

NO. 29052-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

IN RE THE GUARDIANSHIP OF JOHANNA LEE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

APPELLANT'S BRIEF

Brett T. Sullivan
Attorney for Appellant

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I. ASSIGNMENT OF ERRORS

1. The trial court erred in entering the judgment of April 16, 2010, assessing attorney fees and costs incurred by all parties and fees of the guardian ad litem against Appellant, Johanna Lee (“Ms. Lee”).

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is it an abuse of discretion to assess all attorney’s fees and costs and all guardian ad litem fees and costs in a guardianship proceeding against an alleged incapacitated person when the Petition for Guardianship was dismissed at the request of the Petitioner?

2. A judgment was entered against Ms. Lee for her own attorney’s fees and costs. Did the trial court err in entering judgment against Ms. Lee for her own attorney’s fees and costs when no motion or supporting cost bill were filed or presented by her attorney?

3. The Petition for Appointment of Guardian alleged that Appellant had minimal income and a nominal amount of liquid assets. Did the trial court abuse its discretion in assessing the guardian ad litem fees and costs against Ms. Lee without conducting further evidentiary inquiry as to whether such guardian ad litem fees and costs would impose a great hardship on her?

II. STATEMENT OF THE CASE

A Petition for Appointment of Guardian was filed on October 14, 2009 by Meg Irwin (“Ms. Irwin”) alleging that Ms. Lee was incompetent. CP 100-114. The Petition for Appointment of Guardian alleged that Ms. Lee had “some confusion and irrational behavior” and that she had “many health problems” as the reasons to order that a guardian of the person and estate be appointed over Ms. Lee. CP 100. The Petition also claims that Appellant was particularly vulnerable to undue influence and needed to be protected. CP 101.

On the same day the Petition for Appointment of Guardian was filed, an Order Appointing Guardian Ad Litem was entered in the Superior Court of Washington for Yakima County. CP 96-97. Bradley Mellotte was appointed as the Guardian Ad Litem (the “GAL”) for Appellant. CP 96. After conducting an extensive investigation, the GAL stated in his December 15, 2009 report that “it is my opinion that the AIP Johanna H. Lee is not in need of a Guardian of her person or estate.” CP 130. Almost two months later, on February 16, 2010, Ms. Irwin decided to withdraw her initial Petition for Guardianship by filing an Amendment of Petition for Guardianship. CP 88-89. Ms. Irwin stated in her Amendment of Petition for Guardianship that the amendment was made in “recognition of the relatively high burden of proof necessary to

establish a guardianship, and in view of the adverse opinions and conclusions set forth” by the GAL. CP 88.

A Motion to Lift Mutual Restraining Order and Impose Fees was filed on March 5, 2010 by Irwin and by three additional persons (Lew Derrey, Joe Lee and Michelle Lee). CP 84-87. On March 12, 2010, a hearing was held on this Motion. This Motion requested the court to shift attorney’s fees incurred in the guardianship proceeding as well as a separate Vulnerable Adult Proceeding to Appellant. CP 85. Appellant’s attorney objected to the implementation of attorney’s fees. CP 38-39. The trial court concluded that based on the record and under the power of the probate statute that “Mrs. Lee, the alleged incompetent will be responsible for paying *Mr. Mellote’s [the GAL] fees and expenses and the fees and expenses of the petitioner.*” RP 18 (March 12, 2010) (emphasis added).

On March 24, 2010, David Thompson, counsel for Irwin and for Lew Derrey, Joe Lee and Michelle Lee, filed a Response to Motion for Reconsideration. CP 12-14. This Response was filed in response to the filing of a motion by the GAL which asked the trial court to reconsider its ruling of March 12, 2010. *Id.* As stated in this Response, the GAL stated “several times” that “substantial justice has not been done” pursuant to CR 59(a)(9) and that in the GAL’s declaration, the GAL “estimates that

two-thirds to three-quarters of his fees and costs were incurred at the request of the undersigned.” Id.

A judgment was entered on April 16, 2010 by the trial court, which identified the GAL, David Thompson and Kevin Kirvevold, attorney for Appellant in the underlying proceedings (identified in this judgment as “Attorney for Judgment Debtor”), as judgment creditors. CP 16. The April 16 judgment stated the following as the amounts of the judgments: \$4,421.72 as principal judgment in favor of the GAL; \$7,918.34 as principal judgment in favor of David Thompson; and \$11,906.50 as principal judgment in favor of Kevin Kirvevold. CP 16. The total amount of the judgments awarded in favor of the three judgment creditors against Appellant was \$11,906.50, with interest to accrue at the rate of 12% per annum. Id.

IV. ARGUMENT

A. Standard of Review for Award of Attorney’s Fees and Costs.

1. *Abuse of Discretion Standard*

A lower court’s award of costs and fees is reviewed for abuse of discretion. *In re Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966), citing *In re Estate of Leslie*, 137 Wash. 20, 241 P. 301 (1925). A trial court abuses its discretion when its decision is manifestly

unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959).

