

1988

In the matter of the Guardianship and Conservatorship of: Dorothy M. Bow v. Marvin : Brief of Respondent

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT
STATE OF UTAH

In the Matter of the)
Guardianship and)
Conservatorship of:)
DOROTHY M. BOW,)
Appellant.)

88

Case No. 860019

BRIEF OF RESPONDENT
(LAURA M. MARVIN - Guardian of the Person of DOROTHY M. BOW)

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
JUDGE DAVID B. DEE

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FILED

JUL 14 1986

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUE

WHETHER THE DISTRICT COURT ERRED IN AWARDING
ATTORNEY'S FEES AND INVESTIGATIVE COSTS TO
GUARDIAN IN OPPOSING TERMINATION
OF GUARDIANSHIP

STATEMENT OF THE CASE

A) NATURE OF CASE

Appellant filed a Petition for Removal of Guardian and also petitioned for the appointment of one JOSEPH ROSNER as Successor Guardian. (R 98). Guardian (Respondent herein) resisted the appointment of JOSEPH ROSNER as Successor Guardian, and also petitioned the Court for an Order approving the Conservator's reimbursement of her attorney's fees and expenses of doing so.

B) DISPOSITION IN LOWER COURT

After a trial, the Lower Court partially granted the Petition in that the Court removed LAURA M. MARVIN as Guardian of DOROTHY M. BOW, but denied the petition insofar as it sought to appoint JOSEPH ROSNER as Successor Guardian.

The Court, after notice and hearing in the matter of the Conservatorship of DOROTHY M. BOW, granted the Guardian's Petition for Order authorizing payment of attorney's fees and expenses (R 131) incurred by the Guardian in opposing her replacement as Guardian by one JOSEPH ROSNER. The

Court by Memorandum Decision approved the Petition for attorney's fees and expenses. (R 156-158)

C) FACTS

Appellant's Statement of Facts is mostly correct, with the following exceptions:

1) The Court allowed Respondent to respond to the Petition to replace her with one JOSEPH ROSNER, even though a written responsive pleading had not been filed, and to raise the issue of the forgery of the Petition and the suitability of JOSEPH ROSNER as Successor Guardian. (Transcript, P. 106, Line 17-25. Also, Transcript, Pp. 175-177, Line 6.)

2) At the hearing on the Petition for attorney's fees and costs (see Transcript, Pp. 393-408), the matter was fully argued by Counsel for both sides before the Court made its final ruling on the matter. Ruling on Appellant's Objection, the Court had before it the Petition for fees and costs (R 131) which set out the costs and expenses and attorney's fees in detail. The Court also had before it Affidavits from the Attorneys for the Guardian, Respondent herein, setting out in detail the attorney's fees. (R 136-137, R 138-139, and R 166-167).

3) The Petition for fees and costs was filed in the matter of the Conservatorship of the estate of DOROTHY M. BOW, not in the matter of the Guardianship of DOROTHY M.

BOW, and it was a Petition for an Order allowing the Conservator of the estate to pay the fees.

4) Pursuant to the Court Order allowing the Petition, the Conservator, FIRST SECURITY BANK, paid the amounts to Respondent and Guardian LAURA MARVIN.

SUMMARY OF ARGUMENT

The Utah Uniform Probate Code allows Guardians to recover their costs and expenses in performing their duties on behalf and in the interest of their Ward. The Code also allows a Conservator to pay costs, expenses, and attorney's fees incurred in the interest of and for the protection of the Ward. The Guardian in this case, when faced with a Petition to replace her with another person, had a duty to investigate the matter and respond thereto in Court where it appeared that the Petition was forged and the replacement Guardian was not a suitable person to act as Successor Guardian.

ARGUMENT

The Utah Uniform Probate Code allows Guardians to recover their costs and expenses, which would include attorney's fees incurred in the course of performing their duties as Guardians. The Utah Probate Code, Section 75-5-312(2) provides that:

"any Guardian of one for whom a Conservator also has been appointed shall control the custody and care of the Ward and is entitled to receive reasonable sums for his services...The Guardian may request the Conservator to expend the Ward's estate by payment to third persons...for the Ward's care and maintenance."

The Utah Uniform Probate Code, Section 75-5-424, empowers Conservators to pay out funds of the estate for the protection of the protected person, including attorneys and agents. See U.U.P.C. Section 75-5-424(r)(w).

Generally, a Guardian has the duty to care for the person of his Ward (Utah Probate Code Section 75-5-312, and Editorial Board Comment thereto). That duty must include the examination of any Petition filed to remove the Guardian and replace her with another person. Guardianship does not end until the Guardian is removed by Court Order after hearing on the removal petition. (U.U.P.C. 75-5-306, 75-5-307).

In this case, LAURA M. MARVIN's duty to protect her Ward continued through these proceedings, and required her to take steps as necessary to protect the interest of DOROTHY M. BOW. "A Guardian may in a proper case employ attorneys to care for the interest of her Ward." 39 AmJur 2d, Page 82, Section 98. And, a Guardian may employ others who specialize in areas needed to assist the Guardian in the interest and care of the Ward. 39 AmJur 2d, Page 18, Section 97.

In this case, the Petition for Removal also included a Petition to appoint JOSEPH ROSNER as Successor Guardian. (R 98). Guardian LAURA MARVIN was suspicious of the motives behind the Petition, and reasonably believed that the matter needed to be investigated and contested in the interest of her Ward. To this end, she used the services of two attorneys, an investigator, and an expert on handwriting. Guardian LAURA MARVIN knew JOSEPH ROSNER had been meddling with the person of DOROTHY M. BOW, and had been meddling with some of her money and property. (Transcript, Pp. 124-125). She also knew DOROTHY BOW had expressed displeasure with JOSEPH ROSNER. (Transcript, P. 80, Line 2-5, and Pp. 124-125). In addition, it appeared to Guardian LAURA MARVIN that the Petition to replace her was a forgery. DOROTHY BOW's signature on the Petition had been forged before a Notary Public. (Transcript, Pp. 174-188).

Under those circumstances, Guardian LAURA MARVIN had a duty and obligation under her charge as Guardian to appear and respond to the Petition and present evidence of these matters to the Court. If she had not, she may well have been liable for breach of her duty had the Ward fallen prey to a Successor Guardian who may have been intending to exercise further unauthorized control over her property.

During the course of the trial, Guardian LAURA MARVIN presented substantial evidence that DOROTHY BOW's signature

on the Petition had been forged before a Notary Public (Transcript, Pp. 174-189). The evidence is uncontradicted that JOSEPH ROSNER was the one who perpetrated that fraud. First, he claimed he took DOROTHY BOW to Attorney MATT BILJANIC's office where it was signed. Under cross examination, he claimed that he took her to a bank where she signed it before a Notary. In either event, JOSEPH ROSNER was involved with the forgery. (Transcript, P. 27, lines 21-25; Pp. 37, 44, 55).

Next, the Guardian was able to establish in Court that JOSEPH ROSNER had exercised authority over moneys and property belonging to DOROTHY M. BOW. He took possession of cash he found in her apartment and deposited it in a bank account (Transcript, Pp. 40-41). Next, he succeeded to have his name and himself placed on the account as a "beneficiary" (Transcript, Pp. 60-62). And lastly, he caused the withdrawal of cash and gave it to Counsel MATT BILJANIC (Transcript, Pp. 57-58), all without authority from the Guardian, or the Conservator of DOROTHY M. BOW's estate.

The Court recognized these issues and problems, and saw fit to not appoint JOSEPH ROSNER as Successor Guardian. The Court, in its Memorandum Opinion, recognized that the Guardian LAURA MARVIN used the assistance of the attorneys, investigator, and handwriting expert, to bring these matters to the attention of the Court. The Court then granted the

Guardian's Petition for attorney's fees and costs, as being reasonable and directly related to the issues raised at the hearing. (R. Pp. 156-157). The fees and costs were supported by the Petition filed by the Guardian, and the Affidavits filed by the attorneys retained by the Guardian. (R. 131, 136-137, 138-139, 166-167). The Court, in setting attorney's fees and costs, has wide discretion since the Judge himself is personally aware of such matters, and "in the absence of the abuse of sound discretion, the decision of the trial court will be affirmed..." (In Re Smith's Estate, 162 P2d 105, P. 111).

Appellant attempts to characterize the issue as being one of whether or not the Court should award attorney's fees between adverse parties in a typical lawsuit situation. This case, by nature, does not involve adverse parties in the usual sense. Therefore, the cases on attorney's fees cited by Appellant are not applicable.

This case is one involving the Guardianship and Conservatorship of DOROTHY BOW and her property. A Guardian and Conservator are appointed to act for and on behalf of their ward. The question of whether or not the Guardian should recover her attorney's fees and expenses herein is the same as whether or not DOROTHY BOW should pay her own fees, since they were incurred for and on behalf of DOROTHY BOW and in her interest. This is not the same as whether one adverse

party should pay the other adverse party's attorney's fees and expenses.

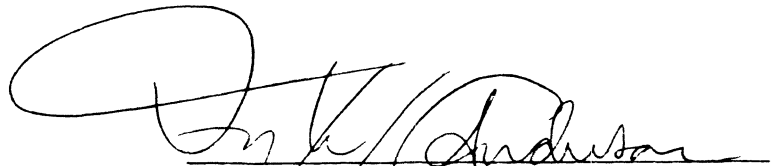
CONCLUSION

The Utah Uniform Probate Code allows the Guardian to recover her costs and expenses in discharging her duties as Guardian, which under the circumstances of this case must include attorney's fees, investigator fees, and expert witness fees. The Probate Code also allows the Conservator of the estate to pay such cost and expenses incurred by the Guardian out of the estate of the protected person.

In addition, the Lower Court reviewed the matter on a Petition filed in the conservatorship, after notice to all parties, and hearing, and found the amounts and petition reasonable, and ordered the Conservator to pay the same.

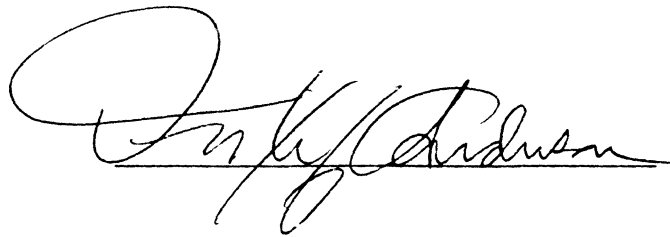
Appellants' Appeal herein should be overruled and denied and Respondent should be awarded her costs and expenses including her reasonable attorney's fees in these proceedings.

DATED this 26 day of June, 1986.


DEXTER L. ANDERSON
Attorney for LAURA M. MARVIN

CERTIFICATE OF MAILING

I certify that I mailed four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT to MATT BILJANIC, Attorney for Appellant, 7355 South 9th East, Midvale, UT 84047, postage prepaid, this 26 day of June, 1986.

A handwritten signature in cursive script, appearing to read "J. K. Anderson", written over a horizontal line.