

20100246

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 10, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Guardianship/Conservatorship of G.L.

Supreme Court Case No. 20100246
Burleigh County Case No. 09-P-00201

APPEAL FROM THE ORDER TERMINATING
GUARDIANSHIP/CONSERVATORSHIP ENTERED ON JUNE 10, 2010 FROM
SOUTHCENTRAL DISTRICT COURT,
COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA, HONORABLE THOMAS
J. SCHNEIDER

BRIEF OF APPELLEE/GUARDIAN AD-LITEM

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Guardian Ad-Litem /Appellee

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North Dakota Cases:

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STATEMENT OF THE ISSUES

1. Whether the Court correctly considered all reports in rendering its decision in this case.

2. Whether the court was correct in ordering that certain fees be paid by the Guardian /Conservator.

1. STATEMENT OF THE CASE

2. This is a case in which the Ward in this matter hereinafter referred to as Mr. G.L. was removed from his home due to behavior issues. Upon removal from his home Mr. G.L. was seen by Dr. Patrick Goodman. (Appellant's Appendix pps.4-5) Dr. Goodman recommended that Mr. G.L. family seek a guardianship to assist him as they believed he was in need of assistance in making reasoned decisions. Additionally, Dr. Goodman recommended that a non-family member serve in this capacity due to a history of contention in the family. As such, Mr. G.L.'s wife M.L. and Daughter C.V. sought the assistance of Attorney Melvin Webster to obtain a guardianship. A petition was prepared in Melvin Webster's office naming M.L. and C.V. as the petitioners and asking that GAPS be appointed as the guardian. During her testimony at the hearing C.V. explained why GAPS was named as guardian in the petition. C.V. stated that M.L. could not provide the necessary supervision to act as guardian. She went on to state that she and her brother Cr.L. had no desire to serve as guardian and that although her brother Ch.L. would be willing to serve as guardian he was unable to provide the supervision necessary and he had a potential conflict due to the fact that he had a contract for deed with Mr. G.L. to purchase the farm. (Petition Tr. pps.35, 36, 38)

3. After the petition in this matter was filed and shortly prior to the hearing M.L. changed her mind regarding the petition and Mr. Webster asked the court to allow him to withdraw as counsel due to the ethical conflict regarding clients with competing positions. M.L. appeared at the hearing with her new attorney Donavin Grenz. M.L. asked that the petition be dismissed and that if the court felt it necessary to have a guardian appointed that she be appointed and that her husband Mr. G.L. be allowed to

return home. Rather than seeking a continuance at the hearing to allow M.L. and her counsel Mr. Grenz time to either depose or subpoena the appointed physician they simply objected to the allowance of the physician's report to be considered by the court. The court overruled the objection and considered the report of the appointed physician through its written order. The court ultimately decided that Mr. G.L. was an incapacitated person in need of a guardian and conservator and GAPS was the proper guardian/conservator in this case. M.L. and her attorney have taken the position that it was the duty of the guardian ad-litem and the guardian to cross examine the court appointed physician, and that their failure to do so was a direct violation of Mr. G.L.'s due process rights. They further contend that the court violated Mr. G.L.'s rights of due process when it considered the report of the physician without requiring the physician to be present at the hearing. Based on these contentions, a number of motions and this appeal have followed.

4. STATEMENT OF THE FACTS

5. This case began when Mr. G.L. began displaying behaviors that caused him to be removed from his home on two occasions. (Petition Tr. pps.43) Mr. G.L. was seen by Dr. Patrick Goodman following his removal from the home. (Appellant's Appendix pps.5, 6) Dr. Goodman recommended that Mr. G.L. have a guardianship established due to what he stated was a showing of "dementia with paranoia." (Id. at 5) Dr. Goodman additionally recommended that a non-family member be appointed to act as a guardian for Mr. G.L. based on the frequent conflict within the family for many years. (Id.) Based on the recommendations from Dr. Goodman, Mr. G.L.'s wife M.L. and daughter C.V. decided to seek the assistance of Attorney Melvin Webster to petition the court for a

