2019 IL App (2d) 180602-U
No. 2-18-0602
Order filed July 2, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re THE ESTATE OF JEAN OSTROM,	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
(Laurie Byrge, Petitioner-Appellee and	)	No. 08-P-291
Cross-Appellant v. Linda Sunnen, in her	)	
Capacity as the Successor Trustee of the	)	
Leonard Ostrom Irrevocable Trust dated	)	Honorable
December 31, 1994, Respondent-Appellant	)	John A. Noverini,
and Cross-Appellee).	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court retained *in personam* and subject matter jurisdiction to adjudicate Laurie's request to enforce the settlement agreement and agreed care plan entitling Laurie to be paid $56,000 for suspended caregiver expenses; and Linda failed to present evidence of a change in circumstances requiring a change in the settlement agreement. The trial court did not err in denying Laurie's cross-appeal for attorney fees. Affirmed.

¶ 2 This appeal arises out of the adult guardianship proceeding of Jean Ostrom and the payment of caregiver fees to one of her daughters, petitioner, Laurie Byrge, to be paid by Jean's other daughter, respondent, Linda Sunnen, as successor trustee of the Leonard Ostrom Irrevocable Trust dated December 31, 1994 (Trust). The parties entered into a settlement agreement and agreed care plan for Jean where Laurie would be paid to care for Jean. The Trust

paid Laurie these fees. At one point, the public guardian sought to have Jean placed in a residential facility and the payments to Laurie were suspended. The placement never occurred and Laurie continued to care for Jean until Jean's death. Laurie sued the Trust for the suspended payments, and the trial court ordered the Trust to pay Laurie. Linda, as trustee, appeals the order of the trial court requiring the Trust to pay the fees arguing that (1) the trial court did not have *in personam* jurisdiction over the Trust; (2) the trial court did not have subject matter jurisdiction to enter the order after Jean died; and, (3) even if the trial court had jurisdiction, Laurie was not entitled to the payments based on changed circumstances. Laurie, who petitioned for the Trust to pay her attorney fees, cross-appeals from the trial court's denial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The Trust, dated December 31, 1994, was created by Leonard Ostrom with life insurance proceeds in order to support both Jean and Linda. Jean was the initial trustee and Linda was to succeed her if she became unable to continue in that capacity. The Trust provided that, after Leonard's death, the trustee may pay part or all of the net income to Jean as necessary or advisable for her health, maintenance, and support. Following the deaths of Leonard and Jean, the Trust was to distribute to Linda and her descendants as provided in the Trust. On July 30, 2007, the Trust, with Jean as trustee, loaned Laurie and Kenneth Byrge (Laurie's husband) $750,000 to purchase a home in St. Charles, Illinois.

¶ 5 On June 9, 2008, Linda filed a petition to appoint a guardian for her mother Jean. Linda requested that she be appointed guardian of Jean's person and estate. The trial court appointed Mary Agrella as guardian *ad litem* (GAL). The GAL report states that Jean had been living with Laurie and paying Laurie $5,400 per month since the fall of 2007, and that sum was meant to be Jean's contribution toward her living expenses and compensation for the care Laurie provided

for Jean. The GAL recommended that Jean continue to live with Laurie in Laurie's home in St. Charles and that Jean have unrestricted contact with Linda. Jean's attorney filed an answer stating that Jean preferred to live with Laurie and she requested that funds from both of her trusts, one established by her and one established by her husband, be used for her care.

¶ 6 On October 28, 2008, Christine Adelman, the Kane County Public Guardian, was appointed temporary guardian of Jean's person and estate. A plan of care was developed in accordance with a court order. It set forth a budget of Jean's caregiver costs as well as a portion of the living expenses attributable to Jean, and recommended that Laurie be paid $5,600 per month for those costs. The plan noted that the Trust had $144,000 in liquid assets, plus a $750,000 mortgage. Other funds available to Jean included a bank account and proceeds from the sale of Jean's condominium. The plan also noted that Jean was receiving excellent care at home from Laurie and recommended that it continue.

¶ 7 On January 14, 2009, the trial court appointed Adelman as plenary guardian of Jean. Linda filed a motion to reconsider and to vacate the order. Nevertheless, on April 3, 2009, Linda relied on the appointment of the guardian to prepare a memorandum of trust to declare herself the successor trustee of the Trust. Jean's attorney then asked the court to strike the motion to reconsider and vacate.

