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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Conservatorship of the Person and Estate of SYMA ZILBERSTEIN	B234320 (Los Angeles County Super. Ct. No. LP014326)
CHARLES A. SHULTZ, Petitioner and Respondent, v. AHRON ZILBERSTEIN, Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Reva Goetz, Judge. Affirmed.

Melvin Teitelbaum for Objector and Appellant.

Wasserman, Comden, Casselman & Esensten and Charles A. Shultz for Petitioner and Respondent.

INTRODUCTION

Rachel Zilberstein filed a petition for conservatorship of her grandmother, Syma Zilberstein. At a status hearing, the parties agreed that the court would appoint the Los Angeles County Public Guardian to serve as conservator; Syma died five weeks later. Rachel's attorney, Charles Shultz, filed a motion seeking reimbursement for his professional services and costs. The trial court granted the motion and entered an order awarding Shultz approximately $14,000 in attorneys' fees and $2,000 in costs.

Ahron Zilberstein, who is the son of Syma, appeals the order, claiming that the court had no authority to award attorneys' fees or costs because it never appointed a conservator. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2009, Rachel Zilberstein filed a petition requesting that the court appoint Daniel G. Stubbs to serve as conservator of the estate of Syma Zilberstein, who was Rachel's grandmother.[1] The petition alleged that a conservatorship was necessary because Syma was "unable to resist [the] undue influence" of her two children, Ahron Zilberstein and Yocheved Druk. According to the petition, Ahron and Yocheved had "exerted [improper influence] against" Syma by convincing her to: (1) terminate her attorneys; (2) appoint Ahron as her attorney-in-fact and the trustee of her trust; (3) transfer ownership of two properties located in Israel; and (4) alter her estate plan to favor Ahron and Yocheved.

Shortly after the petition was filed, the trial court appointed a Probate Volunteer Panel (PVP) attorney to serve as Syma's counsel. (See Prob. Code, § 1470.)[2] The court

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[1] For the purposes of clarity, we refer to members of the Zilberstein family by their first names. We intend no disrespect.

[2] Section 1470, subdivision (a) states that "[t]he court may appoint private legal counsel for . . . a conservatee, or a proposed conservatee . . . if the court determines the person is not otherwise represented by legal counsel and that the appointment would be

also ordered a physician to evaluate Syma's "mental capacity and her ability to withstand undue influence." Syma, however, refused to undergo the evaluation.

During the pendency of the conservatorship proceedings, Syma was hospitalized in the mental health unit of the Encino Hospital Medical Center "due to her . . . fragile mental and physical condition." On January 13, 2010, Ahron filed an ex parte petition requesting that the court appoint Frumeh Labow to serve as conservator of Syma's person and her estate. The petition alleged that Syma had "been determined to lack current capacity" and was unable to "understand the nature or quality of her estate. . . ." The petition was accompanied by a declaration from a psychiatrist stating that Syma lacked capacity to consent to medical treatment or to attend court hearings.

In response to the ex parte petition, PVP attorney filed a report indicating that although Rachel's initial petition for conservatorship was still pending, Rachel agreed with Ahron's request to appoint Frumeh Labow as conservator. The report also indicated that the PVP attorney "could not adequately communicate with [Syma] about her legal matters" and was unable to determine her "position regarding . . . [the] pending petitions [for conservatorship]."

At a status hearing on February 25, 2010, Ahron withdrew his petition to appoint Labow as conservator and the court ordered that the "matter be referred to the Public Guardian of the County of Los Angeles for appointment as Temporary Conservator of the Person and Estate of [Syma]." Two weeks later, Rachel filed a second petition requesting that the court appoint Nancy Mello as conservator of Syma's person and her estate. The petition alleged that Syma suffered "some sort of mental breakdown" in January of 2010, rendering her incapable of managing her assets or providing for her personal needs. Syma's treating physician provided a declaration in support of the petition indicating that she lacked the ability to consent to medical treatment.

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helpful to the resolution of the matter or is necessary to protect the person's interests." Neither party has raised any issue regarding the court's appointment of the PVP attorney.

