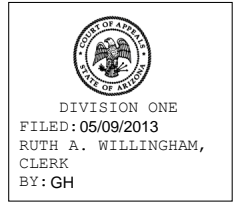


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Guardianship) 1 CA-CV 12-0518
and Estate of:)
) DEPARTMENT D
FRANCISCO JESUS MUNOZ-GOMEZ,)
) **MEMORANDUM DECISION**
) (Not for Publication
) - Rule 28, Arizona
A Minor.) Rules of Civil
) Appellate Procedure)
_____)
BRIDGET O'BRIEN SWARTZ, from the)
LAW OFFICE OF BRIDGET O'BRIEN)
SWARTZ, P.L.L.C.,)
)
) Appellant,)
)
) v.)
)
CRAIG R. EIRICH, as Trustee of)
THE FRANCISCO JESUS MUNOZ-GOMEZ)
IRREVOCABLE TRUST,)
)
) Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB2010-001717

The Honorable Richard L. Nothwehr, Commissioner

AFFIRMED

Jaburg & Wilk, P.C.
By Bridget A. O'Brien Swartz
Attorneys for Appellant

Phoenix

N O R R I S, Judge

¶1 Appellant, Bridget A. O'Brien Swartz appeals the probate court's order partially denying her request for attorneys' fees. On appeal, she argues the probate court failed to understand the complexity of the work she performed, abused its discretion, and misapplied the governing law by only relying on one factor -- a cost-benefit analysis -- in partially denying her fee request. For the reasons discussed below, we disagree, and affirm the probate court's fee award.

FACTS AND PROCEDURAL BACKGROUND

¶2 An out-of-state law firm representing a minor in a medical malpractice lawsuit retained O'Brien Swartz to assist in seeking the appointment of a conservator for the minor and obtaining approval of a medical malpractice settlement on his behalf. O'Brien Swartz determined the minor needed a trust that could be converted into a special needs trust if the minor's disability persisted and as the circumstances warranted, which she then prepared. Through frequent consultations with the minor's family, she also discovered the minor's trust needed to be specially structured to ensure the minor's family remained eligible for public benefits. She also substantially assisted the law firm and the other attorneys involved in complying with Arizona rules and law, drafted pleadings, and performed various other tasks.

¶13 After conducting an evidentiary hearing ("first hearing"), the probate court approved a \$550,000 settlement for the minor and allocated over 50% of the settlement to costs and attorneys' fees: \$946.26 for a medical lien, \$220,000 in attorneys' fees and \$50,638.37 in costs¹ to the law firm, and \$6,443.18 in attorneys' fees to O'Brien Swartz for work she performed from June 11, 2010 through September 30, 2010.

¶14 Subsequently, O'Brien Swartz requested an additional \$7,067.71 for work performed from October 20, 2010 through February 28, 2011. After holding oral argument on her fee request, the court, however, awarded O'Brien Swartz \$3,000 in fees, less than half of the additional fees she had requested ("final fee award").

DISCUSSION

¶15 As discussed, O'Brien Swartz argues the probate court failed to understand the complexity of her work, abused its discretion, and misapplied the governing law in only relying on one factor -- a cost-benefit analysis -- in partially denying her fee request.

¶16 In making these arguments, O'Brien Swartz relies on *In re Guardianship of Sleeth*, 226 Ariz. 171, 244 P.3d 1169 (App. 2010). There, we held a probate court should consider a number

¹The law firm subsequently refunded \$1,536.82 of the awarded costs to the minor.

of factors in determining the reasonableness of a request for attorneys' fees:

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.

Id. at 175, ¶ 17, 244 P.3d at 1173 (quoting Ariz. R. Prob. P. 33, cmt. ("Rule 33")). In addition, we identified other factors that would aid a court in determining whether fees are reasonable, such as:

the usual and customary fees in the legal community; the risks and responsibilities associated with the services; the estate's size; the character of the services or the complexity of the issues; the amount of time required; the skill and expertise required; the experience, reputation, and ability of the provider.

Id. at 176 n.6, ¶ 20, 244 P.3d at 1174 n.6 (citing National Probate Court Standards, § 3.1.5 cmt.).

¶17 In identifying these factors, we emphasized that an attorney has a "duty to undertake a cost-benefit analysis at the outset and throughout their representation to ensure that they provide needed services that further the protected person's best

interests and do not waste funds or engage in excessive or unproductive activities." *Id.* at 175, ¶ 18, 244 P.3d at 1173.

