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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Conservatorship of the Person and Estate of J.J.

TONYA MOORE, as Conservator, etc.,

Petitioner and Appellant,

v.

J.J.,

Objector and Respondent.

A129934

(Alameda County Super. Ct.
No. P-255409)

Tonya Moore appeals an order of the probate court that denied her request for further compensation as conservator of the person and estate of J.J. As discussed below, we reverse and remand so that the trial court may exercise its discretion to award further compensation for the period prior to January 1, 2009. In all other respects, we affirm.

BACKGROUND

In 2006, the Legislature enacted the Omnibus Conservatorship and Guardianship Reform Act of 2006. (Stats. 2006, ch. 491, § 1.) Among other things, the Legislation initially provided that, on or after July 1, 2008, a person could no longer act or hold himself or herself out to the public as a professional fiduciary¹ unless he or she had

¹ The Legislation defines “professional fiduciary” as a “person who acts as a conservator . . . or guardian . . . for two or more individuals at the same time who are not related to the professional fiduciary or to each other.” (Bus. & Prof. Code, § 6501, subd. (f)(1); see also Prob. Code, § 60.1, subd. (a).)

obtained a license pursuant to the Professional Fiduciaries Act.² (See former Bus. & Prof. Code, § 6530, subd. (a); former Prob. Code, § 60.1, subd. (b); Stats. 2006, ch. 491, §§ 3, 4.) These particular provisions were amended in 2007 to change the deadline for obtaining a license from July 1, 2008 to January 1, 2009. (See Bus. & Prof. Code, § 6530, subd. (a); Prob. Code, § 60.1, subd. (b); Stats. 2007, ch. 354, §§ 4, 70.)

It appears that, before July 1, 2008, Moore had acted as a “private professional conservator” under the prior law.³ She concedes she has not since obtained the license now required pursuant to the Professional Fiduciaries Act.

On October 29, 2008, Moore filed a petition seeking compensation for herself and fees for her attorney, Patricia Simmons. She attested the probate court had “duly appointed [her] conservator of the person and estate” of J.J. on November 3, 2005.⁴ She stated that her “hourly rate” was \$100, and that she had spent 56.05 hours attending to her duties as conservator for the period between November 3, 2005 and October 18, 2008. Accordingly, she requested \$5,605 as compensation.

At the hearing on the petition, on December 24, 2008, Simmons explained to the probate court that Moore had waited three years to seek compensation and fees, because initially the estate had had no assets. The conservatee, however, was the beneficiary of a trust established by her parents, and she received a distribution from the trust “every five years” in the amount of \$50,000.⁵ One such distribution had occurred earlier in 2008, and “that’s when we filed the petition.” The probate court noted the trust distribution

² Business and Professions Code section 6500 et seq.

³ Former Probate Code sections 2340 et seq. and 2850 et seq. (See, e.g., Stats. 2001, ch. 176, §§ 43, 47, pp. 1928, 1930–1931; see also former Prob. Code, §§ 2356, 2856.)

⁴ In her second petition for compensation, discussed below, Moore attested she was appointed conservator of the estate in November 2005, but was not appointed conservator of the person until December 18, 2008, six days prior to the hearing on her first petition. The itemizations attached to the second petition show Moore filed a petition for appointment as conservator of the person on October 29, 2008, the same date she filed her first petition for compensation, and that Simmons left her a message regarding her appointment on December 19, 2008.

⁵ Simmons also noted Moore was the successor trustee of the trust.

essentially worked out to \$10,000 per year, and suggested that the total sum of compensation and fees sought by Moore for a three-year period—about \$10,000 in “round figures”⁶—constituted a significant portion of the estate assets, which were, in effect, \$30,000 for the three-year period. The court also commented that there was an issue concerning Moore’s “not being licensed,” that the deadline for obtaining a license was “*January of ’08*,” and thus “there need[ed] to be a modification” of her compensation request for that reason. (Italics added.) The court instructed Simmons to “[d]o the arithmetic, modify the order, and I’ll sign it.” That same day, the court signed an order approving compensation for Moore in the amount of \$4,125 instead of the sum of \$5,605 Moore had requested.

Moore filed a second petition, together with her first account, on September 25, 2009. In this petition, she sought compensation and fees for the period of January 8, 2008 through August 16, 2009.⁷ As for compensation, Moore attested she had spent 106.75 hours on her duties as conservator during this period, and requested \$100 per hour for a total of \$10,675.

The probate court held its hearing on the second petition on December 10, 2009. At the outset, the court noted Moore still had not obtained a license; that it, therefore, could not approve \$100 per hour for her compensation. Moore said she had formerly been a “professional,” had unsuccessfully attempted to qualify for a license, and had run the conservatorship “in a professional manner.” The court responded that it would approve compensation for Moore at the rate of \$35 per hour—evidently the local rate for “non-professionals”—without prejudice to Moore to “do some sort of digging” in an effort to persuade the court to approve a higher amount. The court then continued the matter, and signed an order approving compensation for Moore in the amount of \$3,735.25, instead of the sum of \$10,675 Moore had requested.

⁶ Moore’s requested compensation of \$5,605 plus her request for \$4,235 in fees for Simmons totaled \$9,840.

⁷ We observe here a considerable overlap between the time periods for which Moore sought compensation in her first petition and second petition.

Simmons filed two declarations, on March 8 and April 5, 2010, in an attempt to convince the probate court to approve a higher rate of compensation. In these, Moore essentially sought to amend both the order of compensation made December 10, 2009, and also the first order of compensation made December 24, 2008. She claimed the court had erred in both orders by awarding compensation using the “layperson” rate of \$35 per hour instead of the rate of \$100 per hour, which was apparently the local “professional” rate. In Moore’s view, the court had determined she was not entitled to the professional rate after January 1, 2008, because she had not obtained her license as a professional fiduciary by that date, whereas her actual deadline to obtain a license had been “postponed” to January 1, 2009. Thus, she argued she was entitled to compensation at the rate of \$100 per hour for the time she spent on her duties as conservator during the period of November 3, 2005 through December 31, 2008. Citing to California Rules of Court, rule 7.756, Moore argued additionally that she was entitled to further compensation for her time spent on duties during the year 2009, due to “complexity of preparing the account,” and due to the conservatee’s “mental health issues” which had required services on Moore’s part that were “not routine.” Moore requested additional compensation in the total amount of \$5,968.75.

On April 7, 2010, the probate court held its hearing on the issue whether to approve additional compensation for Moore. The court commented essentially that it had considered the declarations, but they had not persuaded the court there was any need to modify its earlier awards of compensation. The court entered a minute order on that date denying Moore’s “request for further compensation.” Moore appeals from that order. (Code Civ. Proc., § 904.1, subd. (a)(10); Prob. Code, § 1300, subd. (f).)

DISCUSSION⁸

A. *Additional Compensation as a Professional Fiduciary*

Moore argues, as she did below, that she was entitled to compensation at the local “professional” rate of \$100 per hour, for the period ending December 31, 2008, because the deadline for obtaining a professional fiduciary license, pursuant to the Professional Fiduciaries Act (Bus. & Prof. Code, § 6500 et seq.), was “extended” to January 1, 2009.

As we have noted, certain provisions were amended in 2007 to change the licensing deadline from July 1, 2008 to January 1, 2009. They now provide that “[o]n and after January 1, 2009, no person shall act or hold himself or herself out to the public as a professional fiduciary unless that person is licensed as a professional fiduciary in accordance with” the Professional Fiduciaries Act. (Bus. & Prof. Code, § 6530, subd. (a); Prob. Code, § 60.1, subd. (b); Stats. 2007, ch. 354, §§ 4, 70.) This extension of deadline, however, was evidently intended to allow persons operating as “professional” conservators or guardians under the prior law an additional six months to comply with the licensing requirement. As such, they were essentially entitled to continue their existing “professional” practices until January 1, 2009.

However, the prior law that had regulated “private professional conservators” was no longer effective beginning July 1, 2008, and was repealed as of January 1, 2009. (See former Prob. Code, §§ 2345, 2856; Stats. 2006, ch. 491, §§ 6, 7; see also fn. 3, *ante*.) On July 1, 2008, replacement provisions became operable. (See Stats. 2006, ch. 491, § 5.) As amended, effective January 1, 2009, these provided that “[a] superior court may not appoint a person to carry out the duties of a professional fiduciary, or *permit a person to continue those duties*, unless he or she holds a valid, unexpired, unsuspended license as a professional fiduciary under [the Professional Fiduciaries Act (Bus. & Prof. Code, § 6500 et seq.)]” or is otherwise exempt. (Prob. Code, § 2340; see also Prob. Code, § 2341.)

