

Opinion issued June 16, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-14-01004-CV

**IN THE GUARDIANSHIP OF LONNIE PHILLIPS, JR.,
AN INCAPACITATED PERSON**

**On Appeal from the Probate Court
Galveston County, Texas
Trial Court Case No. PR-74571**

MEMORANDUM OPINION

This is an appeal from the probate court's final order appointing Catherine N. Wylie as guardian over the person and estate of Kevin Campbell's father, Lonnie Phillips, Jr. ("Lonnie" or "ward"). Campbell raises nine issues challenging the final appointment order as well as other various related orders issued by the court during

the course of the proceedings. We affirm in part and dismiss in part for want of jurisdiction.

Background

On September 25, 2013, Lance Phillips (“Lance”) and Ava Phillips (“Ava”) initiated this guardianship proceeding seeking to be appointed guardians over the person and estate of their eighty-seven year old father, Lonnie.¹ On October 30, 2013, the probate court appointed M. Brandon Maggiore as attorney ad litem to represent Lonnie’s interests.

On November 27, 2013, with Lance and Ava’s agreement, Campbell filed a fourth amended application seeking guardianship over the person and estate of their father. After determining that an attorney ad litem was no longer needed but that it was necessary to appoint a guardian ad litem, the probate court removed Maggiore as attorney ad litem and instead appointed him as guardian ad litem on December 6, 2013.

On January 30, 2014, Maggiore filed a counter-application requesting that Friends for Life, a private professional guardianship agency, be appointed permanent guardian of the person and estate of the ward, as well as an application for the

¹ It is undisputed that Lonnie is incapacitated due to a mental condition and is unable to care for himself or manage his financial affairs. At the time of filing, Lance held a general power of attorney granted by Lonnie, and Ava was Lonnie’s caretaker. Lonnie’s wife, Edith, is deceased.

appointment of a temporary guardian pending contest. The latter application stated that there was an “immediate danger posed to the Proposed Ward’s legal and pecuniary interests, which legal and financial matter[]s may place him in danger of loosing [sic] his current residence.”² The trial court subsequently appointed Wylie as temporary guardian pending contest.³ On February 12, 2014, the probate court appointed Dana V. Drexler as Lonnie’s attorney ad litem.

On March 28, 2014, Campbell filed a motion to withdraw his fourth amended application for guardianship and requested that the court close Lonnie’s estate. On March 31, 2014, Maggiore filed a first amended counter-application requesting that Wylie be appointed permanent guardian of the person and estate of the ward. The record reflects that Lonnie was served with the amended counter-application on April 9, 2014, and that notice was provided to Lance, Ava, and Campbell, through their attorney of record, Veronica L. Davis, and to Felix Phillips, Lonnie’s brother.

On April 2, 2014, Wylie filed a motion to show cause against Campbell, Ava, and Davis due to their failure to respond to her requests for information regarding

² The record reflects that Lance and Ava filed a breach of contract action against Paul Davis Restoration, Cause Number 14-CV-0027, in the 405th District Court, Galveston County, seeking damages after the contractor allegedly failed to make contracted-for repairs to Lonnie’s house following a fire, resulting in the loss of \$30,000 from Lonnie’s estate. In the application for appointment of temporary guardian pending contest, Maggiore stated that Lonnie’s interests in the pending litigation lacked proper representation.

³ The court’s order also suspended Lance’s power of attorney until further notice.

Lonnie's assets. On April 10, 2014, the court conducted a hearing, which spans one hundred pages of the reporter's record. At the conclusion of the hearing, the court determined that an accounting of Lonnie's assets was necessary before continuing with guardianship proceedings.

On September 30, 2014, despite having previously filed a motion to withdraw his fourth amended application for guardianship, Campbell filed a supplement to his application for guardianship and request to close guardianship. In the supplemental pleading, Campbell stated that he was not Lonnie's biological child but instead his child through the doctrine of "equitable adoption or adoption by estoppel." The supplemental pleading was only served on the attorneys in the case.

