

IN THE SUPREME COURT OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP
OF THE PERSON AND ESTATE OF
KATHLEEN JUNE JONES, AN ADULT
PROTECTED PERSON.

KATHLEEN JUNE JONES,

Appellant,

vs.

ROBYN FREEDMAN; AND DONNA
SIMMONS,

Respondents.

Supreme Court No. 81799

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Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Linda Marquis, District Judge
District Court Case No. G-19-052263-A

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certified that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Kathleen June Jones is an individual.

The Legal Aid Center of Southern Nevada, Inc., appeared on appellant's behalf in the district court. Ballard Spahr LLP is expected to appear on appellant's behalf in this Court.

Dated: February 18, 2021

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JURISDICTIONAL STATEMENT

The Court has jurisdiction under NRAP 3A(b)(1) because this is an appeal from a final judgment. Appellant appeals from the Court's Order Granting Robyn Friedman's Petition for Attorneys Fees, which reduces the attorneys' fees award in favor of Robyn Friedman to judgment to be recorded against Appellant's real property.

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises a question of first impression involving the common law – namely, whether the district court may award attorneys’ fees and costs in an adult guardianship proceeding under NRS 159.344.

STATEMENT OF THE ISSUES

1. Did the district court err by improperly awarding attorneys' fees pursuant to NRS 159.344?

2. Did the district court err by improperly concluding that certain of the fees sought were just, reasonable and necessary pursuant to NRS 159.344(5)?

STATEMENT OF THE CASE

Respondent challenges the district court's Order Granting Robyn Friedman's and Donna Simmons' Petition for Attorneys' Fees in Part. After a hearing on Respondents' Petition for Attorneys' Fees, the district court awarded Respondents \$57,742.16 in attorneys' fees despite Respondents serving as a temporary guardian of Appellant for less than one month. *See*, Appellant's Appendix ("AA") at 283-299. The district court found that, notwithstanding the limited length of time that Respondents served as temporary guardian, the aforementioned amount of fees was reasonable and necessary. *Id.* This Court should reverse the Order and Judgment because the district court's award of fees improperly includes fees incurred for earlier work that did not benefit Appellant, and was simply unproductive litigation. Further, Respondents' work for which the substantial attorneys' fees award arises did not meaningfully advance the interests of Appellant as the prevailing guardian was Appellant's initial guardian and named agent under a power of attorney, who has been willing to serve as guardian from the beginning of this matter. These facts and applicable law

support reversal of the Order and denial of Respondent's Petition for Attorneys' Fees.

STATEMENT OF THE FACTS

I. Background and Facts

Appellant is an octogenarian who was diagnosed with, and treated for, cognitive impairment and decline in 2015 and 2016. AA at 129. Appellant was married to Rodney Yeoman (“Mr. Yeoman”), for eleven years. *Id.* Prior to and after her marriage to Mr. Yeoman, Appellant executed Power of Attorney documents that named her daughter, Kimberly Jones (“Ms. Jones”) as Appellant’s preferred and chosen agent. *Id.* These documents included an October 24, 2012, Financial Power of Attorney, naming Ms. Jones as Appellant’s Attorney-in-Fact for financial matters, and a November 23, 2012 Last Will and Testament naming Ms. Jones as Appellant’s Personal representative and chosen guardian over her person and estate. AA at 132-133. Following her selection of Ms. Jones as her preferred and chosen agent, Appellant has never deviated from that election.

In 2015, Appellant began to show signs of cognitive decline and received treatment for that decline at the University of California, Irvine, Medical Center. AA at 129. Appellant’s cognitive decline would continue over the next several years, even while she received treatment, and ultimately would result in a diagnosis of dementia. Specifically, in

September 2019, Appellant received a neurological evaluation at the Cleveland Clinic that indicated she suffered from a degenerative neurological disorder resulting in impairment of memory, judgment, and other cognitive functions. AA at 133. That same month, Appellant received an additional neurological evaluation that indicated she suffered from dementia. *Id.* Both September 2019 evaluations concluded that Appellant fulfills the requirements for a guardianship of both person and estate as defined by Nevada Revised Statutes, and recommended appointment of a guardian. *Id.*

