

20100246

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 4, 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 THAT PART OF THE ORDER TERMINATING GUARDIANSHIP/
CONSERVATORSHIP DATED June 10, 2010, ISSUED BY THE HONORABLE
THOMAS J. SCHNEIDER, DISTRICT COURT JUDGE, WHICH ORDERS THAT
EXPENSES OF ADMINISTRATION BE PAID AS STATED THEREIN

APPELLANT'S BRIEF

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*Redacted pursuant
to N.D. R. App.P. 14*

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¶ 1 STATEMENT OF CASE:

¶ 2 This case involves a situation where an elderly and physically impaired wife was convinced by her daughter to pay for the services of an attorney to seek a guardianship and conservatorship over the person and property of her husband. The attorney was paid in advance by the wife of the proposed ward. Two petitions were signed one seeking the appointment of the proposed ward's wife and daughter as co-guardian/conservators, and the other seeking the appointment of Guardian and Protective Services, Inc. (GAPS). GAPS was appointed as temporary guardian/conservator. The wife/petitioner informed her attorney she wanted to withdraw the petition and drop the proceedings, instead of taking action to do so the attorney withdrew at the start of the guardian/conservatorship hearing. The reports of the court appointed visitor, guardian ad litem, and appointed physician were filed just prior to commencement of the hearing. No copy of the physician's report was served upon the wife/petitioner, and there was no evidence of the physician's report being discussed with the proposed ward by the guardian ad litem prior to the hearing. The physician's report, over the objection of the wife/petitioner was considered by the court without the physician being compelled to submit to cross-examination. Statements made by others to the visitor, physician and guardian ad litem, who were not subject to cross-examination were included in their reports to the court and were considered by the court. This case gives rise to what duties a trial court has to protect the statutory, constitutional and due process rights of a proposed ward, and what sanctions or remedies should be imposed when a guardian/conservator or

a guardian ad litem, either violate the statutory, constitutional and due process rights of the proposed ward or fail to take appropriate actions to protect the same.

¶ 3 STATEMENT OF FACTS:

¶ 4 On September 6, 2009, L. L., wife of Cr. L., G. L.'s daughter in law, called the Kidder County Sheriff alleging that G. L. had threatened to kill people with his gun. After the Kidder County Sheriff's second visit to G. L. and M. L.'s rural residence, G. L. was removed there from and was transported and involuntarily admitted to the psychiatric unit at Med Center One.(Appendix pages 4&5, 12/03/2009 Trans. pg.18: 16-20). M.L. was advised by staff members at Med Center One, to initiate a guardianship petition. (Appendix pg. 43: 8-9; 12/03/09 Transcript pg.18: 16-19). On September 15, 2009, M. L. and her daughter C. V., met with Melvin Webster as they had been instructed and signed two petitions for the appointment of a guardian and conservator for G. L. and his property. One petition which requested that they be appointed as co-guardian/conservators and another petition which requested that Guardian and Protective Services be appointed as such. (Appendix pages 6-11 and 12-17). M.L. did not read the documents which were drafted by Melvin Webster, and did not know what she was signing (12/03/09 Transcript pg. 18: 8-24; Appendix pg. 43, paragraph 10). On September 16, 2009, G.L. was released from Med Center One and returned home. (Appendix pg. 44, paragraph 11). On September 16, 2009, Judge Donald L. Jorgensen issued an "ORDER APPOINTING TEMPORARY CO-GUARDIANS/CO-CONSERVATORS" which appointed only Guardian and Protective Services as the guardian/conservator for G.L. and his property, granting it the "Authority to make all necessary residential, legal,

financial, and residential decisions.”, but no authority to make medical decisions (Appendix page 18).

¶ 5 On September 17, 2009, believing that G.L. was being argumentative and abusive toward her mother, C.V. called the Kidder County Sheriff, who refused to get involved without a court order (12/03/2009 Trans. pg. 41:17-25;) C.V. called Melvin Webster who obtained a Transport Order and pursuant thereto, G.L. was removed from his residence, returned to the psych unit at Med Center One, and subsequently transferred to Maple View East, a secured and locked care facility (12/03/2009 Trans. pg. 42: 4-7; Register of Actions #6 and #7).

¶ 6 A hearing on the Petition was held on December 3, 2009, at which time Melvin Webster informed the Court that he wished to withdraw as the attorney for C.V. and M.L., which request was granted by the Court (12/03/09 Trans. pg. 3: 1-25; pg. 4: 1-9). The Court was informed that M.L. wished to have the petition withdrawn, no longer wanted GAPS to serve as guardian/conservator, and if guardianship/conservatorship was necessary, that she be appointed as such (12/03/09 Trans. pg 4: 10-22). Ms. Storbakken who was appointed by the Court as Guardian Ad Litem for G.L. objected to the petition being withdrawn informing the Court that based upon the reports from Dr. Goodman and Dr. Brown she believed that a guardian and conservator should be appointed and that it should be GAPS rather than M.L. or any other family member, even though she found G.L. to be a very friendly articulate man who was able to articulate his position and understand the ramifications of the guardianship, whose condition she believed has improved (12/03/09 Trans. pg. 5: 11-25; pg. 6: 1-25; Reg. of Actions #19).