The court held a status hearing on Rachel's petitions for conservatorship on April 15, 2010 (the April hearing). The PVP attorney told the court that Nancy Mello had decided that she did not want to serve as conservator.[3] The PVP attorney and Rachel's attorney, Charles Shultz, also stated that the case had been referred to the Public Guardian, who was prepared to serve as Syma's conservator. Shultz explained that although the Public Guardian had already conducted a preliminary investigation of the matter, it chose not to attend the status hearing because it thought the parties had agreed Mello would serve as conservator.

The PVP attorney informed the court that, as a result of Mello's decision, the parties were "stipulating . . . that [the] Public Guardian will be appointed if the court is agreeable to that today." After Shultz and Ahron's attorney confirmed that they had no objection to the Public Guardian's appointment as conservator, the court stated "[o]kay. So that will be the order." When Shultz asked the court to clarify what the "order . . . is going to be," the court stated: "[I]t's not just a referral to the Public Guardian. The Public Guardian is actually going to be appointed."

The court then inquired whether all of the parties were "stipulating . . . to the appointment of the Public Guardian." Ahron's attorney expressed concern that the Public Guardian was not present to accept the appointment and suggested that the parties "come back in a week or two when they're actually here and have a stipulation ready. . . ." In response, the court stated "why don't we do this. That will be the appointment, and if for some reason the Public Guardian states that the case is not appropriate for their acceptance, then they will have an opportunity to advise the court, and the court will set a new date." The PVP attorney informed the court that she would call the attorney for the Public Guardian and have them "prepare the order and all the papers to go with their appointment." The court then scheduled another status hearing for June 10, 2010 "just to make sure everything gets done."

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[3] Rachel's attorney asserted that Mello did not want to serve as conservator because Ahron had accused her of "wrongdoing and manipulation."

At the conclusion of the hearing, Syma, speaking on her own behalf, requested that the court allow Ahron to "have power of attorney over [her] health [and] everything with the kids." The court rejected the request, stating "[w]ell, I think under the circumstances, I'm not sure I have a choice as far as the Public Guardian. So the Public Guardian will be designated."

Approximately five weeks after the April hearing, Syma died and a petition for probate was filed in Los Angeles Superior Court. Shortly thereafter, the trial court entered an order stating that Rachel's petition for conservatorship was denied because the proposed conservatee had died.

On August 30, 2010, Shultz filed a motion seeking reimbursement for the professional services he provided in preparing Rachel's petitions for conservatorship. Shultz argued that the court was authorized to make such an award pursuant to Probate Code section 2640.1, which states: "If a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, . . . the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs, provided that the court determines that the petition was filed in the best interests of the conservatee." (Prob. Code, § 2640.1, subd. (a).)

According to Shultz, he was entitled to reimbursement for his services and costs under Probate Code section 2640.1 because Rachel's petitions for conservatorship had been pursued to protect Syma from Ahron[4] and the court had appointed a conservator – the Public Guardian – at the April hearing. Alternatively, Shultz argued that even if the trial court had not formally appointed the Public Guardian, reimbursement was

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[4] Shultz's motion alleged that Ahron had exerted improper influence over Syma and withdrawn significant funds from her savings account immediately prior to her death. The motion was accompanied by Bank of America documents showing that Syma added Ahron as a signatory to her bank accounts in April of 2010 and that almost $600,000 was removed from those accounts four days before Syma died.

appropriate because "[b]ut for [Syma's] untimely death . . . the court would have appointed the Public Guardian as conservator for [Syma's] person and estate."

Ahron objected to the motion for reimbursement of fees and costs, arguing that the court lacked authority to enter such an award because "no conservatorship was ever established" at the April hearing. According to Ahron, "while unsuccessful petitioners for conservatorship may be entitled to an award of fees, that can only occur if a conservatorship was actually established . . . . [¶] Consequently there is no statutory basis for an award of attorneys' fees when no conservatorship at all was ever established."

On May 5, 2011, the trial court entered an order finding that the requested relief was "for good cause" and awarded Shultz approximately $14,000 in attorneys' fees and $2,000 in costs, which were to be paid from Syma's estate. Ahron filed a timely appeal.