guardianship. (Petition Tr. pps.35-36) C.V. and M.L. asked that GAPS be appointed as the guardian /conservator based on the recommendation from the physician and that Mr. G.L. has not listened to any of them throughout the years. Additionally, C.V. stated within her testimony that M.L. could not provide the necessary supervision to act as guardian for Mr. G.L. C.V. went on to state that she and her brother Cr.L. did not want to serve as guardians and that despite their brother Ch.L.'s willingness and desire to serve as guardian he could not provide the necessary supervision and he had a potential conflict in the fact that he has a contract for deed with Mr. G.L. for the farmland. (Petition Tr. pps.35, 36, 38) Both M.L. and C.V. signed the petition that was filed with the court on September 16, 2009. (Appellee's Appendix pps.4) At some point prior to the hearing M.L. changed her position on the matter and discussed the same with her attorney Melvin Webster. (Petition Tr. pps.3) (Appellee's Appendix pps.10) As a result of the discussion Mr. Webster made a motion to withdraw from the matter on December 1, 2009 due to client's conflicting interests. Due to the closeness of the hearing date, Mr. Webster attended the hearing on December 3, 2009 to seek the court's approval to withdraw as the attorney for the petitioners. (Petition Tr. pps.3) The Court allowed Mr. Webster to withdraw and the hearing continued without Mr. Webster present. (Id.)

6. M.L. attended the hearing with her new counsel Donavin Grenz. (Petition Tr. pps.4) M.L. asked for a withdrawal of the petition or in the alternative to be named as the guardian conservator. (Id. at 4) The Court asked the second petitioner, C.V., if she was also in favor of withdrawing the petition to which her answer was no. (Petition Tr. pps.5) The Court noted a procedural problem regarding the presentation of evidence and then asked the guardian ad-litem how she felt about the petition and procedure. (Id.) The

guardian ad-litem objected to the withdrawal of the petition but left the procedural issue to the courts discretion. (Id.) The guardian ad-litem explained her reasoning behind the objection to the withdrawal of the petition as being based on the information from Dr. Brown and Dr. Goodman. (Petition Tr. pps.6) The court reviewed the reports of the guardian ad-litem and the visitor. (Petition Tr. pps.7) Attorney Grenz pointed out a statutory preference to appoint M.L. as the guardian conservator. (Id.) The court again made note of the withdrawal of the petitioning attorney and the procedural difficulty if presenting evidence. (Id.) Attorney Grenz insisted to the court that he and his client were prepared to proceed with the hearing as scheduled. (Id. at 9)

7. The court allowed Attorney Grenz to proceed with his case and call witnesses. (Id.) Testimony was heard by Mr. G.L., M.L., Judy Vetter from GAPS, Audrey Uhrich from GAPS and C.V. (Petition Tr. pps.2) Testimony was not heard from the appointed visitor although she was present at the hearing. (Petition Tr. pps.1, 7) Testimony was not heard from the court appointed physician and he was not present at the hearing. (Petition Tr. pps. 49) Attorney Grenz objected to the physician's report being considered in the matter as he was not present at the hearing. (Petition Tr. pps.49) The court took the matter under advisement stating that it would make a decision on whether or not the physician's report would be considered and whether or not Mr. G.L. was in need of a guardian and if so who that guardian would be. (Petition Tr. pps.50) The Court issued a Memorandum Opinion and Order on December 10, 2009 in which it stated that the court should consider the report of the physician as well as all the reports on file and in so doing it finds that it is in Mr. G.L.'s best interest to appoint a guardian and conservator and that it appointed GAPS to act as guardian and conservator. (Appellant's Appendix.

pps.29)

