

Affirmed and Memorandum Opinion filed August 22, 2017.



In The

Fourteenth Court of Appeals

NO. 14-15-00588-CV

IN THE GUARDIANSHIP OF A.S.K., AN INCAPACITATED PERSON

**On Appeal from the Probate Court No. 3
Harris County, Texas
Trial Court Cause No. 415,959**

M E M O R A N D U M O P I N I O N

This appeal concerns the appointment of a permanent guardian for A.S.K., an adult incapacitated person. Before appointing A.S.K.'s father, Randall Keith, as guardian, the trial court disqualified A.S.K.'s mother, Sharon Keith, as a possible guardian. Sharon raises several issues in this appeal challenging the trial court's disqualification procedures and findings as well as the trial court's requirement that the applicants deposit funds into the registry of the court to secure the costs of the proceedings. We affirm.

I. Background

Sharon and Randall were divorced in 2002. In 2006, the family district court issued a modification order naming Randall as A.S.K.'s sole managing conservator. The present action began when A.S.K. turned 18 in September 2012, and Sharon and Randall each filed applications in probate court seeking to be appointed A.S.K.'s permanent guardian. On September 27, 2012, the probate court ordered, among other things, that both parties each deposit \$15,000 into the court's registry to secure the probable costs of the proceedings.¹ Sharon thereafter filed an Affidavit of Inability to Pay Costs, and it is undisputed that she never deposited the funds as directed.

Randall filed a motion seeking, among other things, to have Sharon disqualified as a potential guardian for A.S.K. Among the grounds presented, Randall contended Sharon should be disqualified because she owed a child support arrearage for A.S.K.; she is a person who—because of inexperience, lack of education, or other good reason—is incapable of properly and prudently managing and controlling A.S.K. or his estate; and she is unsuitable to be A.S.K.'s guardian. The trial court held an evidentiary hearing on the motion. Much of the evidence adduced at this hearing concerned Sharon's finances, including the fact that she had three outstanding liens on her home totaling approximately \$100,000, including one by the Internal Revenue Service for back taxes. There was also evidence that she owed a child support arrearage at least partially for the support of A.S.K.² At the

¹ The trial court also appointed a temporary guardian for Randall who was not one of the parties and who had not applied to become A.S.K.'s permanent guardian. A.S.K. continued to live with Randall during this time.

² Sharon and Randall have three children together, and the alleged arrearage was not for A.S.K.'s support alone. Randall testified that as of the time of the hearing, Sharon owed approximately \$7000 in past due child support with 60-70% percent of that for A.S.K.'s care. Sharon disputed the numbers and argued she had grounds for an offset but had never raised the issue in family court.

conclusion of the hearing, the trial court determined Sharon to be disqualified based on the grounds referenced above. A written order dated July 25, 2013, stated the same.

After a number of other matters were resolved, including a motion to recuse the judge and the disqualification of A.S.K.'s brother as a possible guardian, the trial court held a hearing on Sharon's motion to disqualify Randall as a potential guardian, which the trial court denied. The trial court held a final hearing on the appointment of a guardian and then named Randall as A.S.K.'s permanent guardian in an order dated March 26, 2015. The court further found that there was no need to appoint a guardian of A.S.K.'s estate.

Sharon raises twelve issues on appeal. The key disputes can be grouped as follows: (1) disqualification of Sharon prior to the final hearing on appointment of a guardian [issues 1 and 2], (2) the standards used and evidence presented for disqualification [issues 3 through 8], and (3) challenges to the order to deposit funds into the registry of the court [issues 9 through 12]. We will address each set of issues in turn.

