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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of:) 1 CA-CV 09-0209
)
J.D. BRUCE,) DEPARTMENT D
)
Deceased.) **MEMORANDUM DECISION**
) (Not for Publication -
JAMES E. BACHE, P.C.,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Appellant,)
)
v.)
)
DEAN J. WERNER, ATTORNEY AT LAW;)
GIBSON FERRIN & RIGGS, PLC,)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. PB 2007-090255

The Honorable Kirby D. Kongable, Commissioner

REVERSED AND REMANDED

James E. Bache, P.C. Mesa
By James E. Bache
Attorneys for Appellant

Dean J. Werner, Attorney at Law Mesa
By Dean J. Werner
Attorney for Appellee Dean J. Werner

Gibson, Ferrin & Riggs, PLC

Mesa

By Scott F. Gibson

Russell A. Nevers

Attorneys for Appellee Gibson, Ferrin & Riggs, PLC

O R O Z C O, Judge

¶1 James E. Bache (Bache) appeals from the probate court's decision awarding proportionate shares of the remaining funds in a conservatorship estate as partial payment of attorney fees for himself and Judie Rettelle of appellee Gibson, Ferrin & Riggs, as attorneys for the conservator, and for appellee Dean Werner, attorney for the personal representative. We hold the court lacked authority to order payment of the personal representative's attorney fees from the conservatorship estate. We reverse the court's order directing that payment and remand for the probate court to direct payment of Bache's attorney fees from the conservatorship estate to the extent funds are available.

FACTS AND PROCEDURAL HISTORY

¶2 Bache was the attorney for Laura McDonald, who in April 2007, was appointed temporary guardian and conservator for her father, J.D. Bruce. J.D. Bruce died before a permanent guardian and conservator was appointed. Marlene Bruce, J.D. Bruce's step-daughter, was appointed the personal representative of J.D. Bruce's estate and was represented by Werner.

¶13 On October 26, 2007, Werner, on behalf of the personal representative, filed a consolidated petition for both the conservatorship proceeding and the probate proceeding. In the conservatorship proceeding, the petition sought an accounting, a surcharge for malfeasance, attorney fees and costs, and termination of the conservatorship. In the probate proceeding, the petition sought a turnover order, discovery of concealed assets, avoidance of transfers, double damages, and attorney fees and costs. The petition alleged that the conservator had withdrawn \$49,818.22 in cash from J.D. Bruce's Bank of America account and that the initial inventory for the conservatorship failed to list the cash taken. It also alleged that Bache failed to respond to informal requests for an accounting.

¶14 On November 21, 2007, Bache filed a petition for approval of final accounting of temporary conservator. The final accounting noted the Bank of America account had a balance of \$49,818.22 in the beginning of the conservatorship estate and had an ending balance of \$15,713.05. Bache also filed an affidavit for attorney fees.

¶15 On December 18, 2007, Werner, on behalf of the personal representative, filed a supplement to the petitions and objections to the final accounting. The personal representative alleged that: the conservator improperly paid \$20,525 to her husband or boyfriend for care of J.D. Bruce at rates in excess

of those of licensed caregivers; the accounting failed to include documentation of the payments to the husband or boyfriend; and the funds apparently had not been kept in a restricted interest-bearing account. The personal representative asserted that the accounting was completely inadequate and demonstrated an illegal attempt to quickly take as much from the estate as possible.

¶16 On January 8, 2008, with Laura McDonald's consent, Bache moved to withdraw. The request was approved January 29, 2008.

¶17 The court accountant noted irregularities in the first accounting provided by the conservator. The irregularities included the absence of a financial statement to show the Bank of America account's value and the existence of financial records relating to a second Bank of America account that was not part of the accounting.

¶18 On February 12, 2008, Rettelle filed a notice of appearance as the attorney of record for the conservator.

¶19 The total amount of Bache's fees and costs in representing the conservator was \$8,851.83. On May 29, 2008, Bache filed a petition for an order directing the conservator to pay \$7,906.83 in outstanding attorney fees and costs.

¶10 On June 11, 2008, the conservator, now represented by Rettelle, filed a response to the court accountant's report as

well as documentation to support the conservator's accounting. The response showed the withdrawal of \$49,818.22 from J.D. Bruce's Bank of America account and the deposit of that amount on the same day into a second Bank of America account designated the guardianship account for J.D. Bruce. The conservator also explained that the original accounting had incorrectly identified caregivers to whom payments had been made.

