# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-15-00367-CV**

IN THE MATTER OF THE
GUARDIANSHIP OF MAY K.
JONES

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FROM THE PROBATE COURT OF DENTON COUNTY
TRIAL COURT NO. PR-2014-00591

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## MEMORANDUM OPINION[1]

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### I. Introduction

Appellant Kathy Jones, Appellee Ellen Smith, and their sisters Judy Lynn Jones and Patricia Peacock are all daughters of May K. Jones, the ward in this guardianship proceeding. In two of her four points, Kathy argues that we should

[1]*See* Tex. R. App. P. 47.4.

reverse the trial court's judgment appointing Ellen as May's permanent guardian because there was insufficient evidence to find Kathy disqualified and unsuitable to serve as her mother's guardian and because the trial court erred by granting Ellen's motion in limine and striking Kathy's pleadings. As these two points are dispositive, we affirm without reaching Kathy's remaining points.[2] *See* Tex. R. App. P. 47.1 (requiring the court of appeals to hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal).

## II. Factual and Procedural Background

Although May did not move in with Ellen until July 2014, Ellen became her mother's primary caretaker after she helped move May from Kansas to Texas in

[2]In her first point, Kathy complains that trial court's order on Ellen's motion in limine is defective because it fails to specify that it is full, final, and appealable. *But see Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001) (providing that no particular form is required for an order to be final and appealable and that an order "that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language"). And in her fourth point, Kathy argues that the trial court erred by denying her motion to sever. However, in her motion, which she filed on October 30, 2015, Kathy acknowledged that the final trial was set for November 4, 2015. The trial court heard the motion before trial, orally denied it, and then rendered and signed a final, appealable judgment at the conclusion of trial that day, making severance unnecessary. *See De Ayala v. Mackie*, 193 S.W.3d 575, 578–79 (Tex. 2006) (op. on reh'g) (observing that probate proceedings are an exception to the "one final judgment" rule for an order that disposes of all parties or issues in a particular phase of the proceedings); *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995) ("A severance order avoids ambiguities regarding whether the matter is appealable."); *Kansas Univ. Endowment Ass'n v. King*, 350 S.W.2d 11, 19 (Tex. 1961) ("A severance divides the lawsuit into two or more independent causes, each of which terminates in a separate, final and enforceable judgment.").

2008. By the time of trial on Ellen's permanent guardianship application, May was seventy-nine years old and suffering from numerous health problems, including dementia.[3]

**A. Guardianship Proceeding Background**

The tug-of-war that ultimately led to the siblings' battle over May's guardianship began on May 3, 2014, when Kathy removed May from her residence at Evergreen, a senior living facility in The Colony, and took her to Kathy's home in Austin. En route to Austin, May telephoned Ellen and told her that Kathy was taking her to Austin for "a vacation." Approximately a week later, Kathy informed Ellen that May had hired an attorney.[4]

Three days later, on May 14, 2014, May signed a self-proving affidavit of declaration of guardian in which she attempted to designate Judy as guardian of her person, with Kathy as first alternate; to designate Kathy as guardian of her

[3]During the trial, Ellen testified about May's memory problems and confusion and said that May sometimes "remembered" things that never actually happened. She stated that May could not accurately and safely dispense her own medication without assistance, could not compute math at a basic level, could not drive a car, could not schedule her own doctor's appointments or understand and follow a doctor's advice, could not cook for herself or do her own laundry, and could not work with Medicare or other governmental agencies regarding her benefits and obligations. Ellen opined that May, who was almost completely dependent upon a wheelchair, would not be able to protect herself in an emergency. According to Ellen, May was also easily influenced and taken advantage of by others. In addition to dementia and diabetes, May also suffered from heart problems and from extreme knee pain related to her obesity.

[4]Kathy explained that she had called the lawyer to talk with May about "[May's] options for her estate planning for her future."

estate, with Judy as first alternate; and to expressly disqualify Ellen and Patricia from serving as guardian of her person or estate. Kathy subsequently became May's Social Security representative payee, and she obtained power of attorney over her mother's Wells Fargo account, which contained approximately $8,000 prior to paying the attorney.[5]

When Ellen arrived at Kathy's house to visit May on May 16, she discovered that May was no longer in Austin but was instead at Judy's apartment in Canadian. So, Ellen continued on to Canadian, and when she arrived at Judy's apartment, May told Ellen that she was going to stay there.[6] Shortly after that visit, Ellen was told by a "sheriff" that Judy worked for that she would be arrested for trespassing if she tried to visit her mother again. Because Judy worked evenings, this arrangement left May unsupervised at night, and because Judy had to sleep during the day, May remained unsupervised during daytime hours as well.[7]

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[5]Kathy stated at the July 16, 2015 hearing that she had paid $2,000 of May's money to the attorney she found to represent May, leaving the account's balance at "right under $6,000."

