

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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CHANCERY COURTHOUSE
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Via File & ServeXpress

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Via U.S. Mail

J.C.
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RE: *In the Matter of K.C.*
 C.M. No. 19055-S-PWG

Dear Counsel and J.C.:

The main issue before the Court in this case is whether attorney *ad litem* fees should be paid, in part or full, from the assets of the person with an alleged disability, or by the petitioner seeking appointment of a guardian for the person with an alleged disability. The petitioner was appointed interim guardian, but the

interim guardianship was, subsequently, revoked by agreement between the parties, and the petitioner and cross-petitioner seek to withdraw their guardianship petitions. The person with an alleged disability asks that attorney *ad litem* fees be shifted, in full or part, to the petitioner. The petitioner objects, arguing that the person with an alleged disability should pay the fees, since the attorney *ad litem*'s services benefited her. I recommend that attorney *ad litem* fees be shifted, in part, to the petitioner based upon the circumstances in this case. This is a final report.

I. Background

On February 6, 2019, Petitioner P.P. took K.C., her grandmother, to her doctor, expressing concerns about K.C.'s memory disturbances and behavioral changes. As follow up, K.C. met with Dr. D., a neurologist, on February 14, 2019. Because of behavioral issues,¹ K.C. was transported from the doctor's office to the emergency room for evaluation. She was then immediately taken to a nursing home for further evaluation and care. Dr. S., the nursing home's physician, stated he did not assess her impairment as Alzheimers but she appeared to have "significant problems with thinking," and he did "not feel she should be allowed to

¹ Petitioner informed the doctor that K.C.'s mental status was "getting worse" and "things were quickly deteriorating." Docket Item ("D.I.") 26, Ex. A. A nurse conducting an evaluation of K.C. reported that K.C. stated "[Petitioner] is out to get her," and that "[s]he has thoughts of hurting [Petitioner] off and on." *Id.*

sign any legal documents or make changes at this time.”² On February 26, 2019, Dr. A., a geriatric psychiatrist, evaluated K.C., and concluded that she “does not seem to have any significant problem registering items into short-term memory,” although she “has some difficulty retrieving items” and a “hypomanic presentation.”³ On March 1, 2019, K.C. left the nursing home with Cross-Petitioner J.C., her son, without medical approval, and relocated to his home.

On March 19, 2019, Petitioner filed an emergency petition for the appointment of a guardian of the person and property of K.C., with the nursing home’s physician completing the physician’s affidavit filed with the petition.⁴ On March 21, 2019, Petitioner was appointed K.C.’s interim guardian for a period of 30 days.⁵ Tasha Stevens, Esquire (“AAL”), was appointed K.C.’s attorney *ad litem* on March 28, 2019.⁶ On April 3, 2019, Cross-Petitioner filed an objection and cross-petition to be appointed K.C.’s guardian.⁷ On April 18, 2019, the

² *Id.*, Ex. C.

³ *Id.*, Ex. D.

⁴ D.I. 1.

⁵ D.I. 4.

⁶ D.I. 5.

⁷ D.I. 7; D.I. 8.

interim guardianship was amended, with the AAL's consent, to allow expenditures necessary for K.C. to return to her home.⁸

After meeting with all parties and speaking with K.C.'s treating physicians, the AAL, on May 21, 2019, requested court approval to expend guardianship funds for Dr. A to conduct a forensic evaluation of K.C.'s capacity and competency, which was granted by the Court on May 22, 2019.⁹ Dr. A. concluded, on May 26, 2019, that K.C. "lacks capacity to make informed decisions," including financial and medical decisions, based upon her significant executive function deficits, although he found her alert and attentive with "very mild memory disturbance."¹⁰ In her June 12, 2019 report, the AAL referred to K.C.'s history of urinary tract infections, which are known to cause confusion and behavioral disturbances, and indicated that, while K.C. needs assistance with some matters, "her level of need does not rise to the level that she does not have capacity to make decisions," and recommended that a contested hearing be held to determine whether K.C. is a person with a disability within the meaning of 12 *Del. C.* §3901(a).¹¹ On June 12, 2019, K.C. met with Dr. C., a psychiatric specialist, for a consultation on K.C.'s

⁸ The interim guardianship was also extended for 30 days. D.I. 18. It was extended again on May 10, 2019, June 7, 2019 and July 5, 2019. D.I. 19; D.I. 25; D.I. 32.

⁹ D.I. 21; D.I. 22.

¹⁰ D.I. 26, Ex. E.