¶ 8 On March 19, 2009, the trial court set a trial on all pending motions. On March 30, 2009, Adelman filed a petition for citation and other relief, seeking *inter alia* that the note from the Trust to Laurie and Kenneth be ratified and that Jean be replaced as trustee by the guardian. Linda filed several other motions, and an amended petition for guardianship. The trial court continued the trial to June 24, 2009, and extended the deadlines for discovery.

¶ 9 On May 1, 2009, Laurie filed a cross-motion for payment of the ward's bills and expenses, alleging that the accountant for Jean and for the Trust, Michael Rubin, had used the Trust to pay Jean's bills and provide for her care and comfort. However, Linda had stopped doing that and failed to make the Trust funds available for Jean's care. The motion sought to remove Linda as trustee and to resume the arrangements with Michael Rubin.

¶ 10 On June 11, 2009, Linda, on behalf of the Trust, filed a motion to dismiss the guardian's petition for citation, asserting lack of *in personam* jurisdiction on the basis that Linda as successor trustee of the Trust may only be sued by serving her with appropriate process, which had not occurred. Linda also alleged that the probate court lacked subject matter jurisdiction to change trustees. Linda filed a special and limited appearance and a similar motion to dismiss Laurie's cross-motion for payment of expenses.

¶ 11 On June 24, 2009, before the motions could be resolved, the parties settled the matter. The Kane County Public Guardian, Linda, Laurie, Jean (through her court-appointed lawyer), and Jean's guardian *ad litem* entered into a settlement agreement and an agreed plan of care for Jean, which was approved by the court.

¶ 12 Regarding finances, the parties agreed that Adelman would be the plenary guardian of both the person and estate of Jean and that Jean's care would be financed by her assets, using the funds from the sale of Jean's condominium and funds held in a bank account in the names of Jean, Linda, and Linda's husband. Linda, individually and as successor trustee, also agreed to the following:

> (1) Linda, individually and in her capacity as the successor trustee, acknowledged that the funds currently held in the Trust would be retained for the benefit of Jean during

her lifetime and be available for Jean's care and support when the funds from the sale of her condominium and the funds in the bank account are exhausted;

(2) Linda, individually and in her capacity as successor trustee, stipulated that she will hereafter take no action with respect to the July 2007 loan transaction between Laurie and Kenneth, except for those remedies that are specifically provided in the loan documents themselves, during the lifetime of Jean;

(3) the acknowledgements by Linda, in her capacity as the successor trustee, that are made above, are made to facilitate the resolution of the issues pending in the guardianship case of Jean and "such acknowledgments and stipulations do not otherwise submit the [Trust] or [Linda] in her capacity as the successor trustee to the jurisdiction of the guardianship court beyond the parameters of the acknowledgments and stipulations contained herein."

The parties also approved a dismissal of the citation filed by the guardian against both Laurie and Linda and a suspension of all powers of attorney naming either Linda or Laurie as agents for Jean.

¶ 13 The trial court entered an order approving both the amended care plan and the settlement agreement, stating:

"The Court having participated in several pretrial conferences and with the active participation of the Court the respective parties have this day executed an Agreement Amended Care Plan and Settlement and the Court having reviewed the Agreed and Amended Care Plan and Settlement Agreement, each of the aforementioned documents are hereby approved by this Court."

¶ 14 The guardianship continued for several years. On August 11, 2011, the guardian requested approval to increase Laurie's monthly payments by $475 for expenses for Jean's care, which the court approved. The guardian's periodic reports show payments to Laurie in the requisite amounts throughout the guardianship until July 2017.

¶ 15 On December 18, 2013, the guardian filed a motion for release of funds, alleging that the Trust needed to contribute its fund for Jean's care and requesting an order to release $50,000 quarterly beginning January 1, 2014, from the trustee to the guardian. On December 19, 2013, the trial court, with Linda's and Laurie's counsel present, entered an agreed order stating: "The trustee of the [Trust] is to release to C. Adelman, guardian $50,000 each quarter commencing January 1, 2014(,) and thereafter until further order of court." By January 26, 2017, Linda had made nine deposits of $50,000 each, totaling $450,000 toward Jean's health care and other expenses.