On October 3, 2014, the court conducted a guardianship hearing. The court determined that Campbell's application for guardianship had been withdrawn and that he had no live pleading on file. The court further concluded that a guardianship was still needed, and therefore, the guardianship would not be closed. At the conclusion of the hearing, comprising ninety pages of record, the court appointed Wylie permanent guardian of the person and estate of the ward and entered an order the same day. On November 5, 2014, Campbell filed a motion for rehearing which the trial court denied.

On November 19, 2014, Maggiore filed an application for approval of appointee fees in the amount of \$5,359.59. Having received no objections or

requests for hearings, the trial court issued an order authorizing payment of the fees to Maggiore on December 9, 2014.

On December 11, 2014, Campbell filed a first notice of appeal.⁴ On December 29, 2014, the trial court entered an order reappointing Maggiore as guardian ad litem.

Campbell thereafter filed a motion to recuse Presiding Judge Kimberly Sullivan. Following a hearing, Campbell's amended motion to recuse was denied on April 15, 2015.⁵

After Lonnie's physician requested that Wylie sign a "do not resuscitate" order, Wylie filed a motion for instructions with the court on September 8, 2015. No objection to the motion was filed. The trial court did not enter an order on the motion.

On September 21, 2015, Wylie filed an amended application for "as is" sale of Lonnie's real property.⁶ No objection was filed and no hearing was requested on the amended application. On October 7, 2015, the trial court entered an order

⁴ In his notice, Campbell stated that he had just recently received notice that the court had denied his motion for rehearing on November 19, 2014.

⁵ The Honorable Gladys Burwell, sitting by assignment, issued the order denying Campbell's motion to recuse.

⁶ In the application, Wylie sought authorization from the court to sell Lonnie's home due to, among other things, its inhabitability as a result of the fire, the necessity of paying Lonnie's expenses while in an assisted living facility because "he is currently on Medicaid and all expenses for clothes, etc. has been paid for personally by the Guardian," the cost to complete renovation was more than the value of the property, and the real property, if left vacant, poses a liability to the estate.

authorizing the sale of the property. On October 22, 2015, Campbell filed a second notice of appeal.

Discussion

Campbell raises nine issues on appeal. In his first and second issues, he contends that the trial court lacked jurisdiction to (1) initiate a temporary guardianship pending contest and (2) change the temporary guardianship to a permanent guardianship without proper notice. In his third issue, Campbell argues that his due process rights were violated when Maggiore engaged in ex parte communications with the court regarding an application for guardianship. In his fourth issue, he contends that Wylie lacked authority to demand documentation from Campbell or his counsel because her temporary guardianship appointment had expired. In his fifth issue, he asserts that the trial court denied him due process when it failed to hear his application for guardianship, his opposition to Wylie's appointment as guardian, and his application to withdraw the application for guardianship. In his sixth issue, Campbell argues that the trial court erred when it reappointed Maggiore as guardian ad litem. In his seventh issue, he contends that the court erred in granting Maggiore's fee petition. In his eighth issue, he asserts that the trial court erred in denying him the right to proceed with his guardianship application on the basis that he had no live pleadings on file. In his ninth issue, he contends that the trial court erred in ordering the sale of Lonnie's real property.

A. Probate Court's Jurisdiction

1. Temporary Guardianship

In his first issue, Campbell contends that the probate court lacked jurisdiction to appoint Wylie as temporary guardian pending contest because Lonnie was neither noticed nor served as required under sections 1051.101 and 1051.103 of the Estates Code. Thus, he argues, the trial court's appointment of Wylie as temporary guardian pending contest is void.

Estates Code section 1051.101 provides that “[o]n the filing of an application for guardianship, notice shall be issued and served as provided by this subchapter.” TEX. EST. CODE ANN. § 1051.101(a) (West 2014). Section 1051.103 states that “[t]he sheriff or other officer shall personally serve citation to appear and answer an application for guardianship on . . . a proposed ward who is 12 years of age or older” *Id.* § 1051.103(a)(1) (West 2014). On January 30, 2014, Maggiore filed an application for the appointment of a temporary guardian pending contest, and the trial court appointed Wylie temporary guardian pending contest the same day. The record does not reflect that Lonnie received notice of the filing or that he was personally served as required by sections 1051.101 and 1051.103.