[6]At the July 16, 2015 hearing, Kathy testified that she and Judy had planned for their mother to remain in control of her financial and medical affairs while living in Canadian, with an apartment, bills, and bank account in her own name and responsibility for taking her own medications "with assistance."

[7]At some point, Kathy also removed May's personal property from May's residence in The Colony. Kathy stated at the July 16, 2015 hearing that she was paying for the storage unit that held May's property.

On July 4, Ellen filed her application for appointment as May's temporary and permanent guardian of the person. In it, Ellen alleged that May suffered from dementia, that Judy and Kathy had exerted undue influence or control over their mother to get her to revoke Ellen's durable and medical powers of attorney, which Ellen had had since May lived in Kansas, and that the attempted revocation of these items was ineffective because May lacked the capacity to revoke them. Ellen attached to her application a certificate of medical examination (CME) dated May 21, 2014, which had been completed by Dr. Jose Luis Burbano, May's primary physician for the preceding eight years.[8]

In his CME, Dr. Burbano stated that May had dementia, that she would benefit from placement in a secured nursing facility that specialized in the care and treatment of people with dementia, and that she did not have sufficient capacity to give informed consent to the administration of dementia medications. He observed that May had executed a durable power of attorney and a health care power of attorney some years before but that she no longer had the ability to responsibly execute new ones.[9] The trial court appointed Ellen to be May's temporary guardian at the conclusion of a hearing in July 2014 and, upon the

[8]Dr. Burbano completed another CME on August 1, 2014, based upon an examination in July 2014. Both CMEs were admitted into evidence at the July 16, 2015 hearing on Ellen's motion in limine and for security for costs. Dr. Burbano testified at that hearing and at the trial.

[9]Dr. Burbano testified at the July 16, 2015 hearing that based on his experience with May, her cognitive decline had begun around 2011 or 2012, and she had been incapacitated for all of 2014.

request of May's guardian ad litem, the court also entered a temporary injunction prohibiting the parties from discussing the pending guardianship proceedings with May.[10]

After May moved into Ellen's house, Kathy and Judy repeatedly contacted authorities to report alleged abuse and mistreatment of May by Ellen. Kathy called Adult Protective Services (APS) in August 2014 and called the police on two occasions, while Judy called APS a "couple" of times.[11] Ellen testified that since May had been living with her, the police and APS had visited her home on multiple occasions to investigate complaints, none of which had been "validated." Kathy also filed a grievance against Ellen's attorney in January 2015 but testified that she backed off when "they asked for more information." She explained that she had filed the grievance because her attorney at the time "said [Ellen's attorney] disappeared . . . and no one could contact her."

Kathy and Judy filed a joint counter-application for guardianship on September 9, 2014, seeking to serve as guardian of the person (Judy) and

[10]The guardian ad litem testified that discussing the pending guardianship proceeding "agitated" May and that it was "not good for her psychological health and well-being" and clearly "against her best interest" to discuss these matters in her presence.

[11]Kathy also admitted that on more than one occasion she advised May to call the police or APS if she felt like Ellen was abusing or mistreating her. She also admitted that after Ellen was appointed as May's temporary guardian, she advised May that, if she wanted to, May could have a private conversation with her doctor outside of Ellen's presence, but Kathy denied having "encouraged" May to ask her doctors for this.

guardian of the estate (Kathy) and opposing Ellen's application. They asserted that they did not believe that their mother was totally incapacitated and attached a copy of their mother's May 14, 2014 declaration to their application. They also indicated that May had approximately $8,000 in a bank account and $7,000 in personal effects, household goods, and furniture, and they requested that their attorney's fees be paid out of their mother's estate.[12]

On December 4, 2014, Dr. J. Douglas Crowder, a forensic psychiatrist, conducted an independent psychiatric evaluation of May, and the trial court admitted this evaluation into evidence at the November 4, 2015 trial. Dr. Crowder diagnosed May with major neurocognitive disorder due to dementia, and "probable Alzheimer's disease with possible vascular component." He concluded that May suffered from significant dementia, "which will inexorably progress to a more severe stage over time," and that she was totally incapacitated.[13] He further stated that May blamed all of her children for

[12]At one point during the proceedings, the trial court observed that there was only "roughly $7,000" in assets in the estate and that those assets would "more than likely go to the ad litem costs."