8. The Court directed GAPS to have their attorney draft the findings based on its order. (Id.) Since the original Hearing in this matter there was a Motion for Relief of Judgment, New Trial, Termination of Guardian Protective Services, Inc. as Guardian of G.L. and as Conservator of his Property and for Order Discharging and Releasing G.L. from Involuntary Inpatient Treatment filed by Donavin Grenz on behalf of M.L. and C.V. on December 23, 2009. (Appellant's Appendix pps.31) This Motion alleged insufficient evidence to support the order and a deprivation of due process of law. Both the guardian ad-litem and the guardian/conservator through counsel filed responses to the motion citing the reports of all appointed parties as well as the neuropsychological evaluations and letters from Dr. Goodman. (Appellee's Appendix pps.19, 21) This motion was denied by the court on February 4, 2010. (Appellant's Appendix pps.58, 59) A second motion was filed on behalf of M.L. by Attorney Donavin Grenz on March 24, 2010 titled Motion for Relief from Judgment, New Trial, Termination of Guardian Protective Services Inc. as Guardian and Conservator, and Substitution of M.L., and Modification of Limitations Imposed and Authority Granted alleging issues much the same as the first motion. (Appellant's Appendix pps.60) A demand for hearing was filed with this motion. (Appellant's Appendix. pps.62) Both the guardian and the guardian ad-litem filed responses to this motion again reiterating their positions on the matter. (Appellee's Appendix. pps.25, 27) The guardian ad-litem made a note within her response that there was no objection to seeking a second medical opinion. Prior to the hearing on the second motion a neuropsychological evaluation of Mr. G.L. was completed by Dr. David Brooks on April 14, 2010 which indicated that Mr. G.L. was no longer in need of formal

assistance or guardian services. (Appellant's Appendix pps.65-74) A hearing was held on May 10, 2010 to terminate the guardianship and address remaining fees to be paid on the file through GAPS. (Termination Tr.) The Court granted the termination of the guardianship and conservatorship and ordered certain expenses to be paid through a judgment of the court. (Termination Tr. pps.31) This appeal follows.

9. **LAW AND ARGUMENT**

10. All Procedures for the Court appointment of a guardian of an incapacitated person under NDCC 30.1-28-03 were followed in this case. The petition filed by Attorney Webster had all required information listed in NDCC 30.1-28-03 (2). NDCC 30.1-28-03 (3) states that :

Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity, appoint an attorney to act as guardian ad-litem, appoint a physician or clinical psychologist to examine the proposed ward, and appoint a visitor to interview the proposed guardian and the proposed ward.

11. The court in this case appointed Dr. Brown as the physician, Carol Morast as the visitor and Bonnie L. Storbakken as the guardian ad-litem attorney for Mr. G.L. Dr. Brown conducted an initial neuropsychological evaluation on September 7, 2009 and a follow up neuropsychological evaluation on November 19, 2009. (Appellee's Appendix pps.17) (Appellant's Appendix pps.19-21) Both evaluations indicate a need for a guardian for Mr. G.L. The physician fulfilled his requirements under NDCC 30.1-28-03 (5). Carol Morast provided a report for the court also indicating a need for a guardian and for the guardian to be a non-family member. The visitor fulfilled her requirements under NDCC 30.1-28-03 (6).

12. Bonnie Storbakken, within her reply to the court, indicated a need for a guardian despite Mr. G.L.'s wish to go home and tend to his own affairs. The guardian ad-litem

fulfilled her requirements under NDCC 30.1-28-03 (4).

