

Opinion issued July 17, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-01035-CV

TERA PESSARRA, Appellant

V.

**FRANK WAYNE SEIDLER, KIMBERLY MCMILLAN, FLOYD
CHRISTIAN, JR., TERA HOLLIE STOWE, AND JANET DOUVAS
CHAFIN, Appellees**

**On Appeal from County Court at Law No. 3
Brazoria County, Texas
Trial Court Cause No. GN027633**

MEMORANDUM OPINION

This is an appeal of the trial court's final order in the guardianship proceeding

of appellant, Tera Pessarra, filed by attorney Dora Bonner, who asserts nine issues on behalf of Pessarra. Bonner argues that (1) the trial court failed to file findings of fact and conclusions of law; (2) the trial court erred in not dismissing Seidler's application for guardianship after denying the motion for a mental exam; (3) the trial court erred in not dismissing Seidler's application for guardianship after Seidler was disqualified by Pessarra in her Declaration of Guardian in the Event of Incapacity; (4) the trial court erred in not discharging the attorney ad litem once the temporary guardian was established; (5) the trial court erred in designating the attorney ad litem lead counsel because Pessarra had retained her own counsel; (6) the trial court improperly paid the attorneys associated with this matter; (7) the trial court should have considered Pessarra's preferred guardian as designated in her Declaration of Guardian in the Event of Incapacity; (8) the trial court erred in incorporating terms contrary to the terms of an unrevoked mediated settlement agreement in the final order appointing a permanent guardian; (9) the trial court is estopped from finding that Bonner had no authority to represent Pessarra.

We dismiss for lack of jurisdiction.

Background

The guardianship proceeding began on October 27, 2004, when Frank Seidler, Pessarra's grandson, filed an application to be appointed Pessarra's guardian, alleging that Kimberly McMillan, Pessarra's then-caretaker, was keeping Pessarra away from

other family members and that McMillan had worked in conjunction with others to unduly influence Pessarra to change her will and void a living trust. On October 28, 2004, the trial court appointed Mel Burridge as attorney ad litem for Pessarra.¹

On November 1, 2004, after the appointment of the attorney ad litem to represent Pessarra, McMillan hired Bonner to represent Pessarra using a power of attorney that had been drawn up by Bonner and executed in favor of McMillan on September 16, 2004. McMillan signed a legal services agreement with Bonner on Pessarra's behalf, agreeing to pay Bonner \$150 per hour. McMillan had already retained Bonner to represent herself. On November 2, 2004, Bonner filed McMillan's answer opposing Seidler's application to be appointed Pessarra's guardian and seeking to be appointed as Pessarra's guardian herself. On that same day, the trial court held an evidentiary hearing to determine whether a mental evaluation of Pessarra was necessary. The trial court declined to order the mental evaluation at that time but requested further discovery. Also during the evidentiary hearing, the trial court informed Bonner that she could not continue to represent both McMillan and Pessarra and that she would have to withdraw as counsel for one of them.

On November 4, 2004, Greg Donnell was appointed to replace Mel Burridge

¹ The trial court was required by section 646 of the Texas Probate Code to appoint an attorney ad litem for at least a portion of the proceedings. *See* TEX. PROB. CODE ANN. § 646(a) (Vernon Supp. 2007) ("In a proceeding under this chapter for the appointment of a guardian, the Court shall appoint an attorney ad litem to represent the interests of the proposed ward.").

as Pessarra's attorney ad litem. On November 16, 2004, the trial court signed an order allowing Bonner to withdraw from representing McMillan.

On November 24, 2004, Bonner drafted, and Pessarra executed, a "Declaration of Guardian in the Event of Later Incapacity or Need of Guardian" designating McMillan as the guardian of her person and estate and expressly disqualifying Seidler and Pessarra's other grandchildren, Hollie Stowe and Michael Dvorak. The declaration also disqualified Pessarra's only living child, Carolyn Pruett, from serving as guardian. Also on November 24, 2004, Bonner filed a motion to dismiss applicant Seidler from the guardianship proceedings. On December 3, 2005, the trial court abated the motion to dismiss Seidler pending discovery.

