

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 06-10-2010  
PHILIP G. URRY, CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

IN THE MATTER OF THE ) 1 CA-CV 09-0558  
CONSERVATORSHIP OF: )  
EDWARD E. TREMBLE, JR., ) DEPARTMENT A  
A Deceased Minor. ) **MEMORANDUM DECISION**  
DONALD C. GALBASINI, as former ) (Not for Publication -  
court appointed attorney for the ) Rule 28, Arizona Rules  
Conservator in the Matter of ) of Civil Appellate  
EDWARD E. TREMBLE, JR., ) Procedure)  
Appellant, )  
v. )  
SOUTHWEST FIDUCIARY, INC. and )  
HEALTH MANAGEMENT SYSTEMS, INC., )  
Appellees. )

Appeal from the Superior Court in Maricopa County

Cause No. PB1996-000315

The Honorable Lindsay Best Ellis, Commissioner (Retired)

**VACATED AND REMANDED**

Murphy Law Firm, Inc.  
By Thomas J. Murphy  
Attorneys for Appellant

Phoenix

Bridget O'Brien Swartz, PLLC  
By Bridget O'Brien Swartz  
Attorneys for Appellee Southwest Fiduciary, Inc.

Phoenix

Jaburg & Wilk, PC  
By Lauren L. Garner  
Attorneys for Appellee Health Management Systems, Inc.

Phoenix

---

**O R O Z C O**, Judge

¶1 Appellant Donald C. Galbasini (Galbasini) appeals the probate court's order denying Galbasini's request for attorney fees and costs related to his representation of the conservator. For the following reasons, we vacate the order and remand for proceedings consistent with this decision.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 This case arises out of the conservatorship of Edward E. Tremble, Jr. (Edward).<sup>1</sup> On February 8, 1996, the probate court appointed Vernice Tremble (Vernice) conservator of Edward's estate. On August 19, 1998, Galbasini filed a notice of substitution of counsel indicating he would be representing Vernice in her capacity as conservator.<sup>2</sup> On April 4, 2007, the

---

<sup>1</sup> Because Edward shares the same last name "Tremble" with his paternal grandmother, we distinguish them by using their first names.

<sup>2</sup> The probate court also appointed Vernice trustee of a special needs trust created for Edward's benefit. Galbasini did not represent Vernice in her capacity as a trustee.

probate court removed Vernice as conservator and appointed a temporary successor conservator.<sup>3</sup>

¶13 On January 16, 2008, the probate court appointed Phyllis Tremble Hardin (Hardin) as permanent conservator. On September 8, 2008, Edward passed away. Subsequently, on October 23, 2008, the probate court appointed Hardin as successor trustee. On November 10, 2008, Galbasini filed a notice of appearance indicating that he would be representing Hardin in her capacity as both permanent conservator and successor trustee.<sup>4</sup>

¶14 On December 10, 2008, Galbasini filed an affidavit in support of a motion for attorney fees and costs requesting a total of \$46,736.65.<sup>5</sup> Pursuant to the affidavit, the fees requested were earned between September 2001 and December 2008. On December 22, 2008, the Arizona Health Care Cost Containment System Administration (AHCCCS), the remainder beneficiary of the special needs trust, filed a response in opposition to Galbasini's motion for fees and costs. AHCCCS argued that Galbasini's seven-year delay in requesting his fees and costs

---

<sup>3</sup> In the same order, the probate court removed Vernice as trustee and appointed Southwest Fiduciary, Inc. (SFI) as interim successor trustee.

<sup>4</sup> Based on the record, Galbasini did not represent anyone involved in the matter between April 4, 2007 and November 10, 2008.

<sup>5</sup> The record does not indicate that Galbasini ever filed a motion for attorney fees and costs.

"makes it extremely difficult to evaluate the appropriateness of the services rendered." AHCCCS also argued that Galbasini improperly sought payment for services during "a time when he was not representing the Conservator." Additionally, AHCCCS alleged Galbasini sought payment for services primarily for the benefit of Edward's parents relating to their property.