NDCC 30.1-28-03 (4) states

The duties of the attorney include:

- a. Personally interviewing the proposed ward;*
- b. Explaining the guardianship proceeding to the proposed ward in the language, mode of communication, and terms that the proposed ward is most likely to understand, including the nature and possible consequences of the proceeding, the right to which the proposed ward is entitled, and the legal options that are available; and*
- c. Representing the proposed ward as guardian ad litem. If the appointed attorney or other attorney is retained by the proposed ward to act as an advocate, the attorney shall promptly notify the court, and the court, at determine whether the attorney should be discharged from the duties of the guardian ad litem.*

In this particular case Ms. Storbakken did in fact fulfill her duties as prescribed under NDCC 30.1-28-03 (4). (Appellant's Appendix pps.22-23) Ms. Storbakken explained this process to Mr. G.L. and represented him as a guardian ad-litem at the hearing. (Petition Tr. pps.1) Ms. Storbakken's reply dated Dec. 2, 2009 outlines her opinion as to what she felt was in Mr. G.L.'s best interest regarding the petition for guardianship as well as the basis for her opinion. (Appellant's Appendix pps.22-23) Ms. Storbakken made it clear within her report that Mr. G.L. felt he was better and desired to return home. (Id.) Ms. Storbakken appeared at the hearing and functioned as a guardian ad-litem focused on Mr. G.L.'s best interest rather than Mr. G.L.'s personal wishes.

13. NDCC 30.1-28-03 (4) is clear that if the guardian ad-litem is retained to act as an advocate for the ward the court must be notified immediately. Ms. Storbakken was never retained as an advocate in this matter for Mr. G.L. as there is no record of Ms. Storbakken notifying the court of any such arrangement. Ms. Storbakken's role was as a guardian ad-litem acting on behalf of Mr. G.L.'s best interest rather than his wishes.

M.L. through her counsel has asserted that the guardian ad-litem has violated Mr. G.L.'s due process of law by failing to cross examine the physician. The guardian ad-litem has a duty to explain the process to the proposed ward as well as the consequences of the proceedings and the legal rights the proposed ward has within the process. That was done in this matter. (Appellant's Appendix pps.22-23) The decision of the guardian ad-litem to not object to the acceptance of the physician's report does not violate any duties the guardian ad-litem has within these proceedings. As such, the guardian ad-litem has not violated Mr. G.L.'s due process rights in this matter.

14. If M.L. and her counsel felt it necessary to cross examine the appointed physician they certainly could have requested a continuance of the hearing to allow them time to either subpoena the physician or take the deposition of the physician. However, it was M.L. through her counsel that insisted they were prepared to proceed with the hearing as scheduled. (Petition Tr. pps.7)

15. The court in this matter has discretion to direct payment of fees from the Mr. G.L.'s estate. NDCC 30.1-28-03 (9) states :

If the court approves a visitor, lawyer, physician, guardian, or temporary guardian appointed in a guardianship proceeding, that person may receive reasonable compensation from the ward's estate if the compensation will not unreasonably jeopardize the ward's well being.

The North Dakota Supreme Court has stated, "We apply the abuse of discretion standard of review to the district court's ultimate decision whether to approve payment of a claim against a protected person's estate and the clearly erroneous standard of review to the court's underlying findings of fact." Guardianship/Conservatorship of Thomas, 2006 ND 219¶13, 723 N.W.2d 384. There was no abuse of discretion in this case regarding the order to pay certain fees. The court was well within its discretion when it ordered the

payment of the guardian ad-litem, visitor and guardian/conservator fees to be paid.

16. CONCLUSION

17. The court in this matter was correct in its decision to review all reports on file regarding this case, specifically, the report of the physician. The guardian ad-litem is an attorney assigned in the matter with specific duties outlined within NDCC 30.1-28-03 (4). There is no duty within NDCC 30.1-28-03 (4) to advocate the wishes of the proposed ward but rather to explain the proceedings, consequences, rights and legal options to the ward. The guardian ad-litem fulfilled her responsibilities in this matter. The court was correct in awarding the fees of the guardian ad-litem, visitor and the guardian/conservator to be paid from the ward's estate.

18. The guardian ad-litem is requesting the court to affirm the ruling of the District Court in this matter and to dismiss any and all claims made by M.L. regarding the violation of Mr. G.L.'s due process by the guardian ad-litem, the guardian conservator and the District Court.

Dated this _____ day of November 2010.

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