In January 2018, during Appellant's cognitive decline, and despite Appellant having appointed Ms. Jones as her preferred and chosen agent, Mr. Yeoman allowed his own daughter and son-in-law, Kandi and Richard Powell ("Mrs. Powell" and "Mr. Powell," respectively and collectively, "The Powells"), to transfer title to Appellant's home to themselves. AA at 129-130. Appellant acquired the home prior to her marriage to Mr. Yeoman, and owned it as her sole and separate property through the marriage. *Id.* The Powells effected the transfer via Quitclaim Deed signed by Appellant. *Id.* Noticeably absent were any additional documents to evidence or support a sale, such as a

purchase and sale agreement. *Id.* In addition, Appellant was not represented by counsel during the transfer, nor did Appellant's acting agent, Ms. Jones, receive any form of notice. *Id.*

In 2019, Mr. Yeoman began undergoing cancer treatments and was unable to care for Appellant. AA at 130. Following a request from Mr. Yeoman's family in April 2019, Ms. Jones traveled to Las Vegas to live with and care for Appellant, as her preferred and chosen agent. *Id.* Ms. Jones has remained in Las Vegas as Appellant's caretaker, agent, and guardian, since that time. *Id.*

Ms. Jones' presence as caretaker and guardian of her mother, Appellant, as well as Appellant's children's discovery of the transfer of Appellant's home, led to numerous disagreements between Ms. Jones, Mr. Yeoman, and the Powells. AA at 130-132. These disagreements led to Mr. Yeoman's attempts to isolate Appellant from Ms. Jones, including by taking Appellant to Arizona. *Id.* Ultimately, Ms. Jones would travel to Arizona to bring Appellant back to Las Vegas, where she has remained since. *Id.* Despite attempts by the Powells to remove Ms. Jones and Appellant from Appellant's home, both have remained

there since returning from Arizona, with Ms. Jones continuing to serve as Appellant's chosen caretaker and guardian. *Id.*

While Appellant was living with her caretaker and agent, Ms. Jones, Respondents felt it necessary to request the guardianship court's intervention. AA at 132. As detailed more fully below, Respondents initially requested appointment as temporary guardians for Appellant, and later requested appointment as general guardians. AA at 1-30. The district court would grant Respondents' request to be appointed as temporary guardians; however, less than a month after that appointment, the district court acknowledged Appellant's wishes in her Power of Attorney documents and appointed Ms. Jones as Appellant's guardian. AA at 120-127. The district court appointing Ms. Jones as Appellant's general guardian ultimately placed Appellant in the same situation she was in prior to the guardianship litigation – under the care and protection of Ms. Jones.

II. Procedural History

On September 19, 2019, Respondents filed an *Ex Parte* Petition for Appointment of Temporary Guardian of the Person and Estate and Petition for Appointment of General Guardianship. AA 1-30.

Respondents premised that *ex parte* petition upon neurological evaluations of Appellant. *Id.* Respondents stated in their *ex parte* petition that there was great concern regarding who should care for Appellant, the care she should receive, and where she should live. *Id.*

On September 23, 2019, four days after Respondents submitted the *ex parte* petition, the Court entered the Order Granting the *Ex Parte* Petition for Appointment of Temporary Guardians of the Person and Estate. AA at 134. The September 23, 2019 order appointed Respondents as temporary guardians. *Id.*

On October 2, 2019, Mr. Yeoman filed an Opposition to the Appointment of Temporary and General Guardian, arguing that there were no grounds for emergency guardianship and, to the extent there were such grounds, requesting that the district court appoint himself as Appellant's guardian. AA at 134.

