

Orphans' Court for Montgomery County
Estate No. W70029

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1957

September Term, 2019

TIIA KARLEN

v.

BIRGITTA KARLEN, ET AL.

Nazarian,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 27, 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.

INTRODUCTION

This case is about an award of counsel fees by the Orphans' Court. The personal representative of an estate petitioned for the allowance of \$103,174 in counsel fees to be paid by the estate, and beneficiaries of the estate objected. The Orphans' Court entered an Order awarding \$27,000 in counsel fees to be paid by the estate. The personal representative timely appealed to this Court. The only question is whether the Orphans' Court abused its discretion by awarding less in counsel fees than the petition requested. We hold that the Orphans' Court did not abuse its discretion and affirm.

BACKGROUND

Tiia Karlen was appointed to serve as the personal representative of her father Robert Karlen's estate on October 25, 2011.¹ The estate had assets in both Maryland and Minnesota valued together between \$390,000 and \$450,000. Tiia attempted to administer the estate herself but incurred multiple past due notices for failing to submit both the estate's inventory and the interim accountings describing financial activity involving estate assets.

Tiia eventually submitted the interim accountings for the estate. After the accountings were approved by the Orphans' Court, Tiia's sisters, Birgitta and Karina, beneficiaries of the estate and the Appellees here, filed exceptions to each of the interim accountings,² which we shall refer to as the First Exceptions. Tiia, as the personal

¹ We use the parties first names because they have the same surname.

² The First Exceptions alleged that the Personal Representative: (1) failed to accurately list the value of the estate's assets on the date of decedent's death; (2) failed to

representative, retained counsel to respond to the First Exceptions and to assist with the administration and closing of the estate. Without the Orphans' Court approval, Tiia withdrew \$25,000 from the estate as a retainer for the attorney she hired, Glenn Etelson.

Tiia served Birgitta and Karina with discovery requests regarding the First Exceptions. Shortly before the hearing date, Tiia told Birgitta and Karina that the accounting problems had been corrected and that new accountings had been produced. In response, Birgitta and Karina agreed to withdraw the First Exceptions.

The amended accountings Tiia filed, however, contained new errors and failed to correct some of the errors identified in the First Exceptions. Birgitta and Karina filed another set of exceptions, which we shall call the Second Exceptions, that brought these errors to the Orphans' Court's attention.³ The Orphans' Court set a hearing for the Second Exceptions, but the parties reached an agreement, and Birgitta and Karina withdrew the Second Exceptions.

report certain transactions of the estate; (3) failed to include all of the estate's assets in the accounting; (4) failed to file income tax returns for the estate; (5) incorrectly reported the sale of the estate's tangible personal property; and (6) improperly delayed the closing of the estate and the distributions to beneficiaries.

³ The Second Exceptions claimed that Tiia erroneously: (1) made duplicative tax payments for the year 2011; (2) hired Etelson without permission; (3) withdrew \$25,000 from the estate to hire Etelson; (4) paid herself approximately \$21,430 as the 'attorney in fact' for the decedent; (5) failed to report intangible property belonging to the estate; (6) claimed to have made distributions to Birgitta and Karina that were never received; (7) failed to reimburse Birgitta for moving their father's piano; (8) failed to provide a specific itemization of the tangible personal property distributed to the beneficiaries; and (9) failed to distribute copyrights to musical scores and other musical works owned by their father.

Tiia then filed a Petition for Allowance of Counsel Fees to be paid by the estate. In the petition, the counsel fees were broken into two categories—those incurred administering the estate, and those related to the litigation over the exceptions. The petition sought \$34,421 for counsel fees incurred administering the estate, and \$68,753 for counsel fees incurred in the litigation over the exceptions, for a total of \$103,174. Heavily redacted invoices from Etelson were appended to the petition. Birgitta and Karina filed an exception to the petition for counsel fees, which we shall call the Third Exception. The Third Exception alleged, among other things, improper conduct by Tiia, mismanagement of estate assets, delays in the administration of the estate, inaccurate filings regarding the estate assets, failure to pay taxes and make other necessary disbursements, and unauthorized withdrawals from the estate. Birgitta and Karina also petitioned to remove and replace Tiia with a new personal representative.

After considering the petition for counsel fees, the Third Exception, the removal petition,⁴ and hearing oral argument from the parties, the Orphans' Court allowed \$27,000 in counsel fees to be paid from the estate and explained its rationale for doing so on the record. Tiia noted a timely appeal.

⁴ The Orphans' Court ultimately denied Birgitta and Karina's petition to remove and replace Tiia in January 2020.

DISCUSSION

An attorney who provides legal services to an estate, the personal representative, or both, is entitled to reasonable compensation from the estate. MD. CODE, ESTATES & TRUSTS (“ET”) §7-602(a). As noted above, Tiia requested counsel fees of \$103,174. The Orphans’ Court allowed \$27,000. Disappointed by the significant reduction, Tiia objects on four grounds. She argues that the Orphans’ Court (1) was legally obligated to award the full amount so long as the litigation was conducted in good faith; (2) failed to give a clear, concise explanation for its reductions; (3) failed to consider the “reasonable fee factors” set forth in Rule 19-301.5; and (4) failed to order an *in camera* inspection of counsel’s invoices. We address each of these grounds in turn.

I. The Orphans’ Court Was Not Legally Required to Award the Full Amount

Tiia begins with a statutory argument. Under her theory, once the Orphans’ Court determined the proceedings were brought or defended “in good faith and with just cause,” she was, regardless of the outcome, entitled to receive all of her “necessary expenses and disbursements” from the estate, including all of her counsel fees. The Orphans’ Court, she argues, had no discretion to reduce the counsel fees incurred due to litigation. She bases this reading on ET §7-603(a), which provides:

A personal representative or person nominated as personal representative who defends or prosecutes a proceeding in good faith and with just cause shall be entitled to receive necessary expenses and disbursements from the estate regardless of the outcome of the proceeding.

ET §7-603(a). Tiia believes that her counsel’s fee was part of the “necessary expenses and disbursements” to which she was entitled. While Tiia’s reading of the statute is plausible,⁵ we think the better view is that ET §7-603(a) must be read in conjunction with ET §7-602, which provides:

- (a) An attorney is entitled to reasonable compensation for legal services rendered by the attorney to the estate or the personal representative or both.
- (b)
 - (1) On the filing of a petition in reasonable detail by the personal representative or the attorney, the court may allow a fee to an attorney employed by the personal representative for legal services.
 - (2) The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney.

ET §7-602(a), (b). When read together, we understand the statutes to provide that the Orphans’ Court first may determine the “reasonable compensation” an attorney is entitled to under ET §7-602, and that amount then becomes part of the “necessary expenses and disbursements” under ET §7-603(a). Under that reading, the Orphans’ Court has the discretion to determine what attorney’s fees are reasonable, and then that becomes part of the “necessary expenses and disbursements” that must be paid out of the estate. We prefer our reading for several reasons.

⁵ We suspect Tiia’s reading of ET §7-603 is influenced by its catchline: **Litigation Expenses**, which appears in bold in the Annotated Code of Maryland. Such catch lines are not part of the law adopted by the General Assembly and are not part of the code. MD. CODE, GENERAL PROVISIONS (“GP”) §1-208.

First, we think it is logical that that “an attorney’s ... reasonable compensation for legal services rendered,” ET §7-602(a), are or may be a component of the necessary expenses and disbursements awarded under ET §7-603(a).

Second, the text of ET §7-603 itself seems to presume that the reasonableness of attorney’s fees is a relevant inquiry, although it arises in a different context from here. In subsection (b)(2), the statute provides that “[t]he amount of compensation or attorney’s fees consented to by all interest persons is presumed to be reasonable.” ET §7-603(b)(2). Here, where there was no consent by Birgitta and Karina, no presumption of reasonableness attached. In such a circumstance, we think rather than assuming that reasonableness is not a relevant inquiry (as Tiia would have us do), reasonableness must be proven by a party and decided by the Orphans’ Court. *See* ET §2-105(a) (“In a controversy in the [Orphans’ Court], an issue of fact may be determined by the [Orphans’ Court].”)

Third, the idea that the Orphans’ Court lacks discretion to determine the reasonableness of attorney’s fees incurred and must simply rubberstamp any amount claimed, even where an interested party objects, is illogical and inconsistent with every other provision in Maryland law, which limits attorney’s fees only to those that are reasonable. *See, e.g.*, MD. CODE, EDUCATION (“ED”) §6-905(6) (court may assess “reasonable attorney’s fees and other litigation expenses” in public school whistleblower cases); MD. CODE, HEALTH OCCUPATIONS (“HO”) §1-505(6) (same, in healthcare whistleblower cases); GP §3-401(d)(5)(i) (same, in Open Meetings Act cases); *see also* MD. RULE 1-341 (permitting reasonable attorney’s fees for filings made in bad faith or without justification).

In the end, we are confident that the statutes, ET §§7-602 and 7-603, must be read in harmony and, as a result, that the Orphans' Court had the power and discretion to scrutinize Etelson's bills and only charge the estate for the counsel fees that were, in the Orphans' Court's view, reasonable.

