IN THE COURT OF APPEALS OF IOWA

No. 18-1273
Filed January 23, 2020

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF DIANE FLORENE NORELIUS,

JULIANN ELIZABETH NELSON and KRISTINE BETH NORELIUS,
Petitioners-Appellants.

Appeal from the Iowa District Court for Crawford County, Julie A. Schumacher, Judge.

Children of a ward appeal the district court ruling appointing a guardian and co-conservator for the ward. **AFFIRMED.**

Maura Sailer of Reimer, Lohman, Reitz, Sailer & Ullrich, Denison, and Bruce E. Johnson of Cutler Law Firm, P.C., West Des Moines, for appellants.

Alyssa A. Herbold of Alyssa A. Herbold, P.L.C., Cherokee, attorney for ward.

Gina C. Badding (until withdrawal) and A. Eric Neu of Neu, Minnich, Comito, Halbur, Neu & Badding, P.C., Carroll, guardian ad litem for ward.

Dean A. Fankhauser of Fankhauser Rachel, PLC, Sioux City, for intervenor Marcia Losh.

Rosalynd J. Koob of Heidman Law Firm, P.L.L.C., Sioux City, for intervenor Denzil Nelson.

Considered by Bower, C.J., and Tabor and Mullins, JJ. Schumacher, J., takes no part.

MULLINS, Judge.

Appellants Juliann Nelson and Kristine Norelius appeal the district court ruling on their petition to establish an involuntary guardianship and conservatorship over their mother, Diane Norelius. They argue the court abused its discretion in (1) declining to appoint them as sole non-resident co-guardians of Diane or to name them as non-resident co-guardians along with Juliann's daughter as resident co-guardian and instead appointing one of Diane's friendsand (2) granting Diane's attorney's request for attorney fees and only partially granting the appellants' attorney's request for fees.[1] The appellants request an award of attorney fees.

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[1] The appellants also argue the court abused its discretion in its selection of one of the two co-conservators, declining to reopen the record to allow the presentation of evidence that said co-conservator would be unsuitable, and giving too much weight to Diane's preference to name the co-conservator.

However, "[i]t is our duty on our own motion to refrain from determining moot questions." *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015) (citation omitted). "A case is moot if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (citation omitted). In determining whether an issue is moot, we are entitled to review matters outside of the record on appeal. *See, e.g.*, *Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 170 n.3 (Iowa 2015); *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 539 n.1 (Iowa 1997); *In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992).

Upon our consideration of matters outside the record in this appeal, namely the record in a subsequent appeal in these proceedings, the complained-of conservator has since moved to withdraw as a fiduciary. The district court granted the motion. Consequently, we determine the co-conservator-related issues are moot and do not address them.

Finally, the appellants argue the court abused its discretion in sealing its final order of appointment, arguing such sealing "is a violation of the Iowa Open Records Act," which allows every person "the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." Iowa Code § 22.2(1) (2017). However, following the filing of the appellants' notice of appeal, the district court filed an unsealed but redacted version of the final order of appointment. The redacted version only concealed the ward's medical information, which is excepted from disclosure under open records laws. *See id.* § 22.7(2). The appellants do not challenge the propriety of the unsealed, redacted order. We conclude the filing of the redacted order has rendered the appellants' complaint moot. *See Homan*, 864 N.W.2d at 328.

Actions for the involuntary appointment of guardians are actions at law. *See* Iowa Code §§ 633.33, .555. Our review is therefore for correction of errors at law. *See* Iowa R. App. P. 6.907; *In re Conservatorship of Deremiah*, 477 N.W.2d 691, 692 (Iowa Ct. App. 1991). "Because our review is on error, the district court's factual findings are binding on appeal if supported by substantial evidence." *In re Guardianship of M.D.*, 797 N.W.2d 121, 127 (Iowa Ct. App. 2011); *accord* Iowa R. App. P. 6.904(3)(a). The appointment of a guardian is a discretionary decision on the part of the district court. *See In re Guardianship & Conservatorship of Reed*, 468 N.W.2d 819, 822–23 (Iowa 1991); *see also* Iowa Code §§ 633.556(1), .570(1). We will not interfere with the district court's selection of fiduciaries "unless it is shown that there has been a clear abuse of discretion." *Arent v. Arent*, 32 N.W.2d 660, 661 (Iowa 1948). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Walker*, 935 N.W.2d 874, 877 (Iowa 2019) (citation omitted).

Upon our review of the record, we find the court carefully considered the qualifications of each person who sought to be guardian or co-guardian, the relationships of the parties, the recommendations of the guardian ad litem and the best interests of the ward. We conclude the court's discretionary decisions concerning the selection of the guardian was well reasoned, grounded in the facts presented, and was not based on clearly untenable grounds or to an extent clearly unreasonable. *See id.* We put that issue to bed without further opinion pursuant to Iowa Court Rule 21.26(1)(b) through (e).

Next, the appellants challenge the court's attorney fee awards. They claim the court abused its discretion in not awarding their attorney the full amount requested. They generally argue that their attorney did all the work in the case and the other parties just went with the flow. They also argue the court erred in awarding Diane's attorney fees because "she did not submit the minimum requirements to the court."

> Except as otherwise provided in sections 633.672 and 633.673, in proceedings to establish a guardianship or conservatorship, the costs, including attorney fees and expert witness fees, shall be assessed against the ward or the ward's estate unless the proceeding is dismissed either voluntarily or involuntarily, in which case fees and costs may be assessed against the petitioner for good cause shown.

Iowa Code § 633.551(5).

Pursuant to this provision, the appellants' attorney requested fees in the amount of $60,966.66. The court ordered an award of $25,000.00. The appellants contend the statutory "language does not allow the court any discretion to reduce the fees requested." Diane's attorney and guardian ad litem argue, despite the lack of qualifying language in the statute, the court is still vested with broad discretion. The guardian ad litem cites to *Schaffer v. Frank Moyer Construction, Inc.*, 628 N.W.2d 11, 22 (Iowa 2001) in support of her position. However, *Schaffer* contemplated a fee statute that required a mandatory award of attorney fees, but only to an extent the district court deemed reasonable, thus allowing the court discretion. 628 N.W.2d at 22 (discussing Iowa Code § 572.32 (1997)). Another similar case considered a statute that made an attorney-fee award mandatory, but only to the extent the fees were deemed "usual and necessary." *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 343 (Iowa 2000) (discussing Iowa Code § 91A.8).

We turn to statutory interpretation to determine whether a court is allowed discretion to award fees under section 633.551(5),[2] the goal of "which is to discover the true intention of the legislature." *Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003). "Our first step in ascertaining the true intention of the legislature is to look to the statute's language," and we will not go further "when the statute is plain and its meaning is clear." *Id.* That being said, we will "not construe a statute in such a way that would produce impractical or absurd results." *Id.* Under the absurdity doctrine, "ambiguous statutory language should be construed in a fashion that produces a reasonable result." *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 534 (Iowa 2017). But the doctrine goes further—"courts may use a 'variant of the "reasonableness" rule even absent ambiguity . . . when an act's plain, clear, literal meaning produces an unintended, absurd result.'" *Id.* (quoting 2A Norman J. Singer & Shambie Singer, *Statutes & Statutory Construction* § 45, at 104–06 (7th ed. 2014)).

