COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00353-CV

GUARDIANSHIP OF YUNG LO
YANG, DECEASED

FROM THE PROBATE COURT OF DENTON COUNTY
TRIAL COURT NO. PR-2015-00959

MEMORANDUM OPINION[1]

In six issues, Appellant Chin Hua Wang (Grace) appeals the trial court's order appointing a temporary guardian of the estate of her late husband, Yung Lo "Eddie" Yang, the trial court's order obligating her to pay 20% of the attorney ad litem's fees, and the trial court's supposed failure to enter findings of fact and conclusions of law. We will dismiss in part and affirm in part.

[1]*See* Tex. R. App. P. 47.4.

Eddie was born in 1945. He has three adult children—Appellees Michael Chung-Kai Yang, Lili Yang Callahan, and Emmy Yang Blevins.

In November 2015, Appellees filed an application for appointment of a temporary and permanent guardian of Eddie's estate. According to the application, Eddie was diagnosed with non-Hodgkin lymphoma in September 2012 and underwent surgery to remove a brain tumor. After the surgery, Eddie's mental and physical health slowly declined, and by 2015, he was completely nonverbal. Appellees sought appointment of a third-party temporary and permanent guardian not only because Eddie was totally incapacitated, unable to communicate, and unable to care for himself, but also because his estate was "at risk of imminent harm"—Grace, whom Eddie married in January 2013, had allegedly transferred large sums of money from Eddie's investment accounts to herself, had taken loans against Eddie's life insurance, and had changed beneficiary designations on Eddie's accounts.

Appellees served Grace with the application and notice of a hearing, and the trial court appointed Derbha Jones as Eddie's attorney ad litem. After a lengthy hearing on November 20, 2015, at which Grace appeared, represented by counsel, the trial court appointed J. Kevin Young as temporary guardian of Eddie's estate, signed a temporary restraining order enjoining both sides from accessing or withdrawing any part of Eddie's estate, and signed an order prohibiting any assets contained in Eddie's Morgan Stanley account from being

disbursed. A clinical neuropsychologist later examined Eddie and gave him a physical diagnosis of primary central nervous system lymphoma and a mental diagnosis of major neurocognitive disorder secondary to the lymphoma diagnosis.

Eddie died on January 24, 2016, approximately two months after the trial court appointed his estate a temporary guardian. Thereafter, Jones, Young, and Appellees filed applications for attorney's fees; Young filed a final accounting and an inventory, appraisement, and list of claims; and the trial court terminated Jones's appointment as Eddie's attorney ad litem. The trial court awarded Jones, Young, and Appellees attorney's fees, ordering that all but 20% of the fees awarded to Jones be paid from Eddie's estate. On August 18, 2016, the trial court signed an order discharging Young as temporary guardian of Eddie's estate and closing the guardianship. Grace timely requested findings of fact and conclusions of law, which the trial court signed and filed on November 4, 2016.

Grace's first four issues implicate the trial court's decision to appoint Eddie's estate a temporary guardian. She complains that the application was missing certain information, that a medical report was not on file, that alternatives to guardianship existed, and that the trial court improperly utilized an interpreter during the hearing on the application, violating her due process rights. Appellees respond that we lack jurisdiction to consider each of Grace's first four issues challenging the order appointing a temporary guardian, either because Grace's

notice of appeal was untimely or because the issues are moot. We agree with Appellees.

The estates code allows a party to "appeal from an order or judgment appointing a guardian." Tex. Est. Code Ann. § 1152.001 (West 2014). A "guardian" is defined to include a temporary guardian, including a guardian of the estate of an incapacitated person. *See id.* § 1002.012(a)(3), (b)(1) (West 2014). At least one intermediate appellate court has held that an order appointing a temporary guardian is final and appealable, but this court has previously indicated that such an order is interlocutory and appealable. *Compare In re Cunningham*, 454 S.W.3d 139, 144 (Tex. App.—Texarkana 2014, orig. proceeding) (reasoning that order appointing temporary guardian is final), *with In re Hart*, No. 02-14-00260-CV, 2015 WL 2169130, at *1 (Tex. App.—Fort Worth May 7, 2015, orig. proceeding) (mem. op.) (reasoning that order appointing temporary guardian is appealable, interlocutory order); *see generally De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006) (discussing exception to "one final judgment" rule and observing that "determining whether an otherwise interlocutory probate order is final enough to qualify for appeal[] has proved difficult"). We need not take this opportunity to reassess whether an order appointing a temporary guardian is final or interlocutory because, either way, Grace's first four issues suffer from fatal jurisdictional defects.

The trial court signed the order appointing Jones temporary guardian of Eddie's estate on November 24, 2015. Grace filed her notice of appeal just under ten months later, on September 16, 2016. If the order appointing Jones temporary guardian of Eddie's estate was final for purposes of appeal, then Grace's notice of appeal was clearly untimely because it was not filed within thirty days of November 24, 2015. *See* Tex. R. App. P. 26.1; *In re Estate of Padilla*, 103 S.W.3d 563, 566–67 (Tex. App.—San Antonio 2003, no pet.) (dismissing attempted appeal from final, appealable probate order because notice of appeal was untimely); *Ashmore v. N. Dallas Bank & Tr.*, 804 S.W.2d 156, 158–59 (Tex. App.—Dallas 1990, no pet.) (same).

