

20150043

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Guardianship of
the Person and Conservatorship of the
Estate of V.A.M., an Incapacitated Person

Supreme Court No. 20150043

P.M. Petitioner

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

v.

APR 21 2015

V.A.M., T.M., K.J., D.N., S.M., P.S.M., L.S.;
First International Bank and Trust, Limited
Conservator; Fiduciary and Advocacy
Services, Limited Guardian, Respondents

STATE OF NORTH DAKOTA

T.M. and K.J., Appellants.

APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
TRAILL COUNTY, NORTH DAKOTA
THE HONORABLE DOUGLAS HERMAN

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Corrected brief
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STATEMENT OF THE ISSUE

[¶1] A limited conservator was appointed by the district court for V.A.M. The limited conservator later petitioned the district court for authority to assign certain legal rights of V.A.M. to non-conservator children of the ward over the objection of the ward. Did the district court err when it granted authority to the limited conservator to assign away legal rights to non-conservators?

STATEMENT OF THE CASE

[¶2] P.M., son of V.A.M., filed a Petition for Appointment of Guardian of the Person and Conservator of the Estate (“Petition”) on December 20, 2012. Appendix (“App.”) 1 (Docket (“Dkt.”) 1). The Petition sought to appoint P.M. as conservator and D.N., daughter of V.A.M., as guardian. The district court issued orders appointing a Physician, Guardian Ad Litem (“GAL”), Visitor, and issued a notice of hearing on January 2, 2013. *Id.* (Dkts. 10-13). V.A.M. objected to the Petition on January 15, 2013. *Id.* (Dkt. 15). The Petitioner filed a Notice of Hearing and Statement of Rights on March 4, 2013, which noticed a May 6, 2013, hearing. *Id.* (Dkt. 19). The Visitor’s report was filed on April 23, 2013. *Id.* (Dkt. 23). T.M., son of V.A.M., and K.J., daughter of V.A.M., responded in opposition to the Petition on April 30, 2013. App. 2. (Dkt. 26). V.A.M. opposed the Petition by filing a sworn statement on April 30, 2013. *Id.* (Dkt. 28). The reports of the GAL and Physician were filed on May 2, 2013. *Id.* (Dkts. 30, 32). Rodney A. Swenson, PH.D., ABN, filed a

report on May 3, 2013. *Id.* (Dkt. 35). A brief responding in opposition to the Petition was filed by V.A.M., T.M., and K.J. on May 3, 2013. *Id.* (Dkt. 36).

[¶3] The hearing on the Petition took place on May 6, 2013. App. 5-11. A Stipulation was executed, and an Order entered, appointing Guardian, Fiduciary, & Advocacy Services as limited guardian for V.A.M. on May 7, 2013; First International Bank & Trust (“FIBT”) was named limited conservator for V.A.M., as stated in the Stipulation, and as Ordered by the district court. App. 63-82.

[¶4] FIBT filed a petition for the sale of real property owned by V.A.M. on June 23, 2014. App. 2 (Dkt. 49). A letter objecting to the sale was filed by D.N. on July 9, 2014. *Id.* (Dkt. 51). A Stipulation to Withdraw Petition for Sale of Property was filed on August 20, 2014, executed by D.N. and FIBT. *Id.* (Dkt. 52). FIBT filed a Petition to Approve Retention of Real and Personal Property and Assignment of Potential Claims on September 29, 2014. App. 83-86. T.M. and K