UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2252

September Term, 2014

IN RE: GUARDIANSHIP OF
ZEALAND W. AND SOPHIA W.

Woodward,
Hotten,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 19, 2015

This guardianship proceeding returns to this Court after remand. In a prior decision, we concluded that we did not have jurisdiction over a belated appeal brought by appellant Susan W., mother of Zealand W. and Sophia W. ("Mother'"), but that the Circuit Court for Montgomery County did not have authority to appoint a third party as guardian for the children or to order Mother to pay for a court-ordered custody evaluation. *See In re Guardianship of Zealand W. and Sophia W.*, 220 Md. App. 66, 79, 85-86 (2014). We remanded for further proceedings consistent with those conclusions. *Id*. at 86, 88-89.

On remand, the guardianship was terminated by consent order, custody of the children was transferred to Mother, and the circuit court granted the fee petition of Steven J. Gaba, Esq., who had been serving, since the outset of the guardianship proceedings, as the court-appointed "best interest" attorney for Zealand and Sophia (the "BIA"). The court awarded the full amount requested, $30,848.30, requiring equal payments from separate trust accounts that had been established for the benefit of each child.

Now before us is Mother's challenge to that fee award. In her brief, Mother frames the issue and her supporting arguments as follows:

> Whether, on remand after an interlocutory appeal in which this court held that the appointment of guardians of the persons of the minor children had been unauthorized under § 13-702 of the Estates and Trusts Article where the children's mother was alive and her parental rights had not been terminated, the circuit court erred in then ordering that a best interest attorney be paid legal fees from the minor children's own trust funds, where:
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> (1) the appellate court's decision also specifically held that it was error for the circuit court to have ordered the minor children's mother to pay $5,000 to a court-appointed child psychologist;

> (2) the BIA's fee petition was filed under Family Law Article §1-202, dealing with custody, visitation and support cases, and which, in any event, permits counsel fees in those cases to be imposed only against "parties", while the order appointing the BIA in this case expressly provided that the minor children were not to be considered parties;
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> (3) the circuit court's appointment of the guardians of the persons of the minor children was legally unauthorized *ab initio*, and the BIA vigorously promoted the continuation of that unauthorized appointment, as well as his own appointment, throughout the proceeding, even to the extent of recently mischaracterizing the core ruling of guardianship of *Zealand W*. as "dicta"; and
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> (4) the BIA's fee petition sought fees to be paid solely from the minor children's trust funds, without any apparent thought given or argument made on behalf of his clients, the minor children, that the BIA's fees be paid by the plaintiff, Mr. Tattersall, the party who had improvidently filed the case and caused the unauthorized appointments, including the appointment of the BIA.

We conclude that under Maryland Rule 10-106, the circuit court had authority to appoint the BIA, to award him fees, and to require payment from the children's trusts. Because the court did not err or abuse its discretion in doing so, we shall affirm the fee order.

FACTS AND LEGAL PROCEEDINGS

The history of this guardianship litigation is set forth in our reported opinion. *See Guardianship of Zealand W*., 220 Md. App. 66, 69-78 (2014). The background pertinent to this appeal is that at the time the children's father died, he had sole physical and legal custody of twelve-year-old Zealand and ten-year-old Sophia, who had been living with him in the years following his divorce from Mother. *Id.* at 71. Mother, who had a history of

serious alcohol abuse and was living with her parents in West Virginia, had only supervised visitation rights. *Id.*

These guardianship proceedings began days after Mr. W.'s death on September 20, 2012, when Conway Tattersall, a cousin of the children's late father, filed a petition to establish a guardianship for the children's property and persons. *Id.* at 69. Mr. Tattersall sought appointment of a third party guardian for both children, on the ground that Mother was not fit to have them in her care. *Id.*

In response to the guardianship petition, the circuit court appointed Steven Gaba, Esq., as the children's "best interest" attorney, by order dated September 27, 2012. *Id.* at 72. Mother, who opposed the proposed guardianship, did not oppose Mr. Gaba's appointment.