Also on October 2, 2019, Ms. Jones filed her own Opposition to the Appointment of Temporary and General Guardian, arguing that there was no need for an immediate temporary guardian because she had been, and was continuing to protect Appellant as her chosen and preferred caretaker and guardian. AA at 59-74 Ms. Jones premised her

Opposition upon Appellant's Power of Attorney and Last Will and Testament. *Id.*

The district court extended Respondents' temporary guardianship status until an October 15, 2019 hearing, where the district court ordered that Ms. Jones be appointed as General Guardian of Appellant. AA at 120-126. The district court entered the order appointing Ms. Jones as general guardian of Appellant on November 25, 2019. *Id.*

On February 13, 2020, Respondents filed their Petition for Approval of Attorneys Fees and Costs and Request to Enter a Judgment Against the Real Property of the Estate (the "Petition"). AA at 128. Through the Petition, Respondents requested recovery of their fees and costs incurred in maintaining the guardianship proceeding. *Id.* As evidenced by Respondents' billing invoices attached to the Petition, Respondents sought recovery of fees incurred for preparation of the initial guardianship petition, responding to objections to the Petition, preparation for and attendance at the hearing on the Petition, and further handling related to the outcome of the hearing. AA at 149-173. Aside from work performed in the guardianship proceeding,

Respondents also requested recovery of fees incurred in an earlier, unrelated probate matter. *Id.*

Appellant opposed the Petition on March 4, 2020, noting that Respondents' incurred substantial fees, which ultimately conferred no benefit upon Appellant. AA at 174-198. Her opposition also called into question Respondents' attempts to recover fees for work in the unrelated probate matter. *Id.*

Following a hearing on the Petition, the district court entered the Order Granting Robyn Friedman's Petition for Attorneys Fees on August 17, 2020 (the "Order"). AA at 283-299. The Order awards Respondents a total of \$57,742.16 in attorneys' fees, and reduces that award to judgment to be recorded as a lien against Appellant's real property. *Id.*

Appellant appeals from that Order, requesting reversal based upon the district court's abuse of discretion in awarding Respondents fees.

SUMMARY OF ARGUMENT

The district court abused its discretion by awarding Respondents their attorneys' fees. Respondents commenced the underlying guardianship litigation, which lasted for just over a month, and incurred substantial attorneys' fees without conferring any palpable benefit upon Appellant. Rather, the outcome of the guardianship litigation placed Appellant in the *exact same* circumstances that she was in prior to Respondents' initial filing. Conferral of a benefit upon the protected person, in this instance Appellant, is a condition precedent to recovery of fees in a guardianship proceeding. Respondents' failure to confer a benefit upon Appellant renders the district court's decision to award attorneys fees an abuse of discretion, and warrants total reversal of the fee award.

Even if the district court had a reasonable basis to award Respondents their fees, the district court abused its discretion in the amount of fees it awarded. The district court permitted recovery of a substantial amount of fees that far exceeded the amount of time the guardianship was pending and the benefit that the Appellant received. Further, the district court awarded Respondents attorneys' fees for

work performed in a separate proceeding. A reasonable review of the length of time the guardianship proceeding was pending and Respondents' submitted attorney invoices, demonstrates that the district court abused its discretion by allowing recovery of a substantial amount of fees, necessitating reversal.

STANDARD OF REVIEW

An award of attorneys' fees is reviewed for abuse of discretion, and will be affirmed only if it is supported by substantial evidence. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1143 (2015). A district court has abused its discretion when its action is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev. 558, 564, 331 P.3d 862, 866 (2014).

ARGUMENT

A. The District Court Abused its Discretion in Awarding Respondents' Attorneys' Fees Because Respondents Did Not Confer a Benefit Upon Appellant

Under Nevada law, a guardian is responsible for the payment of all attorneys' fees and costs the guardian incurs absent an order from the Court allowing payment from the protected person's estate. *See* NRS 159.344(1)-(2). A district court may order payment of fees from the protected person's estate only if the requested fees are just, reasonable, and necessary. *See* NRS 159.344(5). Fees are just, reasonable, and necessary, if the attorneys' services conferred an actual benefit upon the protected person or advanced the protected person's best interests. *See* NRS 159.344(5)(b). Further, the court must assess: the extent to which the services were provided in a reasonable, efficient, and cost-effective manner; efforts made by the party or attorney to reduce and minimize issues; actions by the party or attorney that unnecessarily expanded issues or delayed or hindered the efficient administration of the estate; and any other facts relevant in determining whether attorneys' fees are just, reasonable, and necessary. NRS 159.344(5).

