

IN THE SUPREME COURT

20100246

STATE OF NORTH DAKOTA

IN THE DISTRICT COURT OF BURLEIGH COUNTY, NORTH DAKOTA

Supreme Court Case No. 20100246
Burleigh County Case No. 08-09-P-201

In Regard to the Guardianship/Conservatorship of G. L.,
an Alleged Incapacitated Person

APPEAL FROM ORDER TERMINATING
GUARDIANSHIP/CONSERVATORSHIP
ENTERED ON JUNE 10, 2010

DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA

THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING

APPELLEE'S BRIEF -
GUARDIAN AND PROTECTIVE SERVICES, INC.

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STATEMENT OF THE ISSUES:

1. Does M.L., as the named Appellant in this appeal, have standing to contest the District Court's decision on payment of expenses of administration?
2. Are sanctions of the type requested by the Appellant appropriate in circumstances where a guardian/conservator is reasonably and properly handling the statutory duties pursuant to Court authorization?

I. STATEMENT OF THE CASE:

Guardian and Protective Services, Inc. (GaPS) was appointed as temporary guardian/conservator of G.L. on September 16, 2009, by Order of the Burleigh County District Court, the Honorable Donald L. Jorgensen, District Judge, such appointment being based upon the Petition (Appellant's App. pps. 4-9) of G.L.'s wife, M.L., and one of his children, C.V. GaPS assumed its duties as guardian/conservator, which included residential placement of the ward, at a memory care facility, pending the hearing on the Petition that was scheduled for December 3, 2009.

At the Petition hearing, Petitioners' attorney, Melvin Webster, withdrew, citing a conflict in the positions of the Co-Petitioners, as to the necessity of and the proper person as to the appointment of a guardian/conservator for G.L., which request was allowed by the District Court, the Honorable Thomas J. Schneider, District Judge, presiding, and the hearing continued following the Court's assessment of the status of the proceedings.

Following testimony on the issues of capacity and appointment, the Court heard arguments regarding the Physician's Report, which had been received and filed immediately prior to the hearing, upon objection by the attorney representing M.L. At the conclusion of the hearing, the District Court stated that its determination would include both whether the Physician's Report should be considered, and the issues of incapacity and the need for continuing appointment of a guardian/conservator, while extending the temporary appointment of GaPS.

The District Court issued its Memorandum Opinion and Order on December 10, 2009, wherein the Court reviewed the relevant statutory provisions and applicable case

law, relative to guardianship/conservatorship appointments, specifically in the context of determining whether clear and convincing evidence had been presented of G.L.'s incapacity. The District Court referenced the Reports of the Visitor (Appellee's App. pps. 10-16), Physician (Appellant's App. pps. 19-21), and Guardian ad Litem (Appellant's App. pps. 22-23), all of which recommended the appointment of a guardian/conservator, principally addressing the ward's mental capacity, reasoning and overall judgment being impaired by moderate to severe dementia, as diagnosed by the Court-appointed physician. Specifically, the District Court reviewed the factors set forth in NDCC § 30.1-28-04 and determined that appointment of a guardian/conservator was in the ward's best interests. The District Court determined that GaPS, as a non-interested party, was the appropriate guardian/conservator, based upon conflicts within the family, involving both the ward's care and financial interests, to insure the health and safety of the ward. GaPS was directed to prepare the Findings and Order for approval by the District Court.

The District Court issued its Findings of Fact and Order Appointing Guardian and Conservator on January 6, 2010, which established full authority on the part of GaPS as guardian/conservator, effective as of December 3, 2009, such Order identifying the areas of authority and the rights to be retained by the ward, and further instructing that appropriate Letters of Guardianship/Conservatorship be issued.

While the proceeding was pending issuance of the Findings and Order, Attorney Donavin L. Grenz, on behalf of M.L. and C.L., another child of the ward, moved the District Court for relief from its Memorandum Opinion and Order, requesting terminating