¶11 The conservator filed an objection to Bache's petition for fees and costs. The conservator asserted, among other things, that the amount sought was excessive and included charges for unnecessary tasks. She also asserted that Bache's work was subpar and caused an escalation in hostilities, specifically noting Bache's failure to review documents filed by the conservator or advise her as to their inadequacy. She also alleged that Bache was hired to complete the accounting and failed to properly do so, contending that his failure to provide supporting documents with respect to the bank accounts caused the personal representative to believe the conservator had converted funds. She also contended that his failure to accurately identify the caregiver recipients of certain payments from conservatorship funds directly resulted in the personal representative filing a petition against the conservator. The conservator alleged that Bache had created the false impression that the conservator was wasting assets when in fact she was

not. She noted that after new counsel collected the appropriate documentation, discovered the errors and explained what had happened, the personal representative withdrew her petition. The conservator argued that Rettelle and Werner, "the two attorneys who ultimately unraveled the misperception created by Mr. Bache," should be paid first from the funds in the conservatorship account. Rettelle also submitted an application for attorney fees in the amount of \$13,224.11. Rettelle explained that approximately \$15,717.63 remained in the conservatorship account and the account was the extent of the conservatorship estate. The personal representative joined in the objection.

¶12 In response, Bache asserted that any errors in the accounting were the conservator's responsibility because she either filed the documents herself or provided the information on which he based the accounting. He argued that his fees were reasonable and necessarily incurred for the benefit of the conservatorship estate. He also asserted that the escalated dispute was the result of the litigious nature and existing animosity between the conservator and personal representative. He argued that Werner's fees could properly be paid only from the probate estate, not the conservatorship estate. Bache also objected to Rettelle's application for approval of attorney fees

to be paid from the conservatorship account and requested a hearing.

¶13 The court accountant filed a recommendation that the conservator's response to the court accountant's initial review be approved.

¶14 Werner filed an application for attorney fees and costs on behalf of the personal representative in the amount of \$25,697.80.

¶15 The court approved the accounting with exceptions, one of which was that attorney fees would be addressed after an evidentiary hearing. The court held an evidentiary hearing over five days, and consolidated the conservatorship proceeding and the probate proceeding for purposes of the hearing.

¶16 In a signed minute entry filed January 27, 2009, the court found the fees and costs requested by all three attorneys to be reasonable. The court further found that "all of Bache's fees and costs benefitted the conservatorship estate, \$12,158.11 of Rettelle's fees and costs benefitted the conservatorship estate, and \$24,737.74 of Werner's fees and costs benefitted the conservatorship estate." The court awarded from the conservatorship estate \$2,912.75 to Bache, \$4,023.51 to Rettelle and \$8,479.91 to Werner.¹

¹ The court did not explain how it arrived at these amounts. On appeal Rettelle explained that the court determined the

¶17 Bache filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.J (2003).

DISCUSSION

¶18 In reviewing a trial court's decision in a probate matter, we accept the trial court's findings of fact if they are supported by the record. *In re Estate of Stephens*, 117 Ariz. 579, 586, 574 P.2d 67, 74 (App. 1978). We review the probate court's decisions on questions of law de novo. *In re Estate of Headstream*, 214 Ariz. 530, 532-33, ¶ 9, 155 P.3d 1054, 1056-57 (App. 2007).

¶19 Generally, in Arizona, each side in a litigated case must bear its own attorney fees unless an award of fees is expressly authorized by contract or statute. *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 272, ¶ 7, 77 P.3d 444, 447 (App. 2003). The common fund doctrine is an exception to the general rule. *Id.* It is an equitable doctrine under which a court may award attorney fees from a common fund to a party whose efforts in litigation created or helped preserve that fund to the benefit of an identifiable group. *Kerr v. Killian*, 197 Ariz. 213, 217-18, ¶ 19, 3 P.3d 1133, 1137-38 (App. 2000).

percentage of each attorney's approved fee amount to the total amount of approved fees and then awarded each attorney that percentage of the remaining funds of the conservatorship estate.

¶120 Bache argues that, as an attorney for the conservatorship estate, his fees were administrative costs of that estate and by statute had priority for payment over the fees of Werner, the attorney for the probate estate.² He further argues that there is no statutory or other legal basis for awarding fees to Werner and that equitable relief under the common fund doctrine is inapplicable.