On February 9, 2005, Seidler filed a motion for reconsideration of the motion for mental examination and for the appointment of a guardian ad litem or temporary guardian pending a final hearing. In his motion, Seidler relied on discovery received from McMillan showing that she had expended \$85,000 for expenses, including \$39,000 paid directly to herself, and that she had purchased a second home for Pessarra at a cost of \$182,000.

On February 14, 2005, Donnell filed a motion to show authority, questioning the need for Pessarra to have both Bonner and Donnell represent her and asking the court to clarify their roles.

On March 15, 2005, Seidler filed a new application for temporary

guardianship. The trial court issued an order setting a hearing and ordering that Donnell represent Pessarra. The order stated that “Greg Donnell, an attorney licensed to practice before this Court, previously appointed as Attorney Ad Litem, shall continue to represent the interests of [Pessarra].”

The trial court issued another order on March 17, 2005, appointing Floyd Christian as Pessarra’s temporary guardian, suspending the power of attorney executed in September 2004 under which McMillan had hired Bonner to represent Pessarra, and declaring that “Greg Donnell is to remain Attorney Ad Litem and is appointed Guardian Ad Litem to represent the interests of [Pessarra].”

On May 17, 2005, Seidler filed a Rule 12² Motion to Show Authority, also questioning Bonner’s authority to continue to represent Pessarra. Bonner responded to this motion on May 23, 2005, alleging that she had been hired to represent Pessarra under a valid power of attorney and that Pessarra had not been declared incapacitated at the time Bonner was retained. Bonner argued that Pessarra was presumed to have the authority to hire legal representation. The trial court held a hearing on August 4, 2005 addressing the Rule 12 motion and held from the bench:

The Court’s decision is as follows: Because the attorney ad litem is a statutorily mandated position, I make the following finding: [Bonner] may remain on the case as attorney of choice, but the attorney ad litem is designated as lead counsel. All pleadings will be filed under Mr. Donnell’s name on behalf of the ward, [Pessarra]. I will not

² See TEX. R. CIV. P. 12.

consider any filings that do not have Mr. Donnell's approval and sanction for filing.

As to fees, that's a very delicate issue because there is a finite amount of funds at this point and because Mr. Donnell is statutorily required, initial allocation of funds will be Mr. Donnell's fees prior to any private payment for Attorney Bonner's services.

The trial court then went on to hold that the motions filed by Bonner were not properly before the court. The trial court issued an order on Seidler's motion to show authority on August 23, 2005, in which the court found:

[T]he Motion should be denied[.] [T]he Texas Probate Code requires the appointment of an Attorney Ad Litem who is Greg Donnell in this case, and . . . he will be lead counsel in this case and Dora Bonner may not file any documents or motions or take any action without the prior approval of lead counsel. IT IS ORDERED that the Motion to Show Authority is denied but Greg Donnell shall be lead counsel for Tera Pessarra and Dora Bonner shall not file any documents or motions or take any action without the prior approval of lead counsel.

In August 2005, the parties involved reached a settlement through mediation, in which they agreed to retain McMillan as Pessarra's caregiver and to create a management trust for Pessarra's estate. The parties agreed that the estate would make monthly payments to McMillan while she served as Pessarra's caretaker. However, on November 7, 2005, before the trial court entered the final orders implementing the settlement agreement, Pessarra's temporary guardian, Floyd Christian, filed an Emergency Show Cause Complaint for Removal, asking the trial court to remove McMillan as Pessarra's caregiver due to suspected abuse. On November 9, 2005, the trial court held a hearing on Christian's Emergency Show Cause Complaint and

issued an order that McMillan be removed from Pessarra's property. On January 12, 2006, the trial court again ordered McMillan to vacate Pessarra's property and stopped all monthly payments to McMillan.