⁸ No respondent’s brief was filed. In such circumstances we examine the record and consider the opening brief and oral argument, if any, to determine whether the trial court’s ruling was prejudicial error. (See *Conness v. Satram* (2004) 122 Cal.App.4th 197, 200, fn. 3; Cal. Rules of Court, rule 8.220(a)(2).)

In other words, as of January 1, 2009, the *probate court* had no power, on and after July 1, 2008, to appoint an unlicensed person to perform the duties of a professional fiduciary, or to permit an unlicensed person to *continue* performing those duties. (Prob. Code, §§ 2340, 2341.) Thus, while Moore was permitted, under Business and Professions Code section 6530, subdivision (a), and Probate Code section 60.1, subdivision (b), to maintain her existing “professional” practice without a license until January 1, 2009, the probate court had no authority to allow her to continue performing “professional” duties on or after July 1, 2008, and hence no authority to compensate her as a professional on or after that date.⁹

However, it is apparent the probate court misunderstood that Probate Code section 2340, relating to its authority to compensate a conservator as a “professional,” became operative July 1, 2008, and not January 1, 2008. We also note former Probate Code section 2340, which was in effect between its operative date of July 1, 2008, and its amendment effective January 1, 2009, only restricted the probate court’s authority to *appoint* an unlicensed person, and not its authority to permit an unlicensed “professional” to continue his or her duties. (Former Prob. Code, § 2340; Stats. 2006, ch. 491, § 5.) At the time that Moore filed her petition for compensation on October 29, 2008, and at the time of the hearing in December 2008, the statute did not preclude her from continuing as a professional fiduciary.

We will, therefore, reverse in part to permit the probate court to exercise its discretion to determine whether Moore may be entitled to additional compensation for the performance of her duties as a “professional” conservator for the period from November 3, 2005 through June 30, 2008. Moreover, given the language of former Probate Code section 2340, which was effective between July 1, 2008 and January 1,

⁹ In addition, the probate court’s appointment of Moore as conservator of the person of J.J., in December 2008, was not effective to appoint her to that role in the capacity of a professional fiduciary. In December 2008, the relevant statute provided that “[o]n and after July 1, 2008, a superior court may not appoint a person to carry out the duties of a professional fiduciary” unless he or she is licensed under the Professional Fiduciaries Act. (See former Prob. Code, § 2340; Stats. 2007, ch. 491, § 5.)

2009, we will also ask the probate court to consider whether Moore may be entitled to compensation for her continuing actions as a “professional” conservator between the period of July 1, 2008 through December 31, 2008 under former Probate Code section 2340 as it was worded at that time, which then did not prevent an unlicensed professional conservator from continuing in that capacity.

B. Extraordinary Compensation for Services in 2009

Moore concedes she was not entitled to a “professional” rate of compensation beginning January 1, 2009, but argues that her services in 2009 were extraordinary and not routine, and, in light of such circumstances, her compensation at the “layperson’s” hourly rate was not just or reasonable. She again cites the factors for determining compensation, to be considered pursuant to California Rules of Court, rule 7.756, and suggests the probate court did not adequately base its determination on a fair consideration of all applicable factors.

This contention, in our view, has no merit. Moore’s declarations, summarized above, argued this issue and there is no indication the probate court failed to consider her submitted arguments, including her recitation of the nonexclusive factors set out in California Rules of Court, rule 7.756. Nor is it clear from the record that the court improperly relied on a single factor. (See Cal. Rules of Court, rule 7.756(b).) For example, in making its order of December 24, 2008, the court considered the assets of the estate, as well as, the local rates developed for professional and nonprofessional conservators. (See Cal. Rules of Court, rule 7.756(a)(1), (9).) Similarly, the court had before it the time and nature of Moore’s services, as well as, her own estimation of the value of those services. (See Cal. Rules of Court, rule 7.756(a)(5), (8).) Moreover, Moore did not object to the court’s use of a local rate, so much as its failure to use the higher, “professional” rate. As we view the record, the court acted well within its discretion to deny additional compensation based on the “complexity” or nonroutine nature of the conservatorship.

DISPOSITION

The order of April 7, 2010, is reversed and remanded for the probate court to consider whether additional compensation may be appropriate for Moore as a professional fiduciary, for the period between November 3, 2005 and December 31, 2008. The court shall exercise its discretion in considering reasonable compensation under all the circumstances involving this limited estate. In all other respects, the order is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.