

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE
GUARDIANSHIP OF THE PERSON
AND ESTATE OF TEWOLDE
HABTEMICAEL, AN ADULT WARD.

TEWOLDE HABTEMICAEL,
Appellant,
vs.
YOHANNES HABTEMICAEL,
Respondent.

No. 70377

FILED

AUG 02 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Tewolde Habtemicael appeals from a district court order awarding payment of attorney fees from his estate in a guardianship action to counsel for his former guardian, Yohannes Habtemicael. First Judicial District Court, Carson City; James E. Wilson, Judge.

Tewolde was subject to an adult guardianship pursuant to NRS Chapter 159. His son, Yohannes, commenced the underlying action in September 2014 and was represented by the law firm Allison MacKenzie. After being appointed Tewolde's guardian, Yohannes moved Tewolde to live with Tewolde's sister in Chicago in December 2014, sold Tewolde's house, and essentially drained Tewolde's other accounts. In June 2015, the Illinois Department of Aging notified the Nevada district court that Illinois had substantiated an elder abuse allegation against Yohannes. When the Nevada district court sought an accounting of the guardianship from Yohannes and he failed to cooperate, his counsel at Allison MacKenzie moved to withdraw from his representation.

After moving to withdraw, Allison MacKenzie applied for its fees to be confirmed as paid. Tewolde, through counsel, opposed the

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application for attorney fees, arguing that Yohannes' attorney fees should not be paid out of the estate that Yohannes' decimated. The court delayed a decision on the application for fees until after allegations that Yohannes had misappropriated funds from the estate were resolved. Eventually the court removed Yohannes as Tewolde's guardian, made an affirmative finding that Yohannes misappropriated nearly \$100,000 from the guardianship estate, ordered Yohannes to return the funds to the estate, and denied Allison MacKenzie's application for fees.

Allison MacKenzie, however, filed a second application for fees, stating that it had already been paid \$6,121.25 out of the guardianship estate prior to its withdrawal from representation of Yohannes, a payment that was not approved by the court prior to payment from the estate as required under Nevada law. It claimed it had incurred an additional \$3,000 or so in fees but was not seeking payment for the additional fees, only retroactive approval of the already-made payment of attorney fees. The court approved the second application for fees without any discussion of the propriety of the fees or addressing the timeliness of the application. Tewolde then filed this appeal.¹

On appeal, Tewolde argues that the fees incurred by Yohannes in establishing the guardianship over Tewolde should not be shifted to the estate as Yohannes was not acting in furtherance of Tewolde's interests. Tewolde maintains that fees incurred by a fiduciary who neglected his

¹Tewolde named Yohannes as well as Allison MacKenzie as respondents in this appeal. The supreme court removed Allison MacKenzie as a party to this appeal upon motion because Allison MacKenzie was not a party below.

responsibilities to the court and to the person under the protection of the guardianship court should not be paid from the protected person's estate.

Generally, when reviewing attorney fees awards, we review for an abuse of discretion. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005); *see also* NRS 159.183(1) (noting that payment of attorney fees is subject to discretion and approval of the court). While it is within a trial court's discretion to determine a reasonable amount of attorney fees under a statute or rule, in exercising that discretion the district courts must evaluate the *Brunzell* factors. *See Miller*, 121 Nev. at 623, 119 P.3d at 730; *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

Guardians are entitled to compensation for their services and "[r]easonable expenses incurred" in retaining certain professionals. *See* NRS 159.183(1). The statute lists several considerations for the reasonableness of compensation and services. *See* NRS 159.183(2) (listing the following as considerations for the reasonableness of compensation and services: "(a) The nature of the guardianship; (b) The type, duration and complexity of the services required; and (c) Any other relevant factors"); *see also Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (listing the qualities of the advocate, the character and difficulty of the work performed, the work actually performed by the attorney, and the result obtained as factors for determining reasonable attorney fees). The court may direct the expenses to be assessed against a party, or that the estate of the protected person pay the court-approved expenses. *See* NRS 159.183(3), (4). In determining whether a party or the estate of the protected person should pay, the court should consider the nature, extent and liquidity of the protected person's


assets, as well as factors relevant to the duties of the guardian, amongst other things. *See id.*


While Nevada appellate courts do not require that the district courts make explicit findings on each *Brunzell* factor, the record nonetheless must demonstrate that the court considered the factors and that the award is supported by substantial evidence. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *see also Lioce v. Cohen*, 124 Nev. 1, 24-25, 174 P.3d 970, 985 (2008) (holding that, on appellate review, the court was unable to determine whether the district court abused its discretion because the court failed to make any findings in resolving the matter before it). And here, the district court failed to make any findings in awarding attorney fees and there is nothing in the record before us to suggest that the district court considered the appropriate factors in making its decision. Indeed, based on the record, it appears that the district court not only failed to consider the *Brunzell* factors, but that it failed to consider the factors outlined in NRS 159.183(2) and (3) in deciding that payment of the attorney fees out of the estate was proper.

Under these circumstances, we must conclude that the district court abused its discretion in approving payment of the attorney fees from the estate. *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33; *Miller*, 121 Nev. at 623, 119 P.3d at 730. As a result, we reverse this decision and remand this matter for reconsideration under the factors for determining whether attorney fees should be awarded and whether the fees should be paid out of the estate. *See* NRS 159.183(2) (listing various factors for courts to consider in assessing the reasonableness of compensation and services including “[a]ny other relevant factors” as a catchall consideration); NRS 159.183(3) (providing for the consideration of the nature, extent and liquidity of the

protected person's assets; the disposable net income of the protected person; any foreseeable expenses; and any other factors relevant to the duties of the guardian in deciding whether to pay attorney fees from the estate); *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (listing "well known basic elements to be considered in determining the reasonable value of an attorney's services" including "the result; whether the attorney was successful and what benefits were derived"); see also *In re Guardianship of Doyle*, 778 N.W.2d 342, 347 (Minn. Ct. App. 2010) ("The ward's best interests must be the determinative factor in guiding the court when making any choice on the ward's behalf."); *In re Guardianship of Decker*, 353 P.3d 669, 679 (Wash. Ct. App. 2015) (noting that determination of just and reasonable compensation relies upon competing equitable factors of compensating an attorney for their work benefiting the estate and protecting the alleged incapacitated person's right to autonomy as well as protecting the person's estate); *In re Messer's Guardianship*, 7 N.W.2d 584, 586 (Wisc. 1943) ("If the guardian did not act in good faith and was derelict in the performance of his duties, in that situation he should defend his conduct at his own expense.").

It is so ORDERED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Paul F. Hamilton, Settlement Judge
Washoe Legal Services
Yohannes Habtemicael
Carson City Clerk