[13]Dr. Crowder observed in his evaluation that May told him about some cardiac stents placed several years ago but that, other than knee problems, she was unable to name any of her other medical conditions. She did, however, agree that she had diabetes and hypertension when he mentioned these conditions. May had difficulty recalling her daughters' last names except for Ellen's, was confused about their current ages, could not tell him how much she received in Social Security payments, and scored only twelve out of a possible thirty points on a cognitive assessment test. He also observed that as the session went on and her cognitive deficits became more apparent, May burst into

interfering with the independent lifestyle that she wanted but was no longer capable of sustaining but appeared to feel no closer to any one of her other children than to Ellen.

**B. Motion for Security of Costs**

On February 17, 2015, Ellen filed a motion for security of costs,[14] seeking—as May's temporary guardian—an order requiring Kathy and Judy to post security under estates code section 1053.052 and rule of civil procedure 143, based on existing guardian and attorney ad litem fees that would only increase if Kathy and Judy continued to litigate the guardianship case. Ellen asked the trial court to dismiss them if they failed to provide, within twenty days

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tears at the prospect of being asked to do more than she felt she was capable of doing.

[14]Under estates code section 1053.052, "Security for Certain Costs," the applicable portion of which did not change when the legislature amended the statute in 2015,

> (b) At any time before the trial of an application, complaint, or opposition described by Subsection (a) [filed by someone other than a guardian, attorney at litem, or guardian ad litem], an officer of the court or a person interested in the guardianship or in the welfare of the ward may, by written motion, obtain from the court an order requiring the person who filed the application, complaint, or opposition to provide security for the probable costs of the proceeding. The rules governing civil suits in the county court with respect to providing security for the probable costs of a proceeding control in cases described by Subsection (a) and this subsection.

Tex. Est. Code Ann. § 1053.052(b) (West Supp. 2016).

from the date of notice of entry of the signed order, the full amount of security of costs ordered.

Kathy filed a response alleging that since Ellen's appointment as May's temporary guardian, Ellen had "engaged in conduct that would be considered to be abuse, neglect, or exploitation" based on Ellen's alleged interference with May's relationship with other family members, failure to seek medical treatment for May when she needed it, and not allowing May to participate in activities outside of the house.[15]

One month later, the trial court held a hearing on the motion. Judy did not appear at the hearing, and Kathy and Judy's previous attorney was permitted to withdraw.[16]

At the hearing, Ellen explained that Kathy's counsel served Ellen with a notice of deposition shortly after all parties received Byron Brown's guardian ad litem report recommending, among other things, that Ellen serve as May's guardian.[17] Pointing out that $10,000 in ad litem fees had already been incurred

[15]Although Kathy raised other arguments in her response, she does not raise those arguments on appeal.

[16]Kathy had retained new counsel, but according to the withdrawing attorney, Judy had not. Judy has not appealed any of the trial court's rulings.

[17]Brown's report, dated February 5, 2015, stated that May was incapacitated, should not retain any rights, and was well cared-for by Ellen; that Kathy and Judy were unsuitable to be appointed as May's guardians; that a guardianship of the estate was unnecessary; and that Ellen should be appointed as May's permanent guardian. (At the time of the March 2015 hearing, Kathy was only seeking to become guardian of the estate; she filed an amended

to date,[18] Ellen asked that Kathy and Judy be required to post at least $20,000 as security for costs in order to move forward. On April 1, 2015, the trial court granted Ellen's request and ordered Kathy and Judy to each post a $20,000 cash bond or approved corporate security bond. *See* Tex. Est. Code Ann. § 1053.052(b).

**C. Motion in Limine and Motion to Strike**

On May 15, 2015, Ellen filed a motion in limine under estates code section 1055.001[19] challenging the standing of Kathy and Judy to file a guardianship

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application in May 2015 seeking guardianship of May's person as well.) Not long after filing his report, Brown resigned as May's guardian ad litem, and Colette Sallas was appointed as May's new guardian ad litem.

[18]Sallas said that she had already seen fee applications from Brown and Jill Jester, May's attorney ad litem, and that these applications equaled around $10,000 together. She opined that a $20,000 bond should be sufficient.

