



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00824-CV

IN THE GUARDIANSHIP OF GEORGE V. GARCIA, an Incapacitated Person

From the County Court at Law No. 2, Webb County, Texas
Trial Court No. 2015PB6000016 L2
Honorable Jesus Garza, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: December 7, 2016

AFFIRMED

Appellant Fred Vincent Garcia Norris challenges several orders approving payment of fees to an attorney ad litem and guardian ad litem in the underlying contested guardianship case. We affirm the judgments of the trial court.

BACKGROUND

On February 17, 2015, Cynthia Garcia filed an “Application for Appointment of Permanent Guardian of the Person and Estate” seeking her appointment as guardian of her father, 82-year-old George V. Garcia (“George Sr.”). George Sr. was diagnosed with advanced Alzheimer’s disease a year prior to the filing. The same day, Cynthia also filed a “Motion for Appointment of Attorney Ad Litem” seeking the appointment of an attorney ad litem for George Sr.

Ten days later, Fred Vincent Garcia Norris filed his objections and contest to Cynthia's guardianship application. Norris is George Sr.'s second eldest son. Norris disagreed that his father was mentally incompetent, moved for disqualification of Cynthia's counsel, and challenged his father's designation of guardian.

On March 3, 2015, the trial court signed an order appointing Julio Arnoldo Garcia, Jr. as attorney ad litem to represent George Sr. in connection with Cynthia's guardianship application.

Norris then filed a "Motion for Temporary Orders and for Appointment of a Temporary Guardianship over George V. Garcia." Norris requested the appointment of a neutral party to act as temporary guardian over the person and estate of George Sr. to insure that Cynthia was not "drugging" or overmedicating their father. Norris also requested that George Sr. be allowed to rescind his 1995 will in which he and his brother, George V. Garcia II, were disinherited.

On April 28, 2015, attorney ad litem Garcia filed a "Motion to Modify Schedule and Conditions to Visit with Dr. George V. Garcia and Request for the Appointment of a Guardian Ad Litem for the Person." Garcia asked that George Sr. not be intimidated or asked to sign documents during visitation. In response, Norris moved for sanctions and to strike Garcia's motion.

On May 12, 2015, attorney ad litem Garcia filed an "Application for Interim Attorney Ad-Litem Fees." Garcia requested \$12,000 in compensation for the over 40 hours (\$300/hour) he had spent working on the case. On May 19, 2015, the trial court signed an order approving the fees.

On May 12, 2015, the trial court signed an "Order Permitting Visitation of George V. Garcia By His Two Sons" allowing Norris and George II to visit their father on Wednesdays and Saturdays from 3:00 pm to 6:00 pm (attorney ad litem permitted to stay for visit) and directing all parties from making any negative or derogatory remarks about each other to George Sr. The order further prohibited Norris and George II from having their father sign any paperwork during their visits or videotaping the visits.

Three days later, the trial court appointed Mary Capello as guardian ad litem of the person for George Sr. and Cynthia as temporary guardian of his estate. On June 5, 2015, Capello filed her “Application for Guardian Ad-Litem Fees” requesting \$9,477.50 in compensation for the over 40 hours (\$275/hour) she had spent working on the case. Attached to the motion was an itemized statement of services and fees. The trial court signed an order approving the fees.

On June 29, 2015, attorney ad litem Garcia filed an “Application for Interim Attorney Ad-Litem Fees.” Garcia requested \$7,620 in compensation for the over 25.4 hours (\$300/hour) he had spent working on the case. The trial court signed an order approving the fees.

On July 21, 2015, Capello filed a “Motion for Guardian of the Person Fees.” She requested \$10,725 in compensation for the over 40 hours (\$275/hour) she had spent working on the case since June 6, 2015. Attached to the motion was a sworn statement of services and fees. The trial court signed an order approving the fees.

Norris then filed a motion complaining of the fees associated with the attorney ad litem’s and guardian ad litem’s supervision of his visitation with his father. Norris asked that both the attorney ad litem and the guardian ad litem be discharged and replaced. On October 23, 2015, the trial court signed an order finding that the appointment of the ad litem was necessary and that the fees already paid to the ad litem were reasonable, necessary, and consistent with the fees charged by other attorneys for similar work and with similar experience in Webb County. The trial court denied Norris’s request to reevaluate fees already paid and to reduce or disgorge any of the fees paid to the ad litem; the trial court further refused to terminate or replace either of the ad litem.

On November 24, 2015, attorney ad litem Garcia filed an “Application for Interim Attorney Ad-Litem Fees and Reimbursement of Court Costs and Filing Fees” seeking \$23,250 for work done from June 27, 2015 through November 23, 2015, as well as reimbursement of court costs and

filing fees of \$114.21. The motion was accompanied by an affidavit and statement for legal services. Norris filed objections.

On December 1, 2015, Capello filed two separate applications for guardian of the person fees requesting \$11,297 and \$10,900, respectively, for work done July 20, 2015 through November 21, 2015. Both applications were accompanied by Capello's affidavit and an itemized statement for work performed. Norris filed an objection to both of Capello's applications for payment of fees. A hearing on the applications was set for December 9, 2015.

On December 11, 2015, the trial court signed an order approving the attorney ad litem's fees of \$23,250 and reimbursement of \$114.21.¹ The same day, the trial court signed an order approving the guardian of the person fees in the amount of \$11,297. Also, the trial court signed a third order approving guardian of the person fees in the amount of \$10,990.²

On December 15, 2015, the trial court signed an order approving attorney's fees for Cynthia's attorneys in the amount of \$16,241 (Emilio Davila, Jr.) and \$6,192.75 (Frank D. Barrera).³ Barrera and Davila filed an Application for Payment of Attorney's Fees on December 2, 2015 accompanied by their affidavits and statements of professional services rendered. Norris did not file an objection.

On December 23, 2015, Norris filed his amended notice of appeal.⁴ The amended notice of appeal states that Norris is appealing:

¹ The order erroneously recites that it was "heard" on November 23, 2015.

² Both of the guardian of the person orders erroneously recite that they were "heard" on December 11, 2015.

³ The order erroneously recites that it was heard in July 2015 (no day is provided).

⁴ A party has the right to appeal any "final order" in a guardianship proceeding. TEX. ESTATES CODE ANN. § 1022.001(c) (West 2014). A probate court order is final if it disposes of "all parties or issues in a particular phase of the proceedings." *De Ayala v. Mackie*, 193 S.W.3d 575, 579 (Tex. 2006). "[I]f there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of," the order is not final. *Id.* at 578; *In re Guardianship of Conis*, No. 12-14-00218-CV, 2014 WL 4922643, at *1 (Tex. App.—Tyler Sept. 30, 2014, no pet.) (mem. op.).

- (1) the November 23, 2015 order regarding the October 1, 2015 hearing finding that payment of fees to the ad litem was reasonable and necessary and refusing to terminate and replace the ad litem;
- (2) the December 11, 2015 order regarding the December 9, 2015 hearing which approved payment of \$23,250 in fees to the attorney ad litem;
- (3) the two orders dated December 11, 2015 regarding the December 9, 2015 hearing which approved payment of \$11,297 and \$10,900 in fees to the guardian ad litem; and
- (4) the December 15, 2015 order approving attorney's fees for Cynthia's two attorneys in the amount of \$16,241 and \$6,192.75, respectively.⁵

DISCUSSION

In ten issues on appeal, Norris argues the trial court abused its discretion in approving and awarding the payment of attorney ad litem and guardian ad litem fees and in not terminating and replacing the appointed ad litem. He contends the fees paid were illegal, excessive, and duplicitous in violation of the Texas Estates Code.

The probate court must order the payment of a fee set by the court to compensate attorneys appointed in guardianship proceedings. *In re Guardianship of Glasser*, 297 S.W.3d 369, 377 (Tex. App.—San Antonio 2009, no pet.) (citing former TEX. PROBATE CODE ANN. § 665A (Vernon Supp. 2008)).⁶ “The amount of compensation awarded to the ad litem lies within the sound discretion of the trial court. . . . A reviewing court will not overturn a fee award absent evidence showing a clear abuse of discretion.” *Brownsville–Valley Regional Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995) (citing *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 794

⁵ Even though Norris states he is also appealing the order granting attorney's fees, his brief raises no complaints regarding said order. All ten of his appellate issues relate to the ad litem fees/appointments.

⁶ Rule 173.6 also speaks to compensation of a guardian ad litem:

- (a) *Amount*. If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.
- (b) *Procedure*. At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(Tex. 1987)). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). When reviewing a trial court's decision under this standard, we must view the evidence in the light most favorable to the trial court's ruling and indulge every presumption in its favor. *Aqueduct, L.L.C. v. McElhenie*, 116 S.W.3d 438, 444 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We cannot set aside the award without examining the entire record to determine whether the trial court abused its discretion in awarding fees. *See Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996).

“The complaining party has the burden to bring forth a record to support its contention.” *Tex. Mut. Ins. Co. v. Olivas*, 323 S.W.3d 266, 274 (Tex. App.—El Paso 2010, no pet.); *Simon*, 739 S.W.2d at 795. When, as here, the appellant claims the trial court abused its discretion in awarding ad litem fees, the appellant must show that the trial court's judgment is arbitrary and unreasonable. *See City of Austin v. Janowski*, 825 S.W.2d 786, 788 (Tex. App.—Austin 1992, no writ). Absent a sufficient record, we must presume that the record contains evidence to support a judgment. *Simon*, 739 S.W.2d at 795; *Favaloro v. Commission for Lawyer Discipline*, 13 S.W.3d 831, 840 (Tex. App.—Dallas 2000, no pet.) (noting that points of error dependent on the state of the evidence cannot be reviewed without complete record and holding that appellant waived review by failing to bring complete record for review of trial court's award of attorney's fees).

Here, Norris specifically complains of four orders stemming from the October 1, 2015 and December 9, 2015 hearings. However, Norris failed to include the reporter's records from those hearings in the appellate record. In his reply brief, Norris states that he does not need the reporter's records because he is “adopting the sworn affidavit testimony of the ad litem Garcia and guardian ad litem or guardian of the person Capello, so there is no need for such transcripts nor controverting affidavits.” Norris's argument is unavailing. In the absence of a record on the ad litem fee

hearings, we do not know what evidence was presented supporting the ad litem's motions for fees for work performed in connection with the case and, therefore, we will presume the evidence is sufficient to support such award. *See City of Houston v. Woods*, 138 S.W.3d 574, 580 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Because evidence may have been presented at the hearings in support of the trial court's judgments, we must so presume. *See Simon*, 739 S.W.2d at 794-95; *Rhyne*, 925 S.W.2d at 666. Thus, Norris failed to demonstrate from the limited record before us that the trial court's award of ad litem fees was an abuse of its discretion. We therefore overrule all ten of Norris's issues on appeal and affirm the judgments of the trial court.

Rebeca C. Martinez, Justice