assessment of Dorothy’s ability to pay Fred Borden for future services.

Further, all of the beneficiaries have denied any discussion with Cooper concerning \$50.00/hour for all services. Indeed, it was the general understanding that Cooper would perform only financial assistance and other minimal services attendant thereto.

Cooper also testified that she discussed her fees with Dorothy on several occasions and whenever she wrote herself a check for services rendered. However, *there is absolutely no reference in any of her meticulously maintained records that Cooper ever had any such discussion with Dorothy.*

All checks written to Cooper for services rendered were filled out and signed by Cooper except for the first two payments for services rendered in March and April, 2005. After that, months would go by without any payment from Cooper to herself and, when payments were made, there is no written memorandum or reference whatsoever that Dorothy knew that any such payments were being made.

PROPOSITION III

AN ATTORNEY IN FACT MAY NOT PAY HERSELF FOR SERVICES FROM THE PRINCIPAL'S FUNDS IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY

A fiduciary is bound to act in the highest good faith toward her beneficiary. *Panama Processes S.A. vs. City Service Co.*, 1990 OK 66. An attorney-in-fact acting under a durable or non-durable power of attorney is bound by the standards of conduct and liability applicable to other fiduciaries. 58 O.S. § 1081.

***15** Should Cooper claim that she paid herself pursuant to the authority of the POA, it is clear that any such payments were improper and a conflict of interest. Where a fiduciary obtains title to the principals assets arising out of the attorney-in-fact relationship, the attorney-in-fact is not entitled to the beneficial interest and a constructive trust is established for the benefit of the principal. *Isenhower v. Duncan*, 1981 OK CIV APP 31. An agent or trustee cannot lawfully serve or acquire any private interest of its own in the estate of the principal. *Payton v. McAslin*, 1966 OK 4.

Clearly, Cooper benefitted from trust assets by the payment to herself in the sum of \$32,400.18 prior to the filing of this litigation for approval of fees.

PROPOSITION IV

THE SETTLOR LACKED LEGAL CAPACITY TO CONTRACT FOR SERVICES AFTER SHE WAS DECLARED INCAPACITATED AND A WARD OF THE COURT

Should Cooper claim that she continued to have a contract with Dorothy or that the previous contract was renewed following the establishment of the guardianship, it is obvious that Dorothy, after having been declared incapacitated, did not have the legal capacity to enter into any such contract for services whether oral or in writing. Dorothy was judicially determined

an incapacitated person and special guardians of the person were appointed on December 5, 2005. The dispositional order appointing permanent special guardians was signed on January 3, 2006. Dorothy was found by clear and convincing evidence to be an incapacitated person impaired by reason of dementia. She required 24 hour supervision to maintain her health and safety and was unable to make appropriate decisions because of cognitive impairment and her ability to deal with her assets was surrendered to Cooper pursuant to the Durable Power of Attorney of September 21, 2005 and the provisions of the Trust. Clearly, Dorothy was adjudicated an incapacitated person pursuant to [30 O.S. §1- *16 11\(A\)\(12\)](#).

Cooper insisted throughout the trial that she discussed payment for her services with Dorothy and that Dorothy directed and requested services to be performed even after Dorothy was declared incapacitated. However, Dorothy lacked the legal capacity to contract with anyone and Cooper's claim of a continuing verbal or newly created contract for services at \$50.00/hour is not justified by the evidence.

PROPOSITION V

THE TRUSTEE'S CLAIM OF GOOD FAITH OR RELIANCE UPON THE ADVICE OF COUNSEL IS NOT A VALID DEFENSE TO THE CHALLENGE OF REASONABLENESS

Throughout the trial, Cooper indicated that her actions were based upon advice given to her by her attorney. Cooper received legal advice in the spring and summer of 2006, particularly after the filing of a complaint with Adult Protective Services by Bill. Her attorneys entered the fray when Cooper received notice from APS. Shortly thereafter, this action for an accounting was filed and her attorneys have provided legal services in her defense to the objections in the tens of thousands of dollars.

A Trustee may not rely upon an assertion of good faith or upon the advice of counsel as a defense to a claim to the challenge of the reasonableness of the Trustee's alleged fees. [Robinson v. Kirbie, 1990 OK CIV APP 45](#).