¶15 On December 23, 2008, the interim successor trustee, SFI, filed its response and objection to Galbasini's motion for fees and costs. SFI joined in AHCCCS's response and presented other objections. SFI argued it was unclear who Galbasini was actually representing, thus making it difficult to determine whose interests he was actually serving. For example, SFI noted that according to Galbasini's affidavit, "at no time did attorney Galbasini communicate directly with Vernice Tremble, his former client. All communications were with, or by and through, [Edward's] parents." SFI also questioned "how his services benefitted the estate." Lastly, SFI questioned the reasonableness of Galbasini's requested fees. In particular, SFI alleged Galbasini "proceeded to bill at his attorney rate to draft and issue checks out of his attorney trust account, which rate is not reasonable given the task performed and what is customarily charged by a fiduciary in this community for such services."

¶16 Galbasini replied to both responses, arguing the objections were misplaced. However, Galbasini's replies offered no new evidence, stating that "[a]ll services were fully detailed and can be adequately supported by attorney files and/or Court records." On February 20, 2009, a hearing was held on Galbasini's request for fees and costs. During the hearing, SFI raised an issue of timeliness and asked, "how do we evaluate the reasonableness of the fees? How do we know whether it was in the best interests of the estate?" Galbasini reaffirmed his arguments made in his replies but again offered no new evidence to prove the reasonableness of his requested fees. In fact, Galbasini stated, "I have a completely full file drawer of all the matters, all the things that have been involved covering the Ward virtually from the very start. . . . If anybody - if there's any specific item that was questioned, I can certainly copy and furnish that to the Court." The probate court took the matter under advisement.

¶17 On April 21, 2009, the probate court denied Galbasini's request for fees. On May 4, 2009, Galbasini filed a motion to set aside and reconsider the probate court's April 21, 2009 minute entry ruling. Galbasini requested the probate court set a new hearing date to allow Galbasini "to clarify the [s]ervices rendered, proof as to whom . . . services were rendered, what those services were and for, and to allow the presentation as to

why the fees were not presented annually and to show no harm was done to the Estate by any delay.”

¶18 On July 21, 2009, the probate court filed a signed order denying Galbasini’s request for fees and costs. The court stated:

1. The Court has reviewed the chronology of events presented by these complex protective proceedings and the court file. Despite the Court’s best efforts to fairly compensate [Galbasini] for proper and necessary attorney’s fees, it is unclear from the record what services were provided by attorney Galbasini solely for the initial Conservator and Trustee, Vernice Tremble, and what services were provided to others. The record remains unclear as to who [Galbasini] represented and in whose interests he was acting throughout this lengthy time period.
2. Most fees requested in the context of conservatorship proceedings are submitted and resolved on an annual basis. Due to the time period involved, the death of the ward and the claims of AHCCCS, . . . it is fair to place the burden on [Galbasini] to not only account for, but also justify, the amount requested and the appropriateness of the services provided. No reason is cited by counsel as to why the fees request is so belated or why billings were not submitted contemporaneously with the services provided.
3. As a result, the Court finds the fees request to be untimely.

¶19 Galbasini filed a timely notice of appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 and -2101.B (2003).

#### **DISCUSSION**

¶10 Galbasini raises one issue on appeal: whether the probate court abused its discretion in refusing to approve his

request for fees and costs. Specifically, Galbasini argues “[t]he trial court committed reversible error in denying [his] fee application because of the perceived but nonexistent belatedness.”

¶11 We review a trial court’s decision to grant or deny a request for attorney fees for an abuse of discretion. *Vicari v. Lake Havasu City*, 222 Ariz. 218, 224, ¶ 23, 213 P.3d 367, 373 (App. 2009). “An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion.” *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). We note, however, that “the trial court has a substantial degree of discretion in determining what is reasonable under the circumstances.” *In re Estate & Guardianship of Purton*, 7 Ariz. App. 526, 537, 441 P.2d 561, 572 (1968), *abrogated on other grounds by In re Marriage of Zale*, 193 Ariz. 246, 972 P.2d 230 (1999).

