

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 4, 2005 Session

JOSEPH PARKER, JR., v. JOSEPH PARKER, SR.

**Appeal as of Right from the Chancery Court for Sevier County
No. 01-10-507 Hon. Telford E. Forgety, Jr., Chancellor**

No. E2004-00429-COA-R3-CV - FILED MAY 31, 2005

Appellant, who successfully fended off appellee's Petition to Appoint conservation for appellant, asked for attorney's fees from appellee pursuant to Tenn. Code Ann. § 34-1-114, which the Trial Court denied. We affirm.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Patrick T. Phillips, Knoxville, Tennessee, for appellant.

Monica J. Franklin, Knoxville, Tennessee, for appellee.

OPINION

This action originated with the filing of a Petition for Appointment of Conservator by Joe Parker, Jr., naming his father, Joseph Gussie Parker, as respondent. The Petition alleged that respondent's condition required that a conservator be appointed, and petitioner's siblings filed a Waiver of Next-of-Kin, stating they agreed that their brother should be named conservator for their father.

The Court appointed Rebecca McCoy as respondent's guardian ad litem, and authorized any entity having medical or financial records for respondent to disclose them to the guardian. The Court also ordered respondent to submit to a medical examination by a physician associated with the Baptist Hospital Geriatric Assessment Program.

Respondent employed counsel, and filed a Motion stating that he had a long term doctor/patient relationship with Dr. Helen Bidawid, and asked the Court to allow Dr. Bidawid to examine respondent and make a determination regarding his abilities. Respondent also filed a Motion to Dismiss, alleging that the service on him was improper, and that the Petition did not state a claim.

A hearing was conducted on October 28, 2003, and respondent was ordered to produce Dr. Bidawid's records for petitioner's counsel and the guardian ad litem. The Order requiring respondent to be examined was stayed, and petitioner then filed a Notice and Order of Voluntary Dismissal, and dismissed the action without prejudice pursuant to Tenn. R. Civ. P. 41.

Respondent then filed a Motion for Discretionary Costs, seeking the payment of court reporter expenses and expert witness fees, and also filed a Motion for Costs of Proceedings, asking that petitioner pay the guardian ad litem fees, the costs of medical examination, and his attorney's fees, pursuant to Tenn. Code Ann. §34-1-114.

The Court held a hearing on February 19, 2004, and held that respondent's Motion seeking his attorney's fees was not well-taken, because Tenn. Code Ann. §34-1-114, did not explicitly provide for payment of the respondent's attorney's fees. This Appeal ensued.

The issue raised on appeal is whether the Trial Court erred in interpreting Tenn. Code Ann. §34-1-114, such as to preclude an award of attorney's fees to the respondent?

Tenn. Code Ann. §34-1-114 states:

(a) If a fiduciary is appointed, the costs of the proceedings, which are the court costs, the guardian ad litem fee, the required medical examination costs and the attorney's fee for the petitioner, shall be charged against the property of the respondent to the extent the respondent's property exceeds the supplemental security income eligibility limit. If no fiduciary is appointed, the costs of the proceedings shall be charged against the petitioner. 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.

The statute provides that if no fiduciary is appointed, as the case herein, then the "costs of the proceedings" are to be charged against the petitioner. Respondent argues that "costs of the proceedings" should include the respondent's attorney's fees, since the "costs of the

proceedings” (as defined in the previous sentence) when a fiduciary is appointed includes petitioner’s attorney’s fees. Appellee argues that since the statute does not mention granting attorney’s fees to the respondent in this situation, such fees should not be allowed.

Our Supreme Court has recently taught in cases of statutory interpretation:

Resolution of the issue in this appeal requires a review and interpretation of several statutory provisions. The duty of this Court in construing statutes is to effectuate legislative intent. Legislative intent is to be ascertained primarily from the natural and ordinary meaning of the language used. Where the language used is devoid of ambiguity, we must apply its plain meaning without a forced interpretation that would limit or expand the statute's scope. In short, this Court must presume that the legislature says in a statute what it means and means in a statute what it says.

Kyle v. Williams, 98 S.W.3d 661, 664 (Tenn. 2003).

In the statute under review, there is no mention made of granting a respondent his or her attorney’s fees on the facts of this case. In fact, in a subsequent section, the statute provides that if an attorney ad litem is appointed to represent the respondent, then the costs of such attorney “shall be charged against the assets of the respondent.” Tenn. Code Ann. §34-1-125. As we have routinely recognized, attorney’s fees cannot be awarded in an action unless provided for by contract or statute. *Hogan v. Coyne Intern. Enterprises Corp.*, 996 S.W.2d 195 (Tenn. Ct. App. 1998). In this case, the statute does not authorize the Court to award respondent his attorney’s fees.

An argument similar to respondent’s argument was advanced by a respondent in a case decided under the prior limited guardianship law, which was then codified at Tenn. Code Ann. §34-12-101 *et seq.*, in the case of *In re Webb*, 675 S.W.2d 176 (Tenn. Ct. App. 1984). In *Webb*, this Court determined that under the prior statute dealing with costs, if the legislature had intended for the word “cost” to include attorney’s fees, then it “most certainly could have inserted the language” as it had done in the first section, but since the legislature did not, and given the general rule relative to the awarding of fees, the judgment denying attorney’s fees to respondent was affirmed. Similarly, here, if the legislature had intended for “costs of the proceedings” to include an award of respondent’s attorney’s fees where no fiduciary is appointed, then the legislature would have expressly included such language, as it did in the previous sentence, and we are bound to apply the plain meaning of the statute, as written.

The Judgment of the Trial Court is affirmed.

Petitioner argues that the appeal filed by respondent is so lacking in justiciable issues that it should be deemed frivolous pursuant to Tenn. Code Ann. §27-1-122. The Appeal involved an issue regarding statutory construction that was not so devoid of merit that it should be deemed frivolous. *See, Young v. Barrow*, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003).

The Judgment of the Trial Court is affirmed, and the cost of the appeal is assessed to Joseph Parker, Sr.

HERSCHEL PICKENS FRANKS, P.J.