¶ 16 On March 4, 2015, the court ordered Adleman's counsel to distribute Trust documents to all parties. Linda subsequently filed an objection to the distribution of the documents, arguing that although the Trust agreed to supply funds for Jean's care, it did not otherwise submit to the jurisdiction of the guardianship court "beyond the parameters of the acknowledgements and stipulations herein"; and (2) the guardian had requested that the Trust provide an accounting, but that Laurie and other parties, who are not beneficiaries, are not entitled to an accounting of the Trust. The trial court sustained the objections and vacated paragraph four of the order that Adelman's counsel distribute Trust documents.

¶ 17 On April 28, 2017, Adelman resigned as guardian and the court appointed Diana M. Law as Jean's successor guardian. She filed an emergency petition for residential placement and to establish a pooled trust. The petition alleged that the trustee, Linda, informed Law that the

current Trust assets were approximately $22,000. The petition did not attach any evidence to demonstrate the current assets of the Trust. Law listed the costs of Jean's care, including caregivers employed by BrightStar Care and the expenses for care provided by Laurie. Law believed that an OBRA '93 pooled payback trust would need to be created and that Jean would need to be placed in an appropriate residential facility. Thus, she requested leave to place Jean in an appropriate residential care facility, apply for Medicaid benefits for her, and create a self-settled pooled payback trust and fund it with Jean's assets, including the assets held in the Trust. The petition did not request that the payments to Laurie cease before Jean was moved and the pooled payback trust was created.

¶ 18 Laurie filed a response, noting that the Trust also held a note and mortgage, and that since July 2007, she and her husband had paid the Trust a total of $592,151.13, consisting of both monthly payments on the mortgage and proceeds from the sale of her former St. Charles' residence. Laurie thus questioned how the Trust could only have $22,000 in assets and argued that the establishment of a pooled payback trust was not necessary.

¶ 19 On July 21, 2017, the trial court ordered that Jean be placed in a facility of the guardian's choosing, and continued the petition for a pooled trust. The court also suspended payments to Laurie "until further order of the court."

¶ 20 On August 18, 2017, Laurie filed a motion to reconsider. Laurie noted that the July 21, 2017, order occurred after a conference with the attorneys in chambers and not following a hearing and it was based on the representation by counsel without any evidence presented that the Trust had only $22,000 remaining in the Trust. The motion argued that there was no evidence establishing that removing Jean from her residence with Laurie and into a nursing facility was in Jean's best interests. In fact, Jean's physician stated that removing her would be

contrary to her best interests. The motion further argued that, contrary to the Probate Act of 1975 (Probate Act), the guardian may not place the ward outside of her home until the guardian has visited the facility and Law had not done so. See 755 ILCS 5/13-5(b) (West 2018). Laurie requested an accounting of the Trust based on the representation that it had insufficient assets to care for Jean.

¶ 21 On August 29, 2017, the trial court vacated its earlier order to the extent it directed the placement of Jean in a nursing facility. The order suspending the caregiver payments to Laurie was not affected and the trial court never ruled on Law's petition regarding the OBRA '93 pooled payback trust and none was ever established.

¶ 22 On January 3, 2018, Laurie filed a motion to resume caregiver payments. In that motion, she alleged that, even after the payments to her were suspended, she continued to provide 24-hour care, housing, and support for Jean. The motion also alleged that on November 21, 2017, she sold the St. Charles home and she and her husband paid the Trust approximately $530,260. Accordingly, Laurie maintained that the Trust had sufficient funds to both resume the caregiver payments and to pay the amount which accrued while the payments were suspended, which at the time totaled $39,200. Linda opposed the motion.

¶ 23 While the motion was pending, Jean died on April 23, 2018. Laurie amended her motion, repeating the allegations of the original motion and further alleging that since the filing of the original motion, Laurie continued to provide care and services for Jean until her death. The motion also argued that the settlement agreement entered in 2009 obligated the Trust to provide funds to the guardianship estate and that the trial court had jurisdiction to enforce the agreement. The motion requested that Laurie be awarded caregiver payments accruing from July 2017 through April 2018, for a total of $56,000, plus attorney fees incurred in presenting the motion

and that the Trust be required to pay those costs. Laurie attached several exhibits to the motion, including the closing statement of the sale of the property for which the Trust held a first mortgage.