[19]Estates code section 1055.001, "Standing to Commence or Contest Proceeding," provides,

> (a) Except as provided by Subsection (b), any person has the right to:
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> > (1) commence a guardianship proceeding, including a proceeding for complete restoration of a ward's capacity or modification of a ward's guardianship; or
> > (2) appear and contest a guardianship proceeding or the appointment of a particular person as guardian.
>
> (b) A person who has an interest that is adverse to a proposed ward or incapacitated person may not:
>
> > (1) file an application to create a guardianship for the proposed ward or incapacitated person;

application or to contest Ellen's guardianship application.[20] She also filed an amended motion to strike their pleadings because Kathy and Judy had not posted security for costs as ordered by the court. Notwithstanding her failure to comply with the court's order to post security, on May 19, 2015, Kathy filed an

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> (2) contest the creation of a guardianship for the proposed ward or incapacitated person;
> (3) contest the appointment of a person as a guardian of the proposed ward or incapacitated person; or
> (4) contest an application for complete restoration of a ward's capacity or modification of a ward's guardianship.
>
> (c) The court shall determine by motion in limine the standing of a person who has an interest that is adverse to a proposed ward or incapacitated person.

Tex. Est. Code Ann. § 1055.001 (West 2014).

[20]In the motion in limine, Ellen alleged that Kathy and Judy lacked standing under section 1055.001(b) due to indebtedness to May caused by their having taken possession of her personal property and money and by having not returned it to May or to Ellen as May's temporary guardian. Ellen further alleged that they were disqualified because of inexperience, lack of education, "or other good reason," as they were incapable of prudently managing or controlling May's person and that they were disqualified because they were "unsuitable," as they had interfered with the court's temporary guardianship orders, had incited May's emotions and attitudes against Ellen, guardianship, and May's medical treatment, therapy, and diet plans advised by medical professionals that Ellen had chosen, had made false accusations to APS and law enforcement about May, Ellen, and Patricia, and had violated the trial court's injunction prohibiting discussing the guardianship case with May. Ellen claimed that all of these actions had adversely affected May's welfare and well-being.

amended application seeking guardianship of both May's person and her estate.[21]

At the July 16, 2015 hearing on Ellen's motion in limine, Ellen testified that May's personal property was "somewhere down around Canadian, Texas," that she did not know exactly where, and that despite requests that it be returned to May, the property had not been returned. Ellen testified that the personal property was important to May and that May "constantly" worried about not having it.

By the time of the hearing, Kathy had also failed to return the remainder of May's money in the Wells Fargo account, despite Ellen's having requested that as well. During the time Kathy maintained control of the Wells Fargo account, she allowed May's Social Security funds to accumulate in the account to a point where May lost part of her Medicaid status and thus incurred additional expenses.

Ellen had recorded some of Kathy's phone conversations with May, and the trial court allowed her to play a portion of their June 25, 2015 conversation in which Ellen contended Kathy encouraged May to disregard her attorney's advice and discuss the proceedings with Kathy:

[21]Kathy waited until the day before the hearing on the limine motion—two months after it had been filed with the court—to file a response. At this point, she still had not complied with the trial court's April 1 order.

[Kathy]: So did you read your letter, open it yourself?

[May]: Let's see -- well, this is -- I think this has something in it I can't talk about. I can't talk about this. I'm not allowed to.

. . . .

[Kathy]: Okay. You can talk about anything you want. No restrictions. But you don't have to talk about that to me --

. . . .

[May]: I saw my lawyer yesterday and I am restricted. So --

[Kathy]: By who?

[May]: Well, my lawyer, Jill [Jester, May's attorney ad litem].

[Kathy]: No. The only person that can restrict you is the judge, Mom.

[May]: I was told by my lawyer. And her name is Jill.

[Kathy]: Okay. Well, I'll talk to my attorney about it and we'll just drop it. But --

[May]: Okay.

[Kathy]: -- not as far as I'm aware.

[May]: Well, you know, I've been mixed up of this all the time so -- anyway.

[Kathy]: Yeah, it's a lot.

[May]: Yeah.

Regarding that conversation, Ellen testified,

I mean[,] Mom had just come from Jill's office and Jill very clearly told her "do not discuss the case." And Kathy tells her, "no, you don't have to listen to that." And Mom says, "yes, I do." And . . . Kathy says, "no, you don't, Mom." You know, so they override Mom

> all the time and -- to get their way about things. And that's not in Mom's best interest.

Kathy contended that she did not talk with her mother about the case on purpose and that she did her best to tell May to call her attorney or Brown.

At the hearing, Kathy testified that since she had not had "physical contact with [May] for a year," she could not be sure that her mother did not need a guardian, as she had originally contended in 2014,[22] but that if May did need a guardian, she wanted to serve in that capacity. Kathy further admitted that she had not turned over to Ellen May's funds held in the Wells Fargo account, which she testified were "right under $6,000." At the hearing, Kathy retreated from her original position that her attorney's fees should be paid out of May's estate. With regard to May's personal property in storage in Canadian, Kathy explained that May had told her that she wanted her personal property to stay where it was.

