

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0607-14T4

IN THE MATTER OF D.W., an
alleged incapacitated person.

Submitted June 8, 2016 – Decided July 26, 2016

Before Judges Koblitz and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
306533.

Richard S. Mazawey, attorney for appellant
D.W.

Alan John Clark, appellant pro se.

Rubenstein, Meyerson, Fox, Mancinelli, Conte
& Bern, attorneys for respondent M.W.
(Lawrence N. Meyerson, of counsel; Evelyn F.
Nissirios, on the brief).

Matthew Van Natten, respondent pro se.

PER CURIAM

Plaintiff M.W. filed an action to declare D.W., his then
sixty-seven-year old mother, incapacitated and to appoint a
guardian for D.W.¹ After more than a year and a half of
litigation, the substantive issues were resolved through a
consent order. The consent order also provided that "all

¹ We use initials for the parties to protect their privacy
interests. R. 1:38-3(e).

counsel fee applications . . . shall be determined by the [c]ourt." The trial court reviewed the fee applications and issued an order on August 21, 2014 awarding counsel fees to plaintiff and a court-appointed guardian ad litem for D.W., but denying counsel fees to D.W.'s former attorney, Alan John Clark. D.W. and Clark now appeal the August 21, 2014 order.² We affirm.

I.

In December 2012, plaintiff filed a verified complaint and order to show cause seeking to declare his mother, D.W., to be incapacitated and to appoint a guardian for her person and property. Although plaintiff is an attorney, he has been represented throughout these proceedings by legal counsel. Initially, the court appointed Matthew Van Natten to be the attorney for D.W. Thereafter, D.W. retained Clark to represent her and Clark entered his appearance on May 16, 2013. Accordingly, the court appointed Van Natten to be D.W.'s guardian ad litem. Approximately a year later, on May 28, 2014, Clark withdrew as counsel for D.W. and Richard S. Mazawey substituted in as new counsel for D.W.

The substantive claims regarding D.W.'s capacity were litigated for over nineteen months. During that time, numerous

² Clark calls his appeal a "cross-appeal," but it is not a cross appeal because no relief was sought against him in D.W.'s appeal.

motions were filed, discovery was exchanged, and two mediation sessions were conducted. Throughout those proceedings, D.W. disputed that she had any diminished capacity and maintained that she was fully capable of overseeing her own finances. Eventually, the matter was scheduled for trial on July 21, 2014. On that trial date, the case was settled through a written consent order, which was signed by all parties and their counsel. D.W.'s only other child also signed the consent order. Under the consent order, a "Financial Monitor" was appointed to "oversee" D.W.'s finances, but D.W. retained "final and ultimate decision making authority over all her financial matters." The consent order also provided "that all counsel fee applications made or to be made by any prior or current attorney of record in this case, shall be determined by the [c]ourt."

Plaintiff, through counsel; Van Natten, as the guardian ad litem; and Clark, as former counsel for D.W., filed fee applications. D.W., through her current counsel, opposed all the fee applications. Judge Lourdes I. Santiago reviewed the fee applications, considered the briefs filed in support of and in opposition to the fee applications, and on August 21, 2014, issued an order and written opinion. In her order, Judge Santiago (1) awarded plaintiff \$74,411.56 in attorney's fees,

(2) awarded Van Natten \$12,600 in fees, and (3) denied Clark's request for fees.

In her accompanying written opinion, Judge Santiago explained that she was granting plaintiff and Van Natten fees under Rules 4:42-9(a)(3) and 4:86-4(e), which allow for the award of fees in a guardianship action. The judge reasoned that fees can be awarded even if D.W. is not adjudicated to be incapacitated. Judge Santiago then reasoned that plaintiff was entitled to a fee award because plaintiff had filed the suit with "valid concerns for his mother . . . and her ability to manage her own finances. Plaintiff also put forth a substantial amount of evidence to prove his application for incapacity." With regard to Van Natten, the judge found that the court had felt it was necessary to appoint a guardian ad litem and Rule 4:86-4(e) expressly authorizes the compensation of a court-appointed guardian ad litem.

Turning to Clark, Judge Santiago held that the court rules do not provide for an award of attorney's fees for an attorney directly retained by the alleged incapacitated person. Judge Santiago then reasoned "that the only recourse Attorney Clark has is to seek fees directly from [D.W.] because he was not [c]ourt appointed and was personally retained by [D.W.]." The judge also held that any disputes between D.W. and Clark

concerning Clark's representation and his fees would have to be brought in a separate action.

Judge Santiago then reviewed the reasonableness of the fees sought by plaintiff and Van Natten. In that review, the judge conducted an analysis, first determining the lodestar for each counsel fee request. See Rendine v. Pantzer, 141 N.J. 292, 335 (1995); R. 4:42-9(b). Judge Santiago found that the fees sought by Van Natten were appropriate, and she reduced the fees sought by plaintiff. Finally, consistent with Rule 4:86-4(e), the judge directed that the fees were to be paid from the estate of D.W.

II.

D.W., through her current counsel, appeals the award of fees granted to plaintiff and Van Natten. Specifically, D.W. argues that the trial court erred in (1) awarding fees when there was no evidence that she was incapacitated and the action was dismissed by consent; and (2) not conducting a plenary hearing to determine the reasonableness of the fees. Clark appeals the denial of his fee application and argues that because he was not allowed to withdraw from representing D.W. without court permission, he was a "De Facto court appointed attorney for [D.W.]."

Whether a court rule permits the award of attorney's fees is a matter of legal interpretation. Wiese v. Dedhia, 188 N.J. 587, 592 (2006). Accordingly, we review de novo the determination of whether attorney's fees are permissible. Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 453 (2015). "Where a trial court has authority to grant attorney's fees, [however,] we grant it broad discretion and will not disturb its decision unless there has been a clear abuse of that discretion." DeMarco v. Stoddard, 434 N.J. Super. 352, 381 (App. Div. 2014), rev'd on other grounds, 223 N.J. 363 (2015).

Applying this standard of review, and having evaluated the arguments made and the applicable law, we affirm substantially for the reasons explained by Judge Santiago in her thorough written opinion. We add a few additional comments.³

Guardianship actions for incapacitated persons are governed by Rule 4:86 and N.J.S.A. 3B:12-24 to -28. Rule 4:86-4(e) states that "[t]he compensation of the attorney for the party

³ D.W. failed to include all transcripts from the proceedings before the trial court. In addition, D.W. failed to include all the fee certifications and the related filings before the trial court. Plaintiff accordingly filed two motions to dismiss the appeal. Those motions were denied without prejudice. We now deny those motions to dismiss in light of our affirmance on the merits. We note, however, that although we were able to conduct a sufficient review to determine the issues raised on this appeal, D.W. made numerous references to facts that were not in the record.

seeking guardianship, appointed counsel, and of the guardian ad litem, if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct." The comments to the rule also state that "paragraph (e) of the rule makes clear that the attorney for a party seeking appointment of a guardian for an alleged incompetent is entitled to an attorney's fee award." Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:86-4 (2016) (stating that Rule 4:86-4(e) was amended to make it clear that a party seeking appointment of a guardian for an alleged incapacitated person is entitled to attorney's fees in response to In re Landry, 381 N.J. Super. 401 (Ch. Div. 2005)). Accordingly, while the general American Rule does not allow for the shifting of attorney's fees, Rule 4:86-4(e) is an exception to that general rule. See R. 4:42-9(a)(3) (stating in pertinent part that "[i]n a guardianship action, the court may allow a fee in accordance with R. 4:86-4(e) to the attorney for the party seeking guardianship, counsel appointed to represent the alleged incapacitated person, and the guardian ad litem").

Here, the trial court had the authority to make a determination as to counsel fees. The consent order under which the parties resolved the substantive disputes did not expressly declare whether D.W. was incompetent. Indeed, the consent order

was a clear compromise because it appointed a financial monitor, but also acknowledged that D.W. retained final decision-making authority concerning her finances. Just as significant, the consent order expressly stated that the trial court would make a determination on the amount of the fee awards. The consent order is most reasonably read as an agreement by the parties that some amount of fees would be awarded and that that amount would be determined by the court.

Both D.W.'s arguments concerning the right to a plenary hearing in light of the consent order, and Clark's arguments that he was a de facto court-appointed attorney, lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION