

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

IN THE MATTER OF:	:	O P I N I O N
THE GUARDIANSHIPS OF	:	
RUDOLPH J. SETINSEK AND	:	
MARY T. SETINSEK, INCOMPETENTS	:	CASE NOS. 2011-T-0021
	:	and 2011-T-0022
	:	
	:	

Civil Appeals from the Trumbull County Court of Common Pleas, Probate Division, Case Nos. 2008 GDP 0168 and 2008 GDP 0169.

Judgment: Affirmed.

Douglas J. Neuman, Westenfield, Neuman & Parry, 761 North Cedar Street, #1, Niles, OH 44446 (Ward for Rudolph J. Setinsek).

Stephen A. Turner and *William M. Flevares*, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481 (Former Guardian for Appellant-Rudolph Joseph Setinsek).

Joshua M. Garris, pro se, 197 West Market Street, #200, Warren, OH 44481 (Successor Guardian Appellee).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Rudolph Joseph Setinsek, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Probate Division, denying a Motion to Approve Attorney Fees. The issues presented before this court are whether counsels' assistance in the preparation of guardianship accounts and in opposing a motion to remove the guardian provided a direct benefit to the guardianship estates. For the reasons that follow, we affirm the decision of the court below.

{¶2} On November 20, 2008, Setinsek filed Applications for Appointment of Guardian of Alleged Incompetent, pursuant to R.C. 2111.03, on behalf of his parents. These Applications were assigned probate court case numbers 2008 GDP 0168 and 2008 GDP 0169. At this time, Setinsek was represented by Attorney John C. Grundy.

{¶3} On December 29, 2008, the probate court issued a Judgment Entry, appointing Setinsek guardian of the person and estate for his parents.¹

{¶4} On April 24, 2009, the probate court issued a Citation on Delinquent Guardian's Inventory, for Setinsek's failure to file Inventories for the guardianships within 90 days of his appointment as guardian, as required by R.C. 2111.14(A)(1).

{¶5} On April 27, 2009, Setinsek filed Inventories for both guardianships.

{¶6} On May 20, 2009, Setinsek filed Amended Inventories.

{¶7} On July 10, 2009, Attorney Grundy filed Motions to Approve Attorney Fees, requesting the approval of attorney fees in the amount of \$8,248.08 for services rendered for the benefit of the guardianships from November 17, 2008, through June 1, 2009.²

{¶8} On July 15, 2009, the probate court issued a Judgment Entry, finding "that the amended inventory does not list all income." The court "granted [Setinsek] a thirty (30) day leave to file a second amended inventory and trust accounting."

{¶9} On July 20, 2009, the probate court issued a Judgment Entry, granting Grundy's Motions to Approve Attorney Fees for both guardianships.

{¶10} On October 6, 2009, Setinsek filed a Second Amended Inventory.

1. The two guardianships, for the mother and the father, were administered in a consolidated fashion but were not formally consolidated. Accordingly, the procedural history given here describes the parallel proceedings in both probate court cases.

2. Attorney Grundy actually filed separate motions in each case, requesting \$4,124.04 in fees for each guardianship.

{¶11} On October 30, 2009, Attorney Grundy filed a Notice of Termination of Legal Representation. Attached thereto was a letter from Setinsek terminating Attorney Grundy's representation "effective right now," in the belief that he would "be better served with another attorney."

{¶12} On the same date, Attorney Richard L. Goodman filed a Notice of Appearance of Counsel, on behalf of Setinsek.

{¶13} On November 12, 2009, Motions to Remove Guardian were filed on behalf of both wards.

{¶14} On December 8, 2009, the probate court issued a judgment entry, accepting Setinsek's resignation as guardian of his parents' person and estate. The court ordered Setinsek to file a final account within 30 days.

{¶15} On December 9, 2009, Setinsek filed a Third Amended Inventory and a Guardian's (First) Account in Case No. 2008 GDP 0168, and on December 14, 2009, he filed the same in Case No. 2008 GDP 0169. The Accounts covered the period from December 29, 2008, through October 31, 2009.

{¶16} On January 19, 2010, Attorneys Goodman and Grundy filed Motions to Approve Attorney Fees for services rendered for the benefit of the guardianships from June 2, 2009, through December 31, 2009. They sought \$10,975.30 in fees for Case No. 2008 GDP 0168 and \$7,742.00 in fees for Case No. 2008 GDP 0169.

{¶17} On March 31, 2010, a hearing was held on the Motions to Approve Attorney Fees, at which Attorney Goodman, Attorney Grundy, and Setinsek testified.

{¶18} Attorney Grundy testified that, about a month after Setinsek terminated his representation, he was contacted by Attorney Goodman and asked if he would continue working on the Accounting. Attorney Grundy agreed to do so.

{¶19} Attorney Grundy also testified to difficulties in the preparation of the Inventory and Accounting due to Setinsek's failure to "keep the kind of careful records that I needed to accurately prepare an accounting," such as bank account statements and cancelled checks.