II. The Orphans' Court Did Not Fail to Give a Clear, Concise Explanation for its Award of Counsel Fees

Our case law is clear that if an Orphans' Court declines to award all of a requested fee, it must provide a "concise but clear explanation" of the reduction that supplies "an appropriate basis for meaningful appellate review." *Estate of Castruccio v. Castruccio*, 247 Md. App. 1, 62 (2020) (quoting *Flaa v. Manor Country Club*, 158 Md. App. 483, 496 (2004)). It is insufficient for an Orphans' Court to simply have a "gestalt reaction," and award less than was requested based on "inarticulable and unsubstantiated dissatisfaction with the lawyer's efforts to economize on their time and expenses." *Id.* at 63 (citing *Matter of Continental Illinois Secs. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992)). On the other hand, it is also clear that the Orphans' Court need not review a counsel's fee invoice line-by-line and provide an independent rationale for allowing, disallowing, or modifying each entry.⁶

⁶ The educational background and training of Orphans' Court judges in Maryland runs the gamut: in Montgomery and Hartford Counties, the Orphans' Court judges are circuit court judges, MD. CONST., art. IV, §20(b); in Baltimore City, Prince George's County, and Baltimore County, they must be lawyers, MD. CONST., art. IV, §40(b), (c), and (d); and elsewhere, there are no educational or training requirements, *Kadan v. Board of Supervisors of Elections*, 273 Md. 406 (1974) (holding that judges of the Orphans' Court need not be lawyers). As a result, we must be mindful that not all Orphans' Court judges are equally familiar with attorneys' fees and bills.

An Orphans’ Court need only “articulat[e] an objective basis for its decision” when reducing the requested counsel fees. *Id.* at 64. That suffices for a clear, concise explanation.

We begin by repeating the Orphans’ Court rationale as given:

I did take into account the fact that the estate was open for eight years and the size of the estate ... and what was involved in administering the estate. I recognize that there was property in another state that had to be dealt with. I also understand the personal representative’s justification for not having sold the [Minnesota] property [until the Minnesota court had addressed it]. That there was some interest ... in getting a higher price. I know there was some issues about filing the tax returns and amended returns, or delays in filing returns. I get that there was a number of accountings that were filed that were in need of amendment and that amendments were made. I know those accountings were reviewed. I know there were questions about them. I know there were exceptions filed previously. It sounds like those were resolved by settlement. Part of the settlement was to resolve those by withdrawing them or withdrawing them with prejudice. And you know, and I recognize too that there were some accountings filed that needed to be amended, a number of them.

The representation is that apparently there were errors that were more or less of a minor nature but ultimately they did need to be corrected and fees were incurred in conjunction with that that could have been avoided if the accountings were correct in the first place. There may be good explanations about why they weren’t correct but the fact is that they weren’t. And there has been a significant delay in closing the estate and I recognize the arguments that it shouldn’t have taken as long as it has.

* * *

That its up to the Court to decide what a fair and reasonable amount would be for not only providing the assistance with the administration of the estate but also whether the fees that were incurred in connection with any litigation or defending against the exceptions or defending against the attempt to remove the personal representative also must be fair and reasonable.

I noted in reviewing the petition or the fee request to support the amount asked for with regard to the exceptions, it contains a number of redactions. Actually a great many redactions. And I’m not insensitive to why there would be redactions. But the problem with it when trying to assess a

request for fees is that I can't really assess the fairness or reasonableness or something that's not evident from the bill.

So there's a choice made and I certainly don't blame attorneys for going that [way] but it does make it impossible for me to gauge whether what's in an entry that has part or all of it redacted could be considered fair or reasonable. So I've taken that into account as well. I note that there were a lot of entries ... billing for strategy conferences. Certainly again, [I] don't begrudge attorneys for talking things over with colleagues ... but to then turn around and bill the estate for that, I don't know that that's necessarily something that should fairly and reasonably be borne by all of the beneficiaries of the estate. And I've taken that into account as well.

Tiia attacks this recitation as incomplete and insufficient under our case law. We disagree. While we may prefer a more thorough explanation of the Orphans' Court's reasoning, we think the explanation as given is satisfactory. The Orphans' Court explained its reasons for reducing the counsel fee from the amount requested. These reasons included: the years-long delays, the inaccurate accountings, the unfiled income tax returns, the unexplained withdrawals and expenditures, and the failure to distribute assets.

The purpose of a clear and concise explanation is to allow for meaningful appellate review. *Castruccio*, 247 Md. App. at 62. This Court has no trouble discerning the Orphans' Court's reasons for reducing the fee. Moreover, the reduction was not arbitrary or indiscriminate—it was reasoned and logical, even if succinct. We hold that the Orphans' Court's explanation for its decision was sufficient.

III. The Orphans’ Court Did Not Err by Not Considering the “Reasonable Fee” Factors of Rule 19-301.5

Rule 19-301.5 is the Maryland version of the American Bar Association’s Model Rule 1.5, governing counsel fees.⁷ Tiia argues that the Orphans’ Court was required, but failed, to consider this Rule in determining whether the amount awarded in counsel fees was reasonable.

