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ORDER AND JUDGMENT

(Title of Document)

This page added to provide additional information required by NRS 111.312 Sections 1-2. (Additional recording fee applies)

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FILED

1 CASE NO. 10-PB-0117

2 DEPT. NO. I

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3 *The undersigned affirms that this document does not*
4 *contain the social security number of any individual.*

TED THUAN
CLERK

K. WILFERT DEPUTY

6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF DOUGLAS

9 In the Matter of the
10 Guardianship of:

ORDER AND JUDGMENT

11 LENA MAE LUNDY

12 An Adult Ward.

13
14 This matter commenced as a Petition to Appoint KayCee Zusman as Guardian over Lena
15 Mae Lundy. After appointment, and at the direction of this Court, KayCee Zusman undertook an
16 investigation to determine whether Lena's previous caretaker, Michael Spes, had control of Lena's
17 property. Following her investigation, Ms. Zusman filed a Motion to Compel Michael Spes to
18 Return Personal Property and to Reimburse the Guardianship Estate for Expenses Fairly Attributable
19 to Michael Spes. She subsequently filed a supplement to that motion. Michael Spes objected. After
20 reviewing the pleadings, this Court determined that an evidentiary hearing would be required.

22 Prior to the hearing, the parties filed a document entitled, "Stipulation for September 12,
23 2012 Hearing." In that document the parties stipulated that they would waive any pleading defect
24 in the proceedings, and any claim that this Court does not have jurisdiction. The parties
25 acknowledge that they have sought resolution of this issue in this guardianship proceeding, and
26 without filing a separate complaint, because they "desire to resolve this matter in a more simplified"
27 manner. See the September 12, 2012 Stipulation, p.1.
28

1 Prior to the hearing the parties agreed to try the matter in a summary fashion. They
2 stipulated to the admission of most documents. The documents objected to were admitted by the
3 Court despite the objection. Each party was fully heard on this matter.
4

5 Accordingly, this Court hereby finds as follows:

6 1. Since 2005, Michael Spes has provided assistance in caring for Lena Lundy. At the
7 time of the hearing, Lena Lundy was 95 years old.

8 2. From April of 2008 until the appointment of the Guardian, Michael Spes was the
9 represented Payee with the Social Security Administration.

10 3. From at least 2008 until November 30, 2010 (the date KayCee Zusman was
11 appointed as Guardian) Michael Spes owed a fiduciary duty to Lena Lundy. "A fiduciary
12 relationship exists when one has the right to expect trust and confidence in the integrity and fidelity
13 of another." *Powers v. USAA*, 114 Nev. 690, 700, 692 P.2d 596, 603 (1998). The existence of the
14 representative payee relationship was one of many factors supporting Lena Lundy's claim that a
15 fiduciary duty existed.
16

17 4. After her appointment, KayCee Zusman requested a full accounting from Michael
18 of his handling of Lena's money. She received what was essentially a check register. She did not
19 receive copies of checks. She received only a very few receipts generated by a store or vendor. Most
20 of the backup for the various expenses was in the form of a document created by Mr. Spes on his
21 computer.
22

23 5. After receiving the accounting, Ms. Zusman reviewed the accounting and identified
24 expenses paid for from Lena Lundy's accounts which benefitted Michael Spes.
25

26 6. The check register with Ms. Zusman's handwritten notes was reviewed by the Court.
27 Based upon the review, the testimony of Ms. Zusman, and other evidence presented at the hearing,
28 the Court finds that the adjustments made by Ms. Zusman to the accounting were substantially

1 appropriate. Ms. Zusman originally sought \$29,341.07 in reimbursement. The Court finds that the
2 appropriate amount of reimbursement is \$25,000. This reduction includes \$2,996.25 for interest
3 which Ms. Zusman could not locate, but which Mr. Spes showed, at the time of trial, had in fact been
4 paid by the bank and retained in Lena Lundy's account.
5

6 7. Mr. Spes in his testimony acknowledged that all of the credit card debt was his.
7 Evidence was also introduced showing that showing that new credit cards were opened up in the
8 joint names of Lena Lundy and Michael Spes after Mr. Spes became a caregiver. Mr. Spes' acts with
9 regard to these credit cards were completely inappropriate. The evidence indicates that most, if not
10 all, of the charges on those cards were incurred for Michael Spes's benefit. Any charges for Lena's
11 benefit appear to have been paid from her funds.
12