PROPOSITION VI

COOPER'S CLAIM FOR \$50.00 PER HOUR FOR ALL SERVICES IS NOT REASONABLE AND NECESSARY

The decision of the trial court regarding approval of the \$50.00 omnibus per hour charge and that all of the tasks performed by Cooper were necessarily beneficial to the Trust is clearly against [*17](#) the weight of the evidence. [Buck v. Cavett, 1960 OK 150](#).

Cooper claims that all of the services and tasks performed by her and that the rate of \$50.00/hour for any and all of the services were reasonable and necessary and under the 2005 Trust and Durable Power of Attorney executed by Dorothy.

Although referred to in the 2005 Trust, the Trustee compensation provision is not specific. However, it closely parallels [60 O.S. §175.48](#) as follows:

“A. A trustee acting in a fiduciary capacity, as herein authorized, is entitled to receive such commission as provided for in the trust agreement or other contract. If the amount of such compensation or commission is not regulated by or stipulated in the trust agreement, the trustee may charge or deduct a reasonable compensation or commission for the services rendered and the responsibilities assumed...”

Included in the factors which have been used to determine “reasonable compensation” are the nature of the services performed in the course of administration and whether the services were routine or involving skill and judgment. [§977, Bogert Trusts and Estates](#). Where there is little labor in distribution of income, trustee fees may well be placed at a minimum. [West Coast Hospital Assoc. Vs. Florida Nat'l Bank, 100 S.O. 807 \(Ala. 1958\)](#).

The discretion granted to the trustee is not without limits. *Pipkin v. Pipkin*, 1974 OK 72. A trustee's compensation may be reduced or even forfeited entirely. Factors utilized by various courts include the failure to keep proper records of trust administration, failure to account in a timely fashion, and giving false information to beneficiaries. §980, *Bogert Trusts and Estates*. Further, where a trustee wrongfully fixes his own compensation and pays himself without seeking court approval, he may be denied compensations. *In Re Locarno Building and Loan Assoc.*, 13 A.2d 791 (N.J. 1940). A co-trustee who forces unnecessary litigation will be denied compensation in part. *Appeal of Chaplin*, 177 A. 191 (NE 1935).

*18 A trial court may charge the trust principal attorney fees and other expenses reasonably and necessary incurred by parties of litigation with respect to substantial and material issues in a trust only if an adjudication is essential to the proper administration of the trust and if the trust litigation is in good faith for the primary benefit of the trust as a whole. *Moore v. Cavett*, 1961 OK 288.

Cooper's charges overwhelmingly are for services totally unrelated to the administration of the Trust itself. A review of her billing statements clearly shows that over 90% of her time was spent in services which more properly could be categorized as "personal manager" services than trust administration.

The types of tasks performed and dates performed are set forth in Respondent's Exhibit 21:

| TASK | DATES PERFORMED |
|--|--|
| Driving the car around the block | 12/12/05, 3/8/06, 3/18/06 |
| Delivering mis-delivered mail to neighbors | 1/30/06, 5/20/06, 5/27/06, 7/29/06, 10/10/06, 12/20/06 |
| Visiting with neighbors | 12/12/05, 12/13/05, 3/23/06, 5/27/06, 7/29/06 |
| Clearing food items from the refrigerator | 3/23/06, 5/27/06 |
| Clear food items from cabinet for delivery to shelter | 7/7/06 |
| Organizing closet at the house (DLS in Brighton Gardens) | 11/26/05 |
| Checking on homes for sale | 7/29/06 |
| Check neighbor's house for sale | 9/1/06 |
| Clearing debris and limbs in the backyard & put out trash | 10/10/06 |
| Delivering laundry, organizing closet at Canterbury and delivering personal items (Canterbury) | 12/6/05, 1/30/06, 3/9/06, 3/23/06 |
| Meet with physical therapy team to review care plan | 1/10/06 |
| Family council meetings at Canterbury | 2/6/06, 3/6/06, 4/13/06, 6/5/06, 7/27/06, 8/7/06, 10/5/06, 10/18/06, 11/6/06 |
| Meet with Rod Edwards to review care plan | 2/10/06 |