While Nevada does not have case law addressing the shifting of fees in the guardianship context to the estate of the protected person,

the Arizona Supreme Court has considered the issue and held that when a court considers such a request the court should consider whether or not the guardian actually pursued the best interest of, or conferred any benefit upon, the protected person. *In re Guardianship of Sleeth*, 244 P.3d 1169, 226 Ariz. 171 (2010). The Arizona Supreme Court further explained that as a matter of policy parties to a guardianship case cannot be permitted to presume that their fees and expenses will be automatically paid out of the guardianship estate. *Id.* Rather, they must face the possibility that they will be liable for some, or all, of those costs. To allow otherwise would remove financial incentive to avoid poor decisions as the protected person would bear the entirety of the financial risk:

When a guardian or conservator has no personal obligation for attorneys' fees and no concern over whether his expenditures will be fully approved, he may lack incentive to avoid financial improvidence. In a case in which the protected person's estate suffers significant and harmful losses, the superior court must exercise its independent judgment to determine what portion of the attorneys' fees were reasonably incurred.

Id., 244 P.3d at 1175, 266 Ariz. at 177. Numerous states with similar statutory schemes regarding guardianships require a showing that the party requesting recovery of fees provided a benefit to the protected

person, such as in *Sleeth*. See, *In re Guardianship of Allen*, 50 Ohio St.3d 142, 146 (1990) (“A court applying this test determines . . . whether the attorney’s actions benefited the guardianship”); *In re Guardianship and Conservatorship of Miles*, 2003 S.D. 34 (2003) (Assessing whether an attorney’s actions benefited a protected person to justify affirmance of an award of attorneys’ fees); *In re Guardianship of Lamb*, 173 Wash.2d 173, 191 (Wash. 2011) (“[C]ourt’s allow guardianship fees only when the guardian’s work provides a benefit to the guardianship. A court may not award guardianship fees simply on the basis of work performed.”); *In re Guardianship of Wonderly*, 10 Ohio St.3d 40, 42 (Ohio April 4, 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.”); *Schlesinger v. Jacob*, 240 So.3d 75 (C.A. Fl., Feb. 21, 2018) (“[A]n attorney’s entitlement to payment of reasonable fees and costs is subject to the limitation that his or her services must benefit the ward or the ward’s estate.”) While these cases concerned individual state statutes, their standards of review and requirements for an award of fees in a guardianship proceeding mirrors Nevada’s statutes. These similarities,

including the requirement that the requestor provided a benefit to the protected person, makes each of these cases persuasive to the Court's decision making here.

Using the accepted rule that a party may not recover fees if they did not confer a benefit to the protected person, it is clear in this matter that the district court abused its discretion in awarding Respondents their attorneys' fees. The record below demonstrates that Respondents did not confer an actual benefit upon Appellant. The result of the guardianship proceeding, through which Respondents incurred substantial fees, was to confirm that Appellant's guardian prior to the proceeding, Ms. Jones, would be her general guardian following the proceeding. AA at 120-127. Respondents' therefore placed Appellant in the same position she would be in had they never commenced litigation at all.

Despite the lack of material change in Appellant's guardianship or living situation, the district court determined that Respondents were entitled to recovery of their fees. AA at 283-299. The district court's various findings to support that award of fees runs contrary to the fact

that Respondents, through the guardianship proceeding, did not confer a benefit upon Appellant.

