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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Conservatorship of the Person and Estate of
BING JIAO XIE.

DEBRA J. DOLCH, as Conservator, etc.,

Petitioner,

v.

KEVIN URBATSCH,

Claimant and Appellant.

A133079

(San Francisco County
Super. Ct. No. PCN-10-293816)

Appellant Kevin Urbatsch filed a petition seeking attorney fees and costs for legal services his law firm rendered to the conservators of the estate and person of Bing Jiao Xie. In this appeal from the order authorizing payment of attorney fees and costs from the conservatorship estate, Urbatsch contends the probate court abused its discretion by reducing the amount he requested as attorney fees by over 40 percent. Because we conclude the court acted within its discretion, we shall affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Bing Jiao Xie suffered a severe traumatic brain injury due to a motor vehicle accident. He now resides at Laguna Honda Hospital and Rehabilitation Center in San Francisco. As a result of the motor vehicle accident, Xie's guardian ad litem filed a lawsuit on Xie's behalf. Following a settlement of the case, the court approved a compromise petition. As part of the compromise petition, litigation proceeds of over \$591,000 were to be placed in a conservatorship on behalf of Xie.

Xie's daughter retained appellant Kevin Urbatsch, an attorney, to prepare and file a petition to establish a conservatorship of the person and estate of Xie. On August 20, 2010, Urbatsch filed the conservatorship petition. Following a hearing conducted on October 14, 2010, the probate court approved the conservatorship of the person and estate of Xie. The court found that Xie was unable to properly provide for his personal needs for physical health, food, clothing, or shelter. The court also found that Xie was substantially unable to manage his financial resources or to resist fraud or undue influence. The court appointed Xie's daughter as the conservator of the person and Debra Dolch as conservator of the estate. Letters of conservatorship issued on October 14, 2010. Urbatsch filed an initial inventory and appraisal on January 26, 2011, in which he stated that the value of the conservatorship estate was zero. In subsequent court-filed documents, Urbatsch explained that the settlement funds had not yet been received. In a supplemental inventory and appraisal filed March 23, 2011, Urbatsch stated that the conservatorship estate was valued at \$641,809, comprising the proceeds of a check issued by Allstate Insurance Company.

On April 4, 2011, Urbatsch filed a petition for attorney fees and costs pursuant to Probate Code sections 2640 and 2642.¹ He sought \$10,766.76 as compensation for services rendered in connection with the establishment of Xie's conservatorship. In the petition, Urbatsch stated that he had employed two paralegals to assist him. A billing statement attached to the petition itemized the work done by Urbatsch and the two paralegals. Of the requested amount, \$8,972.50 represented fees for attorney and paralegal time. The remaining \$1,794.26 represented costs incurred for filing fees, photocopy expenses, and courier expenses.

A number of entries in the billing statement referred to work done in connection with a section 3100² petition to authorize the purchase of a family home for Xie's wife using

¹ All further statutory references are to the Probate Code unless otherwise specified.

² Section 3100 is a statute defining "transaction" as used in Chapter 3 of Part 6 of the Probate Code. Under that chapter (§ 3100 et seq.), a petition may be filed seeking a court order authorizing a proposed transaction involving community property if one or both of the spouses lack legal capacity for the proposed transaction. (See §§ 3101, 3110.)

community property assets. The entries relating to the section 3100 petition began on January 26, 2011, with a reference to legal research as to whether a court order is needed to have a fiduciary sign a deed transferring community property to the wife. The entries reflected that Urbatsch and his paralegal prepared a section 3100 petition to authorize the purchase of a home for Xie's wife using community property assets. An entry on February 14, 2011 indicated the wife was unsure she wanted to go forward with the purchase of a home. The final entry relating to the section 3100 petition was dated February 15, 2011, reflecting that the family informed counsel that they wanted to hold off on the filing of a section 3100 petition. Urbatsch sought a total of \$2,335 in fees for work performed in connection with the section 3100 petition. Notably, aside from references to the work in the attached billing statement, Urbatsch's attorney fee petition did not refer to the section 3100 petition or attempt to explain why the work was done or how it benefited Xie.

A probate examiner for the San Francisco County Superior Court prepared a written response to Urbatsch's fee petition.³ In the response, the examiner first noted that pursuant to a local rule, "the court prefers to consider fee requests when the accounting is considered." The examiner stated that the first account is a one-year account that was due to be filed on December 21, 2011, in light of the establishment of the conservatorship in October 2010. The examiner addressed four separate issues under the heading "specific entries." First, as to the section 3100 petition, the examiner noted that "[t]here are substantial entries related to this petition which was never filed." The examiner also stated that "[t]he benefit to the conservatorship for these services is not clear." The second specific issue addressed by the examiner related to "[a]dministrative [e]ntries." The examiner stated that "[s]everal entries refer to services that this court considers administrative in nature, such as mailing notice; preparing documents to be filed, which appears to include making copies; preparing and serving documents; and scanning documents." The third specific issue identified by the examiner was a duplicate entry in the time records. Finally, the examiner noted that the request included costs for filing the fee

³ The record reflects that no other person who received notice of the attorney fee petition objected or otherwise commented on the request.

petition and fees associated with revising the petition. The examiner stated that “[t]he benefit to the conservatorship for these services and costs is not clear.”

Urbatsch responded to the probate examiner’s concerns in a declaration. First, as to the timing of the request, he noted that although the local rules express a preference for combining a fee request with an accounting of the conservatorship estate, the Probate Code authorizes the filing of a fee petition after an inventory and appraisal is filed as long as at least 90 days have passed since the issuance of letters of conservatorship. (See § 2640.1.)

Urbatsch responded to the question about the section 3100 petition as follows: “In February of this year Bao Yi Yu, Conservatee’s wife of over forty years, sought my assistance in purchasing a home. Ms. Yu planned on using her share of litigation proceeds for purchase of a primary residence. At the time she was living with her daughter. Ms. Yu was in the process of acquiring a home when she discovered she would need Conservatee’s signature on the real property paperwork. I prepared a 3100 Petition seeking to authorize [conservator of the estate] Debra Dolch to sign the property paperwork on Conservatee’s behalf; however, after I completed the Petition, Conservatee’s family notified me that they had decided to postpone purchasing a home. I prepared the 3100 Petition to assist Conservatee and his family in their efforts to secure housing for Ms. Yu, a goal I believe the Conservatee would have liked to see accomplished for the well-being of his wife and family. The family’s decision to postpone this process does not discount the time and effort I expended assisting them. If and when they decide to resume their efforts, the Petition will be ready for filing.”

In response to the examiner’s concern about fees charged for administrative work such as copying and filing, Urbatsch responded that he was confident the work done by his paralegals was related to case development and management. He asserted fees for such services were authorized under Business and Professions Code section 6450. He continued: “Nonetheless, if the Probate Examiner believes there are specific tasks for which my paralegals billed that are not appropriate pursuant to the non-exclusive list of paralegal tasks set forth in § 6450, I am amenable to a reduction in fees for those tasks.”

Urbatsch acknowledged that there was a duplicate time entry in the billing records he submitted with his fee petition. Consequently, he agreed to remove \$30.00 from the requested fee total. He responded to the examiner's comments about fees and costs associated with the fee petition by noting that such fees and costs are reimbursable pursuant to provisions of the Probate Code and local rules.

After Urbatsch filed his response to the examiner's notes, the probate examiner prepared a second set of written comments responding to the fee petition. The examiner raised three separate issues—(1) the timing of the petition, (2) fees related to the section 3100 petition, and (3) reasonableness of the fees. The examiner acknowledged that the fee petition was timely under the Probate Code, but stated “[t]his court has a Local Rule stating it prefers to consider fees when the account is presented. This rule allows the court to have a full picture of the estate before awarding fees.” The examiner also stated, “Counsel may be asked to what extent the Inventory includes separate property [versus] community property.”

In addressing the section 3100 petition, the examiner stated as follows: “The response states this petition was prepared because the wife of the Conservatee sought Counsel's assistance in purchasing a home and it was discovered that she would need the signature of the Conservatee to complete that purchase.” The examiner reiterated, “Counsel may be asked to address the benefit to the Conservatee from this work.” The third issue raised by the examiner was a single sentence: “The Court to determine reasonable fees.”

The probate court held a hearing on the fee petition on June 27, 2011. Urbatsch was the only person who appeared before the court. The court began by questioning the timing of the request, as follows:

“THE COURT: Good morning. This is on for a petition for fees and cost[s]. So, let's begin with, while the [Probate Code] permits the filing of the petition for fees and cost[s] at this time, the Local Rule discourages it. So, the question is why now and why not file the petition for fees along with the accounting?

“MR. URBATSCH: Well, Your Honor, the code does authorize us to make this petition. Now, we decided we needed to meet our payroll so we need the money.”

“THE COURT: That’s an honest answer. Okay.”

The court next asked Urbatsch how the preparation of the section 3100 petition benefited the conservatee, Xie. Urbatsch responded: “The conservatee and his wife were married for over 40 years, longer than I’ve been alive; and he’s now residing at Laguna Honda; she’s residing with the family, her daughter. And the entire part of the conservatorship estate is the proceeds from a lawsuit. [¶] And so they asked—they, the mother had asked—or the wife had asked is she could—she wants—in the process of buying a condo so she can live on her own, away from the family, and have more room. She did not know that she was supposed to get the conservatee’s signature because she was using community property assets, her share of the community property assets to purchase the condo. [¶] They came to us in a panic at the last minute, ask[ed] us if we could help them get his signature; and because he couldn’t sign, they’re going to have [conservator of the estate] Debra Dolch sign on his behalf. So, we were in the process of preparing the paperwork. [¶] I’m sure that he would have supported that had he had the capacity to say so. It was for his wife of 40 years. So, that’s why we were working on the paperwork. It was, again, a rush job. It was done in a hurry because I had to get the signing done to make sure they can make the closing. [¶] At the last minute, they decided that they just didn’t have enough time, and they were just going to rethink this whole process and cancel the purchase of the condo. But we had already done the work to prepare the petition. And we are talking about a thousand three hundred dollars worth of work roughly. So, we felt it was what the conservatee would have wanted had he been able to express his concern.”

Finally, the probate court inquired about the conservatorship estate inventory, asking what part was separate property and what part was community property. Urbatsch responded that the entirety of the estate was community property because proceeds from litigation are characterized as community property pursuant to Family Code section 780. The court stated it would look at the cited statute and then took the matter under submission.

In a written order filed July 1, 2011, the court authorized the conservator of the estate of Xie to pay Urbatsch the sum of \$6,841.76 as compensation for services and costs rendered in connection with the establishment of the conservatorship. The court used the

written order submitted by Urbatsch but crossed out “\$10,736.76” and wrote “\$6,841.76” in its place. The order offers no explanation for the reduction of \$3,895 from the amount of requested fees and costs. Urbatsch filed a timely appeal from the order authorizing payment of attorney fees and costs.

DISCUSSION

I. *Standard of Review and Applicable Law*

Section 2642 provides that, upon a petition by an attorney who has rendered services to a conservator of a person or estate or both, the court shall allow compensation to the attorney for services rendered to the conservator that “the court determines [is] reasonable.” (§ 2642, subd. (b).) The determination of what constitutes reasonable attorney fees rests in the sound discretion of the trial court. (*Conservatorship of Levitt* (2001) 93 Cal.App.4th 544, 549.) “The ‘ ‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’ ” [Citation.]” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

“A fundamental rule of appellate review is that ‘ “[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” [Citations.] The record must firmly establish an abuse of discretion. [Citation.] ‘The burden is on the party complaining to establish an abuse of discretion.’ [Citation.]” (*Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.)

There is no statutory requirement that the probate court make specific findings of fact supporting an allowance for attorney fees and costs. (See §§ 2640, subds. (a)(3) & (c), 2642.) Indeed, as Urbatsch acknowledges, a trial court is not required to explain the basis for its decisions on motions for attorney fees and costs. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67.) “In awarding attorney fees in a lesser amount than requested, trial courts are not required to specify each and every claimed item found to be unsupported or unreasonable. [Citation.]” (*Ibid.*)

“The absence of an explanation of a ruling may make it more difficult for an appellate court to uphold it as reasonable, but we will not presume error based on such an omission.” (*Gorman v. Tassajara Development Corp.*, *supra*, 178 Cal.App.4th at p. 67.) The record must provide some rationalization for a trial court’s attorney fee award in order for it to be affirmed on appeal. (See *id.* at p. 101.) “A reduced award might be fully justified by [the trial court’s] general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections.” (*Ibid.*) Alternatively, even if the trial court failed to supply an explanation, the rationalization for a reduced fee allowance may be found elsewhere in the record, such as in the positions parties took or in the written submissions relating to the fee request. (Cf. *ibid.*) It is only when a reduced fee allowance is “inscrutable to the parties involved in the case[] and there is no apparent reasonable basis for the award in the record” that a fee allowance might be characterized as arbitrary. (*Ibid.*)

II. Reasonableness of the Allowance for Fees and Costs

Urbatsch contends the probate court arbitrarily reduced the amount he requested as attorney fees. He argues that preparation of the section 3100 petition benefited the conservatee even if the petition ultimately was not filed. Consequently, he claims it was error to exclude the \$2,335 in fees associated with that effort. He further claims that, even if the section 3100 petition fees were properly excluded, there is a “*wholly unexplained* reduction of \$1,550” beyond the amount related to the section 3100 petition. As we explain, the record on appeal supplies a rationalization for the court’s reduction in the requested allowance for fees and costs.

With regard to the section 3100 petition, it was Urbatsch’s burden to demonstrate that the legal services related to that petition benefited and were in the best interest of the conservatee. (See Cal. Rules of Court, rules 7.702(3), 7.751(b).) Initially, Urbatsch’s petition failed to mention what benefit the conservatee received from the legal work associated with the section 3100 petition. The only reference to the section 3100 petition was contained in cryptic time entries in the billing statement submitted with the fee petition. It was only after the probate examiner questioned the benefit of the services that Urbatsch

filed a response explaining that Xie's wife sought his assistance in using a share of the litigation proceeds to purchase a home. Urbatsch essentially stated that the purchase was intended to benefit Xie's wife, noting that he believed Xie would have approved of the effort to aid his wife's well-being. When he was asked by the probate court whether the preparation of the section 3100 petition benefited the conservatee, Urbatsch provided a response much like the one he had previously offered in writing. Among other things, he claimed that Xie's wife wanted to buy a condominium and needed her husband's signature to complete the transaction. Urbatsch described the legal work as something he thought Xie would have wanted for his wife of 40 years.

Based on this record, we discern no abuse of discretion in reducing the fee allowance by the amount of fees associated with the section 3100 petition. Urbatsch failed to establish how preparation of a section 3100 petition (that was never filed) benefited the conservatee. Rather, his claim was that work was done to benefit the conservatee's wife. At most, he asserted his belief that Xie would have approved of the effort to assist his long-time spouse.

In his appellate brief, Urbatsch provides a more expansive justification supporting his request for attorney fees associated with the section 3100 petition. He has also attached a copy of the draft section 3100 petition in his appellant's appendix, even though there is no indication the draft petition was presented to the probate court. We will disregard the draft petition as well as the new arguments contained in the appellate briefing, including the argument that preparation of the section 3100 petition was for Xie's benefit because he and his conservator had a legal obligation to support Xie's wife. In considering whether the probate court abused its discretion, we must necessarily confine ourselves to the record before that court at the time it exercised its discretion. (See generally *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [reviewing courts generally consider only matters that were part of the record at time judgment was entered]; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 161 [abuse of discretion measured by record at time of ruling]; *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1237 ["it would be eminently unfair to assess a trial court's exercise of discretion based on matters not before it at the time of decision"].) We have set forth in this opinion the entirety of Urbatsch's

statements to the probate court regarding the section 3100 petition. We conclude the court acted within its discretion in declining to compensate Urbatsch for work associated with the section 3100 petition.

Having determined there was no error in deducting the fees related to the section 3100 petition, we next turn to Urbatsch's contention that the remaining deduction of \$1,550 is "*wholly unexplained*" and "does not match any permutation imaginable for a reasoned reduction of unreasonable fees." We disagree.

The probate examiner made clear there was a concern about fees charged for administrative services, such as mailing, preparing documents to be filed or served, and scanning documents. Urbatsch responded that he was amenable to a reduction in fees for specific tasks that fell within the scope of the examiner's concern. A reasonable assumption is that the court reduced the requested fees by the amount associated with administrative tasks. Indeed, we can easily arrive at the amount of the fee reduction by identifying each paralegal billing entry that involves preparation of documents for filing, scanning, mailing, service, or actual filing. By doing so, we calculate fees totaling \$1,550, which corresponds exactly to the amount of the reduction beyond that associated with the section 3100 petition.⁴

The reduced award therefore can be rationalized by reference to the record before the probate court. It was not unreasonable for the court to reduce the fee allowance by amounts

⁴ The pertinent paralegal billing entries include: (1) entry dated June 17, 2010, referring to drafting conservatorship documents (\$150); (2) entry dated June 18, 2010, referring to drafting conservatorship documents (\$450); (3) entry dated July 15, 2010, referring to forwarding documents for signature (\$30); (4) entry dated August 20, 2010, referring to preparing documents for filing (\$150); (5) entry dated September 3, 2010, referring to preparing and serving petition (\$150); (6) entry dated October 20, 2010, referring to preparation and mailing of various documents (\$200); (7) entry dated October 20, 2010, referring to scanning email (excluding duplicate entry for same task) (\$30); (8) entry dated December 8, 2010, referring to preparing document for filing with court (\$30); (9) entry dated February 17, 2011, referring to preparation of declaration for filing (\$45); (10) entry dated March 4, 2011, referring to mailing notice to all parties (\$90); (11) entry dated March 7, 2011, referring to preparing notice to be filed (\$75); (12) entry dated March 15, 2011, referring to drafting of supplemental inventory (\$75); and (13) entry dated March 25, 2011, referring to sending notice to all interested parties (\$75).

associated with clerical tasks, such as preparation of standard forms, mailing, filing, and scanning. Urbatsch received notice of the probate examiner's concern and was permitted to respond. Under the circumstances, we find no abuse of discretion in reducing the fee allowance by amounts associated with tasks characterized as clerical or administrative in nature. Taken as a whole, the court's reduction of the fee allowance for amounts associated with the section 3100 petition and clerical tasks was well within the court's broad discretion.

III. *Local Rule Preference on Timing of Fee Petition*

Urbatsch surmises that the court reduced his fees as a “disguised penalty” for filing his fee petition before the time preferred by the probate court, as expressed in a local rule specifying that court prefers to hear fee petitions at the time an accounting is considered. He claims he “was penalized by back door enforcement of an otherwise non-enforceable local rule.” We reject Urbatsch's claims of error.

As an initial matter, Urbatsch's argument must be rejected because it relies entirely on speculation. As we have explained, an order of the lower court is presumed correct, and we will not speculate as to whether a court erred when the record is silent. (*Conservatorship of Rand, supra*, 49 Cal.App.4th at p. 841.) Here, although the probate court asked Urbatsch to comment on the timing of the petition, it did not expressly or impliedly suggest it was reducing the fee allowance as a penalty for Urbatsch's filing his fee petition before an accounting could be performed. To the contrary, as described in the previous section of this opinion, the amount of the reduction can be accounted for by reference to two issues raised by the probate examiner—the fees related to the section 3100 petition and paralegal fees associated with clerical tasks. It is not only improper but unnecessary to speculate about whether the court might have been motivated to punish Urbatsch for filing his fee petition before the time preferred by the local rules.

Further, insofar as Urbatsch suggests the local rule is inconsistent with section 2640, subdivision (a), we disagree. Under section 2640, subdivision (a), a petition for compensation may be filed “at any time after the filing of the inventory and appraisal but not before the expiration of 90 days from the issuance of letters” of conservatorship. San Francisco Superior Court Local Rule 14.96(B) echoes the statutory language, stating in part:

“No fees to the fiduciary or the fiduciary’s attorney will be ordered paid in . . . conservatorship proceedings until the filing of an inventory and in no event, before the expiration of ninety (90) days from the issuance of letters. Probate Code §§ 2640-2642.” What Urbatsch objects to is the language that follows: “*The Court prefers to determine the amount of fees at the time an accounting is considered.*” (S.F. Local Rule 14.96(B), italics added.) Urbatsch claims this preference is not authorized by the Probate Code and essentially allows the probate court to penalize attorneys for filing a fee petition before the preferred time even though the petition is timely under the Probate Code.

We reiterate that there is no reason to believe Urbatsch was penalized for filing his fee petition before an accounting could be done. Further, there is nothing before this court to suggest the probate court in San Francisco has a policy or practice of penalizing attorneys who file fee petitions before an initial accounting.

Moreover, we see no inconsistency between the local rule’s preference for considering fee petitions in connection with an accounting and the Probate Code’s specification of when a fee petition may be filed. Section 2640, subdivision (a) provides that a petition may be filed after the specified time “or any other period of time as the court for good cause orders.” Plainly, if an accounting has not yet been performed, and there is a question about the value or composition of the conservatorship estate, there is good cause to question the propriety and amount of an attorney fee allowance. As the probate examiner explained, the local rule “allows the court to have a full picture of the estate before awarding fees.” Further, the local rule is consistent with the California Rules of Court, which provide: “Notwithstanding the time period after which a petition may be filed for an allowance of compensation to . . . an attorney for a . . . conservator, the court may order the . . . conservator to file an accounting before or at the time a petition for an allowance of compensation is filed or heard.” (Cal. Rules of Court, rule 7.752.)

If an attorney seeks to be compensated before an accounting has been performed, the attorney should expect a fee petition to receive careful scrutiny. Indeed, it appears the court in this case devoted some attention to understanding whether the conservatorship estate was composed of separate or community property. Although the court was authorized to do so

under California Rules of Court, rule 7.752, it did not order an accounting before ordering the conservator to pay fees. Given the straightforward composition of the conservatorship estate in this case—consisting entirely of litigation proceeds—it is not surprising the court decided to forgo an accounting under the unique circumstances presented here.

In short, we see nothing improper in a local rule providing that the probate court prefers to consider fee petitions in connection with an accounting of the conservatorship estate. As this case demonstrates, the expressed preference does not prevent the court from ordering the payment of an allowance for reasonable fees and costs before an accounting has been performed.

DISPOSITION

The court’s July 1, 2011, order authorizing the payment of attorney fees and costs is affirmed. Each party shall bear its own costs on appeal.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.