However, a complaint about the appointment of a temporary guardian becomes moot once a permanent guardian is appointed. *See In re Guardianship of Berry*, 105 S.W.3d 665, 666 (Tex. App.—Beaumont 2003, no pet.) (per curiam)

(“The appointment of the temporary guardian is moot now that the temporary guardian has been replaced with a permanent guardian.”); *In re Smith*, 05-09-00913-CV, 2010 WL 4324434, at *2 (Tex. App.—Dallas Nov. 3, 2010, no pet.) (mem. op.). Here, the trial court entered an order appointing a permanent guardian on October 3, 2014. We therefore dismiss Campbell’s first issue as moot.

2. Permanent Guardianship

In his second issue, Campbell argues that the trial court lacked jurisdiction to consider Maggiore’s counter-application to appoint a permanent guardian because Maggiore failed to strictly comply with the notice requirements of section 1051.104. Thus, he contends, the trial court’s appointment of Wylie as permanent guardian is void.

Service of citation on a proposed ward is jurisdictional and a court order appointing a guardian without proper service on the ward is void. *Whatley v. Walker*, 302 S.W.3d 314, 321 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Proof of service must be filed before a hearing, TEX. EST. CODE § 1051.153, and an affidavit of compliance with the notice requirements set out in section 1051.104 must be filed before a court can act on a guardianship application, TEX. EST. CODE § 1051.106.

Section 1051.104 of the Estates Code provides, in relevant part:

- (a) The person filing an application for guardianship shall mail a copy of the application and a notice containing the information

required in the citation issued under Section 1051.102 by registered or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery, to the following persons, if their whereabouts are known or can be reasonably ascertained:

- (1) each adult child of the proposed ward;
- (2) each adult sibling of the proposed ward;
- ...
- (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward

TEX. EST. CODE § 1051.104.

Maggiore filed his amended counter-application for guardianship on March 31, 2014. The record reflects that Lonnie was served with citation, and service was returned, on April 9, 2014. Lonnie’s adult children—Ava, Lance, and Campbell—were noticed through Davis, their counsel, on May 19, 2014, by certified mail, return receipt requested, and by email. Felix Phillips, Lonnie’s only adult sibling whose location was able to be identified, was sent notice on August 20, 2014, which was received by him on August 21, 2014. On August 21, 2014, Maggiore filed an affidavit of compliance with section 1051.104.

Campbell asserts that the trial court lacked jurisdiction to appoint a permanent guardian because (1) Maggiore failed to send notice to Lonnie’s brother, Lorenzo, and to Lance whom Maggiore knew held a power of attorney signed by Lonnie; (2) the August 20, 2014 letter sent to Lonnie’s brother, Felix, was defective because it advised Felix that he must file his opposition to the application, if any, by May 26, 2014, a date that had already passed by the time he received his letter; and (3)

Maggiore failed to serve Drexler, the attorney ad litem, thus violating section 1051.105.

Campbell's contentions are unavailing. With regard to service on Lorenzo, section 1051.104 requires that notice be provided to the persons listed, including adult siblings of the proposed ward, "if their whereabouts are known or can be reasonably ascertained." TEX. EST. CODE § 1051.104(a)(1). Maggiore's amended counter-application and affidavit of compliance—as well as Campbell's own pleadings—list Lorenzo's address as "unknown." Moreover, subsection (c) makes clear that the failure to serve an adult sibling of a proposed ward is not considered a jurisdictional defect. *See* TEX. EST. CODE § 1051.104 (stating that applicant's failure to provide notice to adult sibling of proposed ward does not affect validity of guardianship); *see also Hailey v. Paduh*, No. 04-12-00823-CV, 2014 WL 1871334, at *11 (Tex. App.—San Antonio May 7, 2014, no pet.) (mem. op.) (holding that mandate of section 1051.104(a)(1) requiring notice to ward's adult children, and provisions of section 1051.106 stating when court may act on guardianship application, are not jurisdictional).

