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Ethical Considerations for Fee Applications in Probate Court

Judge Guy Herman

Presenter Contact Information:
Guy Herman
Travis County Probate Court No. 1
1000 Guadalupe Street, Room 217
Austin, Texas 78701
512-854-9258

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ATTORNEY'S FEES

I. Attorney's Fees: Why Am I Getting .75 hrs of Ethics?

Behind the statutes, case law, and rules with which this paper largely concerns itself lies an ethical dimension that informs this topic. As a case cited in this paper points out, a court is the true protector of a ward's estate. This is so because after fees are requested and any objections made, it is a judge's duty to determine reasonableness and necessity. It is a judge's signature that orders them paid.

When a court abdicates this fundamental duty and falls into the pernicious practice of simply approving applications for fees with pre-printed orders granting the fees sought, it fails in its obligation to protect the vulnerable ward. For those wishing to see what this failure looks like on an epic scale, the author encourages the reader to peruse www.azcentral.com/news/probate, where you'll find stories (in a fine investigative series in the Arizona Republic) of somnolent courts permitting attorneys and fiduciaries to commit epic abuses.

Since a ward is by definition incapacitated, a court appoints an attorney ad litem to represent him. One obligation of that attorney is to object to unreasonable or unnecessary fees. But no court can defer to whether an ad litem objects to fee applications. Wards are the most vulnerable people a court is charged with protecting; to fail in this is to fail in a moral and ethical obligation. And now to those statutes, cases, and rules that tell us how all this plays out.

II. The Texas Disciplinary Rules of Professional Conduct

Every attorney is bound by the Texas Disciplinary Rules of Professional Conduct's "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action." Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 7. Attorneys are required to follow the rules in every representation, including representations commenced through appointment.

Rule 1.04 prohibits attorneys from charging an unconscionable fee, that is a fee that no reasonable lawyer could believe is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. The Rule provides a list of several factors that may be considered to determine reasonableness. Some of the factors include the fee customarily charged in the area, the difficulty of the questions presented, and the experience and ability of the lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. The comments indicate that an attorney should not abuse a fee arrangement, such as an hourly rate, by using it to further the attorney's own financial interests. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 6. Factors that are particularly relevant in borderline cases include overreaching by an attorney and the attorney's failure to clearly explain the fee calculation at the beginning of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. cmt. 8. In addition, the comments indicate that the circumstances of the representation, such as the capacity of the client, are relevant to determining the reasonableness of the fee. See Tex. Disciplinary Rules Prof'l Conduct R. 1.04. cmts. 4, 5, 8.

The Rules are mandatory in every attorney-client relationship and exist independently of the specific requirements of the Estates Code or the judgment of a court regarding the propriety of fees.

III. Fees for Attorneys and Ad Litems

A. Attorney's Fees in Temporary and Permanent Guardianships

A temporary or permanent guardian is entitled to reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the ward's estate. Estates Code §§1155.002-1155.151 (hereafter EC). If the ward's estate is insufficient to pay for the reasonable and necessary attorney's fees, fees may be paid from the county treasury—but "only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services . . . from any other source." EC §1155.054(e).

The Legislature made a change in the 2013 session long sought by bench and some of bar by enacting EC §1155.054(d). Here, in full:

> If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.

And in EC §1155.151(a), the Legislature defined "court costs" to include "costs of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals and interpreters," and provided these costs shall be paid out of the guardianship estate (or the county treasury if the estate is insufficient), "except as provided by Subsection (c)":

> If the court finds that a party in a guardianship proceeding acted in bad faith in prosecuting or objecting to an application in a proceeding, the court may order the party to pay all or part of the costs of the proceeding. If the party found to be acting

> in bad faith or without just cause was required to provide security for the probable costs of the proceeding under Section 1053.052, the court shall first apply the amount provided as security as payment for costs ordered by the court under this subsection. If the amount provided as security is insufficient to pay the entire amount ordered by the court, the court shall render judgment in favor of the estate against the party for the remaining amount.

This provision brings guardianship litigation more in line with TRCP 141 in giving courts power to assess costs against a party acting in bad faith.

Estates Code §1155.151(d) also forecloses the argument that the parties to a guardianship proceeding could not be required to make a deposit for costs because they could not be ordered to pay the costs in a final order—as the costs are borne by the ward's estate. See, e.g., In re: Mitchell (Tex. App.—El Paso, 2011, no pet.).

These changes have upended over a century of Texas practice in which attorney's fees and costs were paid by the ward's estate, with no bad faith exception.

1. ***Payment of Attorney's Fees to Certain Attorneys***

Probate Code 665B was modified slightly but crucially during the 2013 legislative session as it transitioned to EC §1155.054 (a):

> A court that creates a guardianship or creates a management trust under Chapter 1301 [formerly TPC §867] for a ward, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for creation of the management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just [new language, emphasis supplied], to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether the management trust is created . . . .

In telling courts to consider what attorney's fees are reasonable and necessary and whether that amount is also equitable and just, it seems plain a court is meant to consider factors such as the size of the ward's estate in making an attorney's fees award, and the Code gives a court the power to adjust accordingly.

Whether the fees awarded under EC §1155.054 must relate solely to the application for guardianship or management trust is unsettled. Over strong dissent, one Court of Appeals has held that fees awarded under section 1155.054 need not be directly related to applications for guardianship or the creation of a management trust. In the Guardianship of Burley, 499 S.W.3d 196, 199 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). "Although the statute limits recovery of attorney's fees to a person who acted in good faith and for just cause, the Legislature could have, but did not limit the recovery to only those attorney's fees incurred from the filing and prosecution of the application." Id. The dissent urged that only fees related to an application for guardianship or creation of a management trust should be awarded under section 1155.054. "Absent this nexus between the work performed and the application for guardianship or management trust, there can be no recovery under the statute." Id. at 202 (Frost, J. dissenting).

> Ethics Issue: What are the ethical implications of permitting courts to award fees to attorneys for work unrelated to applications for guardianships or management trusts?

2. Proof

Before a court awards attorney's fees, the court must find that the applicant acted in good faith and for just cause. EC §1155.054(c). Section 1155.054 requires proof that the attorney's services were reasonable and necessary for the preservation, management, and safekeeping of the estate. In Woollett v. Matyastik, 23 S.W.3d 48 (Tex. App.—Austin 2000, pet. denied), the appeals court reversed the trial court's approval of attorney's fees and expenses because the fees were not supported by any evidence or proof and did not meet the requirements of TPC §667 (now EC §1155.103). The application submitted by the temporary guardian was not verified, not itemized, not based on expert testimony, and it failed to detail the work, hourly rate, and number of hours expended. Id. at 53. It further failed to state that the rate was reasonable and customary in the county. Id.

> Ethics Issue: How should an attorney bill an estate for consultations with other attorneys? What is a reasonable and necessary fee if multiple attorneys attend a hearing or trial?

In an analogous context, the Supreme Court has noted that "if multiple attorneys or other legal professionals are involved in a case, the fee application should indicate which attorney performed a particular

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