| | |
|---|---|
| Reports to file taxes | 3/19/06, 3/25/06, 3/28/06, 3/30/06, 4/12/06 |
| Generate financial reports to Bill and Jim | 4/27/06, 5/21/06, 7/18/06, 7/20/06, 7/21/06, 10/16/06, 10/25/06 |
| No checks written for bills on dates charged for | 3/2/05, 3/16/05, 3/23/05, 3/30/05, 5/4/05, 6/15/05, 8/3/05, 8/10/05, 11/29/05, 12/4/05, 2/7/06. |
| Observing house cleaners, lawn care people, dishwasher repairman and carpet cleaner | 11/26/05, 12/13/05, 12/16/05, 12/20/05, 5/20/06, 5/27/06, 7/7/06 |
| Duplicate tasks charged by Cooper and Polley | 1/3/05, 1/4/05, 3/9/05 (twice), 3/23/05, 3/30/05, 4/7/05, 4/20/05, 4/27/05, 4/30/05, 5/4/05, 5/11/05, 5/18/05, 5/26/05, 6/1/05, 6/2/05, 6/15/05, 6/22/05, 7/14/05, 7/19/05, 7/20/05, 7/26/05, 7/27/05, 9/21/05, 11/20/05, 12/5/05 |
| Waiting during medical visits | 11/13/05 (hernia surgery), 12/19/05 (hip surgery), 12/17/05 & 12/18/05 (met ambulance at hospital), 11/3/06 (medical treatment at Edmond Medical Center), 11/25/06 (medical treatment at Edmond Medical Center) |
| Preparation of billing/statement for services | 7/25/06, 7/27/06, 8/30/06, 9/6/06, 9/20/06, 9/24/06, 10/2/06, 10/11/06, 10/15/06, 10/25/06, 11/29/06 |
| Travel to Target to obtain information on arrival of new stock to replace items in Dorothy's wardrobe | 7/27/06 |

***19** From March 1, 2005 through March 30, 2007, Cooper billed 858 hours, or 21.45 weeks, the overwhelming bulk of which constituted tasks in the nature of house sitter, companion, home attendant, or accounting clerk. Jennifer Sullivan testified that these types of tasks performed were ***20** compensated at the rate range of \$7.30/hour to \$13.42/hour in Oklahoma during the appropriate time period. Even the services of a financial planner would range from \$28.70/hour to \$34.18/hour, much less than the omnibus \$50.00/hour charged by Cooper.

Among the more egregious claims for compensation made by Cooper are the following:

On June 22, 2005, Cooper and Polley spent the day with Dorothy at the residence and made a trip to the bank. Polley charged 2.5 hours (\$350.00) and Cooper 7.5 hours, or \$375.00, for a total of \$725.00 for a few phone calls and a trip to the same bank that both had traveled to one week earlier on June 15th.

On July 14, 2005, Cooper billed for 7.5 hours which included taking Dorothy to get coffee and a dinner meal. Cost: \$375.00.

On August 24, 2005, Cooper billed for 5 hours which included an unknown amount of time for "errands." Cost: \$250.00

On September 7, 2005, Cooper billed 8 hours to include some amount of time for "errands." Cost: \$400.00

On November 12, 2005, Cooper billed 8 hours. Dorothy was charged \$50.00/hour for Cooper "moving her into her room at Brighton Gardens, unpacking, touring, and showing Dorothy where to get snacks." There was some amount of time for Cooper to "prepare list of to-dos for Sat/Sun/Mon." Cost: \$400.00

Cooper billed 13.5 hours. This was the date Dorothy had surgery at Deaconess Hospital and Cooper hung around all day. Cost: \$675.00

On March 18 and 19, 2006, long after Dorothy no longer lived at the residence, Cooper spent 13.75 hours at the house doing paperwork, driving the car around the block, opening, sorting and *21 reviewing mail and beginning preparation of tax worksheets and organizing tax documents. Cost: \$687.50 for just two days.

Not to be outdone, Cooper billed 3.5 hours on March 20th; 1.75 hours on March 21st; 2 hours on March 23rd and .25 hour on March 24th, totaling 7.5 hours, or \$375.00 over the four day period.