With regard to Felix, Campbell complains that the August 20 notice sent to him was ineffective because it stated that "he must file his opposition by May 26, 2014, a date that had already passed by the time he received his letter." This is inaccurate. The August 20 letter states, in pertinent part:

Sections 1051.101–1051.106 of the Texas Estates Code requires the Applicant to notify all persons interested in the welfare of the proposed Ward to appear at the time and place stated in the notice if they wish to contest the application. Accordingly, you are hereby notified that, if you wish to contest this Application, you must do so before a hearing is held in this cause, which hearing can be held on, but not before, May 26, 2014.

The letter did not state that Felix had to file his opposition by May 26, 2014, but rather, that any opposition had to be filed before a hearing on the application was held (in this case, on October 3, 2014). Moreover, as noted above, the failure to serve an adult sibling of a proposed ward is not a jurisdictional defect. *See* TEX. EST. CODE § 1051.104.

As to Campbell’s assertion that the trial court lacked jurisdiction to appoint a permanent guardian because Maggiore failed to send notice to Lance, whom Maggiore knew held a power of attorney signed by Lonnie, and failed to serve to Drexler, the attorney ad litem, these arguments are equally unavailing.⁷ Here, Lance filed pleadings in the trial court seeking affirmative relief. A party making a general appearance in a guardianship proceeding is not required to be served with citation. *See Whatley*, 302 S.W.3d at 322 (noting that general appearance in case constitutes waiver of service of process, citing TEX. R. CIV. P. 121). Moreover, Drexler, the attorney ad litem, was not required to be served because she did not fall within the

⁷ We note that the trial court’s earlier order appointing Wylie temporary guardian pending contest suspended Lance’s power of attorney until further notice.

list of those upon whom citation must be served. *See* TEX. EST. CODE § 1051.103; *Whatley*, 302 S.W.3d at 322. The probate court had jurisdiction to consider the application to appoint Wylie permanent guardian. Campbell’s second issue is overruled.

B. Ex Parte Communication

In his third issue, Campbell contends that the trial court violated his due process rights when it held an ex parte hearing on Maggiore’s application for temporary guardian pending contest.

On January 30, 2014, Maggiore filed a counter-application for appointment of a permanent guardian and an application for the appointment of a temporary guardian pending contest. That same day, the trial court appointed Wylie temporary guardian pending contest.

An appellant’s brief “must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” TEX. R. APP. P. 38.1(i); *Abdelnour v. Mid Nat’l Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Campbell has not provided any record references directing this Court to evidence supporting his claim that Maggiore engaged in ex parte communications with the court regarding the application for appointment of a temporary guardian pending contest. Further, an appellant bears the burden to bring forward an appellate record that enables the appellate court to

determine whether appellant's complaints constitute reversible error. *See Enter. Leasing Co. of Hous. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam); *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (stating that burden is on appellant to present sufficient record to show error requiring reversal).

The record before us does not include a transcript of the alleged ex parte hearing about which Campbell complains. Where the pertinent evidence is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment. *See Barrios*, 156 S.W.3d at 550; *see Cantu v. Seeman*, No. 01-09-00545-CV, 2012 WL 1564536, at *5 (Tex. App.—Houston [1st Dist.] May 3, 2012, pet. denied) (mem. op.) (concluding that where appellant fails to bring forward complete record, court will conclude he has waived issues dependent on state of evidence).⁸ In the absence of any record references or a transcript of the hearing to support Campbell's claim that Maggiore engaged in ex parte communications, we presume that the omitted evidence supports the trial

⁸ We further note that section 1251.051 permits the court, "on the court's own motion or on the motion of any interested party" to appoint a temporary guardian without issuing additional citation if (1) the application for a temporary guardianship is challenged or contested and (2) the court finds that the appointment is necessary to protect the proposed ward or the proposed ward's estate. TEX. EST. CODE ANN. § 1251.051 (West 2014). Here, Campbell contested the appointment of Wylie as temporary guardian, and in its January 30, 2014 order appointing Wylie as temporary guardian pending contest, the trial court found that an imminent danger existed making it necessary for the court to appoint a temporary guardian and that the appointment was in the best interest of the proposed ward.

court's judgment. *See Barrios*, 156 S.W.3d at 550. We overrule Campbell's third issue.

