

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

709

CA 18-02156

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE APPLICATION FOR THE
APPOINTMENT OF A GUARDIAN OF THE PROPERTY OF
RALPH C., AN ALLEGED INCAPACITATED PERSON.

MEMORANDUM AND ORDER

CATHOLIC FAMILY CENTER, APPELLANT;

ROBERT CAVIGLIANO, MONROE COUNTY DEPARTMENT
OF SOCIAL SERVICES AND JOHN M. SCATIGNO, COURT
EXAMINER, RESPONDENTS.

DUTCHER & ZATKOWSKY, ROCHESTER (YOLANDA RIOS OF COUNSEL), FOR
APPELLANT.

Appeal from an order and judgment of the Supreme Court, Monroe
County (Joan S. Kohout, J.), entered April 25, 2018. The order and
judgment, insofar as appealed from, denied that part of the
application of appellant seeking an award of counsel fees.

It is hereby ORDERED that the order and judgment insofar as
appealed from is unanimously reversed on the law without costs and
that part of the application seeking an award of counsel fees is
granted, and the matter is remitted to Supreme Court, Monroe County,
for further proceedings in accordance with the following memorandum:
Appellant was appointed as the guardian of a now-deceased
incapacitated person (IP). Following the IP's death, the guardian
filed its final accounting and applied to discharge the guardianship.
As part of its application, the guardian sought permission to disburse
guardianship property that it had retained to cover its counsel fees
in connection with the guardianship. As limited by its brief, the
guardian now appeals from an order that, inter alia, denied its
request for counsel fees and directed it to return the funds retained
for that purpose to the IP's estate (see Mental Hygiene Law § 81.44
[d]).

Preliminarily, we note that the interlocutory order appealed from
was subsumed in a final order and judgment, the entry of which
terminated the guardian's right to appeal from the interlocutory order
(see *Matter of Aho*, 39 NY2d 241, 248 [1976]). We nevertheless
exercise our discretion under CPLR 5520 (c) to treat the notice of
appeal as valid, and we deem the appeal to have been taken from the
final order and judgment (see *Teitelbaum v North Shore-Long Is. Jewish
Health Sys., Inc.*, 160 AD3d 1009, 1010 [2d Dept 2018]; *People ex rel.
Johnson v O'Flynn*, 141 AD3d 1107, 1107-1108 [4th Dept 2016]).

On the merits, we agree with the guardian that Mental Hygiene Law § 81.44 (e) authorizes its retention of a reasonable amount of guardianship property for the purpose of paying its counsel fees in connection with the guardianship. Section 81.44 (e) provides, in relevant part, that a guardian may retain "guardianship property equal in value to the claim for administrative costs, liens and debts," and we have held that the "administrative expenses" of a guardianship—i.e., the administrative costs, liens and debts referenced in the statute—include reasonable "counsel fees incurred in providing services to [the guardian]" (*Matter of Banks [Charlie B.H.]*, 108 AD3d 1055, 1056 [4th Dept 2013]; see also *Matter of Karl*, 266 AD2d 392, 393 [2d Dept 1999]; see generally *Matter of Shannon*, 25 NY3d 345, 347-353 [2015]). We therefore reverse the order and judgment insofar as appealed from, and we remit the matter to Supreme Court to fix a reasonable award of counsel fees (see *Banks*, 108 AD3d at 1055-1056).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court