DISCUSSION

On appeal, Ahron argues that the trial court had no authority to award Shultz attorneys' fees or costs because "no conservatorship was . . . established." Shultz, however, argues that the court had authority to award fees and costs because: (1) the trial court appointed the Public Guardian to serve as conservator, and (2) even if the court did not appoint the Public Guardian, the court had equitable authority to award Shultz compensation for his services.

Ahron has not challenged the trial court's findings that Rachel's petitions for conservatorship were pursued in good faith and in the best interests of Syma. Nor has Ahron challenged the amount of the award. Accordingly, the sole issue for review is whether the trial court had authority to award Shultz reimbursement for his fees and costs.

A. The Trial Court Was Authorized to Award Fees Pursuant to Section 2640.1

The parties agree that, under Probate Code section 2640.1, a trial court may award attorneys' fees and costs to a petitioner's counsel if a conservator other the one sought by the petitioner is appointed. The parties disagree, however, as to whether the court

appointed the Public Guardian to serve as Syma's conservator at the April hearing. Ahron argues that a "Notice of Ruling" summarizing the outcome of the April hearing does not include any statement indicating that the court actually appointed the Public Guardian to serve as conservator. Shultz, on the other hand, argues that the transcript from the April hearing demonstrates that the trial court did in fact appoint the Public Guardian.

Generally, "'[t]he rule with respect to [ascertaining the meaning of court] orders and judgments is that the entire record may be examined to determine their scope and effect . . . . [Citation.]' . . . [W]e may consider the opinion of the trial judge for the purpose of understanding and interpreting the judgment." (*Strohm v. Strohm* (1960) 182 Cal.App.2d 53, 63 (*Strohm*); see also *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 77 ["'In construing orders they must always be considered in their entirety . . . . If the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same.' [Citation.]")

The transcript of the April hearing contains numerous statements demonstrating that the trial court intended to appoint the Public Guardian as conservator. At the beginning of the hearing, the PVP attorney informed the court that although the parties had been unable to reach agreement on a private conservator, they had agreed to "stipulat[e] . . . that a Public Guardian will be appointed if the court is agreeable to that today." The PVP attorney also explained that: (1) the parties had previously referred the case to the Public Guardian; and (2) the Public Guardian had reviewed the matter and deemed it an acceptable case. After being provided this information, the court stated: "Okay. So that will be the order." The court was then asked to clarify the specific nature of the order, and the court stated "[I]t's not just a referral to the Public Guardian. The Public Guardian is actually going to be appointed."

Ahron's attorney expressed concern that the Public Guardian was not present to formally accept the appointment and suggested that the court schedule another hearing with the Public Guardian present. In response, the court stated "Well, since we have the

representation they are will to accept it. . . . [¶] . . . [¶] You know, why don't we do this. That will be the appointment, and if for some reason the Public Guardian states that the case is not appropriate for their acceptance, then they will have an opportunity to advise the court, and the court will set a new date." The court then scheduled a further status hearing "just to make sure everything gets done." These statements demonstrate that the trial court did not merely intend to refer the matter to the Public Guardian; rather it ordered that the Public Guardian was to be appointed conservator with the understanding that, if the Public Guardian wanted to withdraw, it would be given an opportunity to do so.

Language in the trial court's order awarding Shultz reimbursement of his fees and costs also indicates that the court believed it had appointed a conservator at the April 15 hearing. (See *Strohm, supra,* 182 Cal.App.2d at p. 63 ["we may consider the opinion of the trial judge for the purpose of understanding and interpreting the judgment"].) The court's order stated fee and costs were being awarded pursuant to Probate Code section 2640.1, which permits a court to compensate the attorney of "a person [who] has petitioned for the appointment of a particular conservator" if "another conservator was appointed while the petition was pending." (Prob. Code, § 2640.1, subd. (a).) The fact that the court's order specifically referenced a statute that applies only when "another conservator was appointed" suggests that the court believed the Public Guardian was appointed at the April hearing.