We begin by noting that neither Tiia nor Etelson directed the Orphans’ Court to Rule 19-301.5 or objected to its failure to use the Rule 19-301.5 criteria to evaluate the fee petition. Having failed to mention this to the Orphans’ Court, the issue is not preserved for our review. MD. RULE 8-131 (issue must be raised or decided by the trial court to be preserved for review on appeal).

More importantly, we do not see any obligation for an Orphans’ Court to use those factors to determine the reasonableness of the amount requested in a petition for counsel fees under ET §7-602. While those factors might be useful, their consultation is not mandatory, and we will not find an abuse of discretion merely because the Orphans’ Court did not recite them. As the Comment to Rule 19-301.5(a) provides, “the factors specified

⁷ Rule 19-301.5 lists several relevant factors that courts use to consider the reasonableness of attorney’s fees: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the attorney; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the attorney or attorneys performing the services; and (8) whether the fee is fixed or contingent. MD. R. 19-301.5(a).

... are not exclusive. Nor will each factor be relevant in each instance.” The Orphans’ Court could have surely looked at the factors in Rule 19-301.5, but we hold that the failure to do so is not an abuse of its discretion.

IV. The Orphans’ Court Did Not Err by Not Ordering an *In Camera* Inspection of Counsel’s Invoices

Tiia’s counsel fee petition was accompanied by a heavily redacted copy of Etelson’s invoice. In ruling on the fee petition, the Orphans’ Court noted that the heavy redactions made it difficult to determine the reasonableness of some of the fees. Tiia argues now that, given these difficulties, the Orphans’ Court erred by not ordering an *in camera* inspection of the invoices.⁸

Neither Tiia nor Etelson offered the Orphans’ Court the opportunity to conduct an *in camera* review of the unredacted invoices or sought leave to file the unredacted invoices under seal. Having failed to request an *in camera* review at trial, the point is not preserved for our review on appeal. MD. R. 8-131. Nevertheless, we think it is worthwhile to address the merits of the issue. Our conclusion that the Orphans’ Court did not err is based on the respective roles of parties, their lawyers, and the courts.

First, the burden of proof on any motion or petition lays on the party bringing the motion or petition. MD. R. 5-301 (party bears the burden of producing evidence). It was

⁸ “*In Camera*” is a Latin phrase that means “privately in the judge’s chambers.” See BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE, 436 (3d ed. 2011). In this context, it particularly includes the meaning that the inspection occurs outside the view of the opposing party so that attorney-client privilege and confidentiality is protected. We use the phrase here because of that precise meaning and because we know of no English equivalent.

Tiia’s burden to produce sufficient evidence to support her claim for counsel fees pursuant to ET §7-602. There is no doubt that, as here, there is often a delicate balance between providing enough detail to satisfy a court, but not too much so as to reveal confidences. But the responsibility for making those choices in the first instance falls on the litigants and their counsel.

Second, the Orphans’ Court read the pleadings, the attached exhibits, heard oral argument, and rendered a decision. There is no requirement that the Orphans’ Court offer additional opportunities for counsel to make the argument that the fees requested were fair and reasonable. *See e.g., Smith v. State*, 64 Md. App. 625, 634 (1985) (noting that in an adversarial legal system, a judge should not try to unearth information about a case). *See also Cranford v. Montgomery Cnty.*, 300 Md. 759, 770 (1984) (“An inspection is or is not to be made depending upon whether the trial judge is concerned that he is not prepared to make a responsible determination in the absence of *in camera* inspection.”) (cleaned up). Trial judges do not usually solicit *in camera* review—they do so at the request of parties.

Third, while appellate courts are always deferential to the discretionary evidentiary decision of trial courts, this is a decision about which we are even more deferential. *See Cranford*, 300 Md. at 770 (explaining broad discretion trial court has when deciding whether to order *in camera* inspection). If the Orphans’ Court had chosen to order an *in camera* review on its own initiative, we would have affirmed that decision. As it didn’t choose to order an *in camera* review, we will affirm that decision, too. Neither decision would have constituted an abuse of discretion, as neither decision would have been “well

removed from any center mark” or “beyond the fringe” of what is minimally acceptable. *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418-19 (2007) (cleaned up).

We hold that the Orphans’ Court did not abuse its discretion by not soliciting unredacted copies of the invoices or ordering an *in camera* review.

CONCLUSION

For these reasons, we affirm the Orphans’ Court’s award of counsel fees in the amount of \$27,000.

**JUDGMENT OF THE ORPHANS’ COURT
FOR MONTGOMERY COUNTY IS
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**