Kathy denied encouraging May to call APS on Ellen, stating that she had merely informed May that she had *a right* to call APS. Kathy did agree, however, that since Ellen's appointment as May's temporary guardian, she had advised May to tell her doctors that she wanted to have private consultations with them outside of Ellen's presence. Kathy also agreed that she sent a letter to May on

[22]Kathy refused to rely upon Dr. Crowder's report about May's mental deficiencies in determining May's needs, stating, "Dr. Crowder is under investigation."

June 24, 2015—a letter that May had to sign for—that instructed May on how to hire another attorney.[23]

With regard to the bond, Kathy stated that she did not intend to pay the $20,000 security for costs, as ordered by the trial court. Nevertheless, she said she intended to persist in contesting Ellen's guardianship application and pursuing her own. By way of explanation, Kathy testified that she had gone to a bondsman and was denied and, further, that she could not afford to pay both the bond and her own attorney's fees and did not anticipate being able to do so in the foreseeable future.

Brown, May's former guardian ad litem, also testified at the hearing regarding the recommendations contained in his February 5 report and the basis for them. Brown testified that he did not think Kathy would be suitable as May's guardian because she failed to grasp the severity of May's dementia and, against May's best interest, agitated her mother about the guardianship litigation in violation of the injunction prohibiting her from doing so. He also expressed his opinion that while May did not want to live with Ellen, she could not live independently, and Brown believed that Ellen represented May's best chance to avoid having to live in a skilled nursing facility, an option to which May was adamantly opposed. Brown related that May told him that she did not want to

[23]Ellen said that when May received the letter, she handed it to Ellen and said "please submit a copy of this to my attorney."

live with any of her daughters. Instead, she wanted to live on her own in her hometown in Oklahoma.[24]

At the conclusion of the hearing, Ellen argued that Kathy was unsuitable to be May's guardian because she had taken May's Social Security money, had not returned it, had used it to pay $2,000 to an attorney hired to represent May when May was incapacitated, and had otherwise acted adversely to May's best interest by denying the degree of May's incapacity. Ellen also pointed to Kathy's disregard of the court order requiring her to post the $20,000 bond—without any attempt by Kathy to reduce the amount or otherwise avoid its effect through legal means.[25] *See* Tex. R. Civ. P. 143.

Kathy argued that the evidence was inadequate to show that she had an interest adverse to her mother. Specifically, she complained that there was no evidence showing that she had refused to pay any bills out of the Wells Fargo account or that she had refused to return May's personal property that she was paying to store. And she argued that Ellen presented no evidence to show that Kathy was incapable of caring for May or acting as her guardian under estates code section 1104.351, of bad conduct under section 1104.353, or of a conflict of interest. Finally, she argued that she did not have the ability to pay $20,000.

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[24]May echoed these sentiments when she testified during the final trial.

[25]Two months later, on September 9, 2015, Kathy finally filed a motion for reconsideration of the trial court's April 1, 2015 order granting Ellen's motion for security of costs.

Jester, May's attorney ad litem, advised the court that she had received constant complaints from May that Ellen was too controlling and that May did not want Kathy to be disqualified from being her guardian. Sallas, May's guardian ad litem at the time of trial, argued that Kathy should be disqualified under estates code section 1104.351(2)'s "other good reason," based upon Kathy's testimony that she did not know whether May was incapacitated and needed a guardian despite Dr. Burbano's report and the independent psychiatric evaluation by Dr. Crowder, which both stated that May was incapacitated and needed a guardian. Sallas expressed concern that it would not be in May's best interest to be in the care of a guardian who refused to acknowledge the need for such a guardianship. Sallas also observed that Kathy had had plenty of time to object or seek modification of the court's order to provide security of costs or "to do something other than nothing, which is what happened."

The trial court granted Ellen's motion in limine and struck Kathy and Judy's pleadings for failure to provide court-ordered security for costs. On October 30, 2015, Kathy filed a motion to sever the trial court's rulings on the motion to strike and the motion in limine. The trial court denied Kathy's motion five days later, immediately before the final trial began on November 4, 2015.

**D. November 4, 2015 Trial**

At the November 4, 2015 trial, May testified that she was opposed to Ellen as her permanent guardian because Ellen told her when she could not do something or go somewhere, but she expressed appreciation for what Ellen had

done as her temporary guardian, stating that she "just [hasn't] liked [Ellen] taking over everything." Dr. Burbano testified that May needed round-the-clock supervised care, was unable to take care of her daily life activities without assistance, and would not be able to safely make decisions that would affect her finances, residence, or medical affairs. He concurred with Dr. Crowder's diagnosis.

