

IN THE COURT OF APPEALS OF THE
STATE OF NEVADA

IN THE MATTER OF THE
GUARDIANSHIP OF DELFORD W.
MENCARELLI, ADULT WARD.

TERRI BLACK,

Appellant,

vs.

HELEN NATKO,

Respondent.

IN THE MATTER OF THE
GUARDIANSHIP OF THE PERSON
AND ESTATE OF DELFORD W.
MENCARELLI, AN ADULT WARD.

HELEN NATKO,

Appellant/Cross-Respondent,

vs.

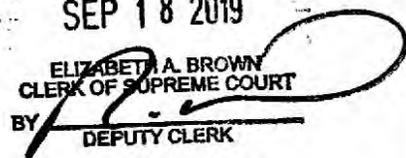
TERRI BLACK,

Respondent/Cross-Appellant.

No. 74219-COA

FILED

SEP 18 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

No. 74384-COA

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

These are consolidated appeals and a cross-appeal from district court orders in a guardianship matter. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

Delford Mencarelli was subject to an adult guardianship pursuant to NRS Chapter 159.¹ His daughter, Terri Black, commenced the underlying guardianship action in June 2013, and Helen Natko,

¹NRS Chapter 159 was amended during the 2017 legislative session, and thus, we have noted any analytical effect that these amendments may have on our analysis, as well as the district court's analysis upon remand.

19-38904

Mencarelli's live-in companion, filed a competing petition in July 2013. The district court appointed Natko the guardian after a lengthy hearing before the guardianship commissioner in 2014. Mencarelli passed away in July 2015 and Natko then filed a petition to be discharged as guardian and have a final report and accounting approved pursuant to NRS 159.177(1)(d).²

Black objected in part to the petition primarily because Natko had been criminally charged with exploitation of Mencarelli and theft of his funds. The district court deferred a full ruling on the petition until after the criminal case was resolved. The guardianship case was later transferred to a different district judge before any ruling on the merits of the petition.

Natko was found guilty of exploitation of a vulnerable person and theft. She was sentenced in August 2017 to a suspended prison term with probation that included a condition that she either pay a \$10,000 fine or perform 1,000 hours of community service. There was no restitution

²We note that NRS 159.177(1)(d) was amended during the 2017 legislative session. 2017 Nev. Stat., ch. 390, § 28, at 2559 (providing a nonsubstantive amendment that changed “NRS 159.177(4)” to “NRS 159.177(1)(d),” which is the current version). The effective date of this amendment was July 1, 2017. *Id.*, § 41, at 2571. The district court entered its order after this amendment’s effective date, and we conclude that—because these amendments were nonsubstantive (i.e., they only clarified the statutory scheme by renumbering the subsections)—this amendment was retroactive. *See, e.g., Delucchi v. Songer*, 133 Nev. 290, 293-94, 396 P.3d 826, 829 (2017) (“When the legislature amends a statute, [t]here is a general presumption in favor of prospective application. *When an amendment clarifies, rather than substantively changes a prior statute, the amendment has retroactive effect.*” (alteration in original) (emphasis added) (citation and internal quotations omitted)). Therefore, we conclude that NRS 159.177(1)(d) should be applied to this analysis regardless of the date of the filing of Natko’s petition.

ordered as the one act of theft occurred in July 2013 and the funds were returned that same month. The judgment of conviction was later reversed by this court and remanded to the district court. *See Natko v. State*, 134 Nev., Adv. Op. 103, 435 P.3d 680 (Ct. App. 2018).

Natko resubmitted her petition for approval of her final report and discharge request in August 2017. Black objected again to the petition and filed a counterpetition seeking double damages, disgorgement of all previously ordered guardian fees and expenses, and attorney fees. At the hearing in August 2017, the district court partially approved Natko's petition for fees, but denied the request for all fees and expenses, including guardian compensation and attorney fees. The district court denied Black's counterpetition. The court took the request for full approval of the guardianship report and discharge of guardian under advisement. The court indicated it would be reviewing the pleadings and issuing an order. Black requested permission (1) to prepare her own proposed order following the hearing, and (2) to file further claims against the guardian. The court granted the request but said any further claims or objections would have to be filed "immediately."

The district court filed its order approving the guardian's report and accounting and discharging guardian on September 1, 2017. The court filed the alternative order prepared by Black on October 5, 2017, which also included the denial of Black's counterpetition. The second order allowed Black to pursue further claims against Natko up until the point she had been discharged as guardian, which had already occurred on September 1. The second order also denied the requests for attorney fees by both parties. The district court denied Black's petition for reconsideration. Black appeals from the September 2017 order and cross-appeals from the October 2017

order. Natko appeals from the October order, which denied all guardianship compensation and attorney expenses Natko claimed she was entitled to, and Black claims the two orders are inconsistent with each other.³

On appeal, Black argues that the September 2017 order discharging Natko was erroneous and not supported by substantial evidence or otherwise constituted an abuse of discretion. Black argues she objected to the guardian's report and had additional claims she wanted to pursue against Natko. She also contends that a stay had been entered by the district court at the 2015 hearing for approval of the guardian's report and for the discharge of Natko as guardian, and therefore, she should have been able to file additional claims. Finally, she argues that the district court abused its discretion by not allowing her sufficient time to file her additional claims before discharging Natko. Specifically, Black claims on cross-appeal that while the district court granted additional time at the August 2017 hearing, it then abused its discretion by entering an order of approval and discharge in less than ten days following the hearing, thereby preventing her from filing her claims. We disagree.

Natko argues on appeal that the district court abused its discretion by denying her petition for \$45,738.50 in attorney fees and the \$6,000 balance of the \$10,847.40 in guardian fees and expenses, much of which had been preapproved by the court as part of the guardianship budget. She contends that the district court based its decision on its misapprehension that these fees and costs were related to or animated by the criminal prosecution, and not for Natko's work as the guardian of the

³We do not recount the facts except as necessary for our disposition.

person and the estate, and that there were no damages to the estate. She further contends the district court abused its discretion by not making findings regarding attorney fees. We agree.

“An abuse of discretion occurs when a district court’s decision is not supported by substantial evidence or is clearly erroneous.” *Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). “We further review a district court’s factual findings for an abuse of discretion and will uphold them if they are supported by substantial evidence.” *In re Guardianship of N.M.*, 131 Nev. 751, 754, 358 P.3d 216, 218 (2015). Additionally, an abuse of discretion occurs when the district court bases its decision on a clearly erroneous factual determination, *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004), or disregards controlling law, *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993), *superseded by statute as stated in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017) (explaining that NRS 18.005(17), which is inapplicable to this analysis, was amended after *Bergmann*). Generally, when reviewing attorney fees orders, we review for an abuse of discretion. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005); *see also* NRS 159.183(1) (noting that payment of attorney fees is “[s]ubject to the discretion and approval of the court”).⁴

⁴NRS 159.183(1) & (3) were also amended in 2017, with modifications from both the Senate and the Assembly. *See* 2017 Nev. Stat., ch. 552, § 35.5, at 3919; *see also id.*, ch. 390, § 30, at 2560-61. The Senate’s amendments became effective on July 1, 2017. 2017 Nev. Stat., ch. 390, § 41, at 2571. The Assembly’s amendments became effective on January 1, 2018. *Id.*, ch. 552, § 45(3), at 3925. We also conclude that the amendment to NRS 159.183(3) was nonsubstantive, and merely changed the term “ward” to “protected person.” 2017 Nev. Stat., ch. 390, § 30(3), at 2561. Thus, we also conclude that this amendment is retroactive. *Delucchi*, 133 Nev. at 293-94,

While it is within a trial court's discretion to determine a reasonable amount of attorney fees under a statute or rule, in exercising that discretion district courts must evaluate the *Brunzell* factors. See *Miller*, 121 Nev. at 623, 119 P.3d at 730; *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Although Nevada appellate courts do not require district courts to make explicit findings on each *Brunzell* factor, the record nonetheless must demonstrate that the court considered the factors and that the award is supported by substantial evidence. See *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); see also *Lioce v. Cohen*, 124 Nev. 1, 24-25, 174 P.3d 970, 985 (2008) (explaining that the supreme court was unable to determine whether the district court abused its discretion because the district court failed to make any findings in resolving the matter before it).

Guardians are required under NRS 159.177(1)(d) to file a verified accounting within 90 days of the death of the protected person. NRS 159.179 specifies the contents of the accounting and NRS 159.181(1) allows an objection to be filed by any interested person. NRS 159.181(2) authorizes the court to determine if the accounting should be approved, and if the objections are overruled, the court may enter an order confirming the accounting. Such an order is a final and conclusive order against all persons. See NRS 159.181(3).

Guardians are entitled to compensation for their services and "[r]easonable expenses incurred in retaining" certain professionals. NRS 159.183(1)(c). The statute lists several considerations for judging the reasonableness of compensation and services. See NRS 159.183(2) (listing

396 P.3d at 829. Therefore, we conclude that the current version of NRS 159.183(1) & (3) should be applied to this analysis.

the following as considerations for the reasonableness of compensation and services: "(a) The nature of the guardianship; (b) The type, duration and complexity of the services required; and (c) Any other relevant factors"); see also *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (listing "the qualities of the advocate," the character and difficulty of the work performed, "the work actually performed by" the attorney, and the result obtained as factors for determining reasonable attorney fees). The court must direct the expenses to be assessed against the estate unless it shifts the responsibility to the guardian if certain factors are met. See NRS 159.183(3). In determining whether a party or the estate of the protected person should pay, the court should consider, among other things, "[t]he nature, extent and liquidity of the" protected person's assets, as well as factors relevant to the duties of the guardian. *Id.*

Here, the district court failed to make any specific findings for denying all attorney fees as an unreasonable expense and for shifting the expense entirely onto the guardian. Moreover, there is nothing in the record before us to suggest that the district court considered the appropriate factors in making its decision. Indeed, based on the record, it appears the district court not only failed to consider the *Brunzell* factors, but failed to consider the factors outlined in NRS 159.183(2) and (3) in deciding that payment of any attorney fees from the estate was improper.

Further, it is apparent that the district court was under the mistaken belief that much of the guardian expenses, including compensation and all attorney fees, were related to the criminal action. The record does not support that conclusion, as established by the documentation in support of the first and final accounting, the nature of the

objections, and the lack of findings from the district court to support its impressions.

Under these circumstances, we must conclude that the district court abused its discretion by denying all compensation to the guardian, including preapproved guardian fees and expenses, and by denying attorney fees in their entirety. As a result, we reverse this decision and remand this matter to the district court for reconsideration under the factors for determining whether guardian fees and attorney fees should be awarded, and whether the fees should be paid out of the estate. See NRS 159.183(1)-(2) (requiring the estate to pay the expenses unless the responsibility is shifted and listing various factors for courts to consider in assessing the reasonableness of compensation and services including “[a]ny other relevant factors”); NRS 159.183(3) (providing for the consideration of “[t]he nature, extent and liquidity of the” protected person’s assets; “[t]he disposable net income of the protected person”; “[a]ny foreseeable expenses”; and “[a]ny other factors that are relevant to the duties of the guardian” in deciding whether to pay attorney fees from the estate); *Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (listing “well-known basic elements to be considered in determining the reasonable value of an attorney’s services” including “*the result*: whether the attorney was successful and what benefits were derived.” (internal quotations omitted)).⁵

⁵See also *In re Guardianship of Doyle*, 778 N.W.2d 342, 347 (Minn. Ct. App. 2010) (“The ward’s best interests must be the determinative factor in guiding the court when making any choice on the ward’s behalf.”); *In re Guardianship of Decker*, 353 P.3d 669, 679 (Wash. Ct. App. 2015) (noting that determination of just and reasonable compensation relies upon competing equitable factors of compensating an attorney for the work benefiting the estate and protecting the alleged incapacitated person’s right

The district court did not abuse its discretion in denying Black's counterpetition for double damages, disgorgement of previously approved fees and attorney fees. The court correctly noted at the August 2017 hearing that there was no legal basis for any of these claims. The double damage claim was based upon a criminal fine, not restitution; no authority was provided to the district court for disgorgement of long ago approved fees after contested hearings; and attorney fees were not appropriate as Black's counterpetition failed.

We further conclude that Black was not deprived of any rights in pursuing her claims. She objected to the original request for approval and discharge of the guardian in 2015 but did not file a counterpetition at that time. We find her argument that she felt restrained from filing a counterpetition, objection, or other claims unpersuasive. The record reveals that no stay was ever entered, and Black filed her second set of objections, and a counterpetition during the time where a stay, if one had been entered, would have been in effect. Further, the district court stated at the August 2017 hearing that Black could file further objections or claims if done immediately. While no time period was set, NRS 159.181 only allows an objection to be filed prior to the hearing, yet the court considered the second objection and counterpetition, and added even more time by allowing further pleadings if filed before the discharge of the guardian. Thus, any alleged error was harmless as Black's claims and concerns were presented to the district court. *Cf.* NRCP 61 ("At every stage of the proceeding, the

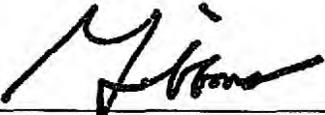
to autonomy as well as protecting the person's estate); *In re Messer's Guardianship*, 7 N.W.2d 584, 586 (Wis. 1943) ("If the guardian did not act in good faith and was derelict in the performance of his duties, in that situation he should defend his conduct at his own expense.").

[district] court must disregard all [harmless] errors and defects that do not affect any party's substantial rights." (emphasis added)).

Therefore, the order of the district court approving the guardianship report and discharging the guardian is affirmed and the order denying guardianship costs and expenses to the guardian, including attorney fees in their entirety, is reversed and remanded for the court to apply the relevant statutory factors as part of making a final determination.⁶ Accordingly, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge
Hon. Bryce C. Duckworth, Presiding Judge
Hon. William S. Potter, District Judge
Carolyn Worrell, Settlement Judge
Anthony L. Barney, Ltd.
Foley & Oakes, PC
Eighth District Court Clerk

⁶Insofar as the parties raise arguments that are not specifically addressed in this order, including as to Black's cross-appeal, we have considered the same and conclude they either do not present a basis for relief or need not be reached given the disposition of these appeals.