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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2020 Session

IN RE CONSERVATORSHIP OF DANIEL ALLEN

**Appeal from the Circuit Court for Davidson County
No. 16P370 David Randy Kennedy, Judge**

No. M2019-00469-COA-R3-CV

This appeal arises from a conservatorship action in which an attorney ad litem was appointed to represent the respondent. The dispositive issue is whether the trial court had the discretion to assess all or any portion of the fees of the attorney ad litem to a party other than the respondent when Tenn. Code. Ann. § 34-1-125(b) states “[t]he cost of the attorney ad litem shall be charged against the assets of the respondent.” The trial court ruled that it did not have the discretion to deviate from the clear mandate in the statute. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which J. STEVEN STAFFORD P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Fred C. Dance, Franklin, Tennessee, for the appellant, M. Todd Sandahl, attorney ad litem.

Rachelle Gallimore-Scruggs, Nashville, Tennessee, for the appellant, LP North Nashville, LLC d/b/a Nashville Community Care & Rehabilitation Center at Bordeaux.

Herbert H. Slatery, Attorney General and Reporter, Andrée Sophia Blumstein, Solicitor General, and Jordan K. Crews, Assistant Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Human Services.

OPINION

This appeal arises out of two related but separate actions, each pertaining to the safety and welfare of Daniel Allen. The first action was an adult-protection proceeding filed by the Tennessee Department of Human Services (“the Department”). The second

was a petition for the appointment of a conservator for Mr. Allen filed by LP North Nashville, LLC d/b/a Nashville Community Care & Rehabilitation Center at Bordeaux (“LP North”) (formerly known as Signature Health), which owned and managed the facility where Mr. Allen resided.

The adult-protection proceeding was initiated by the Department on January 28, 2016. Upon receiving the petition, the court appointed Charles Griffith as counsel for Mr. Allen. Soon thereafter, the court delegated responsibility for the personal welfare of Mr. Allen to the Department.

Four weeks later, on February 26, 2016, LP North filed its Petition for Letters of Conservatorship, alleging that Mr. Allen was disabled and in need of assistance, protection and/or supervision. Upon receiving the conservatorship petition, the court appointed a guardian ad litem.¹ As required by Tenn. Code. Ann. § 34-1-107, the guardian ad litem conducted an investigation and filed a report and recommendation with the court. The guardian recommended the appointment of a conservator for Mr. Allen, but the guardian also informed the court that Mr. Allen opposed a conservatorship and had requested an attorney to represent him. Acting pursuant to Tenn. Code. Ann. § 34-1-125(a), the court appointed M. Todd Sandahl as Mr. Allen’s attorney ad litem.²

The dispositive hearings in both the adult-protection and conservatorship cases were delayed by agreement pending adjudication of Mr. Allen’s request to relocate to Utah, where a relative resided. In the interim, the court appointed a temporary conservator for Mr. Allen and consolidated the two cases.

Following the appointment of the temporary conservator, the Department filed motions to remove Mr. Allen from its protection and to be dismissed from the case. The court granted the motions, closed the adult-protection matter, and relieved the Department of further responsibility. Shortly thereafter, the court approved Mr. Allen’s request to move to Utah and relieved the temporary conservator of her duties.

¹ “The guardian ad litem [in a conservatorship proceeding] owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. **The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.**” *Runyon v. Zacharias*, 556 S.W.3d 732, 738 (Tenn. Ct. App. 2018) (quoting Tenn. Code Ann. § 34-1-107(d)(1)) (emphasis added), *appeal denied* (May 17, 2018).

² Tennessee Code Annotated § 34-1-125(a) provides: “The court shall appoint an attorney ad litem to represent the respondent on the respondent’s request, upon the recommendation of the guardian ad litem or if it appears to the court to be necessary to protect the rights or interests of the respondent. **The attorney ad litem shall be an advocate for the respondent in resisting the requested relief.**” (Emphasis added).