C. Motion to Show Cause

In his fourth issue, Campbell contends that Wylie lacked authority to demand documentation from him or his counsel because Wylie's temporary guardianship had expired sixty days after her appointment.

As we previously noted, once a temporary guardian is replaced by a permanent guardian, complaints regarding the prior temporary guardianship are moot. *See In re Guardianship of Berry*, 105 S.W.3d at 666 ("The appointment of the temporary guardian is moot now that the temporary guardian has been replaced with a permanent guardian."); *see also In re Smith*, 2010 WL 4324434, at *2. Therefore, Campbell's complaint that Wylie no longer had authority to demand documentation regarding Lonnie's assets or an accounting of those assets is moot. We overrule Campbell's fourth issue.

D. Campbell's Guardianship Application

In his fifth issue, Campbell asserts that the trial court denied him due process when it failed to hear his application for guardianship, his opposition to Wylie's appointment as guardian, and his application to withdraw the application for guardianship. In his eighth issue, he asserts that the trial court erred in denying him

the right to proceed with his guardianship application on the basis that he had no live pleadings on file. Because these issues are related, we address them together.

Initially, we note that Campbell's arguments under his fifth and eighth issues are difficult to follow, convoluted, and include several unsupported assertions not relevant to the issue before us.⁹ *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a *clear and concise* argument for the contentions made, with appropriate citations to authorities and to the record.") (emphasis added). Nonetheless, we will attempt to address those arguments that are germane to the issues we understand him to raise, namely, that the trial court denied him the opportunity to proceed with his application for guardianship and to contest Wylie's appointment as permanent guardian.

1. Guardianship Application

On November 27, 2013, Campbell filed a fourth amended application for appointment of a guardian. On March 28, 2014, Campbell filed a pleading entitled "Motion and/or Notice of Withdrawal of Application for Guardianship of Lonnie Phillips, Jr. and Application to Close Estate." On September 30, 2014, Campbell filed a supplement to his November 27 application for guardianship and request to

⁹ These assertions include that Maggiore appeared "to go on an all-out witch hunt to find problems or create impediments to the caretakers," and that he "appeared offended that he was not given a level of deference that he expected and grew offended and querulous as a result."

close guardianship. The record reflects that the supplemental pleading was only served on the attorneys in the case.

At the October 3, 2014 guardianship hearing, the court reviewed the history of the parties' pleadings on file and, in particular, considered whether Campbell had a live pleading entitling him to seek appointment as guardian of the ward and his estate.

The Court: Okay. I just don't see right now we have a live pleading. Now, because you withdrew everything on March 28—and so, now, here we are—

Ms. Davis: Your Honor, I didn't withdraw the pleading for the guardianship. My pleading was to close the estate. The application that they had made to appoint a guardian—the pleading is to close the guardianship because there is nothing to manage.

The Court: But the words you used were withdraw your application. You put it in there. That's pretty clear. It's clear—it's—in the beginning is your opening paragraph and it's in your prayer at the end. You asked to do both those things, not only close it but you—

....

Ms. Davis: No, your Honor. As was said in my—in paragraph 1—that's not a paragraph. That's an opening.

The Court: Well, that's great; but that's what your opening says. You can't discredit—I mean, that's what you wrote.

....

The Court: You asked for two things: One of them was to withdraw application. One of them was to close the estate. Obviously, we didn't close the estate; but you withdrew your application. It's pretty clear to me.