On March 19th, 20th 21st, 25th, 28th, 29th, 30th and April 12th, there are references in Cooper's notes regarding the gathering and preparation of tax information for the filing of the 2005 income tax return. Dorothy had her own CPA who had filed her tax returns for many years and virtually all asset and income information was available through periodic statements from Chase Bank.

On March 25, 2006, Cooper billed 10 hours for tasks involving income taxes, making a few phone calls and checking the house, yard and auto. Cost: \$500.00

The employee (Cheryl Winslow) of the nursing home testified that it was not necessary for Cooper to have had meeting with the staff at Canterbury and that the family council meetings contained simply generic information applicable to all of the residents. Nonetheless, Cooper billed for ten separate meetings with Canterbury staff.

Cooper also charged for tasks which were duplicated by Polley, at the same time and at the same location, including sorting mail, reviewing files, searching for documents, paying bills, etc., several times per month.

Cooper was totally incapable of breaking down the amount of time spent on each task and therefore relied upon the "bundling" of services in her billing statements. Cooper's request for approval of her billing statements should be denied on this basis alone because it cannot be determined how much time was spent on each task.

Cooper's billing statements do not indicate an arrival or departure time for trips Cooper made *22 to the residence or later to Brighton Gardens or to The Fountains at Canterbury. Cooper indicated, however, that on trips to the residence she charged one hour travel time, although no travel time whatsoever was indicated in the billing statements.

Cooper charged \$50.00/hour for entering expense information into a computer program which compiled her billing statements and then again, \$50.00/hour for "preparing" her billing statements.

In November, 2005, the month in which Dorothy checked into Brighton Gardens for her ensuing surgery and went straight to Fountains, never to return again to her residence, Cooper charged 83 hours, or \$4,162.00. This included a charge for 13.5 hours at the hospital while Dorothy had surgery. This cost the Trust \$675.00 for "waiting" and is patently unreasonable.

Cooper conducted no investigation with regard to obtaining assistance at a cheaper rate for many of the services she was performing at \$50.00/hour. The only person hired drove Dorothy to church and back or to the grocery store for \$8.00/hour.

However, Louise Jennings, the owner of BAE Inc., a company which provides services for the **elderly**, testified that she reviewed Respondent's Exhibit 21 above and that her company would perform most if not all of those services for \$15.00/hour. She had been in the business for 21 years and her company was listed in the phone book in 2005 and 2006. Her company had nine or ten competitors during the same time period in the Oklahoma City area. Had Cooper simply hired BAE, there would have been a savings of over 70% from the amount billed by Cooper for the same services.

Cooper also failed to make a timely accounting for the type and cost of her services to the beneficiary. It took her from January, 2006, until May, 2006, to provide a minimal accounting. She *23 did not provide documentation regarding her hours or rate per hour until July 7, 2006. From January 1, 2006, until July 7, 2006, she paid herself \$20,875.00.

The Protective Services for Vulnerable Adults Act, 43 A.O.S. § 10-101, et seq, recognizes that many older citizens are unable to manage their own affairs or to protect themselves from exploitation and are in need of protective services. Adult Protective Services is the department responsible for investigating complaints where adults are defined as persons who because of physical or [mental disability](#), incapacity or other disability are substantially impaired or unable to manage his or her property and financial affairs effectively without assistance from others (§103, §104). Caretaker exploitation is defined as the misuse of resources or money of another person for another person's benefit (§10-103(A)(6)(9)).

It is not reasonable and necessary to charge a trust for time spent and attorney fees incurred in defense of a substantiated complaint of caretaker [abuse](#). Cooper's July, 2006 billing statements make many references to Cooper's gathering of documents in response to the demand for documents made by Agnes Tobler and for meeting with Cooper's attorney in support of preparation of a response to the APS inquiry. This litigation was filed at least in part to absolve Cooper of wrongdoing arising out of the findings of Agnes Tobler on seven separate occasions from May 11, 2005 until September 21, 2005. To allow Cooper and her attorneys to use trust funds to defend Cooper's exploitation of Dorothy, is unconscionable.

