

*Estate of Tmilchol v. Kumangai*, 13 ROP 179 (2006)  
**ESTATE OF BECHESERRAK TMILCHOL and KATSUTOSHI BECHESERRAK,**  
**Appellants,**

v.

**ELIZABETH KUMANGAI, FELIX GAAG TMILECHOL and ARTHUR TMILECHOL,**  
**Appellees.**

CIVIL APPEAL NO. 05-044  
Civil Action No. 02-341

Supreme Court, Appellate Division  
Republic of Palau

Decided: September 19, 2006<sup>1</sup>

**1180**

Counsel for Appellants: Raynold B. Oilouch

Counsel for Appellees: Mariano W. Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

PER CURIAM:

### **BACKGROUND**

On October 18, 2002, Robert Becheserrak petitioned the Trial Division to be appointed as guardian of the estate and affairs of his grandfather and adopted father Becheserrak Tmilchol.<sup>2</sup> Tmilchol had four years earlier suffered a stroke which left him incapacitated and unable to manage his personal and business affairs. Becheserrak's petition stated that, since Tmilchol's incapacitation, his business interests (collectively known as B.T. Company<sup>3</sup>) had been mismanaged through the payment of exorbitant salaries to phantom employees as well as the transfer of various real estate and mortgage interests without consideration. The trial court appointed Becheserrak as guardian on November 8, 2002. Shortly thereafter, Anna Becheserrak, Tmilchol's wife, objected to the appointment, claiming that she had been actively managing her

<sup>1</sup> The court has concluded that oral argument would not materially assist in the resolution of this appeal. ROP R. App. P. 34(a).

<sup>2</sup> There is some confusion regarding whether decedent's name is properly spelled "Tmilchol" or "Tmilechol." We have opted for the former.

<sup>3</sup> At the time of his stroke, Becheserrak was the sole proprietor of B.T. Company, a conglomeration of business interests including a retail store and commercial and residential real estate.

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husband's business affairs since his incapacitation, and that Tmilchol had previously barred Robert from taking a role in his businesses following incidents of theft and abuse. Katsutoshi Becheserrak, Tmilchol's stepson, also petitioned for his own appointment as guardian, again stressing his father's distrust of Robert. The Court ultimately appointed Anna Becheserrak as Tmilchol's guardian on February 14, 2003.

A mere three days after her appointment as guardian, Anna Becheserrak passed away. Following various motions for the appointment of a new guardian, the court ordered Edward Isewei Becheserrak to serve as temporary manager of B.T. Company. Edward passed away a few months later, in June 2003. The court then appointed Katsutoshi Becheserrak to serve as temporary guardian of his stepfather's estate.

On November 26, 2003, following the death of Anna Becheserrak and Edward Isewei Becheserrak, a number of parties intervened to object to Katsutoshi's appointment as temporary guardian of Tmilchol. Robert Becheserrak again petitioned the court to be named guardian of his adopted father's affairs. Robert also moved the court to order Katsutoshi to provide an accounting for that period in which he had served as temporary guardian of Tmilchol's affairs. Additionally, Elizabeth Kumangai, Felix Gaag Tmilechol, and Arthur Tmilechol ("Appellees") filed their own [L181](#) guardianship petition, on the grounds that as his siblings, <sup>4</sup> they stand as Tmilchol's closest relatives, charged with his care under Palauan custom. Appellees retained the services of an attorney to assist them in their various claims arising out of Tmilchol's estate.

On January 27, 2005, the parties entered into a stipulated agreement regarding the care of Tmilchol and the management of his businesses. Based on this agreement, the court entered an order delegating responsibilities over the care of Tmilchol and his businesses on February 2, 2005. Shortly thereafter, on March 22, 2005, Tmilchol died.

Following Tmilchol's death, Appellees filed a motion for an award of attorneys fees incurred in the present case. Katsutoshi Becheserrak objected on behalf of himself and Tmilchol's estate. The trial court granted Appellees motion for attorneys fees with respect to those fees "incurred in seeking and carrying out their appointment as guardians ad litem in the *Estate of Anna Becheserrak*, Civil Action No. 03-97." *In re Estate of Tmilchol*, Civil Action No. 02-341 (Decision and Order dated Nov. 24, 2004, at 1). The court reasoned that, "[i]nsofar as the Court found it necessary and appropriate that [Appellees] serve in that role to protect Becheserrak's interests in that case, it is also entirely appropriate that they be paid by his Estate." *Id.* The court, however, refused to award any fees incurred in connection with the present case, reasoning that their right to such expenses would turn on the success or failure of their motion to be substituted as guardian of the estate of Tmilchol.

Appellees renewed their motion for attorneys fees on April 19, 2005. Subsequently, after determining that the estate had paid all of the legal fees incurred by Katsutoshi Becheserrak in his role as guardian of Tmilchol's estate, the court concluded that Appellees were also entitled to payment of fees from the estate:

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<sup>4</sup> Felix Gaag Tmilechol stands as Becheserrak Tmilchol's younger brother. Elizabeth Kumangai and Arthur Tmilechol are his adopted siblings.

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Although the Court has some question concerning the Estate's obligation to pay [Appellees'] attorney's fees, it also doubts the guardian's authority to pay all of the legal fees he has incurred – even those that would seem to be in his financial interest – from the Estate. Bearing in mind the important legal principle that “what's good for the goose is good for the gander,” the Court will order the estate to pay \$5000.00 to [Appellees'] counsel within the next thirty days.

*In re Estate of Tmilchol*, Civil Action No. 02-341 (Order dated Nov. 15, 2005, at 1-2).

Katsutoshi Becheserrak now appeals the court's award of fees to Appellees. For the foregoing reasons, we vacate and remand.

### ANALYSIS

Generally, a guardian is entitled to reimbursement of legal expenses and costs incurred where litigation has been necessary to assert or defend the rights of his or her ward. 39 Am. Jur. 2d *Guardian and Ward* § 218 (1999). A number of American courts have held that this right extends to preappointment legal fees and costs incurred in successfully petitioning a court to be named **¶182** as guardian. See, e.g., *Penney v. Pritchard & McCall*, 49 So.2d 782 (Ala. 1950); *In re Estate and Guardianship of Vermeersch*, 488 P.2d 671 (Ariz. Ct. App. 1971); *In re Bundy's Estate*, 186 P. 811, 812 (Cal. Ct. App. 1919); *In re Sherwood's Estate*, 206 N.E.2d 304 (Ill. App. Ct. 1965); *In re Landry*, 886 A.2d 216 (N.J. Super. Ct. Ch. Div. 2005). But see *Hampton v. Graham*, 186 So. 202 (Fla. 1939) (refusing to award attorney's fees to guardian pursuant to “doctrine that the enforced recovery of attorney's fees can be had only when provided for by contract, or by provision of statute”); *Temes v. Dep't of Soc. Servs.*, 133 S.W.3d 552, 554 (Mo. Ct. App. 2004) (holding that no statutory authority allowed for assessment of attorney fees in guardianship proceeding). The present appeal, however, involves not the fee award to Tmilchol's guardian Katsutoshi Becheserrak, but rather the award to Appellees, who, although they had so moved, were never ultimately appointed as guardians of Tmilchol or his estate. Although this alone does not necessarily preclude an award of attorney fees in their favor, see *In re Estate of Johnson*, 579 N.E.2d 1206, 1210 (Ill. App. Ct. 1991) (awarding fees to unsuccessful guardianship applicants who “were at least somewhat successful in that the trial court determined [that the incapacitated individual] did need some assistance in managing his affairs”), the unique circumstances of such an award demanded some legal and factual explanation as to its basis.

Beyond expressing some misgivings as to the propriety of reimbursing the legal fees incurred by a non-guardian out of an estate, however, the trial court's legal analysis did not address the legal or factual basis for the attorney fee award. The trial court did not, for example, discuss whether Appellees' litigation resulted in a material benefit to Tmilchol and his estate, see *In re Guardianship of Hallauer*, 723 P.2d 1161, 1165 (Wash. Ct. App. 1986) (“A court may award attorney's fees only for litigation which results in a material benefit to the estate.”), or whether the litigation was undertaken primarily out of Appellees' own self-interest, see *Landry*, 886 A.2d at 221 (holding that a court awarding attorney's fees arising out of a guardianship petition must consider, *inter alia*, whether “plaintiff [was] primarily concerned with protecting

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the incapacitated person, or . . . by some other interest”). Moreover, the court did not set forth the basis for its award of \$5000 in fees, rather than the \$6500 sought by Appellees or some other figure. As a result, we cannot discern the legal and factual basis for the trial court’s award of fees to Appellees, and are thus unable to conduct a full and fair review of this decision. In situations such as these, where a lower court has not clearly set forth the basis for its decision, remand for further elaboration is appropriate. *Smanderang v. Elias*, 9 ROP 123, 124 (2002); *see also Dep’t of Health & Rehabilitative Service v. Bean*, 435 So.2d 967 (Fla. Dist. Ct. App. 1983) (vacating and remanding award of attorney’s fees where trial court did not set forth the factual basis for the award).

### **CONCLUSION**

For the reasons set forth above, the Trial Division’s award of attorney fees to Appellees is vacated and the matter is remanded for further proceedings.