The parties proceeded to wind down the conservatorship,³ and Mr. Sandahl requested that his fees be charged to LP North and/or the State of Tennessee instead of Mr. Allen. Mr. Sandahl argued that Tenn. Code Ann. § 34-1-121(a) gave the court discretion to waive the requirements of Tenn. Code Ann. § 34-1-125(b), which provided that attorney ad litem fees be charged to the respondent.

In its order, the trial court found the requested attorney's fees were reasonable and necessary and awarded Mr. Sandahl \$38,595.04; however, the court ordered the fees to be paid by Mr. Allen, not LP North or the State. Relying on the provisions of § 125(b), the court stated:

The Attorney Ad Litem argued that Tenn. Code Ann. § 34-1-121(a) allowed the court, in its discretion, to waive the requirements of Tenn. Code Ann. § 34-1-125(b), that provides the Attorney Ad Litem fees to be charged to [Mr. Allen]. The court determined that it did not have the discretion to waive the provisions of Tenn. Code Ann. § 34-1-125(b)[;] however[,] if the court believed it had the discretion, or if an appellate court determined a trial court had the discretion to waive the provision of Tenn. Code Ann. § 34-1-125(b)[,] then the court would in fact exercise that discretion and determine whether or not a portion or all of the fees found reasonable and necessary by the court, should in fact, be assessed against other parties in this case.

This appeal followed.

ISSUES

Mr. Sandahl and LP North raise several issues for us to consider, including, but not limited, to the following:

1. Whether the trial court correctly held that the attorney ad litem fees incurred by Mr. Allen could be charged only to Mr. Allen under Tenn. Code Ann. § 34-1-125(b) despite the general waiver provision found in Tenn. Code Ann. § 34-1-121(a).
2. Whether the attorney ad litem fees were recoverable costs under Tenn. Code Ann. § 20-12-119(a).

³ The adult-protection action was closed pursuant to a separate order submitted by the Department. The Department paid all fees and court costs associated with the adult-protection matter, including all of Mr. Griffith's legal fees, which are not at issue in this appeal. Although the Department was never a party to the conservatorship action, acting out of an abundance of caution, the Department filed a brief in which it contends, *inter alia*, that sovereign immunity would bar the circuit court from charging any attorney ad litem fees or costs against the Department. Our ruling pretermits this issue.

3. Whether the probate court had discretion under Tenn. R. Civ. P. 17.03 and 54.04 to tax the attorney ad litem fees as costs and apportion those costs between the parties.
4. Whether the attorney ad litem fees were assessable against the Department.⁴

We have determined the dispositive issue is whether the trial court has the discretion to assess all or any portion of the attorney ad litem's fees to a party other than the respondent when Tenn. Code. Ann. § 34-1-125(b) states that "[t]he cost of the attorney ad litem shall be charged against the assets of the respondent."

ANALYSIS

The dispositive issue on appeal is whether the trial court correctly held that the attorney ad litem fees incurred by Mr. Allen could be charged only to Mr. Allen. We review a trial court's interpretation of statutes and rules of civil procedure de novo with no presumption of correctness as to its conclusions. *See Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 518 (Tenn. 2013); *In re Baby*, 447 S.W.3d 807, 818 (Tenn. 2014).

Tennessee courts follow the American Rule for awarding attorney's fees, "which provides that litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005). The relevant statute here is Tenn. Code Ann. § 34-1-125(b), which specifically mandates which party is responsible for the attorney ad litem fees in question. The statute reads:

- (a) The court shall appoint an attorney ad litem to represent the respondent on the respondent's request, upon the recommendation of the guardian ad litem or if it appears to the court to be necessary to protect the rights or interests of the respondent. The attorney ad litem shall be an advocate for the respondent in resisting the requested relief.
- (b) The cost of the attorney ad litem **shall be charged against the assets of the respondent.**

⁴ LP North also contends that Mr. Sandahl does not have standing to bring this appeal; however, LP North failed to raise this issue in the trial court. *See In re Estate of Smallman*, 398 S.W.3d 134, 148 (Tenn. 2013); *State ex rel. Wolfenbarger v. Moore*, No. E2008-02545-COA-R3-CV, 2010 WL 520995, at *3 (Tenn. Ct. App. Feb. 12, 2010). Accordingly, this issue is waived. *The Manor Holmes, LLC v. Ashby Communities, LLC et al.*, No. M2017-01369-COA-R3-CV, 2018 WL 3814981, *14 (Tenn. Ct. App., Aug. 10, 2018).