The court further noted that Campbell's September 30, 2014 supplement to his withdrawn application for guardianship was never served on the ward. *See Whatley*, 302 S.W.3d at 321 (noting service of citation on proposed ward is jurisdictional). The court concluded that Campbell's application for guardianship had been withdrawn and that the guardianship would not be closed.

Under Texas Rule of Civil Procedure 71, courts look to the substance of a document rather than the title to determine the relief sought, if any. *See Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999). Substance is not determined solely from a caption or introduction. *Id.* Instead, substance is gleaned from the body of the instrument and the prayer for relief. *Finley v. J.C. Pace Ltd.*, 4 S.W.3d 319, 320 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

In the conclusory paragraph of his motion to withdraw his application, Campbell stated as follows:

Because the family is fully capable of handling any remaining matters as it pertains to the rebuilding issues and costs in connection therewith, without court intervention, the application for appointment of a guardian is hereby withdrawn. Moreover, any issues regarding improper handling of the estate and control over repairs have been resolved and all issues pertaining thereto are now moot. WHEREFORE PREMISES CONSIDERED, the applicant hereby withdraws its request for an application for the guardianship of Lonnie Phillips, Jr. and requests that this Honorable Court close this estate.

Applying the standard above, we conclude that the trial court properly determined that Campbell had withdrawn his application for guardianship. *See*

Stroman v. Tautenhahn, 465 S.W.3d 715, 719 (Tex. App.—Houston [14th Dist.] 2015, pet. dismiss'd w.o.j.) (concluding appellant's affidavit was exactly what it purported to be—affidavit attesting to dollar value of attorney's fees—and not itself motion asking trial court to award attorney's fees).

2. Contest to Wylie's Appointment

Campbell also complains that the trial court denied him due process when it refused to allow him to contest Wylie's appointment as permanent guardian. Specifically, he argues that he was not allowed to refute any information submitted by Wylie because he was not permitted to cross-examine witnesses and his witnesses were not allowed to testify.

A trial court has broad discretion in the selection of a guardian. *Trimble v. Tex. Dep't of Prot. & Reg. Svcs.*, 981 S.W.2d 211, 214 (Tex. App.—Houston [14th Dist.] 1998, no writ); see *Johnson v. Johnson*, No. 01-04-00813-CV. 2005 WL 615421, at *2 (Tex. App.—Houston [1st Dist.] Mar. 17, 2005, no pet.) (mem. op.). Consequently, an appellate court will not reverse an order appointing a guardian absent a showing that the trial court abused its discretion. *Trimble*, 981 S.W.2d at 214. A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

A probate court conducts its business in a continuing series of events because the nature of administration contemplates decisions to be made on which other decisions will be based. *See Trimble*, 981 S.W.2d at 215; *Youngs v. Choice*, 868 S.W.2d, 850, 852 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Moreover, a trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed. *See Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.—Austin 1994, no writ).

With regard to Campbell's contention that Davis was not permitted to cross-examine witnesses, the record reflects that at the April 10, 2104 show cause hearing, Davis cross-examined Ava five times totaling over 17 pages of the 102-page reporter's record, questioned Campbell on direct examination, and was not prevented from further questioning either witness. Davis also introduced her accounting of the expenditures of the ward's funds into evidence which was admitted without objection. At the October 3, 2014 hearing on the contested guardianship proceedings, Davis cross-examined Wylie and questioned her on re-cross. After hearing the testimony, the trial court concluded that a guardian was needed and that the only question remaining was whom to appoint.

