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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0653
A08-2240

In re the Guardianship and/or Conservatorship of: Joseph Andreszcuk,
Ward/Protected Person (A08-653),

and

In re the Conservatorship of: Joseph Andreszcuk,
Protected Person (A08-2240).

Filed June 2, 2009
Affirmed
Muehlberg, Judge[*]

Brown County District Court
File No. 08PR07982

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Considered and decided by Stoneburner, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

This is a consolidated appeal arising from an order appointing a guardian and conservator for appellant, and from an order directing the sale of real property and denying appellant's motion to disqualify counsel for the conservator. Appellant argues that (1) there is not clear and convincing evidence to support the district court's appointment of a guardian; (2) there is not clear and convincing evidence to support the appointment of a conservator; (3) the district court failed to make specific findings that the conservator appointed for appellant is the most suitable conservator for him; (4) the district court erred in granting the petition to sell his homestead; and (5) his due process rights were violated by the assistant county attorney's simultaneous representation of the conservator, as well as the county interests in the guardianship and conservatorship petition that was unknown to appellant. We affirm.

FACTS

On November 9, 2007, respondent Brown County filed an emergency petition for the appointment of a guardian of the person and conservator of appellant Joseph Andreszcuk's estate. The district court granted the request, appointing Kerry Olsen of Lutheran Social Services Corporation (LSS) as appellant's emergency guardian and conservator. An order for abatement was issued by Brown County Environmental Health on November 13, 2007, because appellant's residence was determined to be a public health nuisance. The order prohibited appellant from occupying the property until the public health nuisance was abated. Following a hearing in December 2007, the district

court prohibited LSS from disposing of appellant's property before an evidentiary hearing regarding the emergency guardianship/conservatorship was held.

An evidentiary hearing was held in January 2008. At the hearing, appellant's son, Joseph Andreszcuk, Jr., testified that when he stayed with his father in the fall of 2007, appellant's house was filled with garbage. Andreszcuk testified that the garbage was stacked to the ceiling in places in the house, and that there was so much garbage in the house that appellant "[a]ctually [slept] on the trash." Andreszcuk also testified that the water in the house had been shut off in 2004, and that his father defecated and urinated in pails inside and outside of the house. Andreszcuk further testified that when he stayed with his father in the fall of 2007, he slept in a tent in the yard "[b]ecause of the conditions." According to Andreszcuk, he took pictures of the house and dropped them off at the police department so that his father would get "the help he needs."

Lisa Langer, a social worker for Brown County, also testified at the hearing. Langer echoed Andreszcuk's testimony concerning the garbage in appellant's home, and testified that appellant had about two weeks notice prior to the initial inspection of appellant's home. Langer also testified that appellant had a "nice" car that he appeared to use "like a storage area," but that the keys, along with other valuables, were buried in trash in the house. Langer further testified that when she visited appellant at his new residence after he was removed from his home, his apartment "border[ed] on cluttered."

Dr. Betsy Anderson, the court-appointed examiner testified that appellant suffers from depression and anxiety, and has a personality disorder. Dr. Anderson specifically identified appellant's personality disorder traits to include: lack of social skills and

difficulty maintaining interpersonal relationships, lack of perspective as to social norms and standards, tendency to see self as a victim, conveys a sense of entitlement to receive assistance, and has difficulty taking any responsibility for his behaviors. Dr. Anderson opined that "hoarding would be an atypical symptom of a personality disorder, but it . . . can be a range of symptoms that come along." Although Dr. Anderson believed that appellant "is competent" because he can "function on a day-to-day basis," she admitted that appellant has a total lack of insight into his personality traits and has deficits as to his ability to meet his shelter and safety needs.

Olsen, of LSS, testified that appellant receives $1,244 in social security disability benefits per month, from which $96 per month is subtracted for the Medicare premium. According to Olsen, appellant has no savings and has $11,449.61 in debt. Olsen also testified that appellant has a history of overdrafts, and that he failed to pay his 2007 real estate taxes. Olsen further testified that despite his poor financial situation, appellant accumulates multiple numbers of the same item or object, which was exemplified by the eight canvas tote bags of DVDs that appellant had in his apartment. Olsen opined that appellant is not financially secure and is incapable of handling his finances.

Appellant testified at the hearing and agreed that his house was "in real bad shape." According to appellant, his problems keeping his house "under control" were due to "health reasons" and "injuries." Appellant testified that his new apartment is clean, and conceded that the county has been helpful in some of his areas of need, such as better housing. But appellant claimed that his financial situation has gotten worse since the conservator was appointed. Appellant testified that before the county involvement,

his financial situation was not that bad. He also claimed that he generally paid his bills on time, was frugal with his money, and sought assistance when necessary. Appellant testified that he objected to the county interfering with his financial affairs.

On February 22, 2008, the district court issued its order appointing LSS as guardian of appellant and conservator of his estate. Appellant subsequently filed this appeal challenging the appointments. Shortly thereafter, LSS, as conservator of appellant's estate, filed a petition to sell appellant's homestead. Counsel for appellant objected to the proceeding on the basis that (1) the petition was improperly noticed; (2) Michael Boyle, the assistant county attorney handling the matter, was representing two parties in the same case: the county, as the assistant county attorney, and the conservator, as a private attorney; and (3) the district court lacked jurisdiction to hear the matter because the matter concerning the appointment of the guardian and conservator was presently before this court. Following a hearing on June 19, 2008, the district court granted the petition to sell appellant's homestead. A few weeks later, however, an order was issued appointing counsel for appellant with respect to the sale of his homestead. The order also required the scheduling of a second hearing so that the court could further consider the matters previously addressed at the June 19, 2008 hearing.

After the second hearing on the matter, the district court issued its decision reaffirming the sale of appellant's homestead. The court found that the relief sought was independent and collateral to the order on appeal, the appointment of a conservator. The court found that pursuant to Minn. R. Civ. App. P. 108.01, subd. 1, it retained jurisdiction over the sale of the homestead. The court also found that because the conservator is a

"special representative, acting as such, by filing a petition for the sale of real estate," Minn. Stat. § 525.714 (2008) does not suspend the operation of the order appealed from. Finally, the court denied the motion to disqualify Boyle, finding "no obvious conflict of interest," and left the decision of whether to withdraw from representing the conservator to Boyle's discretion. Appellant appealed the sale order, and the matter was consolidated with appellant's appeal regarding the appointment of the guardian and conservator.

D E C I S I O N

I.

The "appointment of a guardian is uniquely within the discretion of the appointing court." *In re Guardianship of Stanger*, 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1974). A reviewing court shall not interfere with the exercise of that discretion except in the case of clear abuse of that discretion. *In re Guardianship of Kowalski*, 478 N.W.2d 790, 792 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). A reviewing court is limited to determining whether the district court's findings are clearly erroneous, giving due regard to the district court's determinations regarding witness credibility. Minn. R. Civ. P. 52.01; *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 60–61 (Minn. App. 1990).

A guardian may be appointed if the district court finds by clear and convincing evidence that the proposed ward is an "incapacitated person" whose "identified needs cannot be met by less restrictive means." Minn. Stat. § 524.5-310(a) (2008). An "incapacitated person" is defined as one who,

> for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, shelter, or safety, even with appropriate technological assistance.

Minn. Stat. § 524.5-102, subd. 6 (2008).

Appellant argues that the district court abused its discretion in appointing a guardian because the record lacks clear and convincing evidence that he is incapacitated, and that his needs cannot be met by less restrictive means. We disagree. The record reflects that appellant's house was filled with trash and that the water had been turned off for years. The record also reflects that appellant routinely urinated and defecated in buckets or cans in the house, and that there were places in the house where there was uncontained feces lying on and amongst the piles of trash. Moreover, Dr. Anderson provided detailed testimony pertaining to appellant's personality disorders, and specifically testified that appellant "has been generally unreceptive to feedback." The district court made very extensive findings on the issue and those findings are supported by the record. That there may also be evidence in the record supporting a different result does not mean that the district court's findings are clearly erroneous. *See Stiff v. Assoc. Sewing Supply Co.*, 436 N.W.2d 777, 779–80 (Minn. 1989) (stating that "[a]lthough the record also contains testimony which, if believed, would support different findings of fact more favorable to the respondent, when the record contains credible evidence to support the fact findings and those findings support the [district] court's conclusion," an appellate

court may not reverse just because it might have found the facts differently in the first instance).

Appellant also contends that caselaw supports his position that the district court abused its discretion in appointing a guardian. To support this claim, appellant cites a decision from this court in which the appointment of a guardian were upheld. *See, e.g.*, *In re Guardianship of Dawson*, 502 N.W.2d 65, 67–68 (Minn. App. 1993) (stating that notice of Dawson's incompetence was evidenced by the physician's statement in support of the petition for guardianship which described Dawson as suffering from "organic brain syndrome with disorientation and confusion, blindness, cardiac disease, bilateral pneumonias, [and] urinary and bowel incontinence."), *review denied* (Minn. Aug. 16, 1993). Appellant argues that because his impairment does not rise to the magnitude or degree of the impairments in *Dawson*, the appointment of a guardian was unnecessary.

We disagree. *Dawson* does not set forth the standard for guardianship appointments. Rather, the standard is set forth in Minn. Stat. § 524.5-310(a). As discussed above, there is clear and convincing evidence in the record to meet this statutory standard. Accordingly, the district court did not abuse its discretion in appointing a guardian over appellant.

II.

Under Minnesota law, the district court may appoint a conservator of an individual's estate if the court finds that:

> (1) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment to receive and evaluate information or make

> decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States;
>
> (2) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money; and
>
> (3) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.

Minn. Stat. § 524.5-409(a) (2008). The district court has broad powers in appointing a conservator, and its decision will not be interfered with absent a clear abuse of discretion. *Lundgaard*, 453 N.W.2d at 63.

Appellant argues that the district court abused its discretion in appointing a conservator because there is insufficient evidence in the record to support the three factors set forth in Minn. Stat. § 524.5-409(a). We disagree. The record reflects that appellant has no savings, has a history of overdrafts, and failed to pay the 2007 real estate taxes on his property. The record also reflects that appellant has a limited income of approximately $1,150 per month, and has incurred substantial debt. Moreover, despite appellant's limited income and debt, the record reveals that appellant accumulates multiple numbers of the same item or object. This impairment is exemplified by the eight canvas tote bags of DVDs, many of them unopened, that appellant had in his apartment. The reasonable inference from the evidence is that appellant spends a portion of his limited income on items for which appellant, at best, has a limited need. The evidence in

the record clearly and convincingly supports the district court's conclusion that appellant is unable to manage his property and business affairs because of an impairment. *See* Minn. Stat. § 524.5-409(a)(1).

A preponderance of the evidence also demonstrates that appellant's property will be wasted or dissipated unless conservator management is in place. This is best exemplified by the condition of appellant's house. As noted above, appellant's house was completely filled with trash and the water had been turned off since 2004. The house was in such poor shape that an order for abatement was issued by Brown County. Moreover, the record reflects that appellant had a "nice" car, but that he could not find the keys because they were buried in the trash in his home. The record further reflects that the car was essentially used by appellant for storage. Accordingly, there is sufficient evidence in the record to support the second factor set forth in Minn. Stat. § 524.5-409(a).

With respect to the third factor, the record reflects that appellant has been less than receptive to seeking necessary assistance or services to address his financial and sanitation issues. The record demonstrates that without assistance, appellant's situation would most certainly get worse. In fact, the record reflects that it was appellant's son who took pictures of appellant's house and dropped them off with the local authorities so that appellant could get "the help he needs." The record also reflects that appellant had two weeks prior notice of the initial inspection of his home, yet when Langer inspected the home, she found it in the same condition depicted in the pictures taken by appellant's son. This evidence supports Dr. Anderson's testimony that appellant has no insight into his deficits. The third statutory factor for appointment of a conservator is satisfied

because there are no less restrictive means available to meet appellant's needs. *See* Minn. Stat. § 524.5-409 (a)(3).

Appellant argues that the factual similarities between this case and *In re Conservatorship of Edelman*, 448 N.W.2d 542 (Minn. App. 1989), demonstrate that there is insufficient evidence to support the appointment of the conservator. In *Edelman*, the probate court declined to appoint a conservator over Edelman's estate even though the court appointed a conservator over her person. 448 N.W.2d at 544. The probate court found that clear and convincing evidence did not establish the applicable statutory factors because Edelman's health insurance had been reinstated through her own efforts, and Edelman knew the nature and extent of her assets and the bills which were due and could make decisions as to the order in which to pay these bills. *Id.* at 546. On appeal, this court concluded that there was "ample evidence in the record to support the probate court's decision to deny the petition to establish a conservatorship of the estate." *Id.*

Despite appellant's argument to the contrary, *Edelman* is factually distinguishable. Although, like Edelman, appellant may have paid certain bills on time, the record reflects that appellant is generally unable to manage his property and business affairs because of his impairment. Moreover, the evidence also demonstrates that appellant's property has been or will be wasted or dissipated unless conservator management is in place, and because appellant is unreceptive to services there are no less restrictive means available to meet appellant's needs. Therefore, appellant's reliance on *Edelman* is misplaced, and the district court did not abuse its discretion in appointing a conservator over appellant's estate.

III.

Appellant argues that the conservator appointment must be reversed because the district court failed to make specific findings identifying why LSS is the most suitable conservator to manage appellant's finances. To support his contention, appellant cites *Lundgaard*, where this court stated that specific findings addressing the necessary statutory factors, including why the conservator appointed is the most suitable for the specific individual at issue, must be made by the district court. 453 N.W.2d at 63. But *Lundgaard* addressed the statutory requirements of Minn. Stat. §§ 525.544, .551 (1988), which required specific findings explaining why the conservator appointed is the most suitable for the individual at issue. *Id.*; *see* Minn. Stat. § 525.551, subd. 5; *see also* Minn. Stat. § 525.544, subd. 2. In 2003, however, those statutes were repealed. 2003 Minn. Laws ch. 12, art. 2, § 8. The appointment of a conservator is now governed by the Uniform Guardianship and Protective Proceedings Act. As noted above, Minn. Stat. § 524.5-409 now sets forth the required findings, and there is no requirement in the statute that the district court make particular findings of fact as to the suitability of a particular nominee for conservator, or how the appointment of the same is in the conservatee's best interests. *See generally* Minn. Stat. § 524.5-409. Therefore, the district court did not err by failing to make specific findings explaining why LSS was the most suitable conservator to manage appellant's finances.

Appellant further argues that the conservator appointment must be reversed because the district court erroneously applied the statutory factors as required by Minn. Stat. § 524.5-409. The district court incorrectly quoted Minn. Stat. § 524.5-409(a) to

include an "or" rather than an "and" between subsections (1) and (2). But there is no indication that the district court based its decision on the erroneous quotation of section 524.5-409(a). The district court made extensive findings pertaining to the appointment of the conservator, and the findings support all three factors set forth in section 524.5-409(a). Accordingly, the district court's erroneous quotation of the statute does not constitute reversible error. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that error without prejudice is not ground for reversal).

IV.

Appellant argues that the district court erred in concluding that because the conservator is a special representative acting as such, Minn. Stat. § 525.714 (2008) did not prohibit the conservator from filing a petition to sell appellant's homestead. Appellant also contends that the district court erred in concluding that because the sale of the homestead was collateral to the order on appeal concerning the appointment of the guardian and conservator, the court had authority under Minn. R. Civ. App. P. 108.01, subd. 1, to authorize the sale of appellant's homestead. Therefore, appellant argues that the district court erred in granting the petition to sell his home.

Minnesota law provides that when an aggrieved party takes an appeal in a probate matter:

> The appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the Court of Appeals orders otherwise. The Court of Appeals may require the appellant to give additional bond for payment of damages which may be awarded against

> appellant in consequence of the suspension, on the appellant's failure to obtain a reversal of the order, judgment, or decree appealed from. Nothing herein contained shall prevent the probate court from appointing special representatives nor prevent special representatives from continuing to act as such.

Minn. Stat. § 525.714. The Minnesota Supreme Court has recognized that under section 525.714, a ward remains incompetent under the law pending the appeal of the decision to restore the incompetent ward to capacity. *In re Hudson's Guardianship*, 226 Minn. 532, 534, 33 N.W.2d 848, 851 (1948).

Here, the district court concluded that because the conservator is a special representative, she is permitted to file a petition to sell appellant's homestead under Minn. Stat. § 525.714. Appellant acknowledges that section 525.714 provides the district court with the authority to appoint a special representative in the event an appeal is filed challenging the appointment of a conservator. Appellant also acknowledges that following such an appointment, the special representative has the authority to act on behalf of the conservatee. But appellant argues that no such appointment was ever made here because the language used by the district is not sufficient to appoint the conservator as a special representative. Appellant further argues that under section 525.714, the court is required to take affirmative steps when the court appoints a special representative, and that the lack of such steps taken here demonstrates that a special representative was never appointed. Appellant contends that because a special representative was never appointed, Minn. Stat. § 525.714 prohibited the district court from granting the petition to sell appellant's real estate.

We disagree. As noted above, the district court found that the "conservator is a special representative." This language indicates that the court appointed the conservator as special representative. As a special representative, the conservator is allowed to act on appellant's behalf despite the pending appeal. *See* Minn. Stat. § 525.714. Although the record does not reflect separate action to appoint the conservator as a special representative, appellant cites no authority for his position that separate action is mandatory. Without such authority, we cannot conclude that the appointment of the conservator as special representative was an abuse of discretion. Therefore, the district court did not err in granting the petition to sell appellant's homestead pursuant to the appointment of a special representative under section 525.714. Because the petition to sell the homestead was properly granted based on the special representative's authority to file the petition pursuant to section 525.714, we need not address the district court's conclusion that it also had the authority to grant the petition to sell appellant's homestead under Minn. R. Civ. App. P. 108.01, subd. 1.

V.

Appellant argues that Boyle, the assistant county attorney representing Brown County's interests as to the guardianship and conservatorship petition, also, without appellant's knowledge, represented the conservator simultaneously in the same case. Appellant argues that this unknown dual representation violated his due process right to a fair hearing because had he been aware of Boyle's dual representation, he would have had the opportunity to decide whether to file a motion requesting the court to disqualify Boyle from representing both parties. Appellant further claims that even if the court had

denied such a motion, his awareness of Boyle's dual representation would have provided him with the opportunity to make appropriate inquiries concerning the conservator's ability and willingness to make decisions in appellant's best interests and independent of the county's interests.

Appellant's argument is without merit. Although Boyle readily concedes that he represents both Brown County and LSS, there is no evidence in the record that his dual representation was unknown to anyone but appellant.

Boyle's letter to the court concerning this issue was received well after the briefs were due and filed. At oral arguments appellant objected to this court's consideration of this letter. Because the letter is not part of the record and was not necessary to our decision, we did not consider it. Thus, we need not decide whether the "objection" was an objection or a motion to strike, and it is moot.

Affirmed.