¶12 “If not otherwise compensated for services rendered, any . . . lawyer . . . appointed in a protective proceeding . . . is entitled to reasonable compensation from the estate of the protected person.” A.R.S. § 14-5414.A (Supp. 2009).<sup>6</sup> A petition for compensation for attorney fees in probate proceedings is

---

<sup>6</sup> We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

governed by Arizona Rule of Probate Procedure 33.<sup>7</sup> According to the comment to Rule 33, "[t]his rule is not intended to require court approval of fiduciary fees or attorneys' fees in all circumstances. Instead, this rule clarifies that if approval of fees is requested, the court may require that certain information be provided to assist the court in determining the *reasonableness* of the fees." (Emphasis added.) According to the comment to Rule 33, when reviewing an application for attorney fees:

[T]he court should consider, among other factors, the attorney's ability, training, education, experience, professional standing, and skill; the character of the work performed by the attorney (its difficulty, intricacy, and importance, time and skill required, and the responsibility imposed); the work actually performed by the attorney (the skill, time, and attention given to the work by the attorney); and the success of the attorney's efforts and the benefits that were derived as a result of the attorney's services.

¶13 In this case, the probate court essentially denied Galbasini's application for fees based on two reasons. First, the court found that the record was unclear as to whose interests Galbasini was representing. This is a proper factor to consider in determining the reasonableness of the application for fees. Second, the probate court also stated the application was untimely and that Galbasini failed to explain why. Based on the court's order, this second finding appears to be what the court primarily relied on in making its determination.

---

<sup>7</sup> Formerly Local Rule 5.7 (abrogated Feb. 9, 2009).



¶14 However, nothing in Rule 33, or in any statute or case law, requires an application for attorney fees in this setting be filed within any designated time. *In re O'Brien's Estate*, 18 Ariz. App. 375, 383-84, 502 P.2d 176, 184-85 (1972) (stating that a three-year statute of limitations on a claim for attorney fees does not begin to run where services are continuous in nature).<sup>8</sup> Although the delay in submitting the fee request might have made it more difficult for Galbasini to prove the reasonableness of his fees, it is not itself a factor to consider in determining reasonableness. A reasonable fee remains reasonable regardless of when an attorney applies for its payment. To the extent the probate court denied Galbasini's fees based on its finding that the application was untimely, the court abused its discretion.

¶15 Notwithstanding the probate court's abuse of discretion, we agree with SFI and AHCCCS that in some circumstances, a request for fees is clearly unreasonable. For instance, if the probate court finds Galbasini requested fees for services performed for a party other than the conservatorship estate, his fees might be unreasonable. Similarly, if Galbasini requested compensation for services performed while he was not

---

<sup>8</sup> In this case, Galbasini's services were continuous until Vernice was removed as conservator on April 4, 2007. His application was filed on December 10, 2008, before the statute of limitations period had run.

actually representing the conservator, that compensation would also be unreasonable.

¶16 However, we disagree with SFI and AHCCCS regarding other arguments. For example, compensation for issuing checks can be reasonable if the rate and time billed are appropriate. Likewise, seeking compensation for reviewing documents filed in a probate proceeding can be reasonable if the rate and time billed are appropriate. Lastly, we reject SFI and AHCCCS's argument relating to Galbasini's competence in maintaining Edward's eligibility for medical assistance as nothing in the record indicates Edward was ever ineligible.<sup>9</sup>

¶17 SFI and AHCCCS request their fees and costs incurred on appeal. Because we vacate and remand the matter for further proceedings, we deny their request.

---

<sup>9</sup> In their answering brief, SFI and AHCCCS raise an argument based on the doctrine of laches. This argument, however, was not raised before the probate court and is therefore waived on appeal. *Dugan v. Fujitsu Bus. Commc'n. Sys., Inc.*, 188 Ariz. 516, 521, 937 P.2d 706, 711 (App. 1997) (finding an argument waived because it was not raised before the trial court).

**CONCLUSION**

¶18 For the reasons previously stated, we vacate the probate court's order denying Galbasini's request for attorney fees. We remand this issue for a determination of the reasonableness of Galbasini's fees consistent with Rule 33.

/S/

---

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

---

DANIEL A. BARKER, Judge

/S/

---

LAWRENCE F. WINTHROP, Judge