¹¹ *Id.*, ¶¶ 17, 21, 28.

decision-making capacity. In her June 22, 2019 report, Dr. C. concluded that K.C.'s decision-making capacity is "intact in all realms (including medical and financial decisions)," and K.C. "has no frank cognitive or mental conditions" but "could be diagnosed with . . . (Mild Cognitive Impairment)."¹²

A successful mediation in this case was held on August 2, 2019, and memorialized in an August 29, 2019 court order, which revoked the interim guardianship and stayed the petition and cross-petition for six months under certain conditions, with an independent medical evaluation of K.C. to occur after six months.¹³ The AAL's March 6, 2020 report indicated that K.C. was being scheduled for a follow up competency evaluation with Dr. C., which was postponed because of COVID-19 precautions but eventually conducted on August 5, 2020.¹⁴ The AAL's September 2, 2020 report detailed Dr. C.'s conclusion, following that evaluation, that K.C. is competent to make decisions regarding person and property.¹⁵ The AAL also indicated that Petitioner and Cross-Petitioner will withdraw their petitions, and relayed K.C.'s request that the Court assess all,

¹² D.I. 47, Ex.

¹³ D.I. 35.

¹⁴ The follow up evaluation was original scheduled for March 25, 2020 but was postponed because of COVID-19 concerns and K.C.'s vulnerability given her advanced age (92 years old). D.I. 42, at 1.

¹⁵ *Id.*, Ex. A.

or part, of the AAL fees against Petitioner.¹⁶ Cross-Petitioner filed a request to withdraw his petition for guardianship of K.C. on September 15, 2020.¹⁷ On September 16, 2020, Petitioner filed notice of her withdrawal of the petition, but objected to K.C.'s request that she bear the cost of the AAL fees.¹⁸ The Court held a hearing regarding the payment of the AAL fees on September 30, 2020.

II. Analysis

The AAL, on K.C.'s behalf, argues that Petitioner should pay the AAL fees based on Court of Chancery Rule 176, since there were conflicting medical evaluations concerning K.C.'s capacity before Petitioner filed the petition and, even if Petitioner had the best of intentions initially, she continued to pursue the guardianship after Dr. C.'s June 22, 2019 evaluation indicated that K.C. had decision-making capacity.¹⁹ Further, K.C. has incurred significant expenses paying for medical evaluations in this case. Petitioner responds that the AAL fees were incurred for K.C.'s benefit and that she filed the petition in good faith, based upon multiple physician's evaluations. She also argues Rule 176 does not apply where, as occurred in this case, a guardian was not appointed.

¹⁶ *Id.*, at 2.

¹⁷ D.I. 44.

¹⁸ D.I. 45.

¹⁹ K.C. does not ask that Cross-Petitioner pay towards the attorney *ad litem* fees since he filed his petition at her request.

The last sentence in Court of Chancery Rule 176(c) provides “[i]n all cases, the petitioner shall pay the fee and costs associated with the attorney ad litem or fact finder within thirty (30) days of the appointment of the guardian, unless the Court finds that such fee and costs should be paid by the person with an alleged disability.”²⁰ Courts have held that attorney *ad litem* fees are normally paid from the assets of the person with a disability because attorney *ad litem* services are intended to benefit the person with a disability.²¹ If a petitioner, or other person involved in the litigation, acted in bad faith so that the “expense of the litigation was a direct result of [their] inequitable actions,” then attorney *ad litem* fees may be assessed against them.²² However, caselaw addressing this situation predates the amendment to Rule 176, which was effective on January 1, 2015 and added subsection (c), including the payment provision noted above.²³

To make a determination on the attorney *ad litem* fees payment, I consider the interplay between Rule 176(c) and the caselaw as applied to the facts in this

²⁰ Ct. Ch. R. 176(c).

²¹ See generally *In re Acevedo*, 2006 WL 2474091, at *1 (Del. Ch. Aug. 15, 2006); *In re Indira*, 1999 WL 438634, at *5 (Del. Ch. June 4, 1999) (finding that the attorney *ad litem* fees should be paid from guardianship assets because petitioners acted in good faith and for justifiable reasons in pursuing the guardianship).

²² See *In re Mellinger*, 2007 WL 2306956, at *5 (Del. Ch. Aug. 13, 2007) (when prior attorney-in-fact acted in bad faith violation of court orders, the Court shifted attorney *ad litem* fees against him, instead of the guardianship estate).