Ahron largely ignores the transcript of the April hearing and instead focuses on a "Notice of Ruling" that purportedly summarizes the orders that were made during that hearing.[5] The notice, which was filed by Ahron's counsel almost five weeks after the

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5 A single paragraph in Ahron's appellate brief asserts that the trial court made comments at the April hearing demonstrating that it had not appointed the Public Guardian, but only intended to do so. Specifically, Ahron argues that the trial court's statement that "the Public Guardian is actually going to be appointed" shows the court intended to appoint the Public Guardian at some point in the future. The language Ahron cites has been taken out of context. The cited portion of the transcript states, in full: "SHULTZ: Well, what is the order going to be, Your Honor?

hearing and a week after Syma died, states that the court "continued the matter to June 10, 2010 . . . for a further status conference at which the Public Guardian shall be present." Ahron contends this language shows the Public Guardian was not actually appointed as conservator; instead, the matter was continued. There are two problems with this argument. First, the language Ahron quotes does not say whether the Public Guardian was appointed; it merely states that a subsequent status hearing was scheduled and that the Public Guardian was required to attend the hearing. Second, even if the notice could be reasonably interpreted to mean that the Public Guardian had not yet been appointed, the notice was drafted, signed and filed by Ahron's counsel. Neither the court nor any other party signed the document or approved its content. Thus, the document reflects nothing more than Ahron's interpretation of what occurred at the April hearing. However, as explained above, that interpretation is contradicted by the hearing transcript.

In sum, the hearing transcript and the trial court's fee award include language demonstrating that the court appointed the Public Guardian to serve as conservator at the April hearing. Accordingly, it had authority to award attorney's fees under Probate Code section 2640.1.

B. The Trial Court Had Equitable Authority to Award Attorneys' Fees

Even if we were to accept Ahron's contention that the trial court did not appoint the Public Guardian to serve as a conservator at the April hearing, such a finding would be insufficient to support a reversal of the trial court's fee award. Ahron contends that "there is no statutory basis for an award of attorneys' fees when no conservatorship at all was ever established." While Ahron may be correct that there is no statutory basis for attorneys' fees when no conservatorship is established, a probate court nevertheless has equitable authority to award attorneys' fees under such circumstances.

"COURT: Well, it's not just a referral to the Public Guardian. The Public Guardian is actually going to be appointed."

This exchange shows that the court's statement was intended to clarify that it was not merely ordering that the case be referred to the Public Guardian, but rather was ordering that the Public Guardian be appointed to serve as conservator.

It is well-established that a probate court has "the power to apply equitable and legal principles in performing its functions. . . ." (*Estate of Mullins* (1988) 206 Cal.App.3d 924, 928; *Neubrand v. Superior Court* (1970) 9 Cal.App.3d 311.) Our courts have recognized that, at least under some circumstances, these equitable powers permit an award of attorneys' fees even in the absence of statutory authority. For example, in *Estate of Moore* (1968) 258 Cal.App.2d 458 (*Moore*), a physician filed a petition seeking to be appointed as guardian of an elderly woman. Shortly after the petition was filed, a third party filed a competing petition for conservatorship asserting that it was acting "in harmony with the wishes of [the conservatee]." (*Id*. at p. 460.) The trial court denied the physician's petition and appointed the third party to serve as conservator. After the orders were entered, the physician's attorney filed a motion seeking reimbursement for the services he provided in preparing the unsuccessful petition. The trial court granted the motion, ruling that the professional services were "'necessary to safeguard the welfare and best interests of the conservatee.'" (*Ibid*.)

The conservator of the estate appealed the award, arguing that the court was "without authority to compensate an unsuccessful petitioner for appointment as guardian." (*Moore*, *supra*, 258 Cal.App.2d at p. 460.) In support, the conservator noted that although the Probate Code allowed guardians, conservators and their attorneys to be compensated for expenses incurred in petitioning for appointment, the code did "not authorize compensation or reimbursement of expenses for one who has unsuccessfully petitioned for appointment."[6] (*Ibid*.)

The appellate court began by explaining that the conservator's "major premise, that an unsuccessful petitioner for appointment of a guardian or conservator does not earn the right to reimbursement from the estate, is generally sound. If the appointment of a guardian or conservator is sought and denied, it usually follows that . . . a caretaker was not needed. . . . [T]he [conservator] is on solid ground when it argues that a volunteer earns no right to reimbursement for rendering services which have proved unnecessary."