In his role as BIA, Mr. Gaba took the position that it was not in the children's best interests to be transferred to the custody and care of Mother. *Id.* at 75-76. Mother opposed the guardianship, arguing that it was not permissible in these circumstances, and that if any guardians were to be appointed, it should be her parents. *Id.* at 72-75. Over Mother's opposition, the court appointed a series of temporary guardians, ordered guardianship and custody evaluations to be performed by a court-appointed evaluator, and required Mr. Tattersall and Mother each to pay half of the resulting fees. *Id.* at 73, 76-77.

Mother appealed. Although she did so too late to challenge the orders appointing the temporary guardians, this Court addressed the central issue of whether any guardian could be appointed in these circumstances. *Id.* at 79-80. We held that "the circuit court was not

authorized, under section 13-702 of the Estates & Trusts Article to appoint a third party as a temporary or permanent guardian of the person of either Zealand or Sophia when (1) the children's mother is alive, (2) mother's parental rights have never been terminated, and (3) no testamentary appointment has been made." *Id.* at 85-86. Because "the court did not have authority to appoint a guardian under § 13-702 of the Estates & Trusts Article, it follow[ed] that the circuit court committed error when it (1) ordered Susan W. to pay a third party $5,000 to make a determination of whether someone, other than Susan W., should be the guardian of the children; and (2) holding Susan W. in contempt for failing to make the $5,000 payment." *Id.* at 86. We vacated those orders and remanded for further proceedings, with instructions to reconsider Mother's motion to dismiss the guardianship petition. *Id.* at 88-89.

On remand, a consent order authorized transfer of custody to Mother. The BIA filed a final petition for fees. Over Mother's objection that our appellate decision precluded an award of fees to the BIA, the court awarded the full amount requested, $30,848.30, and ordered payment in equal amounts from trusts established for the benefit of each child. Mother now appeals that order.

DISCUSSION

Mother contends that the circuit court erred in granting the BIA's request for fees and in ordering payment to be made from the children's trusts. We disagree.

Our task is to review the circuit court's factual findings for clear error, its application of legal principles for error of law, and its ultimate application of that law to those facts for abuse of discretion. *See In re Shirley B.*, 419 Md. 1, 18 (2011); *In re Yve S.*, 313 Md. App. 551, 586 (2003).

Contrary to Mother's contention, the reported decision of this Court did not address, much less disapprove, fees for legal services rendered by the BIA. In that appeal, we concluded only that the appointment of a guardian for the minor children was not authorized under Md. Code, section 13-702 of the Estates and Trusts Article ("ET"), and therefore, that the court erred in requiring Mother to pay fees for a court-ordered guardianship evaluation.

Mother misunderstands that holding, interpreting it to also negate appointment of the BIA and to preclude his fee award. She argues that "[t]he good intentions of a court-appointed professional, even a benefit to the litigating or third parties occasioned by the efforts of such a professional, cannot and should not serve as a substitute for a statutory or other legally valid basis for imposing liability on someone to pay that professional's fees." Moreover, Mother maintains that instead of requiring payment from the children's trusts, the court should have ordered Mr. Tattersall to pay the BIA's fees, because his guardianship petition was "improvident" and "caused the Minor Children to be removed from their Mother's care without a valid legal basis, relocated hundreds of miles away from their Mother and her family in West Virginia, and [has] already cost her and her family a modest fortune to successfully right that injustice." Mother further contends that the BIA's actions,

in supporting the guardianship petition and asserting that it was not in the children's best interests to be in Mother's custody, unjustifiably prolonged the guardianship proceedings.

We are not persuaded that the circuit court abused its discretion in awarding fees to the BIA or in requiring payment of those fees from the children's trusts. The appointment and payment of a best interest attorney is not governed by statute, but by Md. Rule 10-106(a), which provides: "Upon **the filing** of a petition for guardianship of the person or property of a . . . minor who is not represented by an attorney, the court . . . **may appoint an attorney** for the minor." (Emphasis added.) This power of appointment does not depend on the actual establishment of a guardianship. When, as in this case, there is litigation over whether children may be eligible and appropriate for a guardianship, a best interest attorney may be warranted to represent the children throughout those proceedings.

When this guardianship petition was filed, the court exercised its discretion under Rule 10-106(a) to appoint Mr. Gaba as BIA for both children. The same rule also authorized the court to award fees to the BIA and to require payment of them from the children's trust. It directs that "[t]he fee of an appointed attorney **shall be fixed by the court** and **shall be paid out of the fiduciary estate** or as the court shall direct." (Emphasis added.)

During the time when Mother was vigorously opposing any guardianship, the BIA filed an Interim Petition for Award of Counsel Fees. Mother's response did not contest the continuing appointment. Nor did Mother appeal the ensuing award of interim fees to the BIA. That no one objected, either to the initial appointment of the BIA, or to his continued

representation, or to his interim fee awards, demonstrates that there was consensus among court and counsel that the BIA's legal services were necessary and reasonable during the highly contested proceedings concerning the custody and care of these children following the death of their custodial parent.

When the circuit court entertained the BIA's final petition for fees, it found that the BIA provided extensive and valuable services to Zealand and Sophia, as follows:

> [T]he petition for fees has been submitted and reviewed. It sets forth in detail the services. And I'm certainly very much, very well aware of the extent of Mr. Gaba's involvement in this case, and he . . . pointed out in his petition, he billed at a rate below his regular hourly rate, and he also did not bill for the time that was spent traveling from Washington, D.C. and North Carolina, or expenses for meals and accommodations. So it seems to me that Mr. Gaba's fees are reasonable and necessary and I'm inclined to approve them.

The court expressly recognized the BIA's vital role in obtaining services for the children and facilitating their reunification with Mother:

> [T]he bottom line is, these children were in desperate need of treatment and desperate need of care, and there were in desperate need of assistance. And Mr. Tattersall came over here from New Zealand and was able to provide a platform that allowed them to obtain that assistance, obtain that therapy, obtain that treatment, and become somewhat whole in the process in order to have reunification with their mother. And all of that took place in the sequence of events that were brought about primarily through the funds raised by Mr. Tattersall and the commitment and dedication of Mr. Gaba on behalf of these children. . . .
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> [T]he basis for having the children returned to her was provided primarily by Mr. Tattersall and Mr. Gaba and Dr. Snyder, and ultimately by [Mother] when she was essentially put in a position where she had to comply with certain requirements or she wasn't going to be able to have any kind of relationship with her children. . . .

> I do think that Mr. Gaba's services have been, he performed an incredible service on behalf of these two children. When he was originally appointed there was . . . no objection to his appointment . . . and it's clear that he's entitled to payment of his fees.

The record supports these factual findings, as well as the court's ruling that the requested fees were reasonable and necessary. It is replete with documentation of the active role played by the BIA in securing stability for the children while their care and custody arrangements were in flux and under debate. Altogether, the BIA spent more than 200 hours, billed at a reduced rate, over nearly two years. He conducted visits and had regular communications with the children and their various temporary guardians, therapists, and teachers. He sought and obtained modification of temporary custody and visitation orders, based on evolving events and relationships. He conducted discovery, filed motions, and represented the children in numerous courtroom proceedings, including a five-day hearing in December 2013. Thereafter, the BIA facilitated reunification efforts in accordance with the court's plan for gradual reunification.

For these reasons, we hold that the circuit court had legal authority under Rule 10-106 to appoint the BIA, to award him fees, and to require payment from the children's estates. In exercising that authority, the court did not abuse its discretion.

ORDER DIRECTING PAYMENT OF ATTORNEY'S FEES AFFIRMED. COSTS TO BE PAID BY APPELLANT.