Tenn. Code Ann. § 34-1-125 (emphasis added).

However, Mr. Sandahl argues on appeal that the trial court had the discretion to waive § 125(b)'s requirement under Tenn. Code Ann. § 34-1-121, which provides:

The court has broad discretion to require additional actions not specified in this chapter, and chapters 2 and 3 of this title as the court deems in the best interests of the minor or person with a disability and the property of the minor or the person with a disability. The court also has discretion to waive requirements specified in this chapter, and chapters 2 and 3 of this title if the court finds it is in the best interests of the minor or person with a disability to waive such requirements, particularly in those instances where strict compliance would be too costly or place an undue burden on the fiduciary or the minor or the person with a disability.

Id. § 121(a). Mr. Sandahl maintains that assessing the cost of the attorney ad litem against a party other than Mr. Allen would merely be a waiver of the provisions of § 125(b).

With regard to statutory construction, our Supreme Court has explained that a statute's language is the cornerstone for a court's interpretation:

When we are called upon to construe statutes, we must first ascertain their purpose and then we must give this purpose the fullest possible effect without expanding the application of the statute beyond its intended scope. *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009); *Walker v. Sunrise Pontiac—GMC Truck, Inc.*, 249 S.W.3d 301, 309 (Tenn. 2008). The text of the statute is of primary importance to this endeavor. *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). We must (1) give these words their natural and ordinary meaning, (2) consider them in the context of their entire statute, and (3) presume that the General Assembly intended to give each of these words its full effect. *Knox Cnty. ex rel. Env'tl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 524 (Tenn. 2011).

In re Estate of Trigg, 368 S.W.3d 483, 490 (Tenn. 2012).

Here, § 125(b) unambiguously states the costs of the attorney ad litem are to be assessed against the respondent, and § 121(a) unambiguously gives the trial court authority to waive requirements when waiver is in the respondent's best interest. Nonetheless, after applying the rules of statutory construction, we have determined that § 121(a) does not give trial courts discretion to waive § 125(b)'s mandate.

First, when conflicting, “a specific statutory provision will control over a more general statutory provision.” *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998). This is because, “where the mind of the legislature has been turned to the details of a subject and they acted upon it, a statute treating the subject in a general manner should not be considered as intended to affect the more particular provision.” *Arnwine v. Union Cnty. Bd. of Educ.*, 120 S.W.3d 804, 809 (Tenn. 2003) (quoting *Woodruff v. City of Nashville*, 192 S.W.2d 1013, 1015 (Tenn. 1946)). Section 121(a) is a general provision that grants the trial court discretion to waive unspecified “requirements” in chapters 1 through 3 of Title 34. On the other hand, § 125(b) is a specific provision that governs the narrow issue here: who must bear the cost of the attorney ad litem in a conservatorship proceeding. Thus, the specific provisions in § 125(b) control over the general provisions in § 121(a).

Second, “[w]hen the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute’s application.” *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). We find a distinction between waiving a requirement and affirmatively re-directing the requirement. While § 121(a) provides that the court may waive the requirements in chapters 1, 2, and 3 of Title 34 when strict compliance would be too costly for the disabled person, it does not authorize the affirmative re-direction of the costs of the attorney ad litem to a party other than the one mandated by statute. To hold otherwise would be to expand the statute’s application.