²³ A subsequent amendment, that was effective July 1, 2018, added the language “within thirty (30) days of the appointment of the guardian” to the last sentence in Rule 176(c).

case. I start with the presumption that, in a guardianship case, the petitioner is responsible for paying attorney *ad litem* fees unless the Court finds that the person with an alleged disability should pay the fees.²⁴ And, based on the caselaw, the person with a disability may be ordered to pay the attorney *ad litem* fees when the petitioner acted in good faith and the attorney *ad litem* services benefitted the person with a disability. The attorneys who serve as attorney *ad litem*s in the Court of Chancery – whose purpose is to represent the best interests of the person with an alleged disability – generously devote their time and efforts to serve in this capacity and it would be an extremely rare case (I cannot think of one) in which the attorney *ad litem*'s services did not benefit the person with a disability. Accordingly, relying on the standard established in the caselaw – which predates the Rule change adding the presumption for petitioner's payment of attorney *ad litem* fees – would, effectively, negate the presumption. Therefore, I find that, in

²⁴ Petitioner argues that the provision in the last sentence of Rule 176(c) that the payment is made within 30 days “of the appointment of the guardian” means that the presumption that the Petitioner pays does not apply if a guardian is not appointed. I do not find that argument persuasive. Although the language may be inartful, I find the provision creates a presumption that the petitioner is responsible for attorney *ad litem* fees regardless of whether a guardian is appointed. The language in that sentence allows the Court to override the presumption if it determines that “the person with an *alleged* disability [emphasis added]” should pay those costs. Once a guardian is appointed, the person who has been determined to be incapacitated under 12 *Del. C.* §3901 is referred to as a “person with a disability” (since the disability is no longer alleged). Accordingly, the reference to the person with an alleged disability supports the interpretation that the presumption applies regardless of whether a guardian is, ultimately, appointed, and that the 30-day time restriction for paying the fees is applicable when a guardian is appointed.

furtherance of the presumption, there is another consideration – whether petitioner’s actions were for the benefit of the person with a disability and, if they were not, were attorney *ad litem* fees incurred as a result.²⁵

Here, it is undisputed that the AAL’s services benefitted K.C. throughout the litigation; indeed, her efforts were instrumental in getting this matter resolved. The question focuses on whether Petitioner’s actions, at all stages of this litigation, were for the benefit of K.C. Prior to filing the petition, Petitioner saw firsthand K.C.’s behavioral issues and, even though the medical professionals’ evaluations were not completely consistent, I find there was adequate support for concerns about K.C.’s capacity to show that the filing of the petition, in March of 2019, and Petitioner’s actions during the early stages of this litigation, were for K.C.’s benefit. That changed, however, when Petitioner became aware of sufficient evidence that K.C. was not incapacitated and did not need a guardian, which occurred, preliminarily, when Petitioner received Dr. C.’s evaluation with that conclusion on or about June 22, 2019. However, giving Petitioner the benefit of the doubt (to allow her the opportunity for discussion with K.C. and the Cross-Petitioner about the report’s findings and K.C.’s status), I find there is no basis to conclude her pursuit of the guardianship was for K.C.’s benefit after the mediation

²⁵ Another consideration affecting the decision whether the petitioner should pay attorney *ad litem* fees is whether the person with a disability has sufficient funds to pay those

was completed on August 2, 2019. Therefore, K.C. is responsible for AAL fees incurred between April 2, 2019 and August 2, 2019, and Petitioner is responsible for AAL fees and costs incurred from August 6, 2019 through September 2, 2020. During that time, AAL fees were incurred as a result of Petitioner's actions that did not benefit K.C. But, after September 2, 2020, the AAL's services related to K.C.'s objection to paying the AAL fees, which did not result from Petitioner's actions that did not benefit K.C. I assess AAL fees and costs incurred after September 2, 2020 to K.C.²⁶

III. Conclusion

For the reasons set forth above, I recommend the Court order Petitioner to pay \$2,026.50 (\$2,020.00 in fees and \$6.50 in costs incurred between August 6, 2019 and September 2, 2020), and K.C. to pay \$8,137.69 (\$8,080.00 in fees and \$57.69 in costs incurred between April 2, 2019 and August 2, 2019 and between September 2, 2020 and September 30, 2020), for attorney *ad litem* services provided in this case.²⁷ Further, Petitioner's and Cross-Petitioner's requests to

costs.

²⁶ Although Petitioner asks that Cross-Petitioner share in the attorney *ad litem* fees, I decline to shift fees onto Cross-Petitioner, since his actions benefitted K.C. and no attorney *ad litem* fees were incurred because of his actions.

²⁷ Petitioner is paying her own attorneys' fees in pursuing this action. Petitioner's longstanding relationship with K.C. was fractured as a result of this action. I find Petitioner acted with good intentions in filing the petition because she believed, based upon circumstances at that time, that K.C. was not capable of making decisions in her

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withdraw their petitions are granted. This is a final report and exceptions may be taken under Court of Chancery Rule 144.

Respectfully,

/s/ Patricia W. Griffin

Patricia W. Griffin
Master in Chancery

best interest. Once this matter is closed, I hope that K.C. and Petitioner can consider the possibility of reestablishing their relationship.