Stowe filed an application to be appointed Pessarra's guardian on February 22, 2006, and Janet Chafin, a longtime friend of Pessarra's, filed an application to be appointed Pessarra's guardian on April 12, 2006. On September 1, 2006, Stowe withdrew her application and substituted Charlotte Seward, Pessarra's niece, as an applicant to be appointed Pessarra's guardian.

On September 7, 2006, all of the parties officially stipulated that Pessarra was totally incapacitated. On September 11, 2006, McMillan formally withdrew all of her applications to be appointed Pessarra's guardian, and a bench trial was set to determine whether one of the remaining two applicants, Seward and Chafin, should serve as Pessarra's guardian.

On September 25, 2006, Chafin made a pretrial motion to disqualify Bonner as the attorney representing Pessarra's interests. Chafin argued that the ward had been declared incapacitated and that Bonner had actually been retained by McMillan in defending against Seidler's application for guardianship, which had since been withdrawn. She also cited to the trial court's previous orders limiting Bonner's representation of Pessarra. The trial court denied Chafin's motion, but reaffirmed its previous orders and rulings on Bonner's role in the court, stating that Bonner would

not be able to question witnesses and that all of her input should be funneled through Donnell.

Bonner asked the trial court for leave to file a petition for a writ of mandamus to have this Court determine whether the attorney ad litem or the retained attorney had the right to represent Pessararra. Although the trial court denied her request, Bonner filed a petition for writ of mandamus in this Court on September 26, 2006. We denied her petition for writ of mandamus on the same day.³ Bonner never objected to the trial court's rulings and orders on this issue or filed any motion to have Donnell removed as Pessararra's attorney.

The bench trial concluded on September 27, 2006. On October 25, 2006, the trial court issued a series of orders disposing of the remaining issues in Pessararra's guardianship proceeding. It issued an "Order Appointing Permanent Guardian of the Person," appointing Chafin as Pessararra's permanent guardian and removing Christian as the temporary guardian. The trial court also issued its "Order Creating a Management Trust for the Benefit of Tera Gray Pessararra" and an order approving the final account of Christian, the temporary guardian. The trial court issued three separate orders granting fees and expenses to Donnell, Pessararra's attorney ad litem, Wes Griggs, the lawyer who represented Stowe and Seward, and Christian. In yet

³ *In re Pessararra*, 01-06-00868-CV, 2006 WL 2835889 (Tex. App.—Houston [1st Dist.] Sept. 26, 2006, orig. proceeding) (not designated for publication).

another October 25, 2006 order, the trial court denied Bonner's request for fees and expenses.

On November 1, 2006, Bonner filed a notice of appeal stating Pessararra's intention "to appeal from the final judgment signed by [the trial court] on October 25, 2006." On November 21, 2006, the trial court signed the Supplemental Order Regarding Attorney Representation of the Ward. In the order, the trial court reaffirmed its appointment of Donnell to represent Pessararra's interests and its previous orders regarding Bonner's role in Pessararra's representation. The order stated, "IT IS ORDERED that as of March 17, 2005, the date on which this Court formally suspended all powers of attorney and ordered that Greg Donnell would remain as Attorney Ad Litem for [Pessararra], Dora L. Bonner had and has no legal standing or authority to act as [Pessararra's] attorney in this matter."

Bonner filed an amended notice of appeal on Pessararra's behalf, again challenging the trial court's "final judgment signed . . . on October 25, 2006" and also challenging the trial court's November 21, 2006 supplemental order. Bonner also requested findings of fact and conclusions of law. The trial court issued findings of fact and conclusions of law on July 13, 2007. It included the following conclusions of law:

1. [Bonner] has no standing or legal authority to act as [Pessararra's] attorney.
2. All powers of attorney were terminated by the Order Appointing

Permanent Guardian, therefore the purported Employment Agreement signed by Kimberly McMillan on November 2, 2004 as agent for [Pessarra] is also terminated and of no effect.

3. [Bonner] had no legal authority to act as attorney of record for [Pessarra] independent of the statutorily appointed Attorney Ad Litem from the time the Attorney Ad Litem was appointed on October 28, 2006.⁴
4. Per the Court's Order of March 17, 2005, when the power of attorney pursuant to which [Bonner] was employed by the agent was suspended, the employment agreement was also suspended.