II. Disqualification Before Final Hearing

In her second issue, Sharon contends the trial court erred in determining that she was disqualified prior to and outside of a final hearing on the appointment of a guardian.³ Sharon's argument is premised on Probate Code section 685(c)(4), which provided that at the hearing to appoint a guardian, the court shall "inquire into the qualifications, abilities, and capabilities of the person seeking to be appointed

³ In her first issue, Sharon asserts that this court has jurisdiction to consider her second issue concerning the timing of the trial court's disqualification determination. Randall does not suggest otherwise, and we have no concerns regarding our jurisdiction over this matter. Moreover, Sharon neither alleges the trial court erred nor requests any affirmative relief in her first issue.

guardian.” Tex. Prob. Code § 685(c)(4) (repealed) (see now Tex. Est. Code § 1101.051).⁴ Sharon insists that this provision mandated that the qualifications of *all* applicants must be considered at the final hearing; thus, disqualifying her at the earlier hearing violated the statute.

Sharon does not cite any place in the record, and we have discovered none, where she preserved her contentions by making them in the trial court. *See* Tex. R. App. P. 33.1(a) (requiring as a prerequisite to appellate review that a complaint be made in the trial court by a timely and sufficiently specific request, objection, or motion). When the trial court called the hearing on the motion to disqualify Sharon, Sharon’s attorney announced she was ready for trial and did not object to the proceedings. Although counsel subsequently expressed uncertainty regarding whether the subject of the hearing was Sharon’s standing or disqualification, when it became clear that Sharon’s disqualification was at issue, counsel complained only that Sharon had paid a jury fee and thus the issue should not be tried to the bench. Sharon failed to get a ruling on her objection and does not renew the jury complaint on appeal.⁵

Additionally, even if Sharon had preserved this issue, we disagree with her proffered construction of section 685(c)(4). The proper construction of a statute is a question of law reviewed de novo. *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d

⁴ During the pendency of this case, the Probate Code was recodified into the Estates Code. *See* Acts 2011, 82nd Leg., ch. 1338 (S.B. 1198), § 1 et seq. (eff. Jan. 1, 2014); Acts 2011, 82nd Leg., ch. 823 (H.B. 2759), § 1 et seq. (eff. Jan. 1, 2014); Acts 2009, 81st Leg., ch. 680, § 1 et seq. (eff. Jan. 1, 2014). The recodification was “without substantive change,” and its purpose was to make the law “more accessible and understandable.” Tex. Est. Code § 21.001; *see also In re Davidson*, 485 S.W.3d 927, 930 n.2 (Tex. App.—Tyler 2016, orig. proceeding). We apply the code provisions in effect at the time the trial court signed the orders at issue. *See Woods v. Kenner*, 501 S.W.3d 185, 188 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

⁵ Opposing counsel asserted that the jury fee had been paid on the day of the hearing, which was too late, and Sharon’s counsel did not pursue the issue further.

68, 74 (Tex. 2016). The objective is to ascertain and give effect to the legislature's intent as expressed in the statute. *Id.* The statute must be viewed as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage. *Id.*

Sharon reads into the statute a limitation that was not part of its plain language. She does not cite any authority supporting her construction, and our research has revealed none. Her construction is not a necessary or obvious reading of the statutory language. The trial judge here clearly concluded that having disqualified Sharon in an earlier evidentiary hearing, she was no longer an applicant at the time of the final hearing. *See, e.g., In re Guardianship of Jones*, No. 02-15-00367-CV, 2016 WL 4474353, at *6-9 (Tex. App.—Fort Worth Aug. 25, 2016, no pet.) (mem. op.) (affirming applicant's disqualification in separate hearing). Because Sharon failed to preserve this issue and the trial court did not violate the statute in disqualifying Sharon prior to the final guardianship hearing, we overrule Sharon's first two issues.