¶ 7 At the hearing M.L.'s attorney objected to the Court's receipt and consideration of the doctor's reports, not being supplied with a copy of the court appointed doctor's report, and to the inability to cross-examine the doctor, while the Guardian Ad Litem did not object to the doctors' reports being considered (12/03/09 Transcript pg. 49: 9-25).

¶ 8 On December 10, 2009, Judge Schneider issued his Memorandum Opinion and Order, and on January 6, 2010 issued his Findings of Fact and Order Appointing Guardian and Conservator, both of which ignored M.L.'s objection to consideration of the doctor's report and inability to cross examine the doctor.

¶ 9 By motion dated December 23, 2009, M.L. moved under Rule 3.2 for relief from judgment, a new trial, termination of GAPS as guardian and conservator, and for an order discharging and releasing G.L. from involuntary inpatient treatment at Maple View East which was supported by brief and affidavits (Appendix pgs.: 31, 38-40, 41-47, 48-52, 53, 54-55). On February 4, 2010, Judge Schneider denied the motion upon the grounds that:

1. "Guardian and Protective Services, Inc., G.L.'s Temporary Guardian and Conservator, did not require that the physicians be present at the hearing for cross-examination."
2. "Bonnie L. Storbakken, G.L.'s Guardian Ad Litem, did not require that the physician be present at the hearing for cross-examination."
3. "Neither Guardian and Protective Services, Inc., nor Bonnie L. Storbakken objected to the Court receiving the reports from the physicians."

4. "M.L., through Attorney Donavin L. Grenz, was not G.L.'s legal representative at the hearing."

(Appendix pages 58-59)

¶ 10 Following this order, M.L.'s attorney again moved the court for relief from judgment, a new trial, termination of GAPS as guardian and conservator, substituting M.L. as such, removing and modifying the authority granted to the guardian conservator, removing and modifying limitations previously imposed upon G.L.'s rights, and compelling due process of law by compelling the court appointed physician to appear and be subject to cross examination (Appendix pgs.: 60-64). M.L. and Ch. L. at ██████'s request continued to request an independent neuropsychological examination of G.L. by a different doctor other than the one appointed by the Court. G.L.'s treating physician, Dr. Goodman, who originally requested the first neuropsychological examination, referred G.L. to Dr. Brooks for a second neuropsychological examination. On April 13, G.L. was evaluated by Dr. Brooks who concluded and recommended in his April 15, 2010 report:

"1. Mr. L. is currently able to return to living fairly independently without formal supervision."

"2. This gentleman is seen to have decisional capacity and does not currently require guardianship services."

"3. Neuropsychological reevaluation is suggested in one year to compare a baseline and to update functional recommendations. Should changes in functioning be suspected before that time, reevaluation could be completed sooner."

(Appendix pages: 4-5, and 65-74) The hearing upon M.L.'s motions was scheduled to be heard on April 22, 2010, however it was postponed on April 20, 2010, after M.L. suffered a heart attack and was admitted to Med Center One (Register of Actions #46).

¶ 11 Following the receipt of Dr. Brooks' evaluation on 4/26/2010, GAPS filed a petition to terminate the guardianship and conservatorship. The matter came on for hearing on May 10, 2010. No objection was made to the termination of the guardianship/conservatorship (5/10/2010 Transcript pg 3, line 25; pg. 4:1-3) but objections were made to the payments which GAPS sought to have court ordered (5/10/2010 Transcript pg. 7: 19-20; pg. 9: 5-9; pg. 12: 4-11; pg. 15: 17-25; pg. 16: 1-5; pg.26: 9-25; pg. 27: 1-25; pg 28: 1-19; pg. 33: 13-25; pg. 34:1-3).

¶ 12 At the termination hearing on May 10, 2010, the trial court refused to consider the impact of its consideration of the court appointed physician's report, without permitting the physician's cross-examination. G.L. and M.L. have appealed that part of the Court's order compelling payment of fees charged by GAPS; its law firm; Bonnie Storbakken, the court appointed guardian ad litem; and Carol Morast, the Court Appointed Visitor.

¶ 13 ISSUES:

¶ 14 1. Were G.L.'s rights to due process of law and to cross-examine and confront witnesses violated by GaPS, by Bonnie Storbakken, and by the Court?

¶ 15 2. Should the guardian/conservator, its law firm, and the guardian ad litem be precluded from recovering fees and expenses which they have charged, if they failed to fulfill their duties and protect the rights of the ward and his spouse?

¶ 16 3. Did the trial court commit reversible error when refusing to consider damages which were sustained by G.L. and his wife when they were prohibited from cross-examining the physician and other who made statements and reports against G.L. when ordering G.L. to pay the billed expenses of administration in the sum of

\$12,088.28, or whether because of the violations of rights whether G.L. and his wife should be exonerated from paying said fees?

¶ 17 LAW AND ARGUMENT:

¶ 18 As set forth under NDCC 30.1-28-03, “Any person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian.” The converse of this statutory provision should also apply, that being that any person interested in the welfare of an allegedly incapacitated person should also have the right to contest the petition for appointment, including but not limited to the allegedly incapacitated person’s wife.

