

Circuit Court for Montgomery County
Case No.: 113212-FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1526

September Term, 2015

HEBREW HOME OF GREATER
WASHINGTON, INC.

v.

DAVID R. BACH

Wright,
Friedman,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: August 25, 2017

*This is an unreported opinion, and may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from the appointment of counsel and a temporary guardian of the property by the Circuit Court for Montgomery County for a disabled nursing home resident. At the conclusion of the case, appellee David R. Bach, as appointed counsel, filed a motion for payment of attorney's fees. The court found the fees were reasonable and directed him to submit a request for payment to the State of Maryland pursuant to Maryland Rule 10-106(a). When the State failed to pay the entirety of the fees, the court directed appellant, Hebrew Home of Greater Washington, Inc., the resident's care facility, to pay the remainder. Appellant noted a timely appeal. Following briefing and oral argument, pursuant to Article V, Section 6 of the Maryland Constitution, the Clerk of this Court informed the Attorney General that the State may have an interest in the case. The State, thereafter, filed a motion for leave to file a brief as amicus curiae, which was granted by this Court.

On appeal, appellant presents the following questions for our review:

1. Whether the trial court erred when it ordered that the Hebrew Home pay the attorney's fees charged by the indigent ward's court-appointed counsel because the State of Maryland is the sole source of payment of attorney's fees and costs incurred by an indigent ward's court-appointed attorney in a guardianship proceeding.
2. If the trial court may require an entity other than the State of Maryland to pay an indigent ward's court-appointed counsel's attorney's fees, whether the trial court erred in ordering the Hebrew Home to pay the fee.

For the reasons set forth below, we shall reverse the order of the circuit court.

BACKGROUND

Appellant Hebrew Home of Greater Washington, Inc. ("Hebrew Home") is a licensed long-term care facility located in Rockville, Maryland. On March 23, 2013, Doris

Clark admitted herself to Hebrew Home's skilled unit and resided there until her death in December of 2014.

Mrs. Clark's care upon admission was paid for by Medicare Part A, with a secondary insurance for her co-pay. However, her Medicare coverage expired on April 12, 2013, at which time she became a private-pay resident and was personally responsible for the cost of her care. Her admission agreement required that in the event she lacked sufficient assets, she or her agent must apply to the Maryland Medical Assistance program for a determination of assets and Medicaid benefits. Hebrew Home had reason to believe that Mrs. Clark lacked the capacity to handle her own financial affairs, and, therefore, the facility staff met with Mrs. Clark's family to discuss applying to the Medical Assistance Program. Lloyd Harris, Doris Clark's husband, thereafter, filed a partially completed Medicaid application, but he and Mrs. Clark's daughters, Nancy and Cynthia Clark, were unresponsive to the Program's requests for additional information. The Clarks, further, did not forward payment for Mrs. Clark's care.

While her Medicaid application remained in flux, Hebrew Home became aware that Mrs. Clark's assets may have been misappropriated, and, in August of 2013, it filed a petition for appointment of a guardian of her property. Nancy Clark informed appellant that her sister, Cynthia, had closed their mother's bank account and that the location of her assets were unknown. Hebrew Home's internal investigation confirmed that Mrs. Clark left the premises with Cynthia and visited a bank, before returning to the facility. Hebrew

Home reported the matter to Adult Protective Services, and it began its own investigation that same month.

The guardianship petition asserted that Doris Clark was disabled and that she was unable to manage her property and affairs. Hebrew Home certified that she had been evaluated by two physicians, and that “the precise nature of [Mrs. Clark’s] disability is delirium.” The petition requested that a guardian of the property be appointed to “determine the disposition of [Mrs. Clark’s] assets, to properly manage and disburse any remaining assets,” and to complete the Medicaid application. It also requested that an attorney be appointed to represent Mrs. Clark. All interested parties were notified of the proceeding.

The circuit court appointed appellee David R. Bach, Esq., as counsel for Mrs. Clark in the underlying case. Phil Karasik, Esq., was appointed as the Temporary Guardian of the Property, and he was to complete Mrs. Clark’s Medicaid application and manage her identifiable assets.

On September 24, 2013, Cynthia Clark filed an Answer to appellant’s Petition, in which she opposed the appointment of anyone but herself to be guardian of the property or person for her mother. She conceded that her mother was unable to manage her own financial affairs and that she had closed her mother’s bank account and deposited the assets into a jointly-owned bank account, but she did not disclose the amount of her mother’s assets. Cynthia Clark did, however, consent to Karasik’s appointment as temporary

guardian of the property for the limited purpose of completing the Medicaid application. Neither Mr. Harris nor Nancy Clark responded to the petition.

Cynthia Clark also filed a Counter Petition on September 30, 2013, asking the court to appoint her as the Guardian of the Person and Property of Doris Clark. She asserted that, amongst other things, Hebrew Home was not properly treating her mother and had blocked her from seeking an outside opinion on her mother's condition by banning her from the home. She claimed that, according to her mother's wishes, she had researched a doctor who specialized in "alternative medicines," but that Hebrew Home had not allowed this. She requested her mother be evaluated by a medical professional not affiliated with Hebrew Home.

Bach, as court-appointed counsel for Doris Clark, filed an Answer to the Petition for Appointment of a Guardian of the Property on October 2, 2013, in which it was requested the court deny the Petition filed by Hebrew Home.

On March 5, 2014, the court granted Mrs. Clark's oral motion to dismiss Cynthia Clark's Counter Petition. The court also granted Hebrew Home's oral motion to withdraw its Petition for Appointment of Guardian of the Property, as Karasik had been able to obtain Medicaid benefits for Mrs. Clark.

Bach filed a Motion for Payment of Respondent's Attorney's Fees and Costs on July 22, 2014, in the amount of \$4,810.00.¹ Bach's fee petition stated Clark was indigent

¹ Appellee's original motion for payment requested fees in the amount of \$5,600.00. On October 3, 2014, this was adjusted on the record to \$4,810.00.

and could not pay the fees, and requested the court require Hebrew Home pay the fees. Hebrew Home opposed the petition and argued Maryland Rule 10-106 requires the attorney's fees incurred by an indigent disabled persons' court-appointed counsel in a guardianship proceeding be paid by the State. After argument on October 3, 2014, the court found an award of \$4,810.00 in fees was "fair and reasonable under the circumstances," and directed appellee to submit the fees "for payment to the State pursuant to Rule 10-106(a)." The court stated, however, that, "despite the language, the State does not pay," and therefore held that Bach may renew his motion "[i]n the event payment is not made by the State."

Bach then submitted his request for payment to the Maryland Legal Services Program on December 10, 2014. On January 13, 2015, he received a payment from them in the amount of \$500. Bach, on July 7, 2015, filed a Motion for Payment of Respondent's Attorney's Fees and Costs Pursuant to Order Entered October 3, 2014, in which he requested the court require Hebrew Home to pay the unpaid balance of \$4,310.00. Hebrew Home filed its opposition, again citing Maryland Rule 10-106(a). The court, without an additional hearing, granted Bach's motion and ordered Hebrew Home to pay the remaining balance.

This appeal followed. Following briefing and oral argument, the Clerk of this Court informed the Attorney General that pursuant to Article V, Section 6 of the Maryland Constitution, the State may have an interest in the case. The Department of Human

Resources (“the Department”), thereafter, filed a motion for leave to file a brief as amicus curiae, which was granted by this Court.

STANDARD OF REVIEW

We review the trial court’s interpretation of Rules *de novo*. See *Lowery v. State*, 430 Md. 477, 487-90 (2013); see also *Doe v. Montgomery Cnty. Bd. of Elections*, 406 Md. 697, 712 (2008).

The circuit court’s decision to award attorney’s fees is reviewed for abuse of discretion. *Ochse v. Henry*, 216 Md. App. 439, 456 (2014) (internal citations omitted).

DISCUSSION

- I. Maryland Rule 10-106(a) requires the State to pay the attorney’s fees of a court-appointed counsel for a disabled person.

Appellant argues the circuit court erred in ordering Hebrew Home to pay the remainder of appellee’s fees. According to appellant, Rule 10-106(a)(2) governing guardianship proceedings for disabled persons, establishes that the State has the sole responsibility to pay the attorney’s fees of a disabled person if their estate is insufficient, and the court was not authorized under that Rule to order otherwise. Appellee contends that despite this provision, once the State failed to pay the entirety of his fees, the Rule authorized the fee of an appointed attorney be paid “as the court shall direct.”

The Department, in its amicus curiae brief, argues that the court was correct in not ordering the State to pay the entirety of appellee’s fees because Rule 10-106(a) only applies to attorneys’ fees in guardianship of person cases, not guardianship of property cases. According to the Department, Rule 10-106 “was drafted based on the pre-existing

requirements in the Estates & Trusts Article, which required the State to pay attorney’s fees for indigent disabled adults in guardianship of person proceedings but *not* in guardianship of property proceedings.” The Department argues this is clear when one compares Estates & Trusts Article § 13-705(d)(1), regarding appointment of counsel for disabled persons in guardian of the person proceedings, with § 13-211(b), regarding appointment of counsel for disabled persons in protection of property proceedings. Section 13-705(d)(1) states that, “unless the alleged disabled person has counsel of the person’s own choice, the court shall appoint an attorney to represent” the disabled person in the guardianship of the person proceedings, and, “[i]f the person is indigent, the State shall pay a reasonable attorney’s fee.” Section 13-211(b), conversely, provides only that “[u]nless the alleged disabled person has counsel of his own choice, the court shall appoint an attorney to represent him in the proceeding,” but does not include how the appointed attorney is to be compensated.

The Department also contends that the General Assembly has not appropriated the necessary funds for paying counsel in guardianship of property cases, and that, therefore, their reading of the Rule

avoids the difficult constitutional questions that would arise under the separation of powers doctrine if the rule were interpreted to impose a mandatory obligation on the Executive Branch to make these payments without any statutory authority or budgetary appropriation.

At the time of this litigation, Maryland Rule 10-106(a)² stated:

² The current Rule requires that “[i]f the person is indigent, the State shall pay a reasonable attorney’s fee.”

(a) Appointment of attorney by the court. Upon the filing of a petition for guardianship of the person or property of a disabled person or minor who is not represented by an attorney, the court shall promptly appoint an attorney for the disabled person and may appoint an attorney for the minor. The fee of an appointment attorney shall be fixed by the court and shall be paid out of the fiduciary estate or as the court shall direct. To the extent the estate is insufficient, the fee of an attorney appointed for a disabled person shall be paid by the State.

Maryland Rule 10-106(a) (2014) (emphasis added).

“To interpret rules of procedure, we use the same canons and principles of construction used to interpret statutes.” *State ex rel. Lennon v. Strazzella*, 331 Md. 270, 274 (1993) (internal citations omitted); *see also In re Joy D*, 216 Md. App. 58, 78 (2014). In interpreting statutes, “our primary goal is always ‘to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision.’” *Doe v. Montgomery Co. Bd. of Elections*, 406 Md. 697, 712 (2008). When we interpret rules, our job is to ascertain and effectuate the intent of the Court of Appeals in adopting the Rule. “When the words [of a Rule] are clear and unambiguous, ordinarily we need not go any further,” and apply the rule as written. *State ex rel. Lennon v. Strazzella*, 331 Md. 270, 274 (1993) (citing *Mustafa v. State*, 323 Md. 65, 73 (1991)).

“Only when the language of the rule is ambiguous is it necessary that we look elsewhere.” *State ex rel. Lennon*, 331 Md. at 274 (citing *State Comm’n on Human Relations v. Mayor and City Council of Baltimore*, 280 Md. 35, 41 (1977)). If the language of the rule is ambiguous, we may endeavor to resolve the ambiguity by looking to the history of the rule’s adoption, including records of the standing committee on practice and procedure, case law, and the rule’s purpose and context. *See Maryland Office of People’s*

Counsel v. Maryland Public Service Com’n, 226 Md. App. 483, 509 (2016) (internal citations omitted).

In our view, the language of Rule 10-106 is clear and we, therefore, disagree with the Department’s interpretation. Rule 10-106(a) makes no such distinction between guardianship of the person and property proceedings. It unambiguously states that “[u]pon the filing of a petition for **guardianship of the person or property of a disabled person**...who is not represented by an attorney, **the court shall promptly appoint an attorney for the disabled person.**” It continues that “[t]he fee of an appointment attorney shall be fixed by the court and shall be paid out of the fiduciary estate or as the court shall direct.” “To the extent the estate is insufficient, the fee of an attorney appointed for a disabled person shall be paid by the State.”

We note that, although the proceeding below was a petition for appointment of a guardian of the property, appellant was not appointed as a guardian of the property, but rather as counsel for Mrs. Clark.³ Nevertheless, the language of Rule 10-106(a), as it was in 2014, is plain and expresses a meaning consistent with its apparent purpose, to provide counsel for disabled individuals in guardianship proceedings, of either their person or property, and to compensate those appointed attorneys. No further analysis is therefore required. “We are also to give effect to the entire rule, neither adding, nor deleting, words

³ According to the Order entered August 29, 2013, Phil Karasik was appointed temporary guardian of the property for Doris Clark. Appellant David Bach was appointed counsel for Doris Clark on August 7, 2013.

in order to give it a meaning not otherwise evident by the words actually used.” *State ex rel. Lennon v. Strazzella*, 331 Md. 270, 274-75 (1993) (internal citations omitted).

Moreover, at the time of this litigation, Maryland Rule 10-101, regarding the applicability of Title 10, Guardians and Other Fiduciaries,⁴ in which Rule 10-106(a) is found, stated: “[e]xcept as otherwise provided by law, the rules in this Title apply to proceedings concerning: (1) the guardianship of minors and disabled persons or their property; (2) a fiduciary estate; and (3) the distribution of property to an absent or unknown person.”

The Department’s analysis of the distinction between guardian of the person and property cases may be better suited for Rule 10-106(a) as it currently stands, as it does not include the applicability language that was in the 2014 version. However, with regards to Rule 10-106(a) at the time of the proceeding below, it is clear that the Court of Appeals intended for the State to pay appointed attorney’s fees.

With regards to the ‘difficult constitutional question’ proposed by the Department, the Department itself provided the solution. The Department, in its brief, stated “the court properly declined to require the Department to pay more than the amount the agency had allotted for fee petitions in this class of case.” We agree. This court, under Rule 10-106(a) in 2014 or as it currently stands, may not dictate to the State the amount it must pay a court

⁴ Md. Rule 10-101(a) currently states that “[e]xcept as otherwise provided by law, the rules in this Title apply to proceedings concerning: (1) the guardianship of minors and disabled persons or their property; (2) a fiduciary estate; and (3) the distribution of property to an absent or unknown person.”

appointed attorney. But that the State was required, under Rule 10-106(a) as it was in 2014, to pay a fee to a court appointed attorney in a guardianship of the person or property proceeding is clear. As the Department stated, “the agency had [an] allotted [amount] for fee petitions in this class of case,” which was paid.

The State, therefore, was required to pay the fees of an appointed attorney under the 2014 Rule 10-106(a), and has met its responsibility.

- II. The circuit court abused its discretion in directing appellant to pay appellee’s attorney’s fees.

Appellant further argues that, regardless of our ruling on whether the State was required to pay appellee’s fees, the trial court abused its discretion in ordering Hebrew Home to pay the remainder of the fees. Appellee, conversely, argues that the court was correct in directing appellant to pay because Hebrew Home “initiated the guardianship proceeding,” and they, therefore, should have “reasonably expecte[ed]” that an interested person may file a counter-petition and that appointed counsel would have incurred such fees.

“An award of attorney’s fees will not be disturbed unless the court ‘exercised [its] discretion arbitrarily or [its] judgment was clearly wrong.’” *Ochse v. Henry*, 216 Md. App. 439, 456 (2014) (internal citations omitted); *see also Monmouth Meadows Homeowners Ass’n., Inc. v. Hamilton*, 416 Md. 325, 332 (2010). “While a decision whether to award attorney[’s] fees is reviewed under an abuse of discretion standard, ‘[t]he *standard* that a trial court applies in evaluating whether to award attorney[’s] fees and costs is a legal decision’ that we review without deference.” *Lockett v. Blue Ocean Bristol, LLC*, 446 Md.

397, 414 (2016) (emphasis in original) (citing *Ocean City Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 391 (2013)).

As discussed above, the State was required, and did in fact, reimburse appellee as an appointed attorney under the 2014 Rule 10-106(a). Even if we then assume for the sake of argument that the circuit court had the authority, under the rule or otherwise, to order Hebrew Home to pay the remainder of appellee’s attorney’s fees, the court acted arbitrarily in so ordering. *See Friolo v. Frankel*, 373 Md. 501, 526 (internal citations omitted) (finding statutory fee-shifting provisions “‘were [not] intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client,’ [but] are intended ‘to enable private parties to obtain legal help’...by assuring an attorney ‘that he will be paid ‘a reasonable fee.’””).

The court, thereafter, without reason, made no further analysis before holding Hebrew Home solely responsible for the remainder of the fees requested. *See Lockett*, 446 Md. at 415 (holding a court is required, under Maryland Rule 2-703(g), to state on the record or in a memorandum the basis for its grant or denial of an award of attorney’s fees, “because it is otherwise impossible for an appellate court to review the reasons for the [grant] or denial.”). In our review of appellee’s billing records, it appears that the bulk of the hours spent representing Doris Clark were in response to the answer and counter petition filed by her daughter Cynthia. Appellee admits that Mrs. Clark’s family was “aggressively” involved in the matter and he communicated with them frequently, as reflected in his billings. Thus, while Hebrew Home did initiate the proceedings, its

involvement was minimal. We disagree with appellee’s contentions that simply filing the petition for appointment of a guardian made Hebrew Home solely responsible for every expense that resulted therefrom. *See Monmouth Meadows Homeowners Ass’n., Inc. v. Hamilton*, 416 Md. 325, 342-43 (2010) (upholding the circuit court’s consideration, in determining the reasonableness of attorney’s fees, that “more than one half of the fees [were] associated with pursuing additional attorney fees,” as opposed to the actual issue under consideration).

We, therefore, find the order of the court, requiring Hebrew Home to pay the remainder of appellee’s fees, to be arbitrary and, thus, an abuse of discretion.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY REVERSED. COSTS TO
BE PAID BY APPELLEE.**