¶ 24 Linda objected again, characterizing Laurie as a "creditor." She alleged that (1) the trial court lacked *in personam* jurisdiction over the Trust; (2) the court lacked subject matter jurisdiction due to Jean's death; (3) there were changed circumstances; and (4) Laurie was not entitled to attorney fees. Linda did not provide evidence of the changed circumstances or an amount of what she believed Laurie had incurred.

¶ 25 On July 18, 2018, following argument, the trial court found that it had "jurisdiction to enforce the settlement agreement and to award the amounts sought in the amended motion" and ordered, *inter alia*, the Trust to pay Laurie $56,000. The court further denied Laurie's request for attorney fees.

¶ 26 Linda appeals, claiming that the trial court did not have *in personam* jurisdiction over the Trust, that the court did not have subject matter jurisdiction to enter the order after Jean died, and, in any event, Laurie was not entitled to the payments based on changed circumstances. Laurie cross-appeals from the denial of her petition for attorney fees.

¶ 27 II. ANALYSIS

¶ 28 A. *In Personam* Jurisdiction

¶ 29 Linda argues that the trial court lacked *in personam* jurisdiction over the Trust and therefore did not have the ability to order the Trust to pay Laurie the amount owed for Jean's care. The issue of whether the trial court has *in personam* jurisdiction over a party is a question of law to be reviewed *de novo*. *In re Estate of Burmeister*, 2013 IL App (1st) 121776, ¶ 27. *De*

novo consideration means that we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 30 Courts have no power to adjudicate a personal claim or obligation unless they have personal jurisdiction over the parties. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957). Generally, a court acquires jurisdiction over a party only after a proper service of summons. *In re A.M.*, 128 Ill. App. 3d 100, 103 (1984). There are exceptions, and if a party voluntarily appears or is allowed to intervene, the court will obtain jurisdiction over the party. *Id.* at 103-04. If a party participates in the proceeding on its merits, even after a special appearance has been filed, that party waives the special appearance and jurisdictional challenge when it takes such affirmative action dealing with substantive issues thereby amounting to a general appearance and submitting itself to the jurisdiction of the court. *In re Possession and Control of the Commissioner of Banks and Real Estate*, 327 Ill. App. 3d 441, 464 (2001). "Although the court participation may come in many forms, suffice to say that any action taken by the litigant which recognizes the case as in court will amount to a general appearance unless such action was for the sole purpose of objecting to the jurisdiction." *Lord v. Hubert*, 12 Ill. 2d 83, 87 (1957).

¶ 31 Here, for purposes of enforcing the settlement agreement, Linda submitted the Trust to the jurisdiction of the court. In the settlement agreement, Linda, both individually and as trustee, agreed that the Trust would pay for Jean's care. The agreement stated that the Trust was not "otherwise" submitting to the jurisdiction of the guardianship court.

¶ 32 Laurie finds the case of *In re Estate of Burmeister*, 2013 IL App (1st) 121776, instructive. In that case, the Trust, a non-party, submitted itself to the court's jurisdiction by asking the court for direction on how to make distributions. *Id.* at ¶ 35. The appellate court stated that an action taken by a litigant which recognizes the case as in court amounts to an appearance. The court

stated: "As our supreme court instructed in *Lord v. Hubert*, 'a person cannot, by his voluntary action, invite the court to exercise its jurisdiction and at the same time deny that jurisdiction exists.' " *Id.* (quoting *Lord*, 12 Ill. 2d at 87). In this case, at least for purposes of enforcing the agreement, the Trust, by entering into an agreement to pay for Jean's care, recognized that the case was pending and submitted itself to the court's jurisdiction.

¶ 33 Linda argues that the limiting language in the settlement agreement controls. The use of the word "otherwise" means that, with respect to providing funds for Jean's care, the Trust was subjecting itself to the jurisdiction of the trial court, while not subjecting itself for other purposes. The effect of the limiting language can be seen by the trial court's order concerning that the court first ordered that the Trust distribute trust documents to all parties. On reconsideration, the court vacated that order after Linda highlighted the limiting language in the agreement. The Trust did not submit itself to the court's jurisdiction to be responsible for rendering an accounting to the parties, but it certainly did as it related to the payment for Jean's care.

¶ 34 Furthermore, on December 19, 2013, Linda's attorney appeared and agreed to the order requiring the Trust to make quarterly payments to the guardianship estate in the amount of $50,000. The record shows that the Trust complied with the order for three years, making nine payments of $50,000 each without complaining that the trial court lacked jurisdiction to enforce the settlement agreement against the Trust. Thus, the Trust also submitted itself to the jurisdiction of the trial court for purposes of the settlement agreement when it was ordered by the trial court to make $50,000 quarterly payments for Jean's care.

¶ 35 B. Subject Matter Jurisdiction

¶ 36 Linda next argues that the trial court lost subject matter jurisdiction over the Trust upon Jean's death on April 23, 2018. Whether a court has subject matter jurisdiction is a question of law that we review *de novo*. *Parmar v. Madigan*, 2018 IL 122265, ¶ 17.

¶ 37 Subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs. *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 334 (2002). With the exception of the circuit court's power to review administrative actions, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution. Ill. Const.1970, art. VI, § 9; *Belleville Toyota*, 199 Ill. 2d at 334; *In re Lawrence M.*, 172 Ill. 2d 523, 529 (1996).

¶ 38 Linda cites *In re Estate of Gebis*, 186 Ill. 2d 188 (1999), for the rationale that, once the ward dies, under the procedures set forth in the Probate Act, all claims must be paid through a decedent's estate so that payments are made in the order of the classes established in the Probate Act. The court in *Gebis* limited a circuit court's jurisdiction where the "circuit court's power to act is controlled by statute." *Id.* at 193. The *Gebis* court reasoned that in those cases, "the circuit court is governed by the rules of limited jurisdiction and must proceed within the statute's strictures." *Id.*

¶ 39 Linda's reliance on *Gebis* is misplaced because Laurie's motion did not raise a claim against Jean's estate. Rather, she sought to have the Trust pay for Jean's caregiving expenses as it had agreed to do in the settlement agreement and amended plan of care. Laurie's entitlement to reimbursement for Jean's living and care expenses and the Trusts' duty to pay the expenses were contemplated by the guardianship court itself as part of the settlement agreement and amended plan of care which was agreed to by all parties, including the Trust.

¶ 40 This case is more similar to *In re Estate of Ahern*, 359 Ill. App. 3d 805, 810 (2005), where the court held that, even if the trial court lacked jurisdiction under *Gebis* with respect to claims against a guardianship estate, the claim was for fees awarded prior to the ward's death against a party other than the ward's estate, namely a separate legal entity, the Trust. Therefore, the court held that the reasoning used in *Gebis* would not be applicable. *Id.* Likewise, here, Laurie was awarded caregiver expenses before Jean's death in the 2009 settlement agreement and amended plan of care. The payments were merely suspended and they continued to be incurred while Jean was still alive. In Laurie's motion, she sought what she had already been awarded before Jean's death. Additionally, Laurie sought to enforce those fees against the Trust, not against the guardianship or the decedent's estate. Accordingly, we find the trial court retained subject matter jurisdiction to adjudicate Laurie's request to enforce the settlement agreement.

¶ 41 C. Changed Circumstances

¶ 42 Assuming *arguendo* that the trial court has jurisdiction, Linda argues that the circumstances which existed at the time the settlement agreement was entered into were different than those when the trial court allowed the guardian to cease making payments to Laurie, and therefore, Laurie has not shown she was entitled to the suspended caregiver fees based on changed circumstances.

¶ 43 As noted by Laurie, pursuant to the settlement agreement, she had been receiving $5,600 per month to provide care and living arrangements for Jean. The trial court suspended those payments in July 2017 when the guardian maintained that Linda had informed her that the Trust had only $22,000 remaining in assets. Despite the suspension of payments, Laurie continued to provide for Jean's care and living arrangements, as acknowledged by the guardian in her final

report. In November 2017, Laurie sold the St. Charles home and paid the Trust over $500,000, which appeared to provide funds for Jean's care. It should be noted that Laurie also paid the Trust over the life of the loan for the St. Charles home. Believing that the Trust had enough assets to cover the suspended payments, Laurie filed a motion in January 2018 to receive the suspended caretaker payments. After she filed the initial motion, Jean died and Laurie filed an amended motion in May 2018, alleging that with the partial payoff of the promissory note, the Trust regained the ability to provide for the suspended caretaker payments for Jean.

¶ 44 At the hearing, Linda continued to raise the *in personam* and subject matter jurisdictional arguments. Linda further maintained, alternatively, as she does on appeal, that the circumstances which existed at the time the settlement agreement was entered into were different than those when the trial court allowed the guardian to cease making payments to Laurie, and therefore, Laurie had not shown she was entitled to the suspended caregiver fees. Linda noted that the guardian had filed a motion, verified by the trustee, that there were insufficient funds in the Trust to pay everything. Linda maintained that Laurie could not assume that the Trust had money to provide for the suspended caretaker payments. Linda also argued that "[t]he money that came in after the sale of the house was not then currently held funds in 2009" and that was not funds that Linda, as trustee could have used. Finally, Linda argued that there was a change of circumstances of costs because Laurie sold the St. Charles home and Laurie's housing costs were reduced, thereby implying Laurie had more money to care for Jean.

¶ 45 The problem with Linda's arguments, as pointed out by Laurie, is that she never supported her assertions with evidence at the hearing (nor is there evidence in the record) that there were insufficient funds in the Trust. We agree that because Linda was asserting a change in circumstances requiring a change in the settlement agreement, she had the burden of proving

those changes, not Laurie. The burden of proof rests with the party who asserts a change exists. See *People v. Orth*, 124 Ill. 2d 326, 337 (1988) (the burden of proof in a civil proceeding generally rests on the party requesting relief). At the very least, Linda could have made an offer of proof. An adequate offer of proof appraises the trial court of what the offered evidence is or what the expected testimony will be, by whom it will be presented, and its purpose. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 451 (2004). Failure to present evidence of a change in circumstances or to make such an offer of proof results in waiver of the issue on appeal. *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 561 (2004).

¶ 46 In response to Laurie's amended motion, Linda argued, as she does on appeal, that the Byrges had defaulted on the promissory note to the Trust and therefore, their "need" was "obviated." While the evidence shows otherwise, the status of the Trust's loan to the Byrges has nothing to do with the Trust providing for Jean's needs pursuant to the settlement agreement. As stated by Laurie, the "Trust's payments to Laurie contemplated by [the settlement agreement] were based on Jean's needs, not Laurie's." Any allegations concerning Laurie's default does not change Jean's needs.

¶ 47 Moreover, the argument that Laurie's housing costs decreased after the Byrges sold the St. Charles property and moved to an apartment has nothing to do with the costs of Jean's needs. We observe that Linda cites the final report and accounting of the guardian for this assertion, but the guardian did not make a finding as to the costs or recommendations regarding what amount would be appropriate.

¶ 48 Finally, we reject Linda's contention that "[t]he money that came in after the sale of the house was not then currently held funds in 2009" and that was not funds that Linda, as trustee could have used. The care plan noted the $750,000 mortgage. The parties clearly contemplated

that the mortgage payments would be part of the Trust assets used for Jean's care. The care plan only noted $144,000 in liquid assets at that time, but over time the Trust paid out over $450,000 for Jean's care.

¶ 49 B. CROSS-APPEAL

¶ 50 A. Attorney Fees

¶ 51 Laurie cross-appeals the trial court's order denying her petition for attorney fees. Her amended motion for caregiver payments requested attorney fees but cited no basis for the request. Laurie's motion to reconsider fared no better. At the July 18, 2018, hearing, it appears that Laurie argued for the fees because she provided a benefit to the guardianship estate. On appeal, Laurie argues that she is entitled to attorney fees under section 27-2 of the Probate Act, which provides that an attorney for a representative is entitled to reasonable compensation for his services. (755 ILCS 5/27-2 (West 2018)).

¶ 52 Illinois follows the "American rule," which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 64. In this case, the settlement agreement does not provide for the Trust to pay attorney fees and therefore, Laurie cannot seek an award of attorney fees pursuant to the settlement agreement. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005) ("A court may not award attorney fees as a matter of contractual construction in the absence of *specific* language"). (Emphasis in original).

¶ 53 As stated, Laurie argues on appeal that she is entitled to attorney fees under section 27-2 of the Probate Act. Section 27-2 provides that the attorney for a representative is entitled to reasonable compensation for his services. 755 ILCS 5/27-2 (West 2018). Statutes which allow for fee provisions must be strictly construed, as they are in derogation of the common law.

Carson Pirie Scott & Co. v. State of Illinois Department of Employment Security, 131 Ill. 2d 23, 49 (1989).

¶ 54 In *The Matter of the Estate of Dyniewicz*, 271 Ill. App. 3d 616 (1995), the co-guardians' attorneys consistently maintained that they did not represent the estate but, instead, represented the co-guardians individually, and their "belated attempt to claim that their work benefitted the estate "[wa]s disingenuous and without merit." *Id.* at 625. Similarly here, Laurie's attorneys never claimed to be representing the ward or the estate. Rather, it is clear that Laurie's attorneys always maintained that they represented Laurie individually in her attempt to recover payment for the caregiver services and Laurie was never a co-guardian.

¶ 55 Laurie argues that she "saved the Estate the expenses it would have incurred had Jean been sent to live in a nursing home. In effect, Laurie was doing the things that a personal guardian would have done" pursuant to section 11(a)-17 of the Probate Act (755 ILCS 5/17(a)-17 (West 2018)). Laurie asserts that she provided living arrangements and care at an "extremely reasonable cost." Laurie further maintains that by enforcing the settlement agreement and securing payment for her services she saved the estate $56,000 in expenses and by preserving the assets of an estate necessary for the ward's support is a benefit to the estate. Therefore, Laurie contends that she is entitled to the attorney fees that she incurred in connection with securing the payment of her services to the estate.

¶ 56 None of the cases Laurie cites support her argument. In *Estate of Roselli*, 70 Ill. App. 3d 116 (1979), Alfredo Roselli died intestate. His nephew, Vincent Roselli, petitioned to be named administrator of the estate. Over his objection, another nephew Luigi Roselli, who had the consent of the majority of the other heirs, was named administrator. Vincent's attorney filed a

claim for attorney fees for services rendered on behalf of Vincent's own claim and in opposition to Luigi's petition. The trial judge awarded fees, and the administrator appealed.

¶ 57 The administrator argued that Vincent was not a "representative" as that term is used in section 27-2 of the Probate Act. The administrator also argued that Vincent's actions were not in the interest of the estate. In affirming the judgment, the appellate court held that it could not be said that the legislature intended to limit the word "representative" only to those persons legally appointed to act; that the word "representative is quite broad, meaning simply one who represents." *Id.* at 123. The court recognized that attorney fees are normally awarded only to an attorney not hired by an executor or administrator if legal services were in the interest of the estate. However, the court found that the fees were justified even for an unsuccessful representative "because by bringing the suit he has benefited the estate." *Id.* The court noted that the attorney had provided many legal services to the decedent before and at the time of his death. For example, the attorney handled tax matters related to Alfredo's wife's estate; he started conservatorship proceedings so that medical bills could be paid; and he filed letters of administration for Vincent. *Id.* at 123-24. Thus, the court found the trial court did not err in allowing attorney fees. There, unlike here, the attorney had benefitted the estate by bringing the suit and providing many legal services to the decedent before and at the time of his death. Here, however, Laurie has failed to present evidence to show how her counsel benefited the estate. Accordingly, the trial court did not err in allowing attorney fees.

¶ 58 In *In re Estate of Byrd*, 227 Ill. App. 3d 632 (1992), the ward retained the attorneys before he was adjudicated incompetent. On behalf of the ward, and the person to whom he gave a power of attorney, the attorneys acted to preserve the ward's assets prior to initiation of a guardianship. *Id.* at 634-35. The attorneys claimed they were entitled to fees pursuant to their

contracts. We agreed. *Id.* at 638. *Byrd* is inapplicable here as attorney fees were awarded pursuant to contract. Laurie does not claim that she should be awarded attorney fees pursuant to the settlement agreement

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the trial court.

¶ 61 Affirmed.