Campbell also complains that Davis was not permitted to call a witness to refute Wylie's testimony that Lonnie had been found wandering the streets by emergency medical services. He further argues that Davis should have been

permitted to call the ward's children who went to the hospital after EMS transported Lonnie there. However, the purpose of the testimony Davis sought to introduce was not to contest Wylie's suitability to be appointed guardian but, rather, to contest the necessity for a guardianship, an issue that had already been determined by the trial court.¹⁰ Moreover, the inclusion and exclusion of evidence is committed to the trial court's sound discretion. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000). A party complaining that it was error to deny his request to call a witness must sufficiently brief the issue to show that the trial court committed reversible error. *See id.*; *Manon v. Solis*, 142 S.W.3d 380, 393 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). In particular, a party must explain how excluded testimony is relevant and controlling on a material issue and that it would not have been cumulative of other admitted evidence. *See id.* Here, Campbell has not explained how the excluded testimony was relevant and controlling on the issue

¹⁰ At the hearing, Davis stated to the court:

Now, the other thing that I would like to address with the Court is that we have not been allowed to call any witnesses to refute anything that Ms. Wylie has said. The Court has determined that there is a need for a guardian without hearing testimony from us in any way, shape, form, or fashion regarding the care of Mr.—Mr. Phillips. I have direct testimony of a witness who called the EMS service. Mr. Phillips was not wandering around. He was in this individual's home at the time. And EMS was contacted because he appeared frail and—and—and—couldn't—wouldn't drink any water. So, that information is totally untrue. And then, of course, both the children were there at the hospital; and I would like for them to give testimony because the Court is basing a determination on something that she says is in a record that has not been produced is wholly untrue.

before the court, i.e., whether Wylie was suitable to serve as Lonnie’s guardian. The trial court did not deny Campbell the opportunity to contest Wylie’s appointment as permanent guardian.

We overrule Campbell’s fifth and eighth issues.

E. Reappointment of Guardian Ad Litem

In his sixth issue, Campbell contends that the trial court abused its discretion in reappointing Maggiore as guardian ad litem.

At the conclusion of the October 3, 2014 hearing, the trial court discharged Maggiore and Drexler as guardian ad litem and attorney ad litem, respectively, noting that “if [Davis] refiles, then we’ll revisit that issue.” The trial court signed its order that same day. On December 11, 2014, Campbell filed his notice of appeal. On December 29, 2014, the trial court entered an order reappointing Maggiore as guardian ad litem.

Although the general rule is that appeals may be taken only from final judgments, probate proceedings are an exception to this rule. *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006). The Texas Estates Code specifically allows a party to “appeal from an order or judgment appointing a guardian.” TEX. EST. CODE § 1152.001. Therefore, the December 29 order appointing Maggiore as the guardian ad litem was an appealable order. However, Campbell did not file a notice of appeal from the December 29 order until he filed his second notice of appeal on October 7,

2015—well beyond thirty days after the order was signed—and consequently has failed to perfect an appeal from that order. *See* TEX. R. APP. P. 26.1 (stating notice of appeal must be filed within thirty days after judgment is signed). This Court does not have jurisdiction over an appeal unless a timely notice of appeal has been filed. *See Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 737 (Tex. 2001). We dismiss Campbell’s sixth issue for lack of jurisdiction.

F. Petition for Appointee Fees

In his seventh issue, Campbell argues that the trial court erred in granting Maggiore’s fee petition because Maggiore has failed to provide dates for his alleged services, increased the costs of litigation, engaged in matters not authorized pursuant to his order of appointment, failed to determine whether methods other than guardianship were appropriate in this cause, and failed to tender a report.

A petition for appointee fees must be objected to during the time period set in a trial court’s standing order or rules or the issue is not preserved for appeal. *See Riggins v. Hill*, 461 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (concluding that failure to present complaint regarding disbursement of attorney’s fees and to obtain adverse ruling in trial court precluded party from raising issue on appeal); *Poland v. Grigore*, 249 S.W.3d 607, 618 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (holding that complaining party waived issue challenging attorney’s fees award on appeal where it did not object to award during hearing or

time period between filing of complained-of affidavit for attorney's fees and issuance of order awarding fees).

On November 19, 2014, Maggiore filed his application for approval of appointee fees in the amount of \$5,359.59. The trial court signed an order granting his application on December 9, 2014. Campbell did not request a hearing or otherwise object to the appointee fees below on any of the grounds he now asserts on appeal. *See* TEX. R. APP. P. 33.1.¹¹ Having failed to do so, he has waived this issue for our review. *See Poland*, 249 S.W.3d at 618; *Riggins*, 461 S.W.3d at 583. We overrule Campbell's seventh issue.