¶ 19 A guardian has a duty to safeguard the civil rights and personal autonomy of its ward. NDCC 30.1-28-12(5) specifically provides:

“When exercising the authority granted by the court, the guardian shall safeguard the civil rights and personal autonomy of the ward to the fullest extent possible by:

- a. Involving the ward as fully as is practicable in making decisions with respect to the ward’s living arrangements, health care, and other aspects of the ward’s care; and
- b. Ensuring the ward’s maximum personal freedom by using the least restrictive forms of intervention and only as necessary for the safety of the ward or others.”

¶ 20 NDCC 30.1-28-03(7) in part provides:

“...The proposed ward has the right to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor.”

¶ 21 Section 30.1-28-03(3) directs that an attorney must be appointed to act as a guardian ad litem for the proposed ward. Under 30.1-28-03(4) these duties 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.”

¶ 22 Recognizing wide spread concerns about abuse of mental health

commitments and that incarceration in a barred hospital for a person who does not require it is no different than incarceration in a barred jail, the North Dakota Supreme Court in the case of In the Interest of Laura Goodwin, 366 N.W.2d 809 (ND 1985) discussed whether or not Fifth Amendment rights guaranteed under the United States Constitution and under Article 1, Section 12 of the North Dakota Constitution should be applied in civil commitment hearing, but thereafter side stepped ruling upon this issue; however, the Court did reverse the commitment order of trial court directing that:

“A new hearing should be held consistent with statutory requirements.”

¶ 23 In G.L.’s case he has the statutory right to cross-examine witnesses, including the court-appointed physician and the visitor, and the right to present evidence. He was deprived of that right. The cross-examination of a witness could have resulted in the presentation of evidence favorable to G.L. To present evidence, G.L. should have been permitted to be examined by a physician of his choice, and his temporary guardian and his guardian ad litem, not only had a duty to enforce his right to cross-examine but also to obtain a prompt second evaluation report for introduction into evidence. The visitor’s report contained hearsay statements by individuals who were not compelled to attend the hearing or be cross-examined. Article 14, §1 of the United States Constitution prohibits any state from depriving any person of life, liberty or property, without due process of law. Due process of law requires notice of the contemplated action, a meaningful opportunity to be heard, and procedural fairness in the administration of the

hearing with the procedure being subject to legislative regulation which must preserve the elements of due process. Kessler v. Thompson, 75 N.W.2d (ND 1956); Powell v. Hjelle, 408 N.W.2d 737 (ND 1987). Being deprived of the right of cross-examination and the right to be examined by a physician on one's own choosing does not constitute due process of law, or an opportunity for a fair hearing.

¶ 24 Commencing on September 17, 2009, G.L. was incarcerated for months awaiting a hearing, first in a psychiatric unit and then in a secured care facility. For all practical purposes, his incarceration was no different than being in jail. Even after the December 3, 2009, hearing he was prohibited for months from obtaining a second neuropsychological examination which would have shown that the guardianship/conservatorship should have terminated.

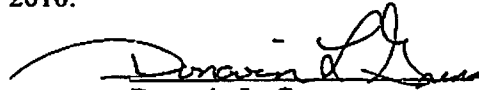
¶ 25 Courts have an inherent power "to vacate or otherwise grant relief from a judgment in the interest of justice." Kopp v. Kopp, 2001 ND 41, ¶ 9, 622 N.W.2d 726, and in G.L.'s case the trial court should have done so.

¶ 26 CONCLUSION:

¶ 27 G.L.'s substantive statutory and constitutional rights were violated. His guardian ignored G.L.'s wishes and desires and did nothing to pursue his rights. The Guardian Ad Litem, did not discuss the physician's report with G.L., nor his right to cross-examine the doctor or other witnesses, or to present evidence which could have been acquired through an examination by a physician of G.L.'s own choosing. Failure to preserve these rights certainly was not in G.L.'s best interests. The visitors report contained statement from individuals who were not subject to cross-examination. The trial court committed reversible error by not preserving G.L.'s rights. The Guardian and

Guardian Ad Litem did not perform the duties which they owed to G.L. and should not be paid for doing so.

¶ 28 Dated this 1st day of October, 2010.

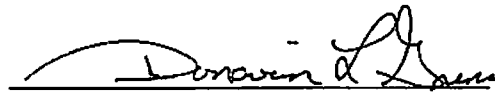


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¶ 29 CERTIFICATE OF SERVICE

¶ 30 I, Donavin L. Grenz, hereby certify that on October 4, 2010, I did serve true and correct copies of Appellant's Brief, and Appellant's Appendix, together with this Certificate of Service upon Bonnie Storbakken by and through her attorney, James S. Hill at jhill@zkslaw.com; and upon Guardian and Protective Services, Inc. by and through their attorney, Charles Isakson at chapmanlaw@btinet.net, and did serve the same for filing with Penny Miller, Supreme Court Clerk @ supclerkofcourt@ndcourts.gov.

¶ 31 Dated this 4th day of October, 2010.



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