STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0920

In re: Guardianship of Dennis G. Esterly

Filed February 3, 2014
Affirmed
Halbrooks, Judge
Concurring specially, Ross, Judge

Wright County District Court
File No. 86-PR-12-6719

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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

HALBROOKS, Judge

Following the appointment of his brother as his unlimited guardian, appellant argues that the district court abused its discretion when it determined that (1) appellant is incapacitated by virtue of his inability to control his alcoholism and (2) there are no less-restrictive alternatives to an unlimited guardianship. We affirm.

FACTS

Appellant Dennis G. Esterly (Esterly) is a 60-year-old widower who suffers from numerous medical conditions, including Type 2 diabetes, coronary artery disease, hypertension, peripheral arterial disease, alcoholic gastritis, anemia, renal failure, seizures, malnutrition, liver failure, and chronic obstructive pulmonary disease, all of which are exacerbated by his principal medical problem—chronic alcoholism. Esterly consumes alcohol to the point that he does not eat, use the toilet, or take his insulin or other medications as prescribed, and on occasion he falls, causing injury.

He is frequently transported, often by ambulance, to the hospital, where he is well-known by hospital staff. The historical pattern has been that, after Esterly is stabilized, he is discharged to Foley Nursing Home (Foley). After a period of time, he checks himself out of Foley and returns home, where he resumes drinking, and the cycle repeats itself. In 2011, Esterly spent 208 days, over 22 different occasions, in a hospital, nursing home, or other health-care or treatment facility. From January through August 2012, Esterly spent 116 days, over 19 different occasions, in a hospital, nursing home, or other health-care or treatment facility. Esterly has been civilly committed three times for chemical-dependency treatment—twice since January 2011.

Esterly had a psychological cognitive assessment on August 1, 2012, after two hospital visits in July for an alcohol-related medical emergency. In his report, James J. Prokop, Psy.D., L.P., L.I.C.S.W., noted that Esterly has been referred numerous times to Adult Protection, but the response has always been that "he has the right to make really bad choices and there is nothing we can do." Dr. Prokop observed that Esterly intends to

continue to drink alcohol, which Esterly calls his "over-the-counter pain medication." Dr. Prokop concludes:

> I do not see sufficient evidence from a cognitive perspective to intervene for [g]uardianship; however, if this case continues to escalate, this may become a possibility, given his self-abuse and substance abuse.
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> I would hope that he could be placed in a safer placement for him to receive the supervision, medication provision, and adequate nutrition and support so that he could have a healthier life.

Following this assessment, Esterly's condition continued to decline. In late July 2012, he left the hospital for Foley. He checked himself out of Foley around August 20. On August 30, he was again admitted to the hospital, and on September 4 he was once again discharged back to Foley. This hospital discharge summary noted that "[d]ue to his chronic alcoholism, he has cognitive impairment and he is quite noncompliant with medication." Esterly remained at Foley for about three weeks.

On October 25, 2012, Esterly fell at home and suffered a head injury. Esterly's brother, Darrell V. Esterly (Darrell), arrived to check on him and found Esterly "minimally responsive, with his hair matted in blood." Esterly then got up and attempted to walk through a corn field. On the way to the hospital, Esterly vomited large amounts of blood. He was treated in the emergency department, where doctors ordered an MRI of his brain as well as CTs of his head, chest, abdomen, and pelvis. Esterly was admitted for management of a probable seizure, alcohol withdrawal, and possible diabetic ketoacidosis. Esterly testified that, in the context of his health history, this episode was "very severe in the fact that I don't remember any of it."

One of Esterly's treating physicians, William M. Goodall, M.D., advised Esterly and his family during this hospitalization that Esterly "would die within two more episodes." Subsequently, Darrell, along with Esterly's sister, Janice Carlson (Janice), filed a petition for appointment of a guardian. Although they "would rather see him be able to do things on his own," their goal in seeking guardianship is for Esterly to remain at Foley, where he is sober, well-fed, and compliant with his medications, "until such time . . . that he could take it on himself again."

Dr. Goodall submitted a physician's statement in support of guardianship dated November 19, 2012. In Dr. Goodall's opinion, Esterly "is in need of a guardian to help in the care and management of the estate of the person." His diagnostic impression is that Esterly has "[m]ultiple medical problems including renal failure, diabetes mellitus, anemia, alcoholic gastritis, cognitive dysfunction, atrial fibrillation, seizure disorder, and liver failure." As behavioral evidence in support of guardianship, Dr. Goodall noted that "[Esterly] is a chronic alcoholic with a pattern of severe alcohol abuse, repeated episodes of falling and often seizures, hospitalization and detoxification followed by brief periods of sobriety and then repeat performance. With each episode his general health deteriorates further and without intervention will undoubtedly lead to premature death."

Esterly remained at Foley voluntarily following his October 2012 hospital discharge. A court visitor met with Esterly to review the guardianship petition. The court visitor concluded that Esterly "appeared to comprehend the petition and [was] in agreement with [guardianship]," but noted that Esterly disagreed with his doctor's statement. The court visitor concluded that an unlimited guardianship was appropriate

and noted that Esterly's preferred residence is his home. The court visitor also noted that Esterly wanted legal counsel.

By January 2013, because Esterly no longer agreed with the appointment of a guardian, the district court held a contested hearing on the petition. Petitioners submitted Esterly's medical records and logs of his time spent in medical facilities. Esterly submitted his health-care directive and Dr. Prokop's August 2012 cognitive assessment.

Darrell testified about his brother's extensive hospitalizations and civil commitments for chemical dependency over the preceding two years. He shared his concerns about Esterly's safety and well-being while living alone in his multi-level home. Darrell testified that he lives 20 minutes from Foley and assists Esterly with transportation to appointments and other needs. Janice testified that she is willing to serve as Esterly's successor guardian. Both Darrell and Janice testified generally that Esterly is stable when living at Foley.

Esterly testified that he has no objection to the appointment of Darrell as his guardian if he must have one. He has appointed Darrell as his health-care agent, nominated him as guardian in his health-care directive, and granted Darrell power of attorney. But Esterly does not believe that his health or current circumstances warrant the restriction on his freedom that an unlimited guardianship would impose. He attributes many of his hospitalizations not to his alcoholism, but to his other medical conditions. Esterly testified that he does not have problems managing his medications or nutrition while living on his own and that he uses a cane for fall protection. He acknowledged a

problem with alcohol in the past but testified that he does not intend to drink anymore. He would like to leave Foley eventually and rent an apartment or buy a new home.

The district court took the matter under advisement. In its order, the district court found by clear and convincing evidence that Esterly

> is incapacitated with regard to his person because he is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions concerning his personal needs for medical care, nutrition, clothing, shelter or safety. [Esterly] has demonstrated, over a significant period of time, an inability to understand and control his alcoholism, which leads to [Esterly] failing to care for himself and make sure his medical and nutrition needs are being met.
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> . . . [Esterly] has demonstrated behavioral deficits evidencing an inability to meet his needs for medical care, nutrition, safety and shelter. [Esterly] has demonstrated behavioral deficits by consistently returning home and consuming alcohol following his discharge from hospitals and treatment facilities.

The district court also found that Esterly's identified needs cannot be met by less-restrictive means, such as a health-care directive, because he could revoke it at any time and that a limited guardianship is not appropriate because of Esterly's demonstrated inability to care for himself and make decisions about daily living. The district court further found that Darrell is the most suitable and best qualified to serve as guardian and that Janice is the most suitable and best qualified successor guardian. The district court appointed Darrell as Esterly's unlimited guardian and Janice as his successor guardian. This appeal follows.

D E C I S I O N

"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), *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).

Incapacity

Esterly challenges the district court's finding that he is an incapacitated person. The gravamen of Esterly's argument is that (1) Dr. Prokop concluded that there is insufficient evidence to intervene for guardianship and (2) in the months preceding the hearing on the petition, Esterly demonstrated a sufficient ability to make responsible decisions relating to his personal care and needs. Esterly raised these arguments to the district court, which rejected them.

In August 2012, Dr. Prokop concluded that there was insufficient evidence "from a cognitive perspective" to intervene for guardianship, but he noted in the same sentence that his opinion may change "if this case continues to escalate." Esterly himself concedes that his October 2012 episode was "very severe" relative to previous medical emergencies. And in November 2012, Dr. Goodall noted cognitive dysfunction as a factor in his conclusion that Esterly is in need of a guardian.

The district court credited Dr. Goodall's opinion that Esterly is in need of a guardian, noting his history of examining Esterly at the hospital. After considering all of the evidence, including Dr. Prokop's assessment and Dr. Goodall's statement in support of guardianship, the district court found that Esterly has an inability to understand and control his alcoholism, which leads to his failure to care for himself.

The district court made specific findings about Esterly's well-documented history of alcoholism, his various medical ailments, and the hundreds of days Esterly spent in inpatient medical facilities in recent years. The district court found that the majority of Esterly's hospitalizations in 2011 and 2012 were the result of his consumption of alcohol.

And the district court found that "when [Esterly] consumes alcohol, [he] cannot meet his medical care or provide himself with sufficient nutrition, safety, and shelter," and discredited Esterly's testimony that he will not consume alcohol in the future. The district court further noted Dr. Prokop's observation that, despite three commitments for chemical-dependency treatment, Esterly does not intend to stop drinking.

Our review of the record shows that Esterly is able to maintain sobriety and meet his medical and nutritional needs while living at Foley, which has 24-hour staffing and assistance and provides his meals. Esterly testified that his "goal is to not drink anymore and [Foley] helps [him] adjust to that." But there is no evidence in the record that he is capable of making "responsible decisions concerning his personal needs for medical care, nutrition, clothing, shelter or safety" outside of Foley. And Esterly testified that he plans to move out. Giving due regard to the district court's credibility determinations, we conclude that the district court's findings of fact are not clearly erroneous.

Esterly also argues that he has the right to continue a lifestyle that is detrimental to his overall health. We understand his argument to be that chronic alcoholism cannot support a finding that a person is incapacitated. We are quite cognizant of free will and a person's entitlement to make poor choices and unhealthy lifestyle decisions. But we are not left with a definite and firm conviction that the district court made a mistake in rejecting Esterly's characterization of his alcohol use as a lifestyle choice.

Neither party directs us to case law addressing chronic alcoholism as a basis for the appointment of a guardian. But chronic alcoholism is not a novel issue for our courts. Minnesota courts have grappled with chronic alcoholism in the context of a good moral-

character determination for purposes of bar admission. The Minnesota Supreme Court has observed, "[a]lcoholism, as it is known today, is the condition or status of being physically and/or emotionally dependent on alcohol. We have recognized alcoholism as a disease which can be controlled with treatment. It is not a mere pattern of voluntary conduct . . . ." *In re Haukebo*, 352 N.W.2d 752, 755 (Minn. 1984) (citation omitted). Unemployment-benefits case law also recognizes that alcoholism is "a chronic illness characterized by remissions and exacerbations," and not simply a lifestyle choice. *See Moeller v. Minn. Dep't of Transp*., 281 N.W.2d 879, 882 (Minn. 1979). In the criminal context, Minnesota courts are called upon to dissect the layers of decision-making and culpability of intoxicated defendants, and in particular, to address the "self-induced involuntary intoxication of a chronic alcoholic." *See State v. Johnson*, 327 N.W.2d 580, 583 (Minn. 1982) (addressing the defense of involuntary intoxication).

In addition, the Minnesota Commitment and Treatment Act (MCTA) touches specifically on guardianship as a possibility for chemically dependent individuals. *See* Minn. Stat. § 253B.02, subd. 2 (2012). The MCTA identifies guardianship as a less-restrictive alternative disposition to commitment as a chemically dependent person. Minn. Stat. § 253B.09, subd. 1(a) (2012). While we do not consider whether Esterly is now a candidate for civil commitment, we note that he has been civilly committed for chemical-dependency treatment three times in the past.

We acknowledge that this case presents a very close call. But given our deferential standard of review, our understanding of the nature of chronic alcoholism, and the ample evidence in the record supporting the district court's findings that Esterly does

not intend to stop drinking and cannot make responsible decisions about his care while he is drinking, we conclude that the district court acted within its discretion in finding that Esterly is incapacitated. The district court's finding that Esterly is impaired to the extent that he cannot make responsible decisions concerning his personal needs and has demonstrated behavioral deficits evidencing an inability to meet his needs for medical care, nutrition, safety, and shelter is supported by reasonable evidence in the record and should not be disturbed.[1]

Less-Restrictive Means

Esterly challenges the district court's finding that his needs cannot be met by less-restrictive means. Esterly argues that his health-care directive is sufficient and is preferable to guardianship. The district court found that Esterly's needs cannot be met by a health-care directive because he could revoke it at any time. We note, too, that from the time that Esterly executed his current health-care directive in November 2011 until August 2012, he was hospitalized or otherwise in a medical facility well more than 100 days as a result of alcohol consumption. It therefore appears that a health-care directive has not been effective at preventing or tempering the effect of Esterly's chronic alcoholism on his general health and well-being.

A health-care directive is certainly less restrictive than guardianship, but the record shows that it is not the right tool to serve Esterly's needs. A primary reason that

[1] We note that any interested person may petition the district court for termination of the guardianship if a ward no longer needs the assistance or protection of a guardian. Minn. Stat. § 524.5-317(b) (2012). Esterly is entitled to annual notice of his right to request termination or modification of the guardianship. Minn. Stat. § 524.5-310(g) (2012).

petitioners seek guardianship is so that Esterly will continue to reside at Foley. And Esterly's health-care directive does not permit his health-care agent to make housing decisions. We therefore conclude that the district court acted within its discretion when, based on clear and convincing evidence, it determined that Esterly's identified needs cannot be met by less-restrictive means.

Affirmed.

ROSS, Judge (concurring specially)

I write separately to express my reservations about what is to me a very close, troubling case involving Esterly and his reasonably concerned, compassionate family.

Unrestricted guardianship is reserved by statute for extraordinary circumstances. Minn. Stat. § 524.5-310(a) (2012). The guardianship statute gives the district court discretion to reduce a person to a ward and to grant the ward's guardian virtually complete control over the ward's life. It generally confers on the guardian "the power to have custody of the ward," Minn. Stat. § 524.5-313(c)(1) (2012); "the power to establish a place of abode within or outside the state," *id.*; "the duty to provide for the ward's care, comfort, and maintenance needs, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate, training, education, and habilitation or rehabilitation," *id.* (c)(2); "the duty to take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects," *id.* (c)(3); "the power to seek appointment of a conservator of the [ward's] estate," *id.*; "the power to give any necessary consent to enable the ward to receive necessary medical or other professional care, counsel, treatment, or service," *id.* (c)(4)(i); "the power to approve or withhold approval of any contract, except for necessities, which the ward may make or wish to make," *id.* (c)(5). And this list of extraordinary personal intrusions is not, and cannot be, exhaustive, because the statute declares that the guardian's authority is "not limited to" even these liberty-engulfing decisions unless the district court

expressly limits the guardian's authority. *Id.* (c). And in this case, the district court expressly conferred the statute's full authority on Esterly's guardian, with no restrictions whatsoever.

I question whether an unlimited guardianship fits this situation. The guardianship statute authorizes the district court to "grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and, whenever feasible, make appointive . . . orders that will encourage the development of the ward's maximum self-reliance and independence." Minn. Stat. § 524.5-310(c). It is not at all clear to me that an unlimited guardianship is proportionate and necessary to remedy the limited issue of alcoholism, and no provision of the order seems to encourage or facilitate Esterly's self-reliance and independence in any way.

But I concur rather than dissent because, although Esterly cites this restraining provision in the statute, he does not argue that the district court should have ordered only a limited guardianship. He argues instead only that the district court should have recognized that his health-care directive is a less restrictive alternative to an unlimited guardianship. The district court explained reasonably why the health-care directive is not a viable alternative, so we do not reverse on that ground. Despite my agreement to affirm on this record and on the arguments presented, it seems to me that the unlimited guardianship overreaches into a person's right to independence, preventing him from making any of his own life decisions—including the health-threatening decision to drink excessively.