Analysis

On appeal, Bonner argues on behalf of Pessarra that the trial court erred in its orders appointing Donnell as lead counsel because it deprived Pessarra of her right to be represented by the attorney of her choice. Chafin and Christian argue that Bonner lacks jurisdiction to assert this appeal because Bonner had no standing or authority to represent Pessarra or to file a notice of appeal on Pessarra's behalf.⁵

There is a general presumption that an attorney is acting with authority; however, that presumption is rebuttable. *Breceda v. Whi*, 187 S.W.3d 148, 152 (Tex. App.—El Paso 2006, no pet.); *Kelly v. Murphy*, 630 S.W.2d 759, 761 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); *see also City of San Antonio v.*

⁴ The trial court cited its order dated August 23, 2005, which was the order disposing of Seidler's Rule 12 motion to show authority. The date given here by the trial court appears to be a clerical error—the attorney ad litem was originally appointed October 28, 2004, the day after Seidler originally instituted the guardianship proceedings.

⁵ Pessarra's appeal, filed by Bonner, does not contend that Chafin should not have been named as Pessarra's guardian.

Aguilar, 670 S.W.2d 681, 684 (Tex. App.—San Antonio 1984, writ dismissed) (“[A]n attorney who has conducted a case in the trial court is presumed to have authority to pursue an appeal, although this presumption can be rebutted.”). Here, appellees have rebutted the presumption that Bonner had authority to represent Pessarra when she filed the notice of appeal by pointing to the trial court’s multiple orders, rulings, and conclusions of law that Bonner was limited in her representation to acting through the court-appointed attorney, Greg Donnell.

The trial court’s rulings and orders on this issue make it clear that Bonner does not have authority to file documents with the trial court on Pessarra’s behalf, and Bonner did not object to those rulings and orders in the trial court.⁶ We conclude that Bonner lacked authority to file a notice of appeal on Pessarra’s behalf.

Furthermore, Bonner herself does not have standing to appeal any of the orders establishing Pessarra’s guardianship. Standing presents a question of law which we review *de novo*. See *Hairgrove v. City of Pasadena*, 80 S.W.3d 703, 705 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Standing is implicit in the concept of subject matter jurisdiction. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851

⁶ Bonner asked for leave to file a mandamus, but that action did not serve to inform the trial court of the grounds on which Bonner objected to the trial court’s rulings on her status in the case. See TEX. R. APP. P. 33.1(a)(1) (stating that complaint must be made to trial court by timely request, objection, or motion that states grounds for ruling sought by complaining party and complies with Texas Rules of Evidence). Her petition for writ of mandamus was denied by this Court. See *In re Pessarra*, 01-06-00868-CV, 2006 WL 2835889 (Tex. App.—Houston [1st Dist.] Sept. 26, 2006, orig. proceeding) (not designated for publication).

(Tex. 2000). Subject matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Standing, as a necessary component of a court's subject matter jurisdiction, is a constitutional prerequisite to maintaining suit. *Id.* at 444. The standing requirement under Texas law stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and the open courts provision, "which contemplates access to the courts only for those litigants suffering an injury." *Id.*

Here, Bonner has not shown that she had authority to represent Pessarra as required to appeal on Pessarra's behalf. Nor has she shown either that herself suffered an injury from the trial court's October 25, 2006 orders appointing Chafin as Pessarra's permanent guardian, creating a management trust for Pessarra's estate, approving the final accounting, or granting attorney's fees and expenses to the other lawyers involved in this case. We hold, therefore, that Bonner lacked standing to bring this appeal. *See id.*

We dismiss this cause for lack of jurisdiction. Because we conclude that Bonner did not have authority to file this appeal and we do not have jurisdiction to consider it, we do not need to address the nine issues raised in her brief. *See* TEX. R. APP. P. 47.1.

Conclusion

We dismiss this appeal for lack of jurisdiction.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley