

Circuit Court for Anne Arundel County
Case No. C-02-FM-18-003860

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1255

September Term, 2020

IN THE MATTER OF
DAVID MAYNE

Friedman,
Beachley,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 21, 2021

*This is an unreported opinion, and it 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 out of a guardianship petition filed by Stacey Ann Reed in the Circuit Court for Anne Arundel County for the person and property of David Charles Mayne, Ph.D., who opposed the petition. After a four-day bench trial, the circuit court granted the petition. Subsequently, Ms. Reed filed motions for attorney’s fees and expenses totaling the amount of \$176,274.15. The court reduced that amount to \$22,384.50. Ms. Reed appeals and presents two questions for our review, which we have slightly rephrased:

- I. Did the circuit court err when it failed to apply the twelve factors listed in Md. Rule 2-703 to her request for attorney’s fees and expenses?
- II. Did the circuit court abuse its discretion in awarding her \$22,384.50 for attorney’s fees and expenses?

We answer the first question in the negative and the second in the affirmative. Because we hold that the circuit court abused its discretion in the amount it awarded to Ms. Reed for attorney’s fees and expenses, we shall reverse the judgment and remand to the circuit court for further proceedings.

BACKGROUND FACTS

On October 1, 2018, Ms. Reed, through her attorney James Dore of Elville & Associates, filed a petition for permanent guardianship of the person and property of Dr. Mayne, who was 75 years old. Ms. Reed was the daughter of Dr. Mayne’s long-term partner, who had died in 2015.¹ In her petition, Ms. Reed attached certificates from two

¹ Dr. Mayne was married for a few years in the 1970’s. Following his divorce, he began dating Janice Reed, who had two daughters from a previous marriage, one of whom is Ms. Reed. Dr. Mayne and Janice remained long-term companions until Janice’s death
(continued...)

health care professionals who opined that Dr. Mayne suffered from moderate to severe Alzheimer’s and needed a guardian of his person and property. The court subsequently appointed Heather Cherry as Dr. Mayne’s court-appointed attorney.

Dr. Mayne, through Ms. Cherry, vigorously contested the petition. The pleadings and discovery in the case were both voluminous and involved. After several relatives intervened in the proceedings, and Dr. Mayne designated five expert witnesses in his defense, both parties hired additional attorneys.² Barrett King entered his appearance on behalf of Ms. Reed, in addition to her attorney at Elville & Associates, and Timothy O’Brien entered his appearance on behalf of Dr. Mayne, as his privately retained attorney.

Dr. Mayne elected a bench trial. During trial, which lasted four days, the parties called over ten witnesses, including four expert witnesses. On October 31, 2019, the court granted Ms. Reed’s petition, finding that she had proven by clear and convincing evidence that Dr. Mayne needed a guardian of his person and property. *See* Md. Code Ann., Estates & Trusts (“E&T”) §13-705. The court found that Dr. Mayne suffered from a major neurocognitive disorder and there was ample evidence of his poor decision-making that endangered his welfare and safety, including employing persons who did not provide him with necessary care or assistance. Dr. Mayne filed a motion for reconsideration, which the

in November 2015. The month that Janice died, Dr. Mayne designated Ms. Reed as his agent under both an advanced medical directive and power of attorney.

² Dr. Mayne’s two living siblings were designated as interested parties in the proceedings: his sister opposed the petition, preferring a court-appointed guardian, while his brother approved of Ms. Reed’s petition. Additionally, the two children of Dr. Mayne’s ex-wife intervened and opposed the petition.

circuit court denied. He appealed the guardianship order, and we affirmed the ruling. *Mayne v. Reed*, No. 2437, Sept. Term 2019 (Md. App. October 6, 2020).

Following the circuit court’s ruling on guardianship, Ms. Reed and Ms. Cherry, among others, sought reimbursement for their attorney’s fees and expenses.³ Specifically, Ms. Reed sought a total of \$176,274.15 for attorney’s fees and expenses pursuant to E&T §13-704(c). She sought:

- \$55,317.30 for attorney’s fees for work done by Mr. King from April through October 2019;
- \$98,861.85 for attorney’s fees for work done by attorneys at the law firm of Elville & Associates from March 2018 through November 2019; and
- \$22,095 for money she spent on expert witness fees and expenses.

Ms. Cherry petitioned for attorney’s fees in the amount of \$31,880 for work done from July through December 2019.⁴ She also filed a motion opposing Ms. Reed’s petitions for attorney’s fees and expenses, arguing that as the petitioner, Ms. Reed had no legal right to attorney’s fees.

³ Mr. O’Brien petitioned the court for attorney’s fees in the amount of \$47,467.50. Ms. Cherry also petitioned for payment in the amount of \$3,277.00 for Mr. Anthracite, Dr. Mayne’s criminal law attorney, and \$9,398.50 for Mr. Lehr, Dr. Mayne’s estate planning attorney. She argued that these requests were separate from the guardianship proceeding and presented them to the court as outstanding debts owed by Dr. Mayne. Mr. Anthracite worked for Dr. Mayne from March until April 2019, when Dr. Mayne had consulted him about pursuing criminal charges against Ms. Reed for cameras she had placed in his home. Mr. Lehr worked for Dr. Mayne between April and October 2019, when Dr. Mayne consulted him about revoking the 2015 powers Dr. Mayne had given to Ms. Reed and on less restrictive alternatives for Dr. Mayne than a permanent guardianship.

⁴ Prior to the instant request, the court had granted Ms. Cherry’s requests for attorney’s fees during the proceedings in the total amount of \$42,409.95. Additionally, in June 2019, the court granted her request for expert fees in the amount of \$9,700.

Roughly nine months later, on September 30, 2020, the circuit court held a hearing on the petitions and each of the parties presented their arguments. Mr. King argued that he was entitled to reimbursement under E&T §13-704(c), which provides that when a petitioner for guardianship requests attorney’s fees, the court may order attorney’s fees, and in making that determination, the court shall consider two factors: the financial resources and needs of the disabled person and whether there was substantial justification for filing the guardianship petition. Mr. King argued that his requested attorney’s fees were reasonable in light of Dr. Mayne’s assets and there was substantial justification for filing the guardianship petition. Meghan McCulloch presented argument on behalf of Elville & Associates and adopted Mr. King’s argument.

Ms. Cherry argued that there were different procedures for determining attorney’s fees in guardianship cases depending on who was requesting the fees. She argued that she was entitled to her attorney fees under Md. Rule 10-106, which states that a court may award attorney’s fees to a court-appointed attorney, and then, in making that determination, the Rule directs a court to consider twelve factors listed in Md. Rule 2-703. In contrast, Ms. Reed’s request for attorney’s fees, as the petitioner for guardianship, was at the discretion of the court under E&T §13-704. At the conclusion of the hearing, the court stated that it would announce its ruling in a few weeks, noting that both parties had “worked very, very hard” and that it was a “challenging” and “difficult case.”

Sometime thereafter, Ms. Reed filed a fiduciary account form in the circuit court for the period between October 31, 2019 and October 31, 2020, that listed Dr. Mayne’s assets

and expenses. The form reflected that during the reporting period Dr. Mayne had spent \$226,127.82 on home health care with Brightstar.

At a remote hearing on December 15, 2020, the court announced its ruling on the attorney's fee petitions. As to Ms. Cherry's request for attorney's fees, the court applied each of the twelve factors stated in Md. Rule 2-703(f)(3), and concluded that it would not be fair to order the full \$31,880 requested, but would award \$28,620.⁵ As to Ms. Reed's request for attorney's fees and expenses, the court applied the two-factors in E&T §13-704, and instead of awarding her the full \$176,274.15 requested, awarded her \$22,384.50. It is from this ruling that Ms. Reed appeals.

DISCUSSION

Ms. Reed raises two arguments on appeal. She argues that the circuit court committed legal error because it failed to apply the twelve factors listed in Md. Rule 2-703 to her request for attorney's fees. Alternatively, she argues that if the court correctly applied the two factors stated in E&T §13-704 to her request for attorney's fees, the court abused its discretion in the amount it awarded in two ways. First, the court failed to explain its concern that Dr. Mayne's assets would be depleted in a few years. Second, the court should have also considered: the amount of time and labor involved in preparing for jury

⁵ After applying the twelve factors of Md. Rule 2-703(f)(3), the court did not grant Mr. O'Brien the full \$47,467.50 requested but awarded him \$36,320. The circuit court did award the full amount requested by Mr. Lehr and Mr. Anthracite, \$9,398.50 and \$3,277, respectively. The court noted that normally these fees would have been decided by the differentiated case management (DCM) judge for guardianships. The court explained, however, that it had consulted with the DCM judge and concluded that it was appropriate for it to rule on these two attorney's fee awards, as it was also making a decision about the fee petitions in the guardianship case.

trial; the large number of motions filed in the case; the costs associated with deposing/defending the seven designated expert witnesses; and that Dr. Mayne’s “litigation strategy drove up the costs of litigation[.]” Ms. Reed adds that her small award, particularly when compared to Ms. Cherry’s award, will have a “chilling effect upon potential petitioners bringing actions to safeguard their friends, loved ones[.]” She argues this “chilling effect” is contrary to the clear public policy inherent in the statute allowing a petitioner to receive attorney’s fees, which is aimed to encourage guardianship petitions like hers.

Dr. Mayne initially argues that Ms. Reed has failed to preserve for our review her legal argument that the court erred in its attorney’s fees award when it failed to apply the twelve factors listed in Md. Rule 2-703. Dr. Mayne argues that she did not raise this argument below, and therefore, she cannot raise it on appeal. Even if she had preserved that argument, Dr. Mayne argues: 1) the court in fact did apply the twelve factors of Rule 2-703 and therefore, her argument is meritless, or alternatively, 2) the court properly ruled that the award was governed by E&T §13-704, and because awards under that statute are discretionary, the court did not abuse its discretion in its award to Ms. Reed given Dr. Mayne’s small annual income and his large expenses for home healthcare. We shall begin our analysis by reciting the law on attorney’s fees.

Maryland follows the common law American Rule on the award of attorney’s fees following litigation. *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*, 405 Md. 435, 445 (2008). That rule provides:

[G]enerally, a prevailing party is not awarded attorney's fees unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution.

Id. (quotation marks and citation omitted). Only the second exception is applicable here.

Because the word “may” is generally understood as permissive rather than mandatory, if a statute provides “that the court ‘may’ award reasonable counsel fees . . . [t]here is no statutory requirement” that the court do so. *Friolo v. Frankel*, 373 Md. 501, 515 (2003). “By using such language, fee-shifting statutes permit a trial court, *in its discretion*, to award attorneys’ fees, and such discretion, consistent with the intent of the General Assembly, is to be exercised liberally in favor of awarding fees, at least in appropriate cases.” *Thornton Mellon, LLC v. Adrienne Dennis Exempt Tr.*, 250 Md. App. 302, 322 (2021) (quotation marks and citations omitted), *cert. granted*, 474 Md. 701 (2021). Accordingly, when a statute permits a court to award attorney’s fees, the award is reviewed on appeal for an abuse of discretion. *Ledvinka v. Ledvinka*, 154 Md. App. 420, 432 (2003). However, “[c]onsideration of the statutory criteria is mandatory in making an award and failure to do so constitutes legal error.” *Id.* (quotation marks and citation omitted).

A court abuses its discretion when a “ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.” *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks and citation omitted). *See also North v. North*, 102 Md. App. 1, 14 (1994) (a decision is an abuse of discretion

when it is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.”).

The award of attorney’s fees to Ms. Cherry was governed by two Md. Rules, which set out how *court-appointed attorneys* in guardianship cases involving disabled adults may be reimbursed for their work.

Md. Rule 10-106, titled “**Attorney for minor or disabled person**” governs a court’s authority to appoint attorneys in guardianship petitions for minors or disabled persons. Subsection (c) provides:

(c) Fees. (1) *Generally.* The court shall order payment of reasonable and necessary fees of an appointed attorney. Fees may be paid from the estate of the alleged disabled person or as the court otherwise directs. To the extent the estate is insufficient, the fee of an attorney for an alleged disabled person shall be paid by the State.

(2) *Determination of Fee.* Unless the attorney has agreed to serve on a pro bono basis or is serving under a contract with the Department of Human Services, the court, in determining the reasonableness of the attorney’s fee, shall apply the factors set forth in Rule 2-703(f)(3) and in the *Guidelines Regarding Compensable and Non-Compensable Attorneys’ Fees and Related Expenses*, contained in an Appendix to the Rules in Title 2, Chapter 700.

(Underlining added). Md. Rule 2-703, titled, “**Attorneys’ fees allowed by law**” provides:

(a) Scope of Rule. This Rule applies to claims for attorneys’ fees⁶ allowable by law to a party in an action in a circuit court.

* * *

⁶ Md. Rule 2-701 defines attorney’s fees to include “related expenses,” which it defines as “expenses related to and incurred as part of the provision of legal services, including compensation for the services of paralegals and law clerks.” See Md. Rule 2-701(a), (b).

(f) Determination of Award. . . . (2) *If Award Permitted or Required.* If, under applicable law, the verdict of the jury or the findings of the court on the underlying cause of action permit but do not require an award of attorneys’ fees, the court shall determine whether an award should be made. If the court determines that a permitted award should be made or that under applicable law an award is required, the court shall apply the standards set forth in subsection (f)(3) of this Rule and determine the amount of the award.

(3) *Factors to Be Considered.* (A) the time and labor required; (B) the novelty and difficulty of the questions; (C) the skill required to perform the legal service properly; (D) whether acceptance of the case precluded other employment by the attorney; (E) the customary fee for similar legal services; (F) whether the fee is fixed or contingent; (G) any time limitations imposed by the client or the circumstances; (H) the amount involved and the results obtained; (I) the experience, reputation, and ability of the attorneys; (J) the undesirability of the case; (K) the nature and length of the professional relationship with the client; and (L) awards in similar cases.

(Underlining added).⁷

In contrast, E&T §13-704 governs a court’s authority in guardianship cases involving disabled persons. Subsection (c) specifically addresses the power of the court to order attorney’s fees for the petitioner for guardianship of a disabled person. That subsection provides:

(c)(1) On the filing of a petition for attorney’s fees made in reasonable detail by an interested person or an attorney employed by the interested person, the court may order reasonable and necessary attorney’s fees incurred in bringing a petition for appointment of a guardian of the person of a disabled person to be paid from the estate of the disabled person.

(2) Before ordering the payment of attorney’s fees under paragraph (1) of this subsection, the court shall consider:

(i) The financial resources and needs of the disabled person; and

⁷ We note that the court considered the twelve factors of Rule 2-703 in awarding attorney’s fees to Ms. Cherry and Mr. O’Brien. Those awards are not on appeal here.

(ii) Whether there was substantial justification for the filing of the petition for guardianship.

(3) On a finding by the court of an absence of substantial justification for bringing the petition for guardianship, the court shall deny a petition for attorney’s fees filed under paragraph (1) of this subsection.

(Underlining added). We note that neither of these two factors are considerations when a court determines an award of attorney’s fees for a court-appointed attorney. *See* Md. Rule 2-703(f)(3).⁸

I.

Ms. Reed argued in her written petition for attorney’s fees and at the hearing on September 30, 2020, regarding the attorney’s fee petitions, that she was seeking attorney’s fees pursuant to E&T §13-704. She argued that the two factors set forth in that section weighed in favor of awarding her attorney’s fees. At no time did she argue that the court should apply the twelve factors of Rule 2-703. In an attempt to excuse her failure to raise her argument below, Ms. Reed contends that she was never “afforded an opportunity” to make the argument that she was entitled to attorney’s fees under Rule 2-703.

“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]” Md. Rule 8-

⁸ Md. Rule 2-703, governing attorney’s fees allowed by law, was adopted by the Court of Appeals by order dated October 17, 2013, effective January 1, 2014. Although Md. Rule 10-106, governing court appointed attorneys for minors or disabled persons, was adopted in 1996, it did not contain an attorney’s fees provision until the Court of Appeals adopted subsection (c) by order dated October 10, 2017, effective January 1, 2018. E&T §13-704, governing a court’s authority in guardianship cases involving disabled persons, originally was enacted in 1974, but likewise did not contain an attorney’s fees section until the Maryland General Assembly amended the statute in 2015. *See* Acts 2015, c. 400, § 1, eff. Oct. 1, 2015.

131(a). A contention not raised or considered below is not properly before the appellate court. *See DiCicco v. Baltimore Cty*, 232 Md. App. 218, 224-25 (2017). Because she never raised below the argument regarding applicability of Rule 2-703 to her request for attorney’s fees, she has failed to preserve the argument for our review. We find no merit to her contention that she was unable to raise this argument below. She, of course, was not required to interject while the court was making its ruling at the hearing on December 15, 2020, however, she could have, and should have, made her argument in her written petition for attorney’s fees or during the September 30, 2020 hearing on attorney’s fees. She did not. By failing to raise below her argument regarding the application of Rule 2-703 to her request for attorney’s fees, she has failed to preserve that argument for our review.

II.

Ms. Reed next argues that the circuit court abused its discretion in its award of attorney fees to her under E&T §13-704. We agree.

At the hearing on December 15, 2020, the court announced its ruling on all the attorney’s fee petitions before it. After applying the twelve factors of Rule 2-703, the court awarded \$28,620 to Ms. Cherry and \$36,320 to Mr. O’Brien. The court then stated it would award the full amount requested, \$9,398.50 and \$3,277, by two other attorneys employed by Dr. Mayne during the proceeding. The total amount of those four fee awards amounted to \$77,615.50.

The court then addressed Ms. Reed’s petition for attorney’s fees, looking to the two-factors of E&T §13-704. As to the first factor, Dr. Mayne’s financial resources, the court noted that Dr. Mayne had about \$1,500,000 in assets but also significant expenses related

to his home healthcare, “which could easily deplete his assets in a few short years if not carefully managed.” The court also noted that his assets would be reduced by the \$77,615.50 in attorney fees the court had already awarded. As to the second factor, whether there was substantial justification for filing the guardianship petition, the court stated that this factor had been met. The court noted that prior to the guardianship petition, Dr. Mayne had hired caregivers that “were financially exploiting him and not giving him proper care,” yet, throughout the proceedings he had insisted that he “does not have any psychological impairments and can manage his own affairs.” The court acknowledged that Dr. Mayne was suffering from Alzheimer’s, which affected his “ability to make responsible decisions [of] his person and property.” The court also acknowledged that Ms. Reed successfully petitioned for guardianship, which included extensive discovery, numerous motions and pro se intervenors, and a four day trial, and as a result, Dr. Mayne is now protected “from financial exploitation and ill treatment from home healthcare workers[.]”

In conclusion, the court believed that, under the circumstances, it was appropriate to award attorney’s fees to Ms. Reed, but not the full amount requested. Instead, the court awarded her \$22,384.50, explaining:

[B]asically what I did was I looked at all Dr. Mayne’s assets and I looked at the amount of fees that were requested[.] . . . And after he pays all of his attorneys’ fees my goal was to have that amount to be around \$100,000. And hopefully the amount adds up to that[,] between the \$77,000 plus the \$22,000.

The court further clarified that the \$22,384.50 award also included Ms. Reed’s request for reimbursement of \$22,095 in fees she paid for expert witnesses and other expenses.

We agree with Ms. Reed that the court’s award of \$22,384.50 was an abuse of discretion. Essentially, after paying for her expert witnesses, Ms. Reed was awarded only \$289.50 for attorney’s fees. We understand the court’s thinking regarding limiting the total requests for attorney’s fees to \$100,000, given Dr. Mayne’s assets, annual income, and home healthcare expenses, but considering the court’s findings on the substantial justifications for filing the petition on which Ms. Reed ultimately prevailed, and the amount awarded to the other attorneys, the award to Ms. Reed of essentially \$289.50 in attorney’s fees was wholly lacking. The failure of the court to revisit her cap of \$100,000 in light of the net fees to Ms. Reed, was an abuse of discretion. The question of whether there is an abuse of discretion “is case specific. The real question is whether justice has not been done, and our review of the exercise of a court’s discretion will be guided by that concept.” *Wormwood v. Batching Sys., Inc.*, 124 Md. App. 695, 700, *cert. denied*, 354 Md. 113 (1999). In this case, justice was not done. Accordingly, we shall reverse the court’s attorney fees award to Ms. Reed and remand for further consideration.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY REVERSED AND CASE
REMANDED FOR PROCEEDINGS
CONSISTENT WITH THIS
OPINION.**

**COSTS TO BE PAID BY THE
APPELLEE.**