13 8. Mr. Spes' acts were a breach of his fiduciary duty to Lena Lundy. These include
14 but are not limited to using Lena Lundy's money to pay for his personal expenses and adding his
15 name to her credit cards and then using the cards to make purchases that benefitted him.
16

17 9. The Court finds that the following items of personal property belong to Lena Lundy
18 and not Mr. Spes: The cremains of Ms. Lundy's son, Harold Lundy; the oriental picture, two small
19 4-part oriental screens; two large accordion-type oriental screens; the oriental dolls; and the oriental
20 plates.
21

22 10. Mr. Spes failed to meet his burden of proof of establishing that Lena Lundy owed
23 additional rent, utilities, or other reimbursement costs to him. Further, Mr. Spes failed to present
24 evidence to support his claim that Lena Lundy somehow denied him access to his home and thus was
25 liable to reimburse him for a period of time in which he claims he was excluded from the home.
26

CONCLUSIONS OF LAW

27 Under trust law principles, if a Trustee fails to keep proper accounts, all doubts will be
28 resolved against him and not in his favor. *Confederated Tribes v. United States*, 248 F. 3d 1365

(Fed. Cir. 2001). The most elementary conceptions of justice and public policy require that the wrong-doer shall bear the risk of the uncertainty which his own wrong has caused. *Id.* Once a beneficiary has established her prima facia claim by proving the Trustee's breach of a fiduciary duty, the burden of explanation or justification shifts to the fiduciary. *Id.* A fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another. *Powers, supra.*

ORDER AND JUDGMENT

Having determined that Mr. Spes breached his fiduciary duty, the Court hereby orders and enters a judgment against Mr. Spes as follows:

1. Mr. Spes shall pay to the guardianship estate of Lena Lundy, KayCee Zusman as Guardian, the sum of \$25,000, plus interest at the statutory amount running from January 31, 2011, until paid in full.

2. All charges for all credit cards in the name of Lena Lundy and Michael Spes shall be paid solely and exclusively by Michael Spes. No credit card company shall have any right or claim against Lena Lundy for these charges. Michael Spes shall indemnify and hold Lena Lundy harmless from these charges. As established by the supplemental affidavit filed by KayCee Zusman, the following are some, but probably not all, of the credit cards which are subject to this Order:

- Bank of America #4264XXXXXXXXX5535 for \$6,236.97
- Bank of America #4264XXXXXXXXX2504 for \$3,008.36
- WaMu #4185XXXXXXXXX2430 for \$345.73
- Chase #4266XXXXXXXXX7633 for \$3,207.36
- Chase #4185XXXXXXXXX2430 for \$653.24
- Wells Fargo #4465XXXXXXXXX3132 for \$3,503.00
- Chevron #706XXXXXXX868 for \$2,547.00
- Sears #512XXXXXXX406 for \$5,769.00

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- Citibank #54241810XXXXXX for \$21,436.00
- Sunrise Credit #5491XXXX2488XXX? \$438.00

3. The following items shall be returned by Mr. Spes to Lena Lundy by delivering them to the Office of KayCee Zusman, the Guardian, no later than 30 days from the date of this Order:

- The cremains of Harold Lundy;
- The oriental picture
- Two small 4-part oriental screens;
- Two large accordion-type oriental screens;
- The oriental dolls; and
- The oriental plates.

4. Mr. Spes shall take nothing by way of his claims and all claims against Ms. Lena Lundy are dismissed with prejudice, including any claims related to any utilities or rent alleged to have been owed by Ms. Lena Lundy, or Mr. Spes' decision to leave the property.

5. This Order resolved all remaining disputes between Lena Lundy and Michael Spes. This Guardianship estate is not yet at a point where it can be closed. There is no just reason for delay in entry of final judgment as against Mr. Spes. Accordingly this Court finds and Orders that this Judgment be a final Judgment. NRCP 54(b).

DATED this 2 day of Oct, 2012.

David R. Gable

DISTRICT JUDGE

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original in file and of record in my office.

DATE February 15, 2013
TED THIRAN Clerk of the 9th Judicial District Court
of the State of Nevada, in and for the County of Douglas.

By *Heidi Lippell* Deputy