G. Order to Sell Real Property

In his ninth issue, Campbell argues that the trial court erred in granting Wylie's amended application to sell Lonnie's real property. He argues that Wylie impermissibly sought to sell the property to reimburse herself for expenses she incurred when she bought clothes for Lonnie.

On August 5, 2014, Wylie filed an application for "as is" sale of Lonnie's real property under Estates Code section 1158.451, and served Campbell's counsel with the pleading. On August 27, 2015, the trial court signed an order authorizing the

¹¹ Further, the trial court held Maggiore's fee application for more than twenty-five days before issuing its order, exceeding the ten-day period outlined in the local probate court's Standards for Court Approval of Attorney Fee Petitions.

sale. On September 14, 2015, Campbell filed a motion to set aside the order granting the sale of the property. On September 21, 2015, Wylie filed an amended application for the sale of the property. No objection was filed and no hearing was requested on the amended application. On October 7, 2015, the trial court entered an order granting the amended application.

Campbell contends that the trial court erred in authorizing the sale of Lonnie's residence because Wylie sought only "to compensate herself for clothes she had bought the ward," and that Wylie "has failed to substantiate that the amount of clothing purchased is commensurate with the amount to be netted from the selling of the ward's home." This characterization is inaccurate. In her motion, Wylie sought authorization from the court to sell Lonnie's home due to, among other things, its inhabitability as a result of the fire, the necessity of paying Lonnie's expenses while in an assisted living facility "because he is currently on Medicaid and all expenses for clothes, etc. has been paid for personally by the Guardian," the cost to complete renovation was more than the value of the property, and the real property, if left vacant, posed a liability to the estate. Campbell also contends that Wylie's attempt to sell the property presents a conflict of interest which violates section 1104.354 because she is seeking to sell the ward's assets for her own financial benefit. TEX. EST. CODE § 1104.354.

However, section 1104.354 provides that a person may not be *appointed* guardian if the person asserts a claim adverse to the proposed ward or the proposed ward's property. *See id.* This section does not support Campbell's assertion that a previously appointed guardian may not seek to sell a residence to pay, in part, the costs of the guardianship.

In a sub-issue, Campbell also argues that Wylie violated the rights of the ward's children by filing a motion for instruction regarding signing a "do not resuscitate" order for the ward. The record reflects that, on September 8, 2015, Wylie filed the motion for instructions after Lonnie's physician requested in writing that Wylie sign a "do not resuscitate" order. Wylie served the motion on Campbell's counsel and no objection to the motion has been filed. We note, however, that the trial court has not entered an order on Wylie's motion for instructions; therefore, there is no appealable order. *See* TEX. EST. CODE § 1022.001 ("A final order issued by a probate court is appealable to the court of appeals.") We dismiss Campbell's ninth issue for lack of jurisdiction.¹²

Conclusion

We affirm the probate court's October 3, 2014 order appointing Catherine N. Wylie as permanent guardian of the person and estate of Lonnie Phillips, Jr., the

¹² On October 15, 2015, Maggiore filed an amended motion to dismiss issues one through six, eight and nine for lack of jurisdiction. In light of our disposition of these issues above, we dismiss Maggiore's first amended motion to dismiss as moot.

November 9, 2014 order granting M. Brandon Maggiore’s application for approval of appointee fees, and the October 7, 2015 order granting Catherine N. Wylie’s amended application for “as is” sale of real property. We dismiss the portions of Kevin Campbell’s appeal relating to the January 30, 2014 order appointing a temporary guardian pending contest, the December 29, 2014 order appointing Maggiore as guardian ad litem, and the September 8, 2015 motion for instruction for want of jurisdiction.

Russell Lloyd
Justice

Panel consists of Justices Bland, Brown, and Lloyd.