In addition to facts previously recited above, at trial Ellen described the living arrangements she had provided for May in her home. She testified that May had two bedrooms for her exclusive use, one of which—the "sitting room"—contained a television and a keyboard that May could play. May used the second room as her bedroom. Ellen explained that through these living arrangements, she tried to give May her own space and "usually [would not] go in there unless she [said] it [was] okay for [Ellen] to go in there." Ellen testified that she kept the two rooms clean for May but would respect May's wishes at times when May indicated that she did not want Ellen to clean the room.[26]

Ellen also testified that she was planning to renovate her home to accommodate her mother's needs. In particular, Ellen planned changes to the bathroom adjacent to May's two rooms to make it wheelchair-accessible. At the time of trial, because the bathroom door was not wide enough for May's

[26]Ellen testified, "I ask her can I run the sweeper in here. There's days she says no, so I look at it and if it's really bad I ask her again later. But, yeah, I do the cleaning."

wheelchair and walking into the bathroom was "painful for her," May still used a "potty chair" by her bed, which Ellen cleaned out "all the time." Ellen explained that she had delayed the construction at her mother's request because "it stressed [May] out thinking she would be there longer than she wanted to be."

At the conclusion of the November 4, 2015 trial, the trial court found by clear and convincing evidence that May was totally incapacitated and totally incapable of maintaining her person and finances and that it was in her best interest to appoint a permanent guardian of the person. The trial court appointed Ellen as May's permanent guardian of the person, ordered Ellen to post a $12,000 bond before letters of guardianship would issue, swore Ellen in as her mother's permanent guardian, and signed the final judgment.

## III. Discussion

A trial court has broad discretion in guardianship matters. *See In re Guardianship of Boatsman*, 266 S.W.3d 80, 88 (Tex. App.—Fort Worth 2008, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). A trial court also abuses its discretion by ruling without supporting evidence. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character

supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (op. on reh'g).

The trial court granted Ellen's motion in limine upon its finding that Judy and Kathy were "disqualified to serve and . . . unsuitable to serve as temporary and/or permanent guardian(s) of the person or estate of May K. Jones pursuant to Texas Estates Code §1055.001(b) and subchapter H, chapter 1104 of the Texas Estates Code."

In her second point, Kathy argues that the evidence at the July 16, 2015 hearing was insufficient to order her disqualified and unsuitable to serve as May's temporary or permanent guardian of the person or estate because while Ellen alleged that Kathy had "an interest adverse to the proposed ward," the trial court "failed to make specific findings on the record against [Kathy] as to [her] 'adverse interest' with her mother."

**A. Standing**

Kathy argues that there is a distinction between "standing" and issues decided at a trial on the merits and refers us to *Baptist Foundation of Texas v. Buchanan*, 291 S.W.2d 464, 469 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.) (op. on reh'g).[27]

[27]In *Buchanan*, the court observed that it was hesitant to establish as precedent that the ultimate rights of a "person interested" under a will could be finally disposed of in limine as a procedure not authorized either by the probate statutes on capacity to sue or a rule of civil procedure. 291 S.W.2d at 471–72.

Assuming, without deciding, that the trial court erred by granting the motion in limine as to Kathy's standing,[28] any error was rendered harmless because, as set out below, the evidence is sufficient to support the trial court's finding that Kathy was disqualified, and the trial court did not abuse its discretion by striking her pleadings, resulting in the same ultimate outcome. That is, Kathy cannot show on this record that the trial court's error, if any, probably caused the rendition of an improper judgment in this case or probably prevented her from properly presenting the case to this court. *See* Tex. R. App. P. 44.1(a)(1)–(2).

**B. Sufficient Evidence to Support Disqualification Findings**

Kathy argues that there is insufficient evidence to support the trial court's order that she was disqualified and "unsuitable" but does not otherwise address the specific chapter 1104 bases alleged by Ellen and ruled on by the trial court, i.e., the "other good reason" basis and the "unsuitable" basis. And while the abuse of discretion standard applicable to guardianship proceedings includes

[28]In *In re Guardianship of Gilmer*, the San Antonio court observed that while the standard for determining a person's standing to file a guardianship application under section 1055.001(b) is distinct from the standard for determining whether a person is disqualified from being appointed as guardian under chapter 1104 because of the threshold-standing-versus-merits issue, there may be instances in which evidence supporting disqualification under section 1104.354 would also support a finding of an adverse interest under section 1055.001(b)(1). No. 04-14-00362-CV, 2015 WL 3616071, at *7 (Tex. App.—San Antonio June 10, 2015, no pet.) (mem. op.) (observing that being indebted to a proposed ward does not automatically deprive a person of standing to apply for a guardianship but that the indebtedness will disqualify the person from serving as guardian unless the debt is paid before the appointment).

