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North Dakota Supreme Court

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Estate of John T. Gleeson

JAN 21 2003

STATE OF NORTH DAKOTA

Appeal from Judgment
District Court, South Central Judicial District,
Burleigh County,
The Honorable Thomas J. Schneider, presiding

Petition for Rehearing

Protection and Advocacy Project
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State of North Dakota

In the Supreme Court

Estate of John T. Gleeson

File Number 20020117

Petition for Rehearing

Under the authority of North Dakota Rule of Appellate Procedure 40, George J. Gleeson (George), appellant, petitions the Court for a rehearing.

Context

The Court's December 30, 2002 opinion interprets some provisions of article V (protective proceedings) of North Dakota Century Code chapter 30.1 for the first time.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted amendments to article V of the Uniform Probate Code (UPC) on August 7, 1982. Recognizing these provisions as invitations to historic change in protective proceedings under state laws, the NCCUSL issued them as amendments to article V of the UPC and separately as the freestanding Uniform Guardianship and Protective Proceedings Act.

While the NCCUSL was working on protective proceedings, the North Dakota legislature initiated an interim study of the issues after the 1981 legislative session. The legislature was concerned with "deinstitutionalization" at the Grafton State School (now the Developmental Center at Westwood Park) and the rights of its residents and former residents.

Then-Senator Wayne Stenehjem (now Attorney General) identified two major problems the bill would solve: (1) the superintendent of the state schools was guardian of nearly all residents at the state schools in Grafton and San Haven and (2) these guardianship appointments were automatic, without any hearings. See Clerk's notes, House Standing Committee on Social Services & Veterans' Affairs, hearing on HB 1057 (January 14, 1983). Stenehjem also declared the bill would introduce the concept of limited guardianships (and conservatorships) to North Dakota law. *Id.*

Though revolutionary, limitations on guardianships and conservatorships got little attention in legislative hearings. The Mental Health Association endorsed the flexibility that would be available for courts, *id.*; the Easter Seals Society acknowledged the value of limitations, written testimony, House Social Services and Veteran's Affairs Committee (January 14, 1983); the Protection & Advocacy Project endorsed the concept of limited guardianships and limited

conservatorships, written testimony, House Social Services and Veteran's Affairs Committee (January 14, 1983). Otherwise, the topic received little attention.

Upon enactment of HB 1057, 1983 session laws chapter 313, North Dakota had available a continuum of protections available through protective proceedings.

The legislature took different approaches to authorizing limited guardianships and limited conservatorships. A guardianship would begin from the premise that it would be limited. Under the guardianship laws, a guardian held "only those powers and duties specified in the order." See N.D.C.C. § 30.1-28-04 (5). Certain rights had special protection, see N.D.C.C. § 30.1-28-04 (3), and courts had to directly address certain areas of responsibility, see N.D.C.C. § 30.1-28-04 (5).

A conservatorship order would begin from the premise that all conservatorship authority would go to the conservator. A court would limit a conservatorship by specifying those limits. When the order vested specific property rights in a conservator, the remaining property rights continued as vested in the protected person. See 1983 N.D. Sess. Laws chapter 313 § 12 and N.D.C.C. § 30.1-29-20. When the order vests property rights in a conservator without limitation, there are no property rights remaining for the protected person.

Conservatorships

A court may appoint a conservator in relation to a person's estate and affairs when

1. The person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
2. The person has property which will be wasted or dissipated **unless** proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

N.D.C.C. § 30.1-29-01 (2) (emphases added).

A conservator, appointed without specified limitations, is supposed to manage the property of the protected person in order to protect it. *Id.* If a conservator and a protected person have equal, independent rights to the protected person's property, the conservator cannot fulfill the responsibility to manage the property and protect it.

Conservatorships are often sought to protect a spendthrift from continuing to dissipate assets improvidently and wastefully. Imagine

Zachary is a spendthrift and Hilda is his conservator. Imagine the conservatorship has no specified limitations. If Zachary and Hilda have equal, independent rights to Zachary's property, Zachary and Hilda may be in a contest to see who can take action on the property first. That is, once Zachary has spent or sold his property, the conservatorship is useless.

As the Court ruled on December 30, a conservatorship proceeding does not affect the protected person's capacity to contract. Nonetheless, a conservatorship order limits the property over which the protected person may exercise control.

The December 30 opinion leaves a hole in the remedies available to North Dakota courts. George was subject to an unlimited conservatorship. The December 30 opinion does not grant the conservator the authority to protect George from selling his interest in property for significantly inadequate consideration. The December 30 opinion strips the conservator of that authority.

During oral argument, Justices Maring and Kapsner suggested the conservator had a duty to rescind or disavow the sale. If George had unlimited capacity to sell the property, the conservator would have no power to undue his sale. The statutes do not set up a scheme in which George makes lawful contracts and his conservator follows

him around nullifying (or rescinding or disavowing) legitimate contracts.

In an unlimited conservatorship, the protected person has capacity to contract. The conservatorship provides protection by limiting the property available to the protected person for making contracts, including contracts of sale. In this instance, the conservator held George's interests in property. The conservatorship court did not limit the conservatorship from hold this interest. George did not hold that interest and could not have sold it.

Guardianship

This court has held that the substance of an order determines its meaning and not the label put upon the order. *Keator v. Keator*, 276 N.W.2d 135, 138 (N.D. 1979). The conservatorship court's order bestowed authority upon the conservator and some of that authority is uniquely available to a guardian, as explained in the Appellant's Brief.

North Dakota's laws on protective arrangements are subject to the same rules of construction as any statute. Those rules dictate that courts consider:

1. The object that the legislature sought to obtain.
2. The circumstances under which the legislature enacted statute.
3. The legislative history.
4. Former statutory provisions.

5. Consequences of a particular construction.
6. The preamble.

See N.D.C.C. § 1-02-29 (omitting subsection 6, which does not apply). As explained above, the legislature intended to authorize a conservator to protect a protected person. George did not have authority to sell his interests in the property.

Property Interests

During oral arguments, Acting Chief Justice Neumann pointed out to Mr. Pulkrabek that the devisees did not have authority to transfer title to a purchaser. The personal representative held that authority. Acting Chief Justice Newman raised the question of what the devisees could have transferred.

The devisees have never held a transferable interest in the residential property; they have never held a legal interest in the property. The residential property belonged solely to the Estate, subject to Jerome's right to reside on the property for a specified period.

In North Dakota, a mere possibility, such as the expectancy of an heir apparent, is not to be deemed a legal property interest of any kind, and an heir cannot transfer an expectancy. See *Wacker Oil v. LoneTree Energy*, 459 N.W.2d 381 (N.D. 1990), citing N.D.C.C. §§ 47-02-20 and 47-09-02, and West's Anno. Cal.Civ. Code §§ 700 and

1045. Here, there were no facts that would have created an exception.

No plan was postulated under which Jerome and George would have held the property together and the facts of the case do not give rise to any feasible arrangement for it.

Fiduciary

The December 30 opinion turns the law of fiduciaries upside down.

1. Regardless of the actions of George's conservator, Jerome had a fiduciary duty to George while Jerome was personal representative. The presence of a conservator does not dissolve Jerome's fiduciary capacity or his fiduciary duties.
2. The burden of proof is on a fiduciary to exonerate his performance but
 - a. The court presumed that John's financial records for the months before he died were not probative. Jerome offered no evidence to support this conclusion.
 - b. The court presumed that the missing \$6,125.00 went for taxes or some other legitimate expense of sale. Jerome did not offer evidence of this and did not even suggest taxes.

- c. The court presumed that Jerome acted properly when he sold the residential property to his dependent, minor children at a substantial discount below fair market value. Jerome offered no evidence that the price was fair. He testified that he was looking out for his dependent, minor children when he made that sale.
- d. The court presumed Jerome acted properly when he solicited a quitclaim deed from George though Jerome knew the conservatorship court had found George "incapacitated."
- e. The court presumed Jerome fully disclosed the fair market value of the residential property to George's conservator and that Jerome explained honestly to the conservator that George was receiving only \$13,000.00 from the liquidation of that asset.

This appears to signal that fiduciaries need not produce evidence of the propriety of their conduct when it is challenged. This contradicts the applicable statutory language and pre-existing law.

Other

The December 30 opinion declares there is no clue as to why George needed a conservator. At the beginning of the appeal, George moved to proceed using fictitious names. George asked for privacy of

information that is equivalent to the mental health information automatically protected in the appeals of chapter 25-03.1 proceedings. That seems like a clue.

After George filed his appeal, he moved the district court to supplement the record on appeal with information that included a psychiatric opinion. The district court granted the motion but the information did not arrive at the Supreme Court (due to a clarity or clerical error). That seems like a clue.

The conservatorship order is res judicata. The reasons behind it are irrelevant. The conservatorship court found George was incapacitated; it conferred a conservator with full authority over his legal and financial matters.

Acting Chief Justice Neumann wondered what kind of disability might account for a 15-month conservatorship. Several examples: (1) a 15-month coma; (2) a cyclical mental illness that is in a 15-month cycle of exacerbation and instability; (3) a serious mental illness that is untreated for 15 months; and (4) a stroke patient who slowly recovers and after 15 months can take over more responsibilities.

Conclusion

George requests a rehearing. If deemed appropriate by the Court, George asks that the mental health records that were ordered

to supplement the record but were not forwarded to the court now be considered upon delivery from the conservatorship court. During the oral arguments, Acting Chief Justice Neumann suggested this court should see the entire conservatorship file if the probate court used it and George submits that would best assure justice in this case.

Dated: January 21, 2003.



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