

Affirmed and Majority and Dissenting Opinions filed July 19, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00664-CV

**IN THE GUARDIANSHIP OF JOHN D. BURLEY, AN INCAPACITATED
PERSON**

**On Appeal from Probate Court No. 1
Harris County, Texas
Trial Court Cause No. 424,791**

MAJORITY OPINION

Appellant Jan B. Cowan appeals from an order directing her, as Guardian of the Person and the Estate of John D. Burley, an Incapacitated Person, to pay from the ward's estate attorney's fees in the amount of \$136,824.45, to counsel for appellee Kellie Black. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cowan is Burley's daughter from his first marriage. Black is Burley's current wife. In 2012, Burley signed a statutory durable power of attorney and a

medical power of attorney, both appointing Black, and a declaration designating Black to serve as guardian of Burley's person if the need arose. In August 2013, Cowan filed an application for appointment as guardian that relied upon an earlier power of attorney. Black contested, arguing Burley did not need a guardian. Black subsequently filed a supplement arguing that, alternatively, she should be appointed as guardian. Cowan filed a plea to the jurisdiction, and Black's alternative pleading was dismissed without prejudice. Black then filed an application for appointment as guardian on March 19, 2014. Following a jury trial, Cowan was appointed guardian of Burley's person and estate.

Black submitted an application for payment of attorney's fees and expenses in the amount of \$174,808.17. Cowan objected and Black responded. After a hearing, and submission of additional expense documentation requested by the trial court, payment was authorized in an order signed July 14, 2014. Cowan, as guardian of the estate, was directed to pay Black's attorneys \$136,824.45. The trial court entered findings of fact and conclusions of law in support of its order.

ANALYSIS

In three issues, Cowan complains of the trial court's award of attorney's fees. First, Cowan contends that the attorney's fees incurred before the filing of the guardianship application that were unrelated to the prosecution of the application are not recoverable. Second, Cowan complains Black failed to segregate her recoverable fees from her unrecoverable fees. Lastly, and in the alternative, Cowan contends that even if the fees were recoverable, the amount awarded was neither equitable nor just.

Texas law does not allow recovery of attorney's fees unless authorized by statute or contract. *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002); *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex.

1992). Black sought attorney's fees pursuant to section 1155.054 of the Texas Estates Code, which provides, in pertinent part:

(a) A court that creates a guardianship or creates a management trust under Chapter 1301 for a ward, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created . . .

. . .

(c) The court may not authorize attorney's fees under this section unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.

Tex. Est. Code Ann. § 1155.054(a), (c) (West 2014).

In support of its award, the trial court found:

10. Kellie Black acted in good faith and with just cause in connection with this case including in the filing and prosecution of her application for appointment as permanent guardian of the person and of the estate of John D. Burley.
11. The parties stipulated and agreed that all issues of attorneys' fees would be submitted to the Court rather than the jury.
12. The parties stipulated and agreed that the amount of fees for which Kellie Black made application were reasonable and the services rendered were necessary.
13. The parties did not stipulate that the fees for which Kellie Black made application were recoverable in this case.

Cowan does not challenge any of these findings.¹ The record before this court reflects the only issue reserved by the stipulation on attorney's fees was whether the fees were recoverable under the statute. Cowan's objection to Black's application for attorney's fees states:

8. At trial in this matter, Counsel for Black and for Cowan stipulated as to the necessity and reasonableness of each other's attorney's fees, but Counsel for Cowan asserted his client's position, then and now, that the Court lacks jurisdiction to award to any party attorney's fees that were incurred prior to her filing an application for the appointment of a guardian. The parties agree that the Court should make the final determination as [to] any amount awarded to any party as the Court deems proper.

At the hearing on the Motion for Entry of Judgment, the parties described the stipulation as follows:

[Cowan's counsel]: And we have stipulated to each other['s fees, right?

[Black's counsel]: The numbers.

[Appellant's counsel]: So they are subject to Court review then.

THE COURT: Yes.

[Cowan's counsel]: And then we are good.

Subsequently, during the hearing on attorney's fees, Cowan's counsel approved the trial court's characterization of the stipulation as follows:

THE COURT: And I remember ya'll agreed that I would review fees and it was going to be obviously discretionary with me as to the awarding of them and the amount?

[Appellant's counsel]: That's correct.

We therefore must consider Cowan's issues in light of the trial court's uncontested

¹ The reporter's record from the jury trial is not part of the record before this court. The issue of attorney's fees was heard separately by the trial court as agreed to by the parties. Accordingly, we disregard references to evidence presented in the jury trial.

findings, the record of the hearing on attorney's fees, and the parties' stipulation on attorney's fees.

In her first issue, Cowan argues the fees and expenses incurred before Black filed her application for guardianship are not recoverable because subsection (c) restricts recoverable fees to only those incurred "in the filing and prosecution of the application." We see no such restriction in the plain language of the statute.

This court has previously considered the construction of this statute. *See In re Guardianship of Whitt*, 407 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (construing former Tex. Prob. Code § 665B redesignated as Tex. Est. Code Ann. § 1155.054). However, in that case, the issue was whether the statute authorized the trial court to award attorney's fees when no guardianship was created. *Id.* at 497–98.

As we recognized in *Whitt*, the trial court's interpretation of applicable statutes is reviewed de novo. *Id.* (citing *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 655–56 (Tex. 1989)). Our objective in construing a statute is to determine and give effect to the Legislature's intent. *Id.* (citing *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000)). Unless the statutory language is ambiguous, we adopt the interpretation supported by the plain meaning of the words chosen by the Legislature and do not look to extraneous matters for an intent the statute does not state. *Id.* (citing *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997)). We found the unambiguous language of the statute did not permit the trial court to grant the relief requested unless it first created a guardianship or management trust. *Id.* at 500. We noted the Legislature could have, but did not, provide for the payment of attorney's fees from a "proposed" ward's estate. *Id.* at 499.

Subsection (a) permits the trial court to authorize the payment of attorney's

fees “to an attorney who represents the person who filed the application. . .” Tex. Est. Code § 1155.054(a). Subsection (c) then bars such an award “unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.” Tex. Est. Code Ann. § 1155.054(c) (West 2014). Although the statute limits recovery of attorney’s fees to a person who acted in good faith and for just cause, the Legislature could have, but did not, limit the recovery to only those attorney’s fees incurred from the filing and prosecution of the application. *See id.* § 1155.054(a), (c); *In re Guardianship of Whitt*, 407 S.W.3d at 499.

Under the unambiguous wording of the statute, because a guardianship was created the trial court was permitted to authorize the payment of attorney’s fees to Black’s attorney upon finding that Black acted in good faith and for just cause. The requisite finding was made and is not challenged on appeal. Accordingly, under the facts presented in this case, we conclude the statute affords a basis for the trial court’s order. Cowan’s first issue is overruled.

In her second issue, Cowan complains Black failed to segregate her recoverable fees from her unrecoverable fees. Because attorney’s fees are only recoverable in Texas if they are authorized by statute or contract, “fee claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not.” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). Cowan’s complaint is based on her assertion that some of the fees were not recoverable because the statute does not authorize recovery of attorney’s fees unless they were incurred from the filing and prosecution of the application. We have concluded the fees were authorized by the statute and appellant is precluded from complaining of the failure to segregate on

any other basis in light of the stipulation to attorney's fees. Accordingly, appellant's second issue is overruled.

In her third issue, Cowan argues the trial court's award includes fees that Black "incurred in contesting [Burley's] expressed wishes and in attempting to gain control over his separate property." Again, Cowan is complaining the fees were unrecoverable because they were not incurred from the filing and prosecution of the application. We have concluded otherwise. Moreover, Cowan stipulated that "the Court should make the final determination as [to] any amount awarded to any party as the Court deems proper." Consequently, there is no basis for this court to conclude the trial court's award was inequitable or unjust. Appellant's third issue is overruled.

We affirm the trial court's order.

/s/ John Donovan
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Brown. (Frost, C.J., Dissenting.)