If the order was instead interlocutory and appealable, not only did Grace not timely pursue an interlocutory appeal of the November 24, 2015 order appointing Jones temporary guardian of Eddie's estate, *see* Tex. R. App. P. 26.1(b), 28.1(a), but she is precluded from alternatively challenging the order in this appeal because the order is now moot—Eddie died; the trial court approved a final accounting, discharged Young, and closed the guardianship; and unlike Grace's fifth issue, which challenges part of an award of attorney's fees, none of Grace's first four issues implicate any remaining controversy between the parties. *See Hernandez v. Ebrom*, 289 S.W.3d 316, 321 (Tex. 2009) (presuming that legislature could not have intended to allow party to appeal order denying motion to dismiss inadequate expert report after full trial on underlying health care

liability claim); *Isuani v. Manske-Sheffield Radiology Grp., P.A.*, 802 S.W.2d 235, 236–37 (Tex. 1991) (holding that final judgment rendered temporary injunction moot); *see also Zipp v. Wuemling*, 218 S.W.3d 71, 73–74 (Tex. 2007) (reasoning that death of ward did not moot guardianship appeal because issues involving who should wind up estate, fees, and costs remained in controversy).

Accordingly, whether stemming from an untimely notice of appeal or from mootness, the result is the same: We lack subject-matter jurisdiction to consider Grace's first four issues. *See Meeker v. Tarrant Cty. Coll. Dist.*, 317 S.W.3d 754, 759 (Tex. App.—Fort Worth 2010, pet. denied) ("The mootness doctrine implicates subject-matter jurisdiction."); *In re K.M.Z.*, 178 S.W.3d 432, 433 (Tex. App.—Fort Worth 2005, no pet.) ("The timely filing of a notice of appeal is jurisdictional in this court, and absent a timely filed notice or extension request, we must dismiss the appeal.").

In her fifth issue, Grace argues that the trial court abused its discretion by ordering her to pay 20%, or $1,274.20, of the attorney's fees awarded to Jones, Eddie's attorney ad litem. She contends that there is no evidence that she acted in bad faith or without just cause in objecting to Appellees' application for appointment of a temporary and permanent guardian of Eddie's estate.

We review a trial court's decision to award attorney's fees for an abuse of discretion. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012). Evidentiary sufficiency issues are not independent grounds under this standard

but are relevant factors in assessing whether the trial court abused its discretion. *Halsey v. Halter*, 486 S.W.3d 184, 187 (Tex. App.—Dallas 2016, no pet.); *see Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). The hybrid analysis involves a two-pronged inquiry—whether the trial court had sufficient evidence upon which to exercise its discretion and, if so, whether the trial court erred in its application of that discretion.[2] *City of Houston v. Kallinen*, 516 S.W.3d 617, 626 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (op. on reh'g).

The trial found that Grace acted in bad faith and without just cause in objecting to the application.[3] The trial court presumably relied upon estates code section 1155.151(c), which allows a trial court to assess an ad litem's fees against a party who acted in bad faith or without just cause in objecting to an application for guardianship. Tex. Est. Code Ann. § 1155.151(c) (West Supp. 2016); *see In re Guardianship of Laroe*, No. 05-15-01006-CV, 2017 WL 511156, at *21 (Tex. App.—Dallas Feb. 8, 2017, pet. filed) (mem. op.) (looking to rule of

[2]We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999).

[3]Grace does not specifically identify this finding in her argument, but it is readily apparent that she challenges it. *See Shaw v. Cty. of Dallas*, 251 S.W.3d 165, 169 (Tex. App.—Dallas 2008, pet. denied) ("A challenge to an unidentified finding of fact may be sufficient if we can fairly determine from the argument the specific finding of fact which the appellant challenges.").

civil procedure 13 to construe section 1155.151(c)'s "bad faith" standard and reasoning that essential element of bad faith is improper motive).

The evidence viewed in the light most favorable to the trial court's finding shows that Grace possessed approximately $70,000 that she had withdrawn in large sums from one of Eddie's accounts, that each Appellee testified that the funds were not being used for Eddie's care, and that Grace had transferred ownership of Eddie's house to her daughter. Grace did not file a written pleading objecting to the temporary guardianship but vigorously contested the several means by which Appellees sought to ensure that Eddie's estate was not depleted. In requesting that part of her fees be assessed against Grace, Jones expressed concern about Grace's failure to file any pleadings, "even a notice of appearance," and the potential adverse effect that failure could have on other parties who later become involved in the litigation.[4] The trial court did not abuse its discretion by ordering Grace to pay $1,274.20 of Jones's fees.[5] We overrule Grace's fifth issue.

Grace argues in her sixth issue that the trial court abused its discretion by refusing to issue findings of fact and conclusions of law. The trial court did not issue findings and conclusions within twenty days of Grace's September 6, 2016

[4]A related probate proceeding was underway.

[5]Insofar as the finding of fact that Grace challenges is a conclusion of law, it is not erroneous. *See City of Austin v. Whittington*, 384 S.W.3d 766, 779 n.10 (Tex. 2012) (explaining that we may review conclusions of law to determine their correctness based upon the facts).

request, *see* Tex. R. Civ. P. 297, but it did eventually issue them on November 4, 2016, and they were included in a supplemental clerk's record filed with this court. The trial court may file findings of fact and conclusions of law after the deadline to file them has expired. *Robles v. Robles*, 965 S.W.2d 605, 610 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). When a trial court files belated findings and conclusions, the only issue is whether the appellant was harmed either because she was unable to request additional findings and conclusions or because she was prevented from properly presenting an appeal, not whether the trial court had jurisdiction to make the findings. *In re E.A.C.*, 162 S.W.3d 438, 443 (Tex. App.—Dallas 2005, no pet.). The supplemental record was filed before Grace filed her brief on the merits and well before her reply brief, and she does not otherwise argue that she suffered any harm caused by the late findings and conclusions. We overrule her sixth issue.

We dismiss Grace's appeal insofar as she challenges the trial court's order appointing a temporary guardian for Eddie's estate. We affirm the trial court's order assessing ad litem fees against Grace.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DELIVERED: July 13, 2017