Third, the goal of statutory construction “is to adopt a reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws.” *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997). It is presumed that the General Assembly used every word deliberately, and that each word has a specific meaning and purpose. *State v. Hawk*, 170 S.W.3d 547, 551 (Tenn. 2005); *Johnson v. LeBonheur Children’s Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002). As LP North argues, if the discretionary authority granted by § 121(a) is broad enough to allow a trial court to dispense with the legislature’s “shall” directive under § 125(b), it would always be “in the best interests of the . . . person with a disability [i.e., a respondent]” to not be charged with the attorney ad litem fees. Such a result would improperly render the “shall” directive in § 125(b) meaningless. *See In re Sidney J.*, 313 S.W.3d 772, 775 (Tenn. 2010) (recognizing a court’s duty “to construe a statute so that no part will be inoperative.” (quoting *Tidwell v. Collins*, 522 S.W.2d 674, 676 (Tenn. 1975))); *Nissan North America, Inc. v. Haislip*, 155 S.W.3d 104, 106 (Tenn. Ct. App. 2004) (stating that a court’s interpretation of a statute “must not render any part of the statute inoperative, superfluous, void or insignificant” (citation omitted)).

Fourth, “statutes ‘in pari materia’—those relating to the same subject or having a common purpose—are to be construed together, and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute.” *Wilson v. Johnson Cty.*, 879 S.W.2d 807, 809 (Tenn. 1994).

“[W]here the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.” *Bryant v. Genco Stamping & Mfg. Co., Inc.*, 33 S.W.3d 761, 765 (Tenn. 2000). In contrast to the legislature’s inclusion of mandatory language in § 125(b), the statute governing attorneys ad litem, the legislature used discretionary language in the statute governing guardians ad litem, Tenn. Code. Ann. § 34-1-114:

- (a) The costs of the proceedings, which are the court costs, the guardian ad litem fee and expenses incurred by the guardian ad litem in conducting the required investigations, the required medical examination costs, and the attorney’s fee for the petitioner, **may, in the court’s discretion**, be charged against the property of the respondent to the extent the respondent’s property exceeds the supplemental security income eligibility limit, or to the petitioner or any other party, or partially to any one or more of them as determined in the court’s discretion. In exercising its discretion to charge some or all of the costs against the respondent’s property, the fact a conservator is appointed or would have been appointed but for an event beyond the petitioner’s control is to be given special consideration. The guardian ad litem fee and the attorney’s fee for the petitioner shall be established by the court. If a fiduciary is cited for failure to file an inventory or accounting, the costs incurred in citing the fiduciary, in the discretion of the court, may be charged to and collected from the cited fiduciary.
- (b) If the principal purpose for bringing the petition is to benefit the petitioner and there would otherwise be little, if any, need for the appointment of a fiduciary, the costs of the proceedings may be assessed against the petitioner, in the discretion of the court.

(Emphasis added).

Moreover, we find the legislative history for § 114(a) and § 125(b) significant. In 2012, the legislature amended § 114(a) by replacing “shall” with “may, in the court’s discretion.” *See* 2012 Tenn. Pub. Acts 917, § 1. However, the legislature did not change the mandatory language in section § 125(b), which had been in effect since 2002. *See* 1992 Tenn. Pub. Acts 794, § 21. Thus, the legislature removed the mandate concerning the fees of guardians ad litem but not attorneys ad litem.

Further, prior to the amendment of § 114(a), our courts did not look to § 121(a) to determine if a court had discretion to charge the cost of the proceedings to other parties; rather, we found a clear legislative intent to charge such costs to the respondent. *See In re Conservatorship of Tate*, No. M2010-01904-COA-R3-CV, 2011 WL 6935342, at *10