{¶20} Attorney Goodman testified as follows regarding the retention of Attorney Grundy's services to complete the Accounting: "it was at least my understanding, and I think that of [Attorney Grundy] and [Setinsek], that even though [Attorney Grundy] was discharged from representation, that there was still a need to have the various accountings completed, and since he had been doing that as part of the case and with his experience in the past, I felt it was a prudent thing * * * to have him work on those while I would assume * * * more of the litigation responsibilities that were pending at that time having to do with the removal of [Setinsek] as guardian."

{¶21} Attorney Goodman defined his services as contesting the removal of Setinsek as guardian whereas Attorney Grundy was responsible for the Accounting: "I didn't get into his accounting of the portion [sic], and he obviously did not interfere with my representation from the standpoint of the removal proceeding."

{¶22} Attorney Goodman testified that this arrangement was understood and agreed to by all parties.

{¶23} Setinsek testified that Attorney Grundy continued to work to complete the Accounting with his knowledge and consent.

{¶24} On January 20, 2011, the probate court issued a Judgment Entry, granting attorney fees in the amount of \$3,184.20 for both guardianships, i.e., \$1,592.10 for each guardianship.

{¶25} The probate court made the following findings in support of its decision:

{¶26} The Court finds that the former guardian, Rudolph Joseph Setinsek, failed to timely file an inventory of the ward's assets and that the former guardian has not filed a final account of his administration since his resignation as guardian on December 8, 2009. The Court further finds that the ward objected to his son serving as legal guardian and ultimately filed a motion to remove Rudolph Joseph Setinsek as legal guardian. The Court finds that the majority of attorney fees were incurred in preparing a defense to the motion to remove the guardian and preparing an accounting for the guardianship and trust. The Court further finds that a Special Court Investigator and Special Commissioner was appointed to investigate and account for guardianship and trust assets as Rudolph Joseph Setinsek was unable to prepare accurate accountings due to his failure to maintain adequate records. The Court finds that the majority of the attorney fees requested were for services that did not directly benefit the guardianship of the person or estate.

{¶27} On February 22, 2011, Setinsek filed Notices of Appeal from both probate cases. Thereafter, this court consolidated the appeals. On appeal, Setinsek raises the following assignment of error:

{¶28} “[1.] The trial court erred when it denied requested attorneys’ fees.”

{¶29} In Ohio,

{¶30} every guardian appointed to take care of the estate of a ward shall have the following duties:

{¶31} (1) To make and file within three months after the guardian's appointment a full inventory of the real and personal property of the ward, its value, and the value of the yearly rent of the real property, provided that, if the guardian fails to file the inventory for thirty days after having been notified of the expiration of the time by the probate judge, the judge shall remove the guardian and appoint a successor;

{¶32} (2) To manage the estate for the best interest of the ward;

{¶33} (3) To pay all just debts due from the ward out of the estate in the possession or under the control of the guardian, collect all debts due to the ward, compound doubtful debts, and appear for and defend, or cause to be defended, all suits against the ward;

{¶34} (4) To obey all orders and judgments of the courts touching the guardianship;

{¶35} (5) To bring suit for the ward when a suit is in the best interests of the ward;

{¶36} (6) To settle and adjust, when necessary or desirable, the assets that the guardian may receive in kind from an executor or administrator to the greatest advantage of the ward. Before a settlement and adjustment is valid and binding, it shall be approved by the probate court and the approval shall be entered on its journal. The guardian also shall have the approval of the probate

court to hold the assets as received from the executor or administrator or to hold what may be received in the settlement and adjustment of those assets.

{¶37} R.C. 2111.14(A).

{¶38} The Ohio Supreme Court has held, “a guardian of the estate of a minor or of the ward may employ legal counsel to initiate or defend a lawsuit on behalf of the estate or ward and that the attendant legal expenses, including attorney fees and court costs, may be recovered by the guardian from the assets of the estate.” *In re Guardianship of Wonderly*, 10 Ohio St.3d 40, 42, 461 N.E.2d 879 (1984). “However, any legal expenses incurred by the guardian of the person or of the estate must directly benefit the estate or the ward in order to be chargeable to the estate.” *Id.*

{¶39} A probate court’s decision regarding attorney fees is reviewed under an abuse of discretion standard. *In re Testamentary Trust of Hamm*, 11th Dist. No. 2003-G-2532, 2004-Ohio-6348, ¶ 6, citing *In re Guardianship of Rider*, 68 Ohio App.3d 709, 712, 589 N.E.2d 465 (6th Dist.1990), citing *In re Jaymes*, 18 Ohio Law Abs. 613 (2nd Dist.1935).

{¶40} Setinsek first argues that the probate court abused its discretion by failing to set forth its reasons for the denial of the majority of the requested fees. Setinsek notes that the court found that a “majority” of the fees incurred were for the purpose of opposing his removal as guardian and preparing an accounting. However, “the probate court’s entry does not delineate what work performed by counsel did or did not benefit the wards or how the court drew the distinction.” Reply of the Appellant, 2. We disagree.

{¶41} This court has held: “The probate court is not bound to follow any precise formula in determining the reasonableness of fees. However, for this court to be able to

conduct any meaningful review of the trial court's exercise of its discretion, we must be able to discern some basis for its decision." *In re Estate of Murray*, 11th Dist. No. 2004-T-0030, 2005-Ohio-1892, ¶ 26; *In re Guardianship of Spagnola*, 11th Dist. No. 2011-T-0017, 2011-Ohio-5602, ¶ 17 ("the trial court must state the basis for the fee determination") (citation omitted).

{¶42} In the present case, the basis for the probate court's decision is succinctly stated in that "the majority of the attorney fees requested were for services that did not directly benefit the guardianship of the person or estate," i.e., contesting the removal of the guardian and preparing an accounting. Setinsek cites no authority for the proposition that the court's decision regarding attorney fees must correspond to the itemization of the services performed. Rather, this court has merely required "some basis" for the decision. In contrast, in the *Murray* decision relied upon by Setinsek, the court reduced the award from the amount requested with no more explanation than the conclusory statement that the reduced amount represented the "reasonable value of services rendered." *Id.* at ¶ 25.

{¶43} Setinsek next argues that, as guardian, he was required to "render an account of the administration of the ward's estate." R.C. 2109.302(A). Thus, according to Setinsek, it is "unfathomable" that the probate court could conclude that the retaining of counsel for this purpose did not directly benefit the wards. Amended Brief of the Appellant, 9.

{¶44} In its Judgment Entry, the probate court cited Ohio Superintendence Rule 71(E), which provides that, "[e]xcept for good cause shown, attorney fees shall not be allowed to attorneys representing fiduciaries who are delinquent in filing the accounts required by section 2109.30 of the Revised Code." The procedural history of the present case demonstrates that neither the Accountings nor the Inventories in the underlying cases

were timely filed. *Compare In re Guardianship of Papuska*, 5th Dist. No. 2004-CA-00150, 2005-Ohio-741, ¶ 22-23 (denying guardianship fees pursuant to the analogous Sup.R. 73(D)).

{¶45} Moreover, the probate court indicated that the fees incurred in the preparation of the Accounting were due to Setinsek's inability "to prepare accurate accountings due to his failure to maintain adequate records." Attorney Gundy's testimony and itemized statement of services performed supports the court's conclusion. The itemized statement contains numerous charges for essentially reconstructing the accounting that was Setinsek's responsibility, as guardian, to maintain: "11/28/09 * * * sorted documents from other financial records * * * began review of all work to try to find reason for out of balance"; "11/30/09 * * * sent Guardian separate e-mails * * * stating what info was missing and what info I needed for each separate account"; "12/02/09 * * * drafted lengthy e-mails to Guardian that 'on-line' info was not acceptable - Guardian needed to go to bank to obtain info requested"; "12/03/09 * * * Discovered new accounts not previously accounted for by Guardian w/explanation from Guardian that he had forgotten about them; * * * received e-mail from Mr. Goodman that Guardian was unhappy with me over accounting issues"; "12/08/09 * * * Guardian unable to explain why Accounting is out-of balance after continued effort - concluded that the Accounting cannot be balanced with information in my possession."

{¶46} Finally, Setinsek argues that Attorney Goodman's efforts in opposing his removal as guardian were for the benefit of the wards, inasmuch as they "were efforts to find a resolution to the outstanding issues complained of regarding [Setinsek's] conduct as Guardian." Reply of the Appellant, 5.

{¶47} The probate court's position that opposing Setinsek's removal did not benefit the wards is supported by case law. In *Wonderly*, the Ohio Supreme Court expressly rejected the proposition that the guardian of the persons of incompetent wards is for their constructive benefit. Rather, "[a]bsent a specific demonstration that the actions are beneficial to the estate or ward, a guardian may not be reimbursed from the estate for legal expenses incurred in proceedings relating solely to the determination of whether the guardian may serve in that capacity." *Wonderly*, 10 Ohio St.3d at 42, 461 N.E.2d 879. See also *In re Guardianship of Kufchak*, 126 Ohio App.3d 428, 430, 710 N.E.2d 748 (9th Dist.1998). In the present case, Setinsek has failed to make a specific demonstration that contesting his removal as guardian benefited either of the wards or their estates.

{¶48} Accordingly, the probate court's decision to award a reduced amount of attorney fees for the reason that the attorneys' services in opposing the guardian's removal and preparing an accounting did not benefit the guardianships does not constitute an abuse of its discretion.

{¶49} The sole assignment of error is without merit.

{¶50} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Probate Division, denying the Motion to Approve Attorney Fees, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.