The Trust and Estate Dispute Resolution Act, also commonly known as “TEDRA”, applies to all proceedings involving trusts, decedent's estates and properties, and guardianship matters. RCW 11.96A.150(2). Pursuant to this statute, a superior court may, upon its own discretion, order costs, including attorneys’ fees, to be awarded to any party from any of the party in the proceeding. RCW 11.96A.150(1). When ordering a party to pay attorneys’ fees, the court may do so in any “such manner as the court determines to be equitable.” RCW 11.96A.150(1). In making an equitable determination, the court can rely on any factors it deems is relevant and appropriate. *Cite?*

2. *The Alleged Incapacitated Person Must Pay for the Guardian Ad Litem Fees Unless Substantial Hardship Exists*

The fees to be paid for a guardian ad litem in a proceeding involving a Petition to Appoint Guardian are to be assessed and charged by the court in accordance with RCW §11.88.090(10), which provides that:

The guardian ad litem shall receive a fee determined by

the court. The fee shall be charged to the alleged incapacitated person unless the court finds that such payment would result in substantial hardship upon such person, *in which case the county shall be responsible for such costs*: PROVIDED, That the court may charge such fee to the petitioner, the alleged incapacitated person, or any person who has appeared in the action; or may allocate the fee, as it deems just. If the petition is found to be frivolous or not brought in good faith, the guardian ad litem fee shall be charged to the petitioner.

RCW §11.88.090(10) (emphasis added).

In *In Re Estate of Tolson*, Division II of the Washington Courts of Appeal made a determination whether the trial court properly awarded fees for a guardian ad litem out of estate assets of an alleged incompetent person arising from the filing of a Petition for to Appoint Guardian pursuant to RCW Ch. 11.88. *In re Estate of Tolson*, 89 Wn.App. 21, 947 P.2d 1242 (Div. II 1997). In this case, the appellants claimed the trial court erred in awarding the guardian ad litem's fees out of the estate and that the County should be responsible for paying the GAL's fees. *Id.* at 38-39.

The *Tolson* court held that the trial court erred in assessing the guardian ad litem's fees to the estate and remanded the case for a determination of whether or not the county should pay the fees. *Id.* at 39. The court found that based upon "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. at 38.

B. The Trial Court Abused its Discretion in Ordering Appellant to Pay Attorney’s Fees and Costs When the Petition to Appoint Guardian was Withdrawn by the Petitioner.

In her Amendment to Petition for Guardianship, Irwin acknowledged the significant difficulty in proving that a guardian should be appointed for Ms. Lee. CP 88. Accordingly, Irwin withdrew her request to have a guardian appointed.

Clearly Ms. Irwin, in withdrawing her Petition, wanted the best of both worlds: to acknowledge the overwhelming evidence against the need for a guardian for the Ms. Lee, and yet have no liability for the significant attorneys’ fees and costs and guardian ad litem’s fees and costs that were incurred as a result of the filing of the Petition for Appointment of Guardian.

Ms. Lee acknowledges that a trial judge has wide discretion to shift attorneys’ fees and costs within a guardianship proceeding pursuant to RCW §11.96A.150. The trial judge acknowledged that a significant amount of the fees and costs incurred in the underlying proceeding may have been caused by third parties (albeit parties over whom he had no jurisdiction). RP 18 (March 12, 2010). However, a miscarriage of justice occurs when a party can allege that a person is in need of a guardianship,

then voluntarily withdraw the petition to appoint guardian when the evidence is not favorable and still have no financial responsibility for the devastating financial outcome that results when the alleged incapacitated person has to pay the entire burden of the fees and costs incurred by attorneys for the petitioner and the guardian ad litem as well as for the fees and costs incurred by the alleged incapacitated person's own attorney in defending against the petition. Ms. Irwin's own Petition, in fact, acknowledged the meager income and cash resources available to Ms. Lee, and assessing attorney's fees and costs for Ms. Irwin against Ms. Lee is an abuse of discretion considering Ms. Irwin's allegations regarding Ms. Lee's finances and Ms. Irwin's withdrawal of the Petition.

C. The Judgment Against Ms. Lee for her Guardianship Counsel is Unsupported by Motion or Cost Bill.

The April 16 judgment identified the three judgment creditors as the GAL, David Thompson (counsel for Irwin as petitioner in the Petition to Appoint Guardian and other parties) and Kevin Kirkevold, attorney for Appellant as judgment debtor. CP 16.