(Tenn. Ct. App. Dec. 29, 2011) (holding that, regardless of whether a temporary or permanent fiduciary was appointed, § 114(b) clearly required the fiduciary's fees be charged against the respondent's assets if a fiduciary was appointed); *In re Conservatorship of Lindsey*, No. W2011-00196-COA-R3-CV, 2011 WL 4120664, at *5 (Tenn. Ct. App. Sept. 16, 2011) (holding petitioner's attorney's fees not properly chargeable against assets of respondent when no fiduciary was appointed, as legislature strictly circumscribed the court's discretion under § 114(b) to award attorney's fees in a petition to establish a fiduciary); *Aldridge v. Aldridge*, No. W2006-02334-COA-R3-CV, 2007 WL 4170826, at *6 (Tenn. Ct. App. Nov. 27, 2007) (holding that awarding attorney's fees of a non-petitioner spouse of a disabled individual would "circumvent the legislative intent of § 34-1-114").

Thus, construing §§ 114 and 125 together, we find that if the legislature desired to afford courts the discretion to charge a respondent's attorney ad litem fees to any party, it would have so stated, as it did with the guardian ad litem costs under § 114(a). The fact that the legislature did not do so is, of course, instructive as to its intent. *See Edmondson*, 231 S.W.3d at 927. As such, we find that the trial court correctly held it did not have discretion to charge any portion of Mr. Sandahl's fees to any party but the respondent, Mr. Allen.

The foregoing notwithstanding, Mr. Sandahl contends the circuit court had discretion not to follow § 125(b) because it was authorized to apportion his attorney ad litem costs between the parties under Tenn. Code Ann. § 20-12-119, which provides in relevant part:

- (a) In all civil cases, whether tried by a jury or before the court without a jury, the presiding judge shall have a right to adjudge the cost.
- (b) In doing so, the presiding judge shall be authorized, in the presiding judge's discretion, to apportion the cost between the litigants, as in the presiding judge's opinion the equities of the case demand.

Id. § 119(a) to (b). We are not persuaded.

Tennessee Code Annotated § 20-12-119 is a general statute that applies, by its terms, to "all civil cases." However, as discussed above, "a specific statutory provision will control over a more general statutory provision." *Cauthern*, 967 S.W.2d at 735. Assuming arguendo the term "cost" in § 20-12-119(a) includes attorney's fees, a trial court's discretion to apportion such cost must yield "where such discretion is superseded by statute." *Carson Creek Vacation Resorts, Inc. v. State, Dep't of Revenue*, 865 S.W.2d 1, 3 (Tenn. 1993). Such discretion would be superseded here by § 125(b), which provides that "[t]he cost of the attorney ad litem **shall** be charged against the assets of the respondent."

Mr. Sandahl also contends the circuit court had discretion to circumvent § 125(b) because his attorney ad litem fees could have been taxed as costs and apportioned between the parties under Tenn. R. Civ. P. 17.03 and 54.04. We disagree.

Rule 17.03 authorizes the court to appoint a guardian ad litem for an incompetent person and provides, “The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed and costs.” Tenn. R. Civ. P. 17.03. Here, Mr. Sandahl did not serve as a guardian ad litem. He was the appointed attorney ad litem. As such, Rule 17.03 is inapplicable.

Under Tenn. R. Civ. P. 54.04, the court is authorized to charge certain discretionary costs:

Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees not paid pursuant to Tennessee Supreme Court Rule 42, and guardian ad litem fees; travel expenses are not allowable discretionary costs. . . .

Tenn. R. Civ. P. 54.04(2). The fees of an attorney ad litem, however, are not listed as “allowable” costs under the rule. Further, as stated, the legislature’s specific statutory mandate in § 125(b) to charge the cost of the attorney ad litem to Mr. Allen would prevail over the general provisions in Rules 17.03 and 54.04. *See Lady v. Kregger*, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987) (holding that “the specific provisions in Tenn. Code Ann. § 56-7-1206(e) prevail over the conflicting general provisions in T.R.C.P. Rule 3”).

IN CONCLUSION

The judgment of the Circuit Court of Davidson County is affirmed, and this matter is remanded with costs of appeal assessed against Daniel Allen, for which execution may issue if necessary.

FRANK G. CLEMENT JR., P.J., M.S.