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[6] *Moore* was decided before section 2640.1 was added to the Probate Code.

(*Moore, supra,* 258 Cal.App.2d at p. 461.) However, the court further concluded that, in the case before it, the record showed that although the physician's petition had been denied, "substantial success attended his petition and substantial benefits [had] accrued to [the conservatee]." (*Id*. at pp. 461-462.) Specifically, the court found that: (1) the physician was the first to initiate caretaker proceedings, thereby notifying the court and others of the conservatee's condition, and (2) a conservator had been appointed, which was the physician's ultimate goal.

Having made these factual determinations, the court next considered "whether in the absence of statutory authorization, one who in good faith initiates caretaker proceedings in which a guardian or conservator other than the initiator is appointed may be awarded his costs and counsel fees." (*Moore, supra,* 258 Cal.App.2d at p. 462.) The court concluded that, under such circumstances, the probate court had "equitable" authority to award fees, explaining: "Such a petitioner performs a service to the disabled by notifying the court of the disabled's condition and need for protection. If compensation were not available, responsible parties might be discouraged from initiating effective action and becoming parties to caretaker proceedings whose primary benefits accrue to other persons. . . . [¶] In analogous situations the broad policy of encouraging persons acting in good faith in the interests of an incompetent has been followed, and compensation has been generally allowed for professional services." (*Ibid*.)

More recently, in *Conservatorship of Cornelius* (2011) 200 Cal.App.4th 1198, the court followed *Moore* in ruling that a temporary conservator could obtain attorneys' fees regardless of whether a permanent conservatorship was ever established. The court concluded that "[t]he deciding factor in awarding reimbursement in a conservatorship proceeding is not whether a permanent conservatorship is established but whether expenses were incurred in good faith and in the best interests of the proposed conservatee." (*Id*. at p. 1205.) As in *Moore*, the court found that an unsuccessful petition to appoint a permanent conservatorship "may well benefit the conservatee." (*Ibid*.)

The facts in this case cannot be meaningfully distinguished from *Moore*. Although Rachel's petitions for conservatorship were ultimately denied as a result of Syma's intervening death, the trial court found that the petitions were initiated in good faith and were intended to benefit Syma. The petitions were also substantially successful because the court concluded that a conservator was in fact necessary and indicated that the Public Guardian would serve in that role. There is no question that, but for Syma's death, a conservator would have taken control of her person and her estate. Permitting a trial court to award attorneys' fees under such circumstances accords with this state's well-established "policy of encouraging prospective [caretakers] to act in appropriate cases. . . ." (*Moore, supra*, 258 Cal.App.2d at p. 462.) Indeed, if compensation were not available, responsible parties might be discouraged from initiating caretaker proceedings for individuals suffering from a condition that threatens their immediate survival.

Having determined that Rachel acted in good faith and in the best interests of Syma, the trial court had equitable authority to reimburse Rachel's counsel for his services despite the fact that Syma died before the conservatorship proceedings were concluded.[7]

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[7] Ahron also argues for the first time in his reply brief that the trial court's award of attorneys' fees was inappropriate because there is no estate from which to award those fees. The appellant did not raise this argument in the trial court or in his opening appellate brief. The argument is therefore forfeited. (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 ["'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal . . . . This rule is based on fairness – it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.'"]; *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780 ["The general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on . . . factual questions whose relevance . . . was not made to appear at trial."]; *Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047, 1064, fn. 2 [appellant "forfeited" argument "raised for the first time in . . . reply brief without a showing of good cause"]; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"].)

DISPOSITION

We affirm the trial court's order awarding Shultz reimbursement for his professional services and costs. Respondent shall recover his costs and attorneys' fees on appeal.[8]

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

[8] Shultz's appellate brief asserts that he is entitled to recovery for the professional services he provided "in connection with this appeal." Ahron's reply brief does not respond to that request. Having concluded that the trial court was authorized to award attorneys' fees under section 2640.1, we also find that Shultz was entitled to recover his fees on appeal. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659 ["'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]' [Citation.]"] [disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68, fn. 5].)