The trial court entered an oral ruling on March 12, 2010 stating that Appellant should pay for the GAL fees and expenses and the fees and expenses of the petitioner, Irwin. RP 18 (March 12, 2010). This is the only reference to an order assessing attorney's fees and costs for Irwin or

for assessment of the fees and costs of the GAL. Id. The trial court did not make a finding or issue an order on March 12, 2010 that Appellant's attorneys representing her in the guardianship proceedings should be entitled to a judgment. Id. No written motion or oral motion was presented or made to the trial court requesting that Appellant's attorneys be entitled to a judgment. Furthermore, cost bills were filed by Irwin's counsel David Thompson and by the GAL; however, no cost bill was filed by Ms. Lee's attorney Kevin Kirkevold to support the entry of a judgment. CP 28; 40.

CR 54(d)(2) requires that a request for attorney's fees and expenses (other than costs and disbursements) must be made by motion, unless the "substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial." CR 54(d)(2). Such a motion must be filed no later than 10 days after entry of judgment. Id. The record is devoid of a motion by Ms. Lee's guardianship counsel to be awarded attorneys' fees and costs, whether in the preceding the entry of judgment on April 16 or within 10 days after entry of such judgment. Accordingly, the trial court erred in entering judgment awarding attorneys' fees and costs in the amount of \$11,906.50 in favor of Kevin Kirkevold as judgment creditor.

D. The Trial Court Abused its Discretion by Failing to Determine if Paying Guardian Ad Litem Fees Would Impose a Substantial Hardship on Ms. Lee.

The record before the trial court revealed that Ms. Lee was an elderly woman, with significant health issues, and who had very limited income. The Petition to Appoint Guardian alleged that the Ms. Lee has “income from the following sources: Social Security benefits – approximately \$900 per month, plus an unpredictable but modest amount from her business (when it is open).” CP 102. Although the Petition to Appoint Guardian alleged that Appellant owned an extensive collection of Indian artifacts, jewelry and coins with a total value of \$600,000, it further alleged that the Appellant is “believed to have [bank] accounts...with unknown but probably minimal balances.” *Id.* Further affidavit testimony by Debrah J. Lynch revealed that the Appellant was “very concerned about” her finances and that her “equity isn’t in the bank...” and rather that it is in “her collection of artifacts, the beading she has done and her property”. CP 10.

With the meager cash flows as indicated in the Petition to Appoint Guardian, supported by uncontroverted affidavit testimony, the trial court should have conducted an evidentiary analysis of whether Yakima County should pay for the costs of the guardian ad litem fees that were

incurred in this matter pursuant to RCW §11.88.090(10). If the payment of the guardian ad litem fees presented a substantial hardship, then Yakima County should be ordered to pay for the guardian ad litem fees accordingly. Unfortunately, this evidentiary analysis was never conducted by the trial court.

V. CONCLUSION

Judgment was entered against Ms. Lee for all of the attorney's fees and costs incurred by Irwin, the GAL and for Ms. Lee's attorney. The Superior Court erred in (1) failing to conduct an evidentiary hearing into whether the guardian ad litem fees and costs would be a substantial financial hardship on her and thus should be paid by Yakima County; (2) by ordering that Ms. Lee pay for all of the parties' fees and costs and the guardian ad litem fees and costs when Ms. Irwin, as the petitioner, voluntarily withdrew her Petition to Appoint Guardian; and (3) entering judgment against Ms. Lee for her own attorney's fees and costs when no motion for such fees and costs was made or supported by a cost bill and such judgment is not supported by the Superior Court's prior oral rulings.

Ms. Lee respectfully requests that the April 16, 2010 judgment in favor of Kevin Kirkevold as judgment creditor be reversed, that the April 16, 2010 judgment in favor of David Thompson as attorney for Ms. Irwin be reversed and that the April 16, 2010 judgment in favor of Bradley

Mellote as the GAL be reversed and remanded to the trial court to conduct further evidentiary proceedings to determine whether Yakima County should be ordered to pay for the fees and costs of the guardian ad litem in the underlying proceedings.

DATED this 20th day of August, 2010.

SULLIVAN LAW OFFICE, P.S.

By:



BRETT T. SULLIVAN, WSBA #24131
Attorney for Appellant Johanna H. Lee

CERTIFICATE OF SERVICE

I do hereby certify that on August 20, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

BRADLEY A. MELLOTT 331 N. 1 st Street Yakima, WA 98901	<input type="checkbox"/> Delivery Service <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery
MEG IRWIN 105 N. Third Street P.O. Box 797 Yakima, WA 98907	<input type="checkbox"/> Delivery Service <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery
DAVID THOMPSON 105 N. Third Street P.O. Box 797 Yakima, WA 98907	<input type="checkbox"/> Delivery Service <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery
KEVIN KIRKEVOLD 24 N. 2 nd Street Yakima, WA 98901	<input type="checkbox"/> Delivery Service <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery

DATED this 20th day of August, 2010.

By: 
 BRETT T. SULLIVAN