¶121 By statute, when the conservatorship estate is likely to be exhausted before all claims are paid, preference is given to claims for the care, maintenance, and education of the ward and to existing claims for administrative expenses. A.R.S. § 14-5428.C (2005). When the conservatorship is terminated, the order of termination must provide for the expenses of administration of the conservatorship estate. A.R.S. § 14-5430 (2005). The order must also direct the conservator to execute the instruments required to transfer the assets of the estate to the protected person or the protected person's successors. *Id.* If the protected person has died, the conservator is reimbursed for the expenses of administration, which include fees and expenses reasonably incurred in winding up the conservatorship estate. *Treadway v. Montague-Elliston*, 138 Ariz. 133, 135, 673 P.2d 331, 333 (App. 1983). The conservator then delivers what

² Bache concedes on appeal that Rettelle was entitled to payment of her fees from the conservatorship estate.

remains of the conservatorship estate to the personal representative. *Id.* "The estate of a deceased protected person is liable for any unpaid expenses of the conservator's administration, and such expenses are a lien on property transferred by the conservator to the decedent's personal representative." A.R.S. § 14-5425.G. (Supp. 2009).³

¶122 As Bache argues, this statutory scheme recognizes separate conservatorship and probate estates. It provides that the administrative expenses of the conservatorship estate shall be paid or provided for prior to transfer of the assets to the personal representative and the probate estate. In so doing, it creates a priority for payment of the expenses of the conservatorship estate before expenses of the probate estate are paid.

¶123 Werner argues that, under the circumstances here, the trial court "blended" the conservatorship and probate estates when it consolidated the conservatorship and probate proceedings for purposes of the evidentiary hearing. Werner offers no legal basis or authority, however, to support treating the two estates together so as to allow partial payment to the personal representative concurrently with partial payment of the administrative expenses of the conservatorship estate. Werner's

³ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

answering brief fails to even address the statutes governing the payment of conservatorship expenses, and thus does not dispute Bache's argument that the statutes create a priority for payment of conservatorship expenses.

¶124 Werner contends that the trial court had discretion to award the personal representative's attorney fees as an expense of the administration of the conservatorship estate pursuant to A.R.S. § 14-3720 (2005). He argues that, under that statute, expenses incurred by persons other than the conservator may be deemed an expense of the conservatorship estate if the expenses were incurred for the benefit of the estate. Section 14-3720 does not, however, concern the expenses of a conservatorship. Instead, it concerns the personal representative of the probate estate and provides that a personal representative that defends or prosecutes any proceeding in good faith is entitled to receive necessary expenses, including attorney fees, from the probate estate.⁴ A.R.S. § 14-3720. It does not provide for recovery of expenses from a conservatorship estate and so does

⁴ One factor in determining if actions were taken in good faith is whether the actions benefitted the estate. *In re Estate of Gordon*, 207 Ariz. 401, 406, ¶ 25, 87 P.3d 89, 94 (App. 2004).

not authorize the trial court to allow payment of the personal representative's attorney fees from the conservatorship estate.⁵

¶125 Werner also argues that Bache's work on the conservatorship accounting was deficient and caused problems and delays, requiring the personal representative to file the objection so as to preserve the assets that were to transfer to the probate estate. He asserts the actions of the personal representative caused the conservator to eventually produce a proper accounting and thereby benefitted the conservatorship estate.

¶126 Contrary to Werner's assertions, however, the trial court found that Bache's fees were reasonable and that his efforts benefitted the conservatorship estate. We accept the trial court's factual findings unless demonstrated to be clearly erroneous, *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996), and Werner has not demonstrated that the court's findings were clearly erroneous.

⁵ Moreover, the authority Werner cites, *In re Estate of Stephens*, does not support his argument. In that case, this Court found that A.R.S. § 14-3720 precluded a co-administratrix from receiving compensation for attorney fees she incurred after she was removed as co-administratrix or for attorney fees incurred while she was co-administratrix if those fees were not incurred for the benefit of the estate. 117 Ariz. 579, 585, 574 P.2d 67, 73. There, this Court did not hold that someone other than a personal representative could be compensated from the estate.

¶127 Because we find that the trial court improperly ordered payment of the personal representative's attorney fees from the conservatorship estate, we do not address the trial court's use of the common fund doctrine as a basis for granting fees.

CONCLUSION

¶128 The trial court was required to provide for the expenses of the administration of the conservatorship estate upon its termination and before its transfer to the personal representative. No statutory or other authority permitted the trial court to award attorney fees to the personal representative from the conservatorship estate. We therefore reverse the trial court's order directing payment to the personal representative from the conservatorship account and remand for the court to direct payment of Bache's outstanding approved attorney fees from the conservatorship estate to the extent funds are available.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

JON W. THOMPSON, Judge