

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32352
O/kmb

_____AD3d_____

Argued - September 8, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2010-07134

DECISION & ORDER

In the Matter of Verna Eggleston, etc., petitioner-respondent; Jennifer D. (Anonymous), appellant; Martin Hersh, nonparty-appellant; Robert Kruger, et al., nonparty-respondents.

(Index No. 100232/03)

Lesley M. DeLia, Mineola, N.Y. (Felicia B. Rosen and Dennis B. Feld of counsel), for appellant.

Robert Kruger, New York, N.Y., nonparty-respondent pro se.

Barry Elisofon, Brooklyn, N.Y. (Pamela Elisofon of counsel), nonparty-respondent pro se.

In a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for the personal needs and property management of Jennifer D., an incapacitated person, Jennifer D. appeals, as limited by her brief, from so much of an amended order of the Supreme Court, Kings County (Lewis, J.), dated June 22, 2010, as, upon granting the motion of the nonparty temporary guardian, Robert Kruger, to settle his final account, directed Robert Kruger to pay the sums of \$16,408 to himself for a "Legal Fee," \$90 to himself as a reimbursement for disbursements, \$19,720 to Hearthside Care Coordinators for social work services, and \$13,800 to nonparty attorney Barry Elisofon as a reimbursement for disbursements, and nonparty Martin Hersh appeals from the same order.

ORDERED that the appeal by nonparty Martin Hersh is dismissed as abandoned, without costs or disbursements; and it is further,

ORDERED that the amended order is modified, on the law, (1) by deleting the provisions thereof directing the nonparty temporary guardian, Robert Kruger, to pay the sums of

October 4, 2011

Page 1.

MATTER OF EGGLESTON, VERNA

\$16,408 to himself for a “Legal Fee,” and \$13,800 to nonparty attorney Barry Elisofon as a reimbursement for disbursements, and (2) by deleting the provision thereof directing Robert Kruger to pay the sum of \$19,720 to Hearthside Care Coordinators for social work services, and substituting therefor a provision denying authorization for payment of that sum; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a hearing on the issue of the reasonable amount of fees, if any, to be awarded to the nonparty temporary guardian, Robert Kruger, and the reasonable amount of sums, if any, to be reimbursed to nonparty attorney Barry Elisofon for disbursements.

A court is authorized to award “reasonable compensation” to a guardian (Mental Hygiene Law § 81.28[a]). The plan for compensation “must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian” (*id.*). However, “[i]f the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed” (Mental Hygiene Law § 81.28[b]).

Here, the Supreme Court did not establish a plan for the temporary guardian’s compensation and did not explain the basis for its award of a “Legal Fee” to the temporary guardian of Jennifer D., Robert Kruger, who, although an attorney, was acting as Jennifer D.’s guardian. In addition, in opposition to Kruger’s request for payment of his fees, Jennifer D. submitted evidence demonstrating an issue of fact as to the propriety of Kruger’s actions on her behalf and the accuracy of Kruger’s accounting. Accordingly, the Supreme Court should have conducted a hearing to determine what, if any, fees were due to Kruger (*see Matter of Joshua H. [Grace N.]*, 80 AD3d 698, 699; *Matter of Harry Y.*, 62 AD3d 892, 894-895; *Matter of Louis G.*, 39 AD3d 546, 547; *Matter of McCormick*, 220 AD2d 506, 508).

Additionally, although nonparty attorney Barry Elisofon may have been entitled to reimbursement of disbursements he paid to Hearthside Care Coordinators (hereinafter Hearthside), the Supreme Court did not conduct a hearing as to the reasonableness of those sums (*see Matter of Maylissa N.*, 5 AD3d 492, 493; *Matter of Castano*, 248 AD2d 382; *Matter of McCormick*, 220 AD2d at 508). As to the fees charged by Hearthside and not paid by Elisofon, the principal of that company, Irene Zelterman, acknowledged in court that she would not seek payment of fees until a personal injury action instituted by Jennifer D. was resolved. Zelterman also confirmed that, if the personal injury action were not resolved, the work on behalf of Jennifer D. would continue on a pro bono basis. Under these circumstances, Hearthside was not entitled to payment of its outstanding fees in the amount of \$19,720.

Jennifer D.’s remaining contention is without merit.

RIVERA, J.P., FLORIO, LEVENTHAL and ROMAN, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court