The district court premised its Order upon the notion that prior to the Respondents' request for appointment as temporary guardians, Appellant was inadequately protected. AA at 288. The district found that "[i]t was clear that the Power of Attorney was being ignored, violated, or was insufficient to protect [Appellant.]" *Id.* The district court made this finding despite the fact that at the time of the temporary guardianship filings, Appellant was living with Ms. Jones, her attorney-in-fact. AA at 131-132. The district court also found that "[Respondents] were left with no alternative, but to intervene and instigate guardianship litigation in order to safeguard the [Appellant]." AA at 288-289. Again, this finding is contrary to the fact that Ms. Jones was then acting as protector and guardian of Appellant. AA at 131-132. Further, the district court stated that "the services provided have conferred an actual benefit upon [Appellant] and have advanced her best interest." AA at 291. Such a finding is contrary to the facts in this matter that the guardianship proceeding resulted in Ms. Jones continuing to be Appellant's guardian and protector. AA at 137. The

unreasonableness of the district court's order is especially apparent in the finding that "but for the efforts of [Respondents], [Appellant] might still be living in uncertain conditions. . ." AA at 297. As Respondents acknowledged in their Petition, Appellant was not living in uncertain conditions. Rather, Appellant was living with Ms. Jones, her chosen and preferred agent. AA at 131-132.

The district court's order has no basis in fact, and no reasonable person would agree with the finding that Respondents improved Appellant's living circumstances or conferred any substantial benefit upon her. No reasonable person, comparing the pre-guardianship and post-guardianship status of Appellant would deem Respondents to have conferred a benefit upon Appellant, necessitating reversal of the district court's Order.

B. Even if the District Court Did Not Abuse its Discretion in Awarding Respondents Attorneys' Fees, the District Court Abused its Discretion in the Amount of Fees it Awarded to Respondents

1. The District Court Erred by Awarding Respondents Excessive Fees

The amount of the fees award alone demonstrates that the district court abused its discretion. The only arguable period during which Respondents conferred a benefit upon Appellant was from the initial

drafting of the guardianship petition on September 9, 2019, and the district court appointing Ms. Jones as general guardian at the October 15, 2019 hearing, a period of thirty-seven days. The district court allowing Respondents to recover \$57,742.16 in fees, for work performed during a thirty-seven day period, is unreasonable and unsupported by the evidence in this matter. Even if the entirety of the fees were incurred during that thirty-seven day period, it would mean Respondents' incurred \$1,560 in fees, *per day*. The fact that Respondents did not confer a benefit upon Appellant makes that fee award even more egregious and appropriate for reversal.

2. The District Court Erred in Awarding Respondents' Fees Incurred in a Different Matter

Respondents documentation supporting their request for attorneys' fees and costs demonstrates that a significant portion of those fees are related to Appellant's probate matter, not the guardianship matter, within which they requested and received an award of fees. The total fees Respondents requested, and received, arising from the probate matter was \$14,051.00. AA at 178.

While Appellant believes that Respondents should not have received *any* attorneys' fees in this matter, to the extent the district

court was correct in awarding fees it should not award fees for work performed prior to the guardianship case. The period within which an award of fees would be reasonable is easily discernible from Respondents' exhibits to the Petition. Respondents' submitted billing entries includes a September 9, 2019 entry of "Begin drafting Petition for Guardianship." AA at 179. This entry denotes the beginning of Respondents' fees incurred in relation to the guardianship proceeding. The district court should not have awarded any fees for work performed prior to that September 9, 2019 entry. Fees incurred prior to that date was for work on another matter and was completely unrelated to protecting Appellant's interests within the guardianship context. Further, any pre-guardianship work, including engaging in unproductive litigation, should not have even been considered by the district court. *See* NRS 159.344(5)(k)-(n).

In addition to fees incurred prior to September 9, 2019, the district court erred in awarding Respondents fees that were: (1) unrelated to the guardianship; (2) incurred via tasks that should have been delegated to a paralegal; (3) block-billed; (4) excessive; and (5) without rational basis, amongst other problematic issues. Appellant's

comprehensive overview of the individual, problematic billing entries demonstrates the basis for which the district court should have denied recovery of each. AA 300-337.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's order.

Dated: February 18, 2021

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CERTIFICATE OF SERVICE

I certify that on February 18, 2021, I submitted the foregoing APPELLANT'S OPENING BRIEF filing through the Court's electronic filing system. Electronic notification of service will be sent to the following:

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRA 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 9,061 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of Nevada Rules of Appellate Procedure.

Dated: February 18, 2021

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