

STATE OF MICHIGAN
COURT OF APPEALS

MARY LOU SKINNER,

Appellee,

UNPUBLISHED
March 20, 2012

v

GUARDIAN CARE, INC.,

Appellant.

No. 303987
Tuscola Probate Court
LC No. 93-027596-DD

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Appellant appeals by right the probate court's order which terminated its guardianship and surcharged appellant for certain expenses on appellee's behalf. We affirm.

Appellee is a developmentally disabled person who has had a court-appointed guardian since 1993. Appellee resides in an adult foster care home, which is paid for with social security benefits, disability benefits, and income from appellee's part-time job. On March 11, 2009, appellant was appointed successor guardian for appellee.

On March 10, 2011, Laura Rickwalt, coordinator for Tuscola Behavioral Health Systems, filed a petition to modify the guardianship, requesting that the probate court remove appellant as appellee's guardian and appoint a new guardian. In support of the petition, Rickwalt alleged that appellant had not been making quarterly visits to appellee and had not made full payments for appellee's housing. A court-appointed guardian ad litem supported the petition citing the above concerns, and added that appellant also failed to set aside sufficient funds for appellee to attend a week-long, yearly camp that she had attended for at least the previous six years.

On April 6, 2011, a hearing was held before the probate court on the petition to modify guardianship. Uncontested testimony included that appellant did not return numerous telephone calls made by appellee, did not respond to several requests for financial reports, did not make the required payments for appellee's housing, and did not visit appellee. In fact, when appellant was contacted with regard to appellee's housing payments, appellee's foster care home owner was advised by appellant that she should "probably move [appellee] out." Following the testimony, the probate court held that appellant would be discharged as appellee's guardian upon the filing of a final accounting and that it was issuing an order to show cause why appellee's guardian should not be held in contempt for failure to comply with her statutory duties. The court further ordered appellant to pay the expense of appellee's camp and the shortage in appellee's housing

payment because it appeared to the court that, through no fault of appellee, the funds were no longer available and appellant failed to provide any actual explanation as to why the funds were not available. On April 7, 2011, orders consistent with the court's holdings were entered.

Appellant filed an accounting dated April 12, 2011, showing an account balance of \$195.80, and an amended final accounting dated April 22, 2011, showing an account balance of \$2,811.80. According to appellant, the discrepancy was due to a lump sum Social Security payment made after the filing of the initial final accounting. On May 2, 2011, the probate court held a hearing on appellant's final accounting and the order to show cause. At the hearing, the probate court disallowed appellant's fiduciary fee and office expenses. And, with regard to the order to show cause, the court held that appellant had mismanaged appellee's finances which caused appellee to be in default on her housing payment and in danger of missing camp. An order was entered on May 2, 2011, requiring appellant to pay for appellee's camp and housing payment deficiency with its own funds and indicating that failure to comply would result in a bench warrant being issued. That order was amended on May 3, 2011, to reflect that failure to pay the ordered expenses of appellee could result in an order to show cause. On May 26, 2011, an order allowing, in part, appellant's second and final accounts was entered with the exception that office expenses and guardian fees were disallowed. This appeal followed.

Appellant argues that the probate court erred in surcharging it for payment of appellee's camp and housing deficiency expenses. We disagree.

"The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A probate court's decision whether to surcharge a fiduciary is reviewed for an abuse of discretion. *In re Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007); *In re Thacker Estate*, 137 Mich App 253, 264; 358 NW2d 342 (1984). An abuse of discretion occurs when the court's ruling falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

First, appellant argues that the probate court's surcharge order was erroneous because the court did not conclude that "the guardian mishandled the ward's funds or misappropriated any of the ward's funds." We disagree. The probate court specifically and repeatedly held that appellant had a fiduciary duty to maintain appellee's finances, as well as assets, and breached that duty, including by mismanaging appellee's assets. The finding was supported by the evidence. At the hearing on the petition to modify guardianship, the undisputed testimony included that appellee was suffering from financial distress that she had not suffered from prior to the appointment of appellant as her guardian, and that there was no known change in her circumstances to justify such hardship. At the hearing on the order to show cause, appellant's justification for appellee's financial situation was that she received Social Security overpayments followed by monthly withholdings. Appellant asserted that this system caused difficulties in meeting appellee's financial needs and obligations, yet the problem had not been resolved by appellant. Appellant also admitted that appellee had been receiving these overpayments in the years prior to appellant's appointment as guardian, and appellant was unable to explain why the overpaid funds were not available, if properly managed, to compensate for the subsequent Social Security withholdings. Accordingly, this argument is without merit.

Second, appellant argues that the probate court erred by surcharging it after approving its final accounting. Under MCL 700.5418, “an order, after notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected individual.” Contrary to appellant’s claims, the order allowing appellant’s final accounting, in part, was not issued until May 26, 2011. Appellant was ordered to pay the contested expenses of appellee on April 7, 2011, May 2, 2011, and May 3, 2011. Therefore, this argument is without merit.

Third, appellant argues that the probate court erred by surcharging it because appellee was not “harmed” by appellant’s actions. Under MCL 700.1308(1)(c), in the event of a breach of fiduciary duty, the court may “[c]ompel the fiduciary to redress [the] breach of duty by paying money, restoring property, or other means.” Appellant relies on *In re Baldwin Trust*, 274 Mich App at 387, for the proposition that liability under MCL 700.1308 may only be imposed in the event of loss to the protected individual, and asserts that appellee suffered no loss in this case because she eventually had sufficient funds to cover her camp and housing expenses. However, *Baldwin* discusses a previous version of MCL 700.1308, not the version at issue here. And, more importantly, in this case there was a clear finding of loss. While appellant stresses that there were sufficient funds in appellee’s accounts to cover her expenses at the time of the show cause hearing, appellant fails to acknowledge that the original surcharge order was issued well before the show cause hearing. At that time, it was undisputed that appellee did not have the funds necessary to cover her housing or camp expenses, and the probate court held that appellee’s lack of funds was because of appellant’s breach of its statutory duties. The fact that the probate court had to re-order appellant to pay for appellee’s camp and housing deficiency expenses because of appellant’s failure to comply with the initial order does not change the timing of the original finding of harm. Accordingly, this argument is without merit.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad