

**RECORD IMPOUNDED**

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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0336-15T2

IN THE MATTER OF  
MARIA DELORES HELLER,  
an Alleged Mentally  
Incapacitated Person.

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Submitted March 6, 2017 – Decided September 11, 2017

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey,  
Chancery Division, Probate Part, Bergen  
County, Docket No. P-244-15.

Wolfberg & Wolfberg, LLC, attorneys for  
appellant/cross-respondent Maria Delores  
Heller (Matthew Wolfberg, of counsel and on  
the briefs).

Susan S. Harmon, respondent/cross-appellant  
pro se.

PER CURIAM

The appeal and cross-appeal in this unsuccessful guardianship action involve the trial court's denial of compensation to a guardian pendent lite and the fee award to her attorneys. Maria Delores Heller, the alleged incapacitated person, appeals from an order that required her to pay counsel fees to the attorneys who represented the guardian pendente lite ("temporary guardian") as

well as the premium for the temporary guardian's bond. The temporary guardian cross-appeals from the same order, arguing the court erred by reducing the fee her attorneys sought and by denying her application for compensation. We have reviewed the trial court's decisions and order for an abuse of discretion and found none. We thus affirm the August 6, 2015 order in its entirety.

The underlying facts are essentially undisputed. Heller, a septuagenarian during the guardianship proceedings, suffers from late-stage Amyotrophic Lateral Sclerosis (ALS). She is bedridden and requires round-the-clock medical care. On July 6, 2015, the temporary guardian, a New York attorney and a former legal associate of Heller's late husband, filed, through New Jersey counsel, an order to show cause and a verified complaint. The temporary guardian sought to have a court declare Heller incapacitated and appoint her as permanent guardian.

In support of her application, the temporary guardian submitted two physicians' certifications opining Heller suffered from ALS, which rendered her mentally incapacitated and unable to govern her own affairs. One physician concluded Heller needed a feeding tube without which she was at a high risk of developing aspiration pneumonia and slowly starving herself to death. In addition to the physicians' certifications, the temporary guardian

alleged Heller had withdrawn a large sum of money from a bank account, prompting the bank to contact Adult Protective Services.

The court appointed counsel to represent Heller. On July 8, 2015, based on the physicians' certifications, the court appointed the temporary guardian as pendente lite guardian of MDH's person and property.<sup>1</sup> The order vested the temporary guardian with the authority to "arrange interim financial, social, medical or mental health services" deemed necessary to address MDH's needs and avoid substantial harm to her person or property. The order also authorized the temporary guardian "to receive reasonable fees for her services as well as reimbursement for reasonable expenses upon approval of the [c]ourt [to be paid] from the estate."

On July 16, 2015, the temporary guardian filed an emergent application to have Heller examined, and, if necessary, to have doctors insert a feeding tube to save her life. The court entered a consent order that required Heller's medical examination to take place as soon as possible and authorized the temporary guardian to approve the administration of life-saving medical intervention, including the insertion of a feeding tube. After doctors examined

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<sup>1</sup> The July 8, 2015 order is an amended order. The temporary guardian represents the original order was entered on July 7, 2015.

Heller, they discharged her from the emergency room, finding a feeding tube was unnecessary.

A few days after Heller's examination, the temporary guardian decided to withdraw her guardianship application. She represented to the court that she no longer wished to continue as guardian pendente lite for Heller "in any capacity." After hearing oral argument and reviewing two new physicians' certifications concluding Heller had the capacity to make decisions relating to her medical care, the court dismissed the guardianship proceeding, finding Heller had capacity and should be permitted to "die with whatever dignity she so chooses to die with."

The court also relieved the temporary guardian of her duties as pendente lite guardian. The court entered an implementing order on July 23, 2015. The temporary guardian had thus served in that capacity from July 8, 2015 to July 23, 2015, a total of fifteen days.<sup>2</sup> For her services, the temporary guardian sought compensation of \$44,973.66 and expenses of \$3938.52. Her attorneys sought fees of \$35,946.25 and reimbursement of \$1678.32 for expenses.

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<sup>2</sup> The temporary guardian served for sixteen days if the day the court entered the July 8, 2015 amended order appointing her is counted, or seventeen days if July 7, 2015 is counted. See n.1, supra.

The court denied the temporary guardian's application for compensation, but awarded her attorneys \$25,924.27, \$23,000.00 of which the court ordered reimbursed to the temporary guardian, who had paid her attorneys that sum. The court also ordered Heller to pay a bonding agency \$1790 for the bond premium owed for the bond the temporary guardian had posted.<sup>3</sup>

Heller paid the bond premium but not the temporary guardian's counsel fees. Rather, she "appealed" the fee award to the trial court, alleging the court had erred by awarding fees to the temporary guardian's attorneys. Heller argued the attorneys were unsuccessful, the court having dismissed the guardianship action. She also argued the temporary guardian's motive in filing the action was for personal gain. Lastly, she argued the attorneys' fees were excessive.

A court has authority to fix compensation for a guardian ad litem, his or her attorney, and appointed counsel under Rule 4:86-4(e), which states: "The compensation of the attorney for the party 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." Rule 4:42-9, which enumerates actions

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<sup>3</sup> The court also awarded Heller's counsel fees and costs, a decision not challenged on this appeal.

in which the award of fees are allowable, also authorizes such fees: "In 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." R. 4:42-9(a)(3).

Both rules vest the court with discretion to fix compensation; the rules do not mandate that a court do so. A court has discretion to decline to award a fee. Moreover, if a court in its discretion chooses to award a fee, the court may consider counsel's lack of success in determining what fee is reasonable. Cf. Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 355 (1995) (noting that the method for calculating reasonable fees – a product of hours reasonably expended on litigation times a reasonable hourly rate – may be excessive if a plaintiff has achieved only partial or limited success). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001).

Heller does not dispute the court's discretion to award fees to the attorneys for the temporary guardian. Rather, she contends the court abused its discretion because the temporary guardian's "motive in being appointed guardian in this case [was] money," the temporary guardian "misrepresented the mental state of Heller in

her Verified Complaint in order to get appointed," and "[t]o require Heller, who was found to be mentally competent, to pay this amount of money for a legal proceeding that was dismissed without a trial or plenary hearing [eighteen] days after its inception is unconscionable."

The trial court determined the temporary guardian's "application was brought in good faith . . . and not for [plaintiff's] own gain." The court also determined "litigation costs were necessary and could not be avoided." These findings are supported by adequate, substantial, and credible evidence in the record and are therefore binding on appeal. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 305 (App. Div. 2010) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

Nor do we find any abuse of discretion by the trial court in the amount of fees it awarded. Attorneys seeking fees under the actions enumerated in Rule 4:42-9 must file "an affidavit of services addressing the factors enumerated by RPC 1.5(a)." R. 4:42-9(b). A judge considering a fee application in a guardianship action should also consider the plaintiff's motivation in pursuing the guardianship action, whether the plaintiff has a potential interest in the incapacitated person's estate, and the financial circumstances of both plaintiff and the alleged incapacitated

person. In re Landry, 381 N.J. Super. 401, 410 (Ch. Div. 2005). Of course, the court must also consider the reasonableness of the hourly rate and the amount of time the attorneys "devoted to the matter." Ibid.

Here, the court considered all of the foregoing factors as well as the life-threatening situation extant when the temporary guardian filed the guardianship application. The court determined Heller's estate was substantial. These findings are amply supported by substantial and credible evidence and therefore should not be disturbed on appeal. Triffin, supra, 411 N.J. Super. at 305.

Similarly, on the cross-appeal, we conclude the trial court did not abuse its discretion by denying compensation to the temporary guardian. As previously noted, the temporary guardian served in that capacity for fifteen days, from July 8 to July 23, 2015; yet, she submitted a bill for services rendered from January 2, 2015 through July 29, 2015. Moreover, as the trial court explained, the time the temporary guardian allegedly spent performing certain services appears to be excessive, and the temporary guardian billed for "attorney services" when she was functioning not as an attorney, but a guardian pendente lite. The temporary guardian is not licensed to practice law in the State of New Jersey.



The temporary guardian's application for compensation included an extraordinary number of hours for which she did not perform services as a temporary guardian, demonstrated excessive time allegedly spent for other services, and apparently included services for attorneys' fees to which she was not entitled. The billing irregularities also called into question the application for compensation that the court properly exercised its discretion in denying it.

We have considered the parties' remaining arguments and found them to be without sufficient merit to warrant further discussion.

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