STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0585

In re: Guardianship/Conservatorship of Wallace Berge

Filed February 18, 2014
Affirmed
Peterson, Judge

Chippewa County District Court
File No. 12-PR-12-295

Douglas D. Kluver, Kluver Law Office and Mediation Center PLLC, Montevideo, Minnesota (for appellant Wallace Berge)

J. Richard Stermer, Stermer Law Firm, PLLC, Montevideo, Minnesota (for respondent Carol Meahger)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

PETERSON, Judge

In this appeal from an order appointing respondent as appellant's limited guardian and limited conservator, appellant argues that the district court abused its discretion by admitting an emergency-room report into evidence and by appointing respondent as his limited guardian and limited conservator. We affirm.

FACTS

Appellant Wallace Berge was born on November 8, 1925, and he lived with his wife on a farm northeast of Milan. Appellant farmed, and his wife took care of most of the household cooking and cleaning. The Berges have three children. Their son Vernon Berge lives about 4.5 miles from his parents' farm; another son, Arden Berge, lives in Apple Valley; their daughter, respondent Carol Meagher, lives in St. Paul.

On February 18, 2012, around 6:20 p.m., the clerks at a convenience store in Montevideo called police because appellant had arrived at the store and was confused about where his wife and car were. Officer Nick Gunderson of the Montevideo Police Department spoke with appellant and contacted a family member, who told Gunderson about some of appellant's medical history. According to Gunderson, appellant said that he did not remember where his car was and may have commented that he thought his wife, who was not with him, was in the car. Gunderson paged an ambulance, which took appellant to a hospital emergency room. The emergency-room report for appellant's visit describes the circumstances that brought appellant to the emergency room, identifies appellant as likely suffering from dementia, and notes that appellant was "disoriented to time, place, and person." Appellant was released from the emergency room into the custody of one of his children and then was voluntarily admitted to Luther Haven nursing home with his wife.

The couple later moved to an assisted-living facility in Montevideo that provides 24-hour care for its residents, three meals per day plus snacks, housekeeping and laundry services, medication administration, and daily activities. Residents are assigned a case-

mix level based on the amount of services they need. Appellant's case-mix level is "A," which means that he receives medication administration, a set schedule for showering and meals, and cleaning and laundry service, but he is otherwise able to live independently, including taking care of his own dressing and grooming.

On April 24, 2012, respondent filed a petition for emergency appointment of guardian requesting that she be appointed guardian of appellant. The district court granted the petition the following day and issued an order appointing respondent as guardian of appellant until June 24, 2012. Respondent then filed a petition for appointment of guardian and an amended petition for appointment of guardian and conservator requesting that she be appointed guardian and conservator of appellant.

An evidentiary hearing on the amended petition was held on October 12, 2012. At the hearing, Dr. Maureen Winger, who is a staff neuropsychologist at the St. Cloud Veterans Administration Medical Center, testified about her August 2012 evaluation of appellant, and the report that she prepared following the evaluation was entered into evidence. Winger diagnosed appellant with dementia due to multiple etiologies, primarily vascular. Winger classified appellant's dementia as "moderate" and expressed concern that appellant was not able to drive a car, operate heavy machinery, manage his medication, manage his finances, or recognize his limitations. Winger reviewed the report from appellant's February 18, 2012 emergency-room visit before writing her report, and she also considered other assessments of appellant, including his occupational-therapy and speech-therapy assessments.

Winger noted that, although appellant's reasoning scores were quantitatively average, he "became frustrated and started breaking the rules and had more difficulty" when tasks became more difficult. Winger opined that appellant could likely do well living in his own house with visiting help, but she was concerned that appellant would refuse to continue those services. She also stated that appellant was showing improvement in cognition because he had assistance with his medications and consistently received nutritious meals. The district court found Winger's testimony credible.

Vernon Berge and respondent testified that, during a visit to appellant's farm house in February 2012, there was no running water and no bathroom facilities, and the furnace did not function properly. The furnace burned fuel oil, and, when it ran, it sent blue smoke into the house. Appellant would turn the furnace on for a few minutes, turn it off, and then turn it on again when the temperature became too cold. Vernon also saw blown electrical fuses and observed that appellant had done some of his own wiring to fix the electricity. Vernon thought that some of the wiring work was not safe. Respondent testified that the laundry was not being done and that she was concerned that her parents were not eating nutritiously.

There were also several checks for significant amounts of money in the home that needed to be deposited. Vernon testified that a check for federal crop insurance had to be reissued because it was lost. Appellant also misplaced a rent check but cashed it when it was found five months later. In order to file a 2011 tax return for appellant and his wife, Arden Berge, respondent, and respondent's husband collected papers from appellant's

home, located the couple's 2010 form 1099, and submitted the information to an accountant to complete the return.

Vernon and Arden testified that appellant has difficulty driving. Vernon testified that appellant drove his pickup into the side of the garage and pushed out a wall, and Arden testified that he watched appellant driving on a highway during the previous winter, and appellant kept crossing the center line. The district court accepted this testimony as credible.

Appellant and his children all testified about appellant's ability to farm in recent years. Appellant testified that in 2011, he rented out 100 acres of his land and farmed 350 acres by himself, doing all of the planting, harvesting, and transporting of the crop. Appellant could not recall how many fields he had. Vernon testified that he helped appellant farm in 2010 and 2011 and that appellant had difficulty unloading the combine. Respondent testified that Vernon helped appellant farm in 2011.

Following the hearing, the district court issued an order appointing respondent as limited guardian of the person and limited conservator of the estate of appellant. Both parties filed motions for amended findings, and appellant also moved for a new trial. The district court issued an order denying appellant's motions and granting respondent's motion by adding requested language to its conclusions of law. This appeal follows.

D E C I S I O N

I.

Appellant argues that, because the two-page report from his February 18, 2012 emergency-room visit was not authenticated and was not admissible under any exception to the hearsay rule, the district court erred by admitting the report into evidence.[1] "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). But "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted).

Appellant argues that, if the doctor who wrote the emergency-room report had testified, cross-examination would have revealed that appellant's apparent confusion on February 18 was due to hearing loss, not dementia, and that the dementia diagnosis in the report was based only on what appellant's children told the doctor. But even if the emergency-room report was inadmissible, appellant has not demonstrated any prejudicial error because other evidence in the record supports the district court's ultimate findings that appellant meets the criteria for appointment of a limited guardian and a limited conservator. Winger's report states that the emergency-room report was consistent with

[1] At the hearing, appellant objected to admission of the report because it was double hearsay but not because it was not authenticated. Respondent contends that appellant stipulated to the admission of the report. In our review of the record, we have not found either a written or oral stipulation.

the results of the other assessments that Winger considered. The district court expressly found Winger's testimony to be credible. The district court also accepted Gunderson's testimony about the incident at the convenience store, and found that "[appellant] was asking the [clerks] where his wife was" and "thought his wife was in the car and he was unable to remember where it was parked. It was in the parking lot." Gunderson's testimony described the "disorientation as to place" discussed in the emergency-room report.

The district court could not have made findings of fact about appellant's condition at the hospital on February 18, 2012, without the emergency-room report. But the court's findings about appellant's condition at the hospital were all related to appellant's lack of awareness and simply confirmed Gunderson's observations of appellant at the convenience store. Furthermore, Winger's testimony was based on her own evaluation of appellant, which was based on more than the emergency-room report. We see no basis to conclude that, if the emergency-room report had not been admitted, the district court would have reached a different conclusion about the need to appoint a limited guardian or a limited conservator. Appellant has not demonstrated prejudicial error.

II.

Appellant argues that the district court abused its discretion in appointing a limited guardian. "The appointment of a guardian is a matter within the discretion of the district court and will not be disturbed absent a clear abuse of that discretion." *In re Guardianship of Autio*, 747 N.W.2d 600, 603 (Minn. App. 2008). "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." *In re Guardianship of Wells*, 733 N.W.2d 506, 510 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Sept. 18, 2007). A finding of fact is "clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). "If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Id.*

The district court may appoint a guardian "only if it finds by clear and convincing evidence that: (1) the respondent is an incapacitated person; and (2) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance." Minn. Stat. § 524.5-310(a) (2012). An "incapacitated person" is

> an individual 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, clothing, shelter, or safety, even with appropriate technological assistance.

Minn. Stat. § 524.5-102, subd. 6 (2012). Appellant challenges the findings that he is an incapacitated person and that his needs cannot be met by less-restrictive means.

Incapacity

Vernon testified about the lack of running water and bathroom facilities at appellant's farm house, the need to repair the furnace, and appellant's insufficient efforts to repair the roof and electrical wiring. The district court found Vernon's testimony

credible. This evidence supports the finding that appellant has demonstrated deficits in behavior that show his inability to meet his personal needs for shelter and safety.

Winger testified that appellant's dementia has caused short-term memory loss and lack of reasoning and problem-solving ability and that these conditions will impair appellant's ability to drive, operate machinery, and manage his medications and finances. This evidence supports the finding that appellant lacks sufficient understanding to make responsible personal decisions.

Appellant's own testimony also supports the district court's incapacity finding. The district court noted that, when appellant testified, "he was unable to recall that [he lived] at Home Front until he was prompted by his attorney." He also stated that he had farmed without help, but Vernon, whose testimony the district court expressly found credible, testified that he had helped appellant on the farm.

Reasonable evidence supports the district court's finding of incapacity.

Less-Restrictive Means

Appellant argues that the district court made no findings about the use of less-restrictive means. But numerous times in its order the district court noted credible testimony that indicated that appellant would not accept less-restrictive alternatives.

Arden, whose testimony the district court found credible, testified that appellant's children tried to convince appellant to move from the farm and not to drive, but appellant resisted. Respondent testified that, four years earlier, appellant had locked a personal-care attendant hired for his wife out of the house. Also, Winger testified that she believed less-restrictive means were not an option for appellant because his frugality would not

permit financial management and that appellant would not continue services such as personal-care attendants in his home.

The record supports the district court's findings that appellant resisted less-restrictive alternatives to guardianship on prior occasions and supports the reasonable inference that appellant would continue to refuse such services. Because a thorough review of the record does not leave a "definite and firm conviction" that the district court erred in determining that appellant is incapacitated and that no less-restrictive means could meet his needs, we affirm the district court's appointment of respondent as limited guardian of appellant.

III.

Appellant argues that the district court erred in finding clear and convincing evidence to support appointment of respondent as limited conservator for appellant. "The appointment of a conservator is a matter within the district court's discretion and will not be disturbed absent a clear abuse of that discretion." *In re Conservatorship of Geldert*, 621 N.W.2d 285, 287 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). "[A] district court abuses its discretion when its decision is against the facts in the record." *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

The district court may appoint a conservator when it finds

> (1) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, . . .

> (2) by a preponderance of the evidence, the individual has property that will be wasted or dissipated unless management is provided . . . ; 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, subd. 1(a) (2012). Appellant challenges the district court's findings regarding each of these factors.

Manage Property and Business Affairs

Appellant contends that respondent did not produce clear and convincing evidence that appellant is unable to manage his property and business affairs. But Arden testified that appellant had difficulty managing his farm and keeping track of all of the tasks he needed to complete to successfully run the farm, and the district court found Arden's testimony credible. Respondent, whose testimony the district court also found credible, testified about more than $100,000 in checks issued to appellant that appellant had lost or failed to deposit. She also testified that she and her husband pieced appellant's records together to submit his 2011 tax return to an accountant. This is clear and convincing evidence that appellant is unable to manage his property and business affairs.

Wasted or Dissipated Property

Respondent's testimony about the $100,000 in checks issued to appellant also supports the district court's finding that appellant has property that will be wasted unless management is provided. Losing a check wastes property. In addition, Vernon testified about the need to repair appellant's furnace and the inadequacy of appellant's efforts to repair the roof and electrical wiring. This evidence is sufficient to support the district

court's finding that appellant's property would be wasted if a limited conservator were not appointed.

Less-Restrictive Means

Finally, appellant argues that the district court erred in finding that appellant's needs cannot be met by less-restrictive means than appointing a limited conservatorship. But Winger testified that appellant's frugality and unwillingness to receive assistance in his home make less-restrictive means inadequate, and respondent testified that appellant had previously locked a personal-care attendant out of the house. This evidence is sufficient to support the district court's finding that appellant's needs cannot be met by means less-restrictive than a limited conservatorship.

The district court did not abuse its discretion in appointing a limited conservator for appellant.

Affirmed.