III. Grounds for Disqualification

In issues 3 through 8, Sharon asserts that the trial court failed to apply the correct factors in determining she was disqualified and that the evidence was legally insufficient to support the trial court's disqualification findings. As stated, the trial court disqualified Sharon based on three independent grounds (1) she owed a debt to A.S.K.; (2) she is a person who—because of inexperience, lack of education, or other good reason—is incapable of properly and prudently managing and controlling A.S.K.; and (3) she is unsuitable to be A.S.K.'s guardian. *See* Tex. Prob. Code § 681(5), (7), and (8) (repealed) (see now Tex. Est. Code §§ 1104.351, .352, and .354(2)). We must uphold the trial court's determination if any one of these three grounds was properly applied and supported by evidence. *See id.*

A trial court's determinations in a guardianship proceeding are subject to review for abuse of discretion. *Trimble v. Tex. Dep't of Protective & Regulatory*

Servs., 981 S.W.2d 211, 215 (Tex. App.—Houston [14th Dist.] 1998, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). Under this standard, legal sufficiency challenges are merely factors to consider in assessing whether the court below abused its discretion. *Trimble*, 981 S.W.2d at 215. When reviewing for legal sufficiency, we consider the evidence in the light most favorable to the finding and indulge every reasonable inference that supports the challenged finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* at 827.

In issues four and seven, Sharon specifically challenges the trial court’s finding that because of her inexperience, lack of education, or other good reason, she is incapable of properly and prudently managing and controlling A.S.K. *See* Tex. Prob. Code § 681(7) (repealed). Although the trial judge did not enter findings of fact or conclusions of law concerning Sharon’s disqualification, he did explain his decision at the conclusion of the hearing as to all the grounds alleged by Randall, specifically noting the evidence concerning Sharon’s finances. The evidence revealed that Sharon had liens on her home totaling approximately \$100,000. She owed a significant amount of back taxes to the IRS. It was also established that she had a spotty record of paying child support for A.S.K. and owed a child support arrearage of several thousand dollars as of the time of trial.⁶

A guardian, once appointed, has “the duty to provide care, supervision, and protection for the ward” as well as “the duty to provide the ward with clothing, food,

⁶ Very little was brought forward at the hearing regarding Sharon’s education or experience beyond the fact she incurred the debts listed. Sharon cites to filings in the clerk’s record to illustrate her educational history and current employment status; however, it does not appear that the filings in question were before the judge at the hearing.

medical care, and shelter.” Prob. Code § 767(a)(2) (repealed) (see now Tex. Est. Code § 1151.051(c)(2) and (3)). Indeed, guardianship disqualification cases often address both the incapacitated person’s needs and the applicant’s ability to provide for those needs. *See, e.g., Trimble*, 981 S.W.2d at 215–16. However, Sharon argues that a different list of factors must be applied here. In support, she relies on the list presented in this court’s opinion in *Hill v. Jones*, 773 S.W.2d 55 (Tex. App.—Houston [14th Dist.] 1989, no pet.). In that case, in affirming the trial court’s finding the applicant was not disqualified, we noted that the applicant did not have a conflict of interest with the ward or owe the ward a debt, she had never been convicted of a felony, and she could read and write English, had completed high school and business school, and had experience as a clerical worker. *Id.* at 57-58. Contra to Sharon’s suggestion, however, nothing in *Hill* indicates that the court intended for these considerations to be an exhaustive list or even a guide to the analysis of future cases. Sharon does not cite any other relevant cases in support of her argument.

Disqualification under subsection 681(7) often involves a fact-intensive analysis that depends heavily on the circumstances of a particular case. Other courts have considered an applicant’s financial difficulties, at least to some extent, in determining that the applicant was disqualified under this subsection. *See, e.g., In re Guardianship of Jones*, No. 02-15-00367-CV, 2016 WL 4474353, at *6-9 (Tex. App.—Fort Worth Aug. 25, 2016, no pet.) (affirming disqualification of applicant who, among other things, had mismanaged funds and personal property); *In re Latham*, No. 09-98-117 CV, 1999 WL 700624, at *3-4 (Tex. App.—Beaumont 1999, no pet.) (considering management of finances in affirming disqualification of applicant as guardian of an estate); *cf. In re Guardianship of Jensen*, No. 10-07-00241-CV, 2008 WL 5115910, at *3 (Tex. App.—Waco 2008, no pet.) (affirming trial court’s denial of motion to disqualify applicant based in part on prior personal

bankruptcy due to conflicting evidence).⁷

Based on the foregoing analysis, we conclude that the trial court's determination that Sharon was incapable of properly and prudently managing and controlling A.S.K. because of "other good reason" was not arbitrary or unreasonable or without reference to guiding rules or principles. Moreover, the record contains legally sufficient evidence to support the trial court's determination. Therefore, we cannot say that the trial court abused its discretion when it disqualified Sharon, and we overrule her fourth and seventh issues. *See Cire*, 134 S.W.3d at 838–39. Because the trial court's disqualification determination is supported by this ground, we need not address Sharon's issues three, five, six, and eight, which challenge the trial court's other grounds for disqualification.

IV. Security

In issues nine through twelve, Sharon challenges the trial court's order requiring her to deposit \$15,000 into the registry of the court, an amount which apparently was to help cover the guardian ad litem's and attorney ad litem's fees. Sharon argues that the order probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals so as to constitute reversible error. *See Tex. R. App. 44.1*.

⁷ Sharon further argues that, while her financial difficulties might factor into the determination of who should be appointed guardian of A.S.K.'s *estate*, they should not disqualify her from serving as guardian of A.S.K.'s *person*. The only support she offers for this proposition, however, is to a pre-2003, unpublished, and therefore nonprecedential, opinion of this court, wherein we noted in a footnote that "it is not clear that a person, because of a debt owed to the proposed ward, would not still be capable of serving as the guardian of the person, while being disqualified from serving as the guardian of the estate." *Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337 *4 n.2 (Tex. App.—Houston [14th Dist.] Jan. 18, 2001) (not designated for publication). Although Sharon was alleged to have had a debt to A.S.K. in this case, that is not the ground on which we are affirming her disqualification. The notation of some uncertainty in *Betts* is not relevant.

Sharon specifically contends that the trial court's security order violated Texas Rules of Civil Procedure 143 through 146 and Probate Code sections 665A and 669(a) (repealed) and that the trial court had insufficient evidence before it on which to base the amount of security required. Sharon further argues that the order is erroneous because it assessed costs against the applicants rather than against the ward's estate. However, even if Sharon is correct that the trial court abused its discretion in some way in ordering the security deposit, we conclude that such would not constitute reversible error.

Sharon acknowledges that she never made the deposit into the court's registry in response to the order. The unpaid costs were not made part of the judgment. Moreover, the trial court did not dismiss Sharon's guardianship application for failure to make the deposit. Sharon complains, however, that the order was harmful because the trial judge considered her failure to make the deposit in his decision to disqualify her. As the trial court did not enter formal findings of fact or conclusions of law, Sharon bases this assertion on the trial judge's explanation for his decision provided after the close of evidence at the disqualification hearing. As part of his explanation, discussed in detail above, the judge briefly noted that Sharon had disregarded two court orders: the child support orders of the family court and the probate court's own security deposit order.

It is clear, however, that although the trial court mentioned Sharon's failure to make the deposit, the judge primarily was concerned with Sharon's finances and financial decision-making: the liens on her home, the IRS debt, as well as her failure to fulfill her child support obligations for A.S.K.'s welfare.⁸ Accordingly, we cannot

⁸ We note that the situation here is analogous to a complaint that the trial court erroneously admitted evidence and such admission caused the rendition of an improper judgment. To be successful in such cases, the appellant usually must show that the outcome turned on the erroneously admitted evidence. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000);

say that any error in requiring a security deposit “probably caused the rendition of an improper judgment” or “probably prevented the appellant from properly presenting the case to the court of appeals.” *See id.* We overrule Sharon’s issues nine through twelve.

Finding no merit in any of Sharon’s appellate issues, we affirm the trial court’s judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.

Saad v. Valdez, No. 14-15-00845-CV, 2017 WL 1181241, at *6 (Tex. App.—Houston [14th Dist.] Mar. 30, 2017, judgm’t vacated by agr.) (mem. op.).