the guardianship/conservatorship and ordering discharge and release of the ward from “involuntary patient treatment”. The contentions presented by the Motion involved insufficient evidence to support the determination of incapacity, and deprivation of due process of law by reason of the District Court having considered the Physician’s Report, in the absence of the physician for cross-examination. The Motion was resisted by both GaPS and the Court-appointed Guardian ad Litem, who each submitted written Responses thereto. The Guardian ad Litem’s Response (Appellee’s App. pps. 19-20) cites the results of the two Neuropsychological examinations by the Court-appointed Physician, together with the prior letter to the District Court from Dr. Goodman, MedCenter One, all of which contained similar recommendations relating to the need for appointment of a guardian/conservator on the basis of the ward’s incapacity from dementia. The Response interposed by GaPS (Appellee’s App. pps. 21-24) also references the results of the Neuropsychological Evaluations diagnosing incapacity, the corresponding need for guardianship/conservatorship authority, and the recommended need for appropriate residential placement. Further, GaPS addresses the allegations of deprivation of the ward’s legal rights or interests, both in the context of its statutory duties, and the decision by the District Court, generally, primarily on the basis of the appropriateness of reliance upon the expert physician opinions. The District Court issued its Order Denying Motion on February 10, 2010, determining that consideration of the Physician’s Report was statutorily appropriate, without being present for cross-examination, in the absence of objection from the Guardian ad Litem and temporary guardian/conservator.

M.L., thereafter, by Motion, dated March 24, 2010, again moved the Court for a new hearing on the original Petition, or, in the alternative, terminating GaPS' appointment and appointing M.L. as guardian/conservator, along with other specific requests for relief along those lines. Responses to the Motion were again interposed by the Guardian ad Litem (Appellee's App. pps. 25-26) and GaPS (Appellee's App. pps. 27-30), in their respective capacities, which generally reiterated their previous positions regarding the appointment decision.

While this Motion was pending hearing, GaPS petitioned the Court for termination of the guardianship/conservatorship, based upon a newly obtained Neuropsychological Evaluation by a different physician. This evaluation report provided an opinion that G.L. was, essentially, no longer incapacitated, pursuant to the statutory criteria, and contained a recommendation that included a determination that the ward no longer required guardianship services. A hearing was held on the termination Petition (Appellee's App. pps. 31-32) on May 10, 2010, at which time the Court heard testimony and received evidence on the issue of the appropriateness of terminating the guardianship/conservatorship, generally, and the nature and status of the outstanding expenses of administration of the estate. The Court issued its Order Terminating Guardianship/Conservatorship (Appellee's App. pps. 33-34) on June 10, 2010, over the objection of M.L. relating to responsibility of the ward's estate for certain outstanding expenses of administration, as itemized in Paragraph 3 of the Order. Such objection alleging the deprivation of due process of law, violation of fiduciary and legal duties by GaPS, and financial hardship.

The guardianship/conservatorship proceedings were finally concluded upon the District Court issuing its Order Approving Final Report/Accounting on September 8, 2010, wherein the disputed administrative expenses are referenced as having been previously approved, and that payment thereof was subject to final determination upon appeal.

This Appeal followed, with the Issues presented being along the same lines as the prior objection of M.L., that this Court should, essentially, impose financial sanctions against GaPS, as the guardian/conservator, the Guardian ad Litem, and the Visitor.

II. STATEMENT OF THE FACTS:

On September 6, 2009, G.L. was involuntarily admitted to the psychiatric unit at MedCenter One in Bismarck, as the result of contact made to law enforcement by his family, due to threatening behaviors. During the inpatient placement, the staff at MedCenter One recommended initiation of a guardianship proceeding, and a Petition therefor was prepared by Attorney Melvin Webster as the family's request.

On September 16, 2009, District Judge Donald L. Jorgensen appointed GaPS as temporary guardian/conservator, with specific authority as identified in the Order and corresponding Letters. The Petition (Appellee's App. pps. 4-9) was accompanied by a letter, dated September 15, 2009, addressed to the Court, from Patrick Goodman, M.D., MedCenter One, which recounts the placement-related behaviors and presents a strong recommendation for guardianship assistance due to "dementia with paranoia, probably Alzheimer's dementia", combined with a suggestion for the appointment of a non-family member guardian.

On September 17, 2009, further behaviors resulted in a return placement at MedCenter One. GaPS, pursuant to its authority, placed G.L. at Maple View East in Bismarck, a memory care facility, as an alternative to hospitalization. GaPS thereafter assisted in facilitation of an Neuropsychological Evaluation by Dr. Marland Brown, the Court-appointed Physician/Clinical Psychologist, at MedCenter One, with the initial evaluation taking place on September 7, 2009. Dr. Brown, in the Summary & Impression section of his evaluation report, diagnosed a “degree of dementia”, whereby it was his opinion that G.L. was “not in a position to make reasoned psycho-social decisions on an independent basis”, and that “Initiation of guardianship procedures is appropriate, supported, and strongly recommended”. Further, Dr. Brown recommended that a follow up Neuropsychological Evaluation be conducted in approximately two months. The report from Dr. Brown’s initial evaluation (Appellee’s App. pps. 17-18) was received by GaPS on November 5, 2009.