Further, inferences may be drawn from Cooper's conduct that Dorothy was simply not aware and could not have approved, as Cooper insists, Cooper's and Polley's charges for services.

Clearly, Cooper waited until she gained control of the Trust and bank account before she paid Polley and herself. From the Aid to Court, Trustee's Payments to herself, EX 22, are the following *24 undisputed facts.

| CHECK NO. | DATE | PAID TO | SIGNED BY | AMOUNT |
|-----------|----------|----------------------------------|-----------------------|------------|
| 5957 | 3/9/05 | Charlotte Ream Cooper, ASSOC LLC | Dorothy L. Shoot | \$1,302.71 |
| 5975 | 5/4/05 | Charlotte Ream Cooper, ASSOC LLC | Dorothy L. Shoot | \$1,419.20 |
| 5997 | 6/29/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$604.00 |
| 6009 | 8/3/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$2,012.50 |
| 6017 | 8/22/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$2,037.50 |
| 6033 | 9/14/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$197.06 |
| 6046 | 10/5/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$500.00 |
| 6057 | 10/12/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$12.19 |

| | | | | |
|------|----------|-------------------------------------|-----------------------|-------------|
| 6085 | 12/23/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$2,500.00 |
| 6088 | 12/23/05 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$187.93 |
| 6096 | 2/6/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$42.17 |
| | 4/17/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$21.62 |
| 6110 | 5/10/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$3,000.00 |
| 6118 | 5/22/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$3,000.00 |
| 6120 | 6/10/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$95.00 |
| 6128 | 6/28/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$3,000.00 |
| 6129 | 7/7/06 | Charlotte Ream Cooper, ASSOC LLC | Charlotte Ream Cooper | \$11,875.00 |
| 6141 | 9/18/06 | | | \$4,400.00 |
| 6147 | 10/26/06 | | | \$1,537.50 |

*25 None of Polley's attorneys fees for services rendered in 2005 were paid with checks written or signed by Dorothy. EX 6

Cooper paid herself \$11,875.00 in July, 2006, shortly after having learned of the APS complaint. From July 2006 through October 2006, she paid herself a total of \$17,812.50. Shortly after the large July payment to herself, Cooper sold trust securities although Cooper did not know whether it was necessary to sell the securities at that time to meet Dorothy's expenses. TT 313

Also, after Polley and Cooper had spent many hours looking for Dorothy's estate plan documents from 1985, Polley told Bill that the original will and trust could not be found, although he had found the original will in the safety deposit box and destroyed it some 3.5 weeks previously.

It cannot be understated that Cooper never obtained a written agreement with Dorothy to provide services at any price and that after Dorothy signed two checks for services rendered in late 2004 and very early 2005, Cooper paid herself for all future services rendered. There is not a single mention in the time and task records maintained by Cooper of any conversation with Dorothy about the \$50.00/hour charges.

Accordingly, the \$50.00/hour omnibus rate and many tasks were not reasonable and necessary to the administration of the Trust.

CONCLUSION

An action for a trust accounting is equitable in nature. *Collmer v. Collmer*, 1952 OK 259. *26 Cooper never had a written or verbal contract with Dorothy or her Trust as conclusively shown by the lack of evidence in support thereof.

Most of the services provided were not reasonable and necessary to the administration of the Trust. Many of those services, if even considered under a theory of *quantum meruit*, to be a reasonable a necessary benefit to the beneficiary, were vastly overpriced at \$50.00/hour for all. Cooper could easily have found and hired others at \$15.00/hour to perform the overwhelming bulk of the 868 hours she charged the Trust. It is not reasonable, for example, for a trustee to pay herself \$50.00/hour to “travel to Target to obtain information on arrival of new stock to replace items in Dorothy’s wardrobe,” or for “clearing debris and limbs in the backyard and putting out the trash.” Cooper treated the trust assets as her own “birds nest on the ground” and totally and abjectly failed to provide the level and quantum of evidence necessary to approve her actions.

Accordingly, the decision of the trial court in all respects should be reversed and judgment entered accordingly in favor of Appellants.

Footnotes

- 1 Record 361-363 Volumes I, II, III referred to as “TT.”
- 2 Record 633-639, Respondent’s Trial Exhibits, referred to as “EX.”