¶18 Here, as *Sleeth* commands, the probate court evaluated and weighed the total amount of fees O'Brien Swartz had requested in the case -- the fees awarded for work performed through September 30, 2010 and the fees she had requested for work performed after that date -- against the benefits the minor received from her work. In so doing, and contrary to O'Brien Swartz's argument, the court considered several *Sleeth* factors and did not abuse its discretion in making the final fee award. *Id.* at 174, ¶ 12, 244 P.3d at 1172 (appellate court reviews probate court's award of attorneys' fees for abuse of discretion).

¶19 In making the final fee award, the court noted that at the first hearing it had inquired "no less than four" times about expenses, had urged the attorneys to "limit[] expenses" and minimize "administrative costs," and had asked everyone "to keep costs down." The court also noted, in its experience, a similar trust should cost approximately \$3,000 to \$4,000, but here, the trust had already cost the minor \$6,443.18 from O'Brien Swartz alone. Although O'Brien Swartz argued "[n]o one went into this arrangement ill-informed or unknowingly," the court disagreed, stating it "was unaware of the significant

additional costs" for work to be performed after the first hearing, and noting "[n]o one suggested or notified the family or this [c]ourt . . . additional funds would be expended for additional attorney[s'] fees." The court also stated it was "told that there should not be a delay in funding the trust," a comment that suggests the court did not anticipate significant, additional work after the first hearing. It further noted O'Brien Swartz had performed substantial work from October 1, 2010 through October 20, 2011, and stated that if it had known she had more work to perform, it would have taken steps to ensure her fees were included in the \$220,000 awarded to the law firm.

¶10 The court acknowledged O'Brien Swartz had performed "various tasks" to complete the settlement and distribution for the minor, and "[n]o one, including the [c]ourt [was] arguing that [O'Brien Swartz] was not performing work on behalf of the [m]inor." But, after considering that the only disbursements from the trust were for attorneys' fees and bond renewal, the amount of fees it had already awarded, "the limited amount of money to be protected, and the manner of protecting the money," the court concluded the "fair and reasonable" amount of fees to award to O'Brien Swartz was \$3,000.

¶11 In short, the record reflects the probate court considered O'Brien Swartz's skills, the overall work she performed, the complexity of the work, the amount of time required to complete the work, the benefit to the minor and his family, the size of the minor's estate -- only \$255,000 originally -- which was less than half of the settlement, whether O'Brien Swartz's fee estimates were reasonable, the total amount of fees it had awarded to O'Brien Swartz as well as to the law firm, and the additional amount O'Brien Swartz had requested, in light of being advised to "keep costs down."

¶12 The issue is not O'Brien Swartz's expertise, the quality of her work, or whether her work benefited the minor. The record reflects these factors supported her fee request. The issue is whether, given the \$6,443.18 in fees she had already received, her request for an additional \$7,067.71 in fees was reasonable. Courts should not reach conclusions on facts not in the record. *In re Fallers*, 181 Ariz. 227, 229-30, 889 P.2d 20, 22-24 (App. 1994). And, generally, when parties disagree over the reasonableness of a fee request, the adversarial process will provide a court with the necessary facts to determine the amount of fees to award. Occasionally, however, as here, no one opposes a fee request. In that situation, we must rely on the trial court's experience to

evaluate the reasonableness of the hours for which fees are requested. See *Sleeth*, 226 Ariz. at 176 n.6, ¶ 20, 244 P.3d at 1174 (probate court should consider "the usual and customary fees in the legal community" in determining reasonableness of fee request); Ariz. R. Prob. P. 33, cmt. (probate court should consider "the fees customarily paid to agents or employees for performing like work in the community"); Ariz. St. Code of Jud. Admin. § 3-303(D)(3)(a) (in determining reasonable compensation, judicial officer shall consider "[t]he usual and customary fees or market rates charged in the relevant professional community for such services").²

¶13 The party requesting fees has the burden of proof to present sufficient evidence about the reasonableness of the hours and fees requested. See *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188-89, 673 P.2d 927, 932-33 (App. 1983) (party seeking fees must present evidence amount of hours expended was reasonable); cf. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990) (party seeking fees under A.R.S. § 12-341.01 has burden to prove entitlement to fee award). In this case, it was only O'Brien Swartz's statements about the reasonableness of the fees and a passing

²Although this section was not effective when the probate court reviewed O'Brien Swartz's fee request, it is nevertheless consistent with Rule 33 and *Sleeth*.