factual sufficiency of the evidence[29] as a relevant factor in assessing whether the trial court abused its discretion, factual sufficiency is not an independent ground for asserting error under this standard. *See In re Guardianship of Covington*, No. 02-11-00107-CV, 2012 WL 1556186, at *3 (Tex. App.—Fort Worth May 3, 2012, no pet.) (mem. op. on reh'g) (quoting *Brooks v. Brooks,* 257 S.W.3d 418, 425 (Tex. App.—Fort Worth 2008, pet. denied)).

Under the estates code, a person may not be appointed guardian if she, because of inexperience, lack of education, or "other good reason," is incapable of properly and prudently managing and controlling the person or estate of the ward. Tex. Est. Code Ann. § 1104.351(2) (West 2014). Likewise, a person may not be appointed guardian if she is "found by the court to be unsuitable." *Id*. § 1104.352 (West 2014); *In re Guardianship of Rombough*, No. 02-11-00181-CV, 2012 WL 1624027, at *6 (Tex. App.—Fort Worth May 10, 2012, no pet.) (mem. op.) (holding that the trial court had sufficient evidence of unsuitability upon which to exercise its discretion when the proposed ward had mild-to-moderate mental retardation, diabetes, hypertension, and hyperthyroidism and, among other

[29]Generally, when reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

things, the record showed that appellant had no concerns with the proposed ward being left alone and unsupervised for extended periods of time and failed to notify the Social Security Administration of a new residence, resulting in a temporary suspension of the ward's Social Security and Medicaid benefits); *In re Guardianship of Alabraba*, 341 S.W.3d 577, 581 (Tex. App.—Amarillo 2011, no pet.) (holding no abuse of discretion by disqualifying mother from being son's guardian for being unsuitable when she failed to pay for his medical care and in light of evidence of his physical deterioration while under her care). The trial court views both the incapacitated person's needs and the applicant's ability to provide for those needs in deciding whether an applicant should be disqualified. *In the Guardianship of Allen*, No. 12-14-00249-CV, 2015 WL 7280894, at *2 (Tex. App.—Tyler Nov. 18, 2015, no pet.) (mem. op.) (citing *Trimble v. Tex. Dep't of Protective & Regulatory Servs.*, 981 S.W.2d 211, 215–16 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (op. on reh'g)).

At the July 16, 2015 hearing, the trial court heard Kathy testify that she was unsure that May needed a guardian despite May's diagnosis with dementia by two different doctors—one of which had served as her physician for almost a decade and the other, a psychiatric specialist, who performed an independent medical examination. Additionally, the court heard testimony that Kathy was still in control of a bank account containing May's Social Security funds, the accumulation of which had cost May some of her Medicare benefits, and that Kathy had retained control over May's personal property in storage despite

Ellen's having been appointed May's temporary guardian and the worry it caused May to be deprived of her belongings. Further, through a recording of one of Kathy's phone conversations with May, the trial court was able to observe Kathy's failure to comply with the injunction prohibiting discussion of the guardianship litigation with May.

Based on the record before us, we conclude that the trial court had factually sufficient evidence to make its ruling and did not abuse its discretion by determining, as recommended by May's guardian ad litem, that it would not be in May's best interest to be in the care of a guardian who refused to acknowledge that a guardianship was necessary, under either the "good reason" or "unsuitability" grounds. Therefore, we cannot say that the trial court abused its discretion when it disqualified Kathy, and we overrule Kathy's second point. *See Unifund CCR Partners*, 299 S.W.3d at 97; *Butnaru*, 84 S.W.3d at 211.

**C. Motion to Strike**

Ellen moved to strike Kathy's pleadings under estates code section 1053.052 and rule of civil procedure 143, alleging that Kathy had ignored the trial court's order to provide security for costs and had—in direct violation of the order—nonetheless filed more pleadings, including a motion to compel discovery.

Estates code section 1053.052, the order's basis, states that at any time before trial, Ellen could obtain by written motion an order requiring Kathy and Judy to provide security for the proceeding's probable costs. *See* Tex. Est. Code Ann. § 1053.052(b). Under rule of civil procedure 143, "Rule for Costs,"

> A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. *If such rule be entered against any party and he failed to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed*.

Tex. R. Civ. P. 143 (emphasis added); *see Guardianship of Rombough*, 2012 WL 1624027, at *5 (observing that "[b]y rule, the probate court provided Appellant sufficient time to provide the required security"); *see also Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982) ("[Appellants] took no action prior to the order of dismissal to secure an extension of time in order to give security for costs.").[30]

In her third point, Kathy contends that the trial court abused its discretion by granting Ellen's motion and argues that the $20,000 "sanction" threatened the litigation because she did not have the financial resources to continue to the final trial on the merits and that the order did not permit the sanction to be paid at final judgment "or make express written findings after the hearing 'why' the monetary sanctions d[id] NOT have a preclusive effect on [her]."

Beyond stating at the July 16, 2015 hearing that she could not post the $20,000 bond in addition to paying her attorney's fees and that a bondman had declined to issue a bond for her, Kathy directs us to no evidence in the record of

[30]In *Clanton*, a will contest case, the supreme court found no merit in the appellants' argument that dismissal of their cause of action for failing to give security for costs violated their due process rights when they received adequate notice of the hearing, were on notice of the rules, and had had the opportunity to be heard at the hearings. 639 S.W.2d at 931.

her financial resources, and the record does not reflect that Kathy—who was represented by counsel at all relevant times—ever sought a reduction in the bond amount, sought additional time to obtain the funds necessary to post the bond, or filed an affidavit of indigence to avoid the necessity of posting the bond.[31] *Cf.* Tex. R. Civ. P. 143, 145; *Guardianship of Rombough*, 2012 WL 1624027, at *2

[31]On September 9, 2015, Kathy did file a motion for reconsideration asking the court to reconsider its April 1, 2015 order granting Ellen's motion for security of costs, its August 10, 2015 order granting Ellen's first amended motion to strike Kathy's pleadings for failure to provide the court-ordered security for costs, and its August 15, 2015 order granting Ellen's motion in limine. In her motion for reconsideration, Kathy stated that she had filed the motion "to allow this Court to set aside and/or modify its prior Orders of 04/01/2015 and 08/10/2015 prior to seeking Mandamus relief from the Court of Appeals—Ft. Worth." *Cf. In re Patton*, 47 S.W.3d 825, 826–28 (Tex. App.—Fort Worth 2001, orig. proceeding) (granting petition for writ of mandamus to remedy probate court's abuse of discretion by excluding relator's trial exhibits when relator did not fail to comply with the probate court's order, real party in interest made no showing that it was prejudiced by relator's failure to serve her exhibits with her exhibit list, and relator was never given the opportunity to correct her exhibits before being sanctioned by having them excluded). The trial court held a hearing on Kathy's motion on October 19, 2015, and then denied it, after which Kathy filed her motion to sever on October 30, 2015, which the trial court also denied. On appeal, Kathy does not complain of the denial of her motion for reconsideration but she does raise as her fourth point a complaint as to the denial of her motion to sever. We do not need to reach her fourth point, as discussed above. *See* Tex. R. App. P. 47.1.

And while "death penalty" sanctions such as striking pleadings may be reviewable by mandamus when there is no adequate remedy by way of appeal, *Patton*, 47 S.W.3d at 828, Kathy did not file a petition for writ of mandamus to complain that her inability to post $20,000 as security for costs precluded her ability to participate in the litigation. *Cf. Shirley v. Montgomery*, 768 S.W.2d 430, 434 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding) (observing that in some instances a party can be so prejudiced by discovery sanctions that appeal will not be adequate and granting mandamus relief in child custody case when it was in the child's best interest for her mother to have a forum in which to present her conservatorship claim in the upcoming trial without having to await an appeal and possible second trial).

(observing that an associate judge held a hearing on appellant's affidavit of indigence and found that she was not indigent after she was ordered to provide security for probable costs and that if she did not file them, her pleadings would be dismissed); *In re Guardianship of Humphrey*, No. 12-07-00118-CV, 2009 WL 388955, at *5 (Tex. App.—Tyler Feb. 18, 2009, pet. denied) (mem. op.) (observing that the probate code authorizes a request for a court order requiring a person who files opposition in relation to a guardianship matter to give security for the probable costs of the proceeding and that a party who is unable to provide security for costs may proceed without giving security if she files an uncontested affidavit of inability to pay costs under civil procedure rule 145).

Based on the record before us, we cannot say that the trial court abused its discretion by granting Ellen's motion to strike. *See* Tex. R. Civ. P. 143. Therefore, we overrule Kathy's third point.

## IV. Conclusion

Having overruled Kathy's dispositive points, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: WALKER, MEIER, and SUDDERTH, JJ.

DELIVERED: August 25, 2016