As the hearing approached, and based upon the time period following Dr. Brown’s initial evaluation, GaPS facilitated a follow up assessment. This procedure was intended to provide the most up-to-date information/opinion for consideration by the District Court, as to G.L.’s current intellectual and cognitive functioning. This updated assessment information was also intended to be beneficial for consideration by the ward’s family, upon their request for a second opinion from G.L.’s family physician. The subsequent Neuropsychological Evaluation was not able to be conducted until November 19, 2009, and in the Summary & Impression section, (Appellant’s App. pps. 19-21) Dr. Brown noted that “a moderate to severe degree of dementia now exists...”, “most likely

senile dementia of the Alzheimer type”. Dr. Brown. further, indicated that the ward “is clearly not in a position to make reasoned psycho-social decisions regarding important issues such as his place of residence”, and that “Pursuit of guardianship is clearly indicated”. Lastly, Dr. Brown opined that “Overall, it is very good that he is residing in a memory care unit. If this type of environment is not able to maintain his behavior, transfer to a skill cared nursing environment is strongly recommended”. The report of this evaluation was not received by GaPS until just prior to the scheduled hearing on the guardianship/conservatorship on December 3rd, notwithstanding repeated inquiries by its staff.

G.L. had remained in residential placement at Maple View East during the interim period, in furtherance of and in compliance with physician diagnoses and recommendations. A copy of the updated Neuropsychological Evaluation report was provided to the Court at the earliest opportunity thereafter. to be included in the file for the hearing.

At the hearing on December 3, 2009, Judy Vetter, Program Director at Guardian and Protective Services, Inc. (Tr. pps. 26-28) (Appellee’s App. pps. 35-37), and Audrey Uhrich (Tr. pps. 29-35) (Appellee’s App. pps. 38-44). its Care Coordinator, were called to testify by the Guardian ad Litem. to provide the Court with certain factual background surrounding the Petition, and related contacts with the family. Ms. Uhrich, during cross-examination by M.L.’s counsel, Attorney Donavin Grenz. stated that the continuing residential placement was pursuant to physician recommendations, which GaPS generally follows. as being expert opinion on what is in the best interests of the ward. Further, that

since there are only two such neuropsychiatric physicians in the Bismarck area, Drs. Brown and Brooks, it was their decision for retesting to be done through Dr. Brown, for continuity in the evaluation process.

The District Court also heard testimony from C.V., regarding the factual background that precipitated the commencement of the guardianship/conservatorship proceeding, her belief as to the need for such an appointment, and that GaPS would be best suited to handle those duties under the circumstances of the family (Petition Hearing Tr. pps. 35-45) (Appellee's App. pps 44-54). Additionally, M.L. testified concerning G.L.'s behaviors immediately prior to preparation of the Petition, and her desire to have G.L. return home under certain conditions (Petition Hearing Tr. pps. 46-49) (Appellee's App. pps. 55-58). At the conclusion of the hearing, M.L.'s attorney objected to the Physician's Report being received/considered by the District Court, due to the absence of Dr. Brown for cross-examination (Petition Hearing Tr. pps. 49-50) (Appellee's App. pps. 58-59). The District Court took the matter under advisement, expressing its intentions as the Physician's Report and appointment, generally (Petition Hearing Tr. p. 50) (Appellee's App. p. 50).

The continuing responsibilities handled by GaPS during the time period its appointment as guardian/conservator included monitoring G.L.'s placement, facilitating contacts with family and any necessary appointments, as well as assessing family finances in relation to the expenses associated with the placement at Maple View East. During this time period G.L.'s family was requesting a "second opinion" on incapacity and placement, and in furtherance thereof GaPS scheduled an appointment with Dr. Brooks

that took place on April 13, 2010. Dr. Brooks' evaluation report dated as of April 15, 2010, and in the Recommendations section thereof, he recommends that "G.L. is currently able to living fairly independently with formal supervision....." and does not currently require guardianship services". Based upon the results of this evaluation, GaPS petitioned the District Court for termination of the guardianship/conservatorship, and correspondingly, its appointment in those capacities. The hearing on the Petition to terminate took place on May 10, 2010, and the District Court, thereafter, issues its Order Terminating Guardianship/Conservatorship, effective as of the hearing date. The District Court determined that G.L. was no longer incapacitated, based upon the evaluation conducted by Dr. Brooks, and thereby terminated the proceedings. Further, the District Court, over objection by M.L.'s counsel, approved payment of certain expenses relating to the administration of the estate.

The expenses presented to the District Court related generally to administration of the guardianship/conservatorship estate, and legal fees incurred by GaPS for preparation of required Court documents and responses to the ongoing challenges to the Court's decision. These expenses of the administration of the guardianship/conservatorship estate are shown in Paragraph 3 of the Order Terminating Guardianship/Conservatorship (Appellee's App. pps. 33-34), totaling the sum of \$12,088.28, to be approved by the Court upon verification thereof. These expenses were later addressed by the District Court in the Order Approving Final Report and Accounting, dated September 8, 2010, and therein identified as being subject to determination upon completion of this appeal.

III. LAW AND ARGUMENT:

1. Does M.L., as the named Appellant in this appeal, have standing to contest the District Court's decision on payment of expenses of administration?

The standard that has been established by this Court is that only a party or person aggrieved by a judgment or order of the District Court can appeal from it to the Supreme Court. Bernhardt v. Rummel, 319 N.W.2d 159, 160 (N.D. 1982) (quoting State v. Bakke, 117 N.W.2d 689, 696 (N.D. 1962)). Further, in order to be entitled to appeal as an aggrieved person, a party must have some legal interest that may be enlarged or diminished by the decision appealed from. Such a party must be injuriously affected by the decision. Huber v. Miller (N.D.), 101 N.W.2d 136. Thus, a party is entitled to have a court decide the merits of a dispute only after demonstrating standing to litigate the issues placed before the court. Triple Quest, Inc. v. Cleveland Gear Co., 2001 ND 101, 627 N.W.2d 379.

The named Appellant, M.L., spouse of the ward, was not a party to the proceeding before the District Court, and has not shown that there has been a contractual assignment of rights which might confer upon her standing to appeal. The issue then is whether M.L. has a sufficient legal interest that has been injuriously affected by the District Court's Order, allowing for payment of administration expenses of the guardianship/conservatorship estate.

M.L. was not a party to the proceedings before the District Court, having declined to continue as a Petitioner, at the time that the Petition was heard by the District Court on December 3, 2009. At that time, her status then was that only of the spouse of the ward,

and participated in the proceedings solely in that capacity. Thus, the Appellant was not a party to the proceedings in the sense required for consideration of a legal interest related thereto, that may be enlarged or diminished by the District Court's decision. GaPS would contend that mere relationship from a familial perspective does not constitute such a legal interest.

Therefore, this appeal should be dismissed on the basis of the Appellant lacking standing so as to be entitled to appeal the decision of the District Court.

2. Are sanctions of the type requested by the Appellant appropriate in circumstances where a guardian/conservator is reasonably and properly handling the statutory duties pursuant to Court authorization?

M.L. appears to contend that GaPS and its counsel are not entitled to payment of reasonable expenses of the administration of the guardianship/conservatorship estate, based upon the theory that it somehow facilitated or participated in a violation of G.L.'s rights, by statute, due to the absence of the Court-appointed physician, Dr. Brown, at the Petition hearing. The undisputed facts indicate that the physician's report, from the second Neuropsychological Evaluation, was not received by GaPS until immediately prior to the hearing, at which time the report was transmitted to the Court file for consideration at the hearing, in the normal course of such proceedings. The lateness of the report is not claimed to be attributable to any actions or omissions on the part of GaPS, nor is there a claim presented herein that a position was expressed to the District Court with regard to receipt or consideration of the report in its determination of incapacity and appointment of a guardian/conservator.

The general powers and duties of guardians of incapacitated persons are found at NDCC § 30.1-28-12, which would be substantially applicable in the instant case, as the District Court ordered full guardianship authority as being in the best interests of G.L. Pursuant thereto GaPS established the ward's place of residence at Maple View East, a memory care facility in Bismarck, based upon the recommendations of the physicians that had provided evaluation recommendations to that effect, beginning with Dr. Goodman at MedCenter One, and then Dr. Brown in his initial Neuropsychological Evaluation. The subsequent Neuropsychological Evaluation conducted by Dr. Brown, just prior to the Petition hearing, confirmed the dementia diagnosis and the corresponding need for residential care of the type that had been put in place.

The powers of a conservator in administration of the estate are enumerated in NDCC § 30.1-29-24, which, again, would be all inclusive in the instant case, as the District Court did not place any limitations on the authority vested in GaPS. GaPS reasonably exercised its powers as conservator in attempting to determine the financial circumstances of the estate, in the context of providing payment for ongoing residential care expenses, and other necessary expenses related to its administration.

The powers undertaken and duties performed by GaPS in its administration of the estate entitle it to reasonable compensation, within the normal standards associated therewith for such agencies. Likewise, the retention of legal counsel to comply with the directive of the District Court to prepare Court documents, and to response to challenges to the performance of its duties, is well within the acceptable standards in these types of situations.

The enumerated duties of a guardian, by statute, do not include representation of the ward in the nature of either an advocate or attorney, in the context of providing representation as part of the hearing procedure. The duty of safeguarding the civil rights and personal autonomy of the ward, as stated in NDCC § 30.1-12-05(5), does not extend, in this context, beyond assisting in the facilitation of the examination by the Court-appointed physician, and using its best efforts to insure that the report is available to the District Court for its consideration at the Petition hearing, or otherwise.

A guardian's adherence to its duties involves care of the person, as directed by the Court. Thus, a guardian does not, in the normal course of the general duties, get involved in such matters as the extent District Court considers the physician's report in its determination, from the perspective of recommending or objecting to either receipt or consideration thereof by the District Court, as M.L. contends. These matters are within the realm of the duties of the attorney/guardian ad litem, pursuant to the provisions of NDCC § 30.1-28-03(4)(c), if at all, as the District Court itself should have unfettered authority to determine whether its consideration of the physician's report is appropriate under the totality of the circumstances involved, as was the case here. The Memorandum Opinion and Order of the District Court identifies the factors that were considered in making its decision on incapacity and appointment of GaPS as guardian/conservator for G.L., again, being fully within its purview in such proceedings.

The provisions of NDCC § 30.1-28-03(7), relating to the right of the ward to present evidence, and to cross-examine witnesses, including the Court-appointed physician and the visitor, again, is not an intended duty of a guardian in such proceedings.

The attorney/guardian ad litem generally handles such matters. In this case, the Court-appointed attorney/guardian ad litem apparently determined that it was in the best interests of the ward not to object to receipt and consideration by the Court of Dr. Brown's updated Neuropsychological Evaluation Report, in his absence. This decision should not be second-guessed at this time, as the expert medical evidence was clear and consistent, and the result of another evaluation that took place several months later that prompted termination of the guardianship/conservatorship, was based upon other factors that developed over time, which are beyond the contentions of M.L. in this appeal.

This Court has established that guardians/conservators, and counsel retained on their behalf, are entitled to reasonable compensation for the services rendered, pursuant to the provisions of NDCC § 30.1-28-12(10). Additionally, the District Court has discretion to consider what compensation is reasonable under the circumstances of any given guardianship proceeding. In the Matter of the Guardianship and Conservatorship of D.M.O., 2008 ND 100, 749 N.W.2d 517. In the Matter of the Guardianship and Conservatorship of V.J.V.N., 2008 ND 106, 750 N.W.2d 462. In this instance, the District Court, over the same objection that is presented in this appeal by M.L., determined that both GaPS and its retained counsel were entitled to the compensation presented to the Court for consideration, as being reasonable under the specific circumstances of the proceeding. Thus, the District Court had full knowledge of the issues that are again presented in this appeal in making its decision as to an appropriate award of administrative expenses.

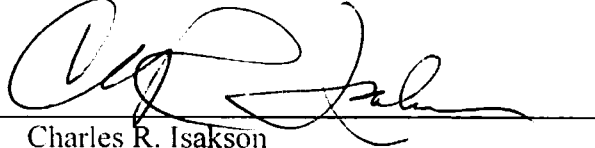
The standard to be used by this Court would be abuse-of-discretion, which did not occur in this instance. whereby the determination of the District Court in its award of administrative expenses to GaPS and its counsel should not be disturbed on appeal. A district court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner. In the Matter of the Guardianship of Renz, 507 N.W.2d 76, 79 (N.D. 1993). The District Court properly determined that GaPS performed its services on behalf of G.L. in a professional manner, befitting its experience in such matters, and is entitled to reasonable compensation therefor, together with the attorney's fees it incurred in an effort to properly perform such duties on behalf of G.L.

IV. CONCLUSION:

Therefore, Guardian and Protective Services, Inc. would respectfully request that the Supreme Court affirm the District Court's Order Terminating Guardianship/Conservatorship, dated June 10, 2010, specifically regarding the administration expenses outlined in Paragraph 3 thereof.

Dated this 5th day of November, 2010.

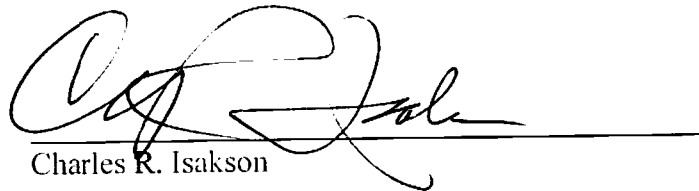
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CERTIFICATE OF SERVICE

5th hereby certify that a true and correct copy of the foregoing document was on the day of November, 2010, mailed to:

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