

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In Re the Guardianship of:

No. 29052-2-III

JOHANNA H. LEE,

Alleged Incapacitated Person.

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Division Three

UNPUBLISHED OPINION

Brown, J. — RCW 11.88.090(10) provides that guardian ad litem (GAL) fees, “shall be charged to the alleged incapacitated person unless the court finds that such payment would result in substantial hardship upon such person.” Following a failed attempt to establish guardianship, the trial court ordered Johanna Lee to pay the petitioner’s attorney fees, the GAL fees, and her own attorney fees. She appeals contending the trial court erred in assessing GAL fees without an evidentiary hearing regarding whether the order would create a substantial hardship on her. She further contends the trial court abused its discretion in ordering her to pay all the parties’ attorney fees, including her own. Because we conclude the trial court did not abuse its discretion under RCW 11.88.090(10), we affirm.

FACTS

On October 14, 2009, Ms. Lee's long-time friend, Meg Irwin, petitioned for appointment of guardian alleging Ms. Lee was incompetent due to Ms. Lee's alleged confusion, irrational behavior, and health problems. The petition alleged Ms. Lee was particularly vulnerable to undue influence and needed protection. A mutual restraining order was entered between Ms. Lee and her son, his wife, and one of her friends.

The court appointed a GAL. The GAL reported that Ms. Lee was not at substantial risk of personal or financial harm and, therefore, did not need a guardian. Further, all parties involved were watching out for Ms. Lee's best interests. But, the GAL found Ms. Lee to be a manipulator as evidenced by her attempts to stay in her home and run her business. Ms. Irwin then requested to withdraw her initial petition for guardianship, but asked the court to decide who should pay GAL fees and expenses and whether the mutual restraining order should continue.

On March 12, 2010, a hearing was held on Ms. Irwin's request to dismiss the guardianship petition. The court found, "the petition was filed in good faith." Report of Proceedings (RP) (March 12, 2010) at 17. Ms. Irwin asked the court to order Ms. Lee to pay all attorney and GAL fees. Based on the record and under the relevant statute, the trial court concluded, "Ms. Lee . . . will be responsible for paying [GAL] fees and expenses and the fees and expenses of the petitioner." RP at 18. Ms. Lee had already

paid her own attorney a \$10,000 retainer.

The court ordered Ms. Lee to pay \$4,431.72 to the GAL, \$7,918.34 to Ms. Irwin's attorney, and \$11,906.50 to Ms. Lee's own attorney, Kevin Kirkevold. The court ordered the restraining order to automatically terminate in 30 days after the order. The GAL and Ms. Lee's attorney unsuccessfully asked the court to reconsider the fee award, arguing it was unfair. The court entered a final judgment on April 16, 2010. Ms. Lee appealed.

ANALYSIS

The issue is whether the trial court erred in ordering Ms. Lee to pay the GAL fees and all parties' attorney fees.

We review the reasonableness of a trial court's award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

In a guardianship proceeding, the court has discretion under RCW 11.96A.150 to order fees and costs to be paid by any party to the proceedings. *In re Estate of Black*, 116 Wn. App. 476, 491, 66 P.3d 670 (2003), *affirmed on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). Similarly, the court has the discretion to allocate GAL fees to the alleged incapacitated person. RCW 11.88.090(10).

Ms. Lee contends the court should have conducted an evidentiary hearing to determine whether a substantial hardship existed. RCW 11.88.090(10) provides that GAL fees “shall be charged to the alleged incapacitated person unless the court finds that such payment would result in substantial hardship upon such person.” Ms. Lee, however, did not request an evidentiary hearing below nor argue substantial hardship at the motion hearing. Generally, a party may not raise an issue for the first time on appeal. RAP 2.5(a). Similarly, when a party has “ample opportunity to request a separate evidentiary hearing” and fails to make such request, “[t]his issue may not be raised for the first time on appeal.” *State v. Hartley*, 51 Wn. App. 442, 449, 754 P.2d 131 (1988) (citing *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985)). Accordingly, Ms. Lee has waived this issue.

Nevertheless, Ms. Lee points to *In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997) to support her argument that an evidentiary hearing must be conducted to determine “substantial hardship.” In *Tolson*, the court awarded \$9,115.96 in fees to the GAL out of the estate assets. *Id.* at 38. Relying on RCW 11.88.090(9) (currently codified at RCW 11.88.090(10)), the court remanded the matter to the trial court to determine whether fees for the GAL should be paid by Mr. Tolson or Clark County rather than the estate. *Id.* at 39. The court, however, noted, “[c]onsidering the financial position of Mr. Tolson, and his dependency upon Social Security Insurance, the trial court may find that requiring him to pay the fees for the guardian ad litem would

be a great hardship.” *Id.* Contrary to Ms. Lee’s assertion, *Tolson* does not require an evidentiary hearing to determine substantial hardship. The court noted in dicta that an individual dependent on social security benefits may not be able to pay a GAL.

Thus, even assuming Ms. Lee preserved this issue for review, she has failed to establish remand for an evidentiary hearing is required.

Ms. Lee next contends no authority exists for an attorney fee award because Ms. Irwin withdrew her guardianship petition. RCW 11.96A.150(1) gives the court broad discretion to order attorney fees. “In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate.” RCW 11.96A.150(1)(c). Ms. Lee argues the voluntary withdrawal of a guardianship petition limits the court’s discretion to award fees to the petitioner. But Ms. Lee fails to cite any legal authority to support her contention. Further, she fails to cite any legal authority in the section of her brief dedicated to this assignment of error. We will not address issues raised without proper citation to legal authority. RAP 10.3(a)(6). Nevertheless, it is noted that RCW 11.96A.150(1)(c) permits the trial court to consider, “any and all factors that it deems to be relevant and appropriate.” The weight to be given to any factor, including the voluntary withdrawal of a guardianship petition is left to the sound discretion of the trial judge. No abuse of discretion is shown by Ms. Lee.

Lastly, Ms. Lee contends the court lacked the authority to order her to pay her own attorney fees. This issue, like the GAL fees issue, is raised for the first time on

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appeal. “[Q]uestion[s] regarding authority for fees should not be considered for the first time on appeal.” *In re Marriage of Freeman*, 146 Wn. App. 250, 259, 192 P.3d 369 (2008), *affirmed by Freeman v. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010) (citing *King County v. Guardian Cas. & Guar. Co.*, 103 Wash. 509, 175 P. 166 (1918)).

Nonetheless, Ms. Lee engaged and apparently contracted to pay her attorney apart from the court’s order. Thus, her obligation to pay her attorney is separate from any relief we may provide. Ms. Lee argues for the first time that her attorney failed to submit a cost bill to support the court’s award amount of \$11,906.50. We will not consider for the first time on appeal whether “the trial court improperly determined the amount of attorney fees awarded.” *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, C.J.

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Korsmo, J.