The appellants' reading of the statute would allow for taxing all attorney fees against the ward or estate, regardless of whether they were reasonable or usual and necessary—an attorney would file a request for fees, and the discretionless court would be required to grant the request. Put another way, the requesting attorney would be the decision maker and could submit for an award of fees in an unreasonable amount and the hand-tied court, as a matter of law, would have to grant the unreasonable request. That is an unquestionable absurdity. The

[2] We note, in the event the proceeding is dismissed, then the court is allowed discretion to assess fees and costs against the petitioner if good cause is shown. Iowa Code § 633.551(5); *In re Guardianship of G.G.*, 799 N.W.2d 549, 553–54 (Iowa Ct. App. 2011).

legislature's failure to place a discretionary qualifier on attorneys' entitlement to fees under section 633.551(5) was clearly an oversight. This court has found few attorney-fee statutes in the Iowa Code allowing for an award of attorney fees absent some sort of reasonableness requirement.[3] In contrast, the list of statutes including such a requirement goes on and on.[4]

In any event, the statute is at least minimally ambiguous. If the proceeding is not dismissed, it requires that attorney fees be taxed to the ward or estate. What

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[3] *See* Iowa Code §§ 508E.15(4)(c); 535B.11(5); 633.356(6)(b).

[4] *See, e.g.*, *id.* §§ 2.12A; 6A.24(3); 6B.33, .34; 9A.116(2); 12C.23(3)(d), .23A(3)(f); 13.3(2); 17A.4(6)(b); 21.6(3)(b); 22.10(3)(c); 29C.25(3)(c); 66.23; 80A.16A(2); 80F.21(1); 91A.8, .10(2); 100B.14(9); 103.39(7); 105.27(3); 123A.11; 135C.33(6)(d); 146B.3(5)–(6); 147C.1(10)(b)(6), (d)(2); 147D.1(13)(b)(6), (d)(2); 152C.4(3); 152E.1(9)(b)(6), (d)(2); 156.16(7); 157.13(4)(c); 202B.401(2)(b); 202C.3(1); 207.14(5); 216.15(9)(a)(8)–(9), .15A(11)(a), .16(6), .17A(6)(b), (9)(b)(2), (11); 216E.6(3); 217.31(1); 235A.20; 235B.11; 237C.9(3); 249A.45(2); 252D.17(1)(h); 252K.313; 272C.8(2); 257B.33; 272.6(4); 280.26(3); 303.16(9)(b)(2); 306.17; 321J.22(3); 322A.5(1); 322C.21(1); 322F.8(1)(a)(1); 322G.8(3); 327D.16; 352.11(1)(d); 384.84(6)(a); 404A.3(4)(c)(2); 421B.10; 453D.6(3), .7(4); 458A.23; 468.112; 476.18(2), .55(2)(a)(4); 479.46(6); 479B.30(6); 486A.701(9); 488.1005(2)–(3); 489.906(2); 499A.22(3)(a)(2); 501A.801(4)(h)(1), .1207(4); 502.509(2)(a), (c), (3)(a), (c), (5), (6)(a), (13B)(a); 504.637, .703(3), .711(4), .1604(3); 507A.7(4); 507C.46; 512B.28(3)(b); 523A.901(18)(a)(5), (22)(b); 523G.9(5); 532D.7(1); 533C.705; 535C.10.1; 537.5108(6), .5110(2)(d); .5201(8), 5203(1)(b); 542.14(7); 543D.21(7); 543E.18(7); 544A.15(3)(g); 548.114; 549.7; 550.6; 551A.8(1), (4); 552.13(1); 552A.5(3); 553.12(4); 554.5111(5), .7601(1), .9607(4), .9608(1)(a)(1), .12305, .12404(2), .13108(4); 538A.9(1); 542B.27(7); 547A.2(1); 555B.2(1); 557A.16(2); 557B.10(3), .11; 558.71(4); 558B.8(1); 562A.11(2), .12(8), .21, .24, .27(3), .27B(4)(d), .32, .35, .36(2); 562B.23(1)(b), .25B(3)(c), (4)(d), .30(2); 572.32; 573.21; 575.1(2)(b)(4); 598.24, .36; 598B.312(1); 598C.103; 600B.25(1), .26, .37A; 607A.45(2); 617.16; 619.19(4); 625.22; 629.6; 633.78(4)(d), .198, .515, .648; 633A.4507, .4604(7)(a)(4); 633B.120(3)(b); 639.14; 649.5(3); 654.9A, .17(2); 655.3, .5; 656.7(1); 657A.2(7), .8; 562A.22(2), .26, .34(4); 633B.116(4); 654.14(2); 663A.1(6)(a), (d); 669.15; 670A.2(3); 682.5(2)(b); 685.3(4)(a)(3), (b); 692.6; 706A.3(3)(d); 714.16(11); 714B.8(2); 714D.6(1)(c); 714H.5(2); 715A.2A(3)(b), .8(6); 717.5 (3)(a)(1); 717A.2(2)(b), .3(2)(b); 717B.4 (3)(a); 717D.5(2); 724.1A(3), .21A(8); 729A.5(1); 808B.8(1)(b)(3); 809A.12(7), .15(2)(b); 904.603; 907B.2(11)(c); 915.23(3). We do not believe the foregoing list to be exhaustive.

is unclear is the amount. All? Some? A reasonable amount? The appellants' reading of the statute would require all. While we acknowledge the absurdity "doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said," departure from the statutory language is still justified if literal reading would produce an absurd result. *Id.* at 539–40 (citations omitted). We are confident the legislature did not intend section 633.551(5) to allow for an assessment of attorney fees in excess of reasonableness. *See id.* at 540. Given the statutory scheme of the entire Iowa Code, we narrow the statute to only allow for assessment of attorney fees that the district court, in its discretion, deems reasonable under the circumstances. *See id.* at 538–39 (discussing the use of specific absurdity to narrow the scope of a statute).

We turn to the court's discretionary decision as to the appellants' request for attorney fees in the district court. The court determined the appellants' attorney should be awarded $25,000.00 in fees, payable by the conservatorship, as said amount was comparable to the fees provided to the other attorneys participating in the proceeding.[5] Upon our review, and given the fact that the district court had the opportunity to view the whole picture, including the conduct and clearly apparent unnecessary litigiousness of the appellants in the proceeding, and our position that the district court is an expert in determining the reasonableness of

[5] The guardian ad litem was awarded $23,310.00, the attorney for the ward was awarded $29,880.00, and the attorney for the appointed guardian was awarded $17,260.34.00.

attorney fees, *see Boyle v. Alum-Line, Inc.*,773 N.W.2d 829, 832–33 (Iowa 2009) (citations omitted), we are unable to say the court exercised its discretion on reasons clearly untenable or to an extent clearly unreasonable. *See Walker*, 935 N.W.2d at 877. We affirm the assessment of fees in favor of the appellants' attorney.

Finally, the appellants argue the court erred in awarding Diane's attorney fees[6] because "she did not submit the minimum requirements to the court." They specifically complain counsel "did not provide evidence of . . . hours worked and the rates claimed." "While the submission of such evidence is helpful and recommended, its absence does not preclude an award of attorney fees." *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). We affirm the award.

We turn to the appellants' request for an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within this court's discretion. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). In determining whether to award attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id*. In consideration of these factors, we decline to award appellate attorney fees to the appellants.

We affirm the district court's appointment of the guardian and assessment of attorney fees. We determine all the co-conservator-related issues and the

[6] No party has challenged standing of the appellants to challenge the fees of other parties in this appeal.

court's sealing of its order of appointment to be moot. We deny the appellants' request for appellate attorney fees. We do not consider any arguments raised by the appellants for the first time in their reply brief. *See Villa Magana v. State*, 908 N.W.2d 255, 260 (Iowa 2019). Costs on appeal are assessed against the appellants.[7]

AFFIRMED.

[7] Both Diane's attorney and guardian ad litem have filed applications for appellate attorney fees. However, the supreme court entered an order directing those parties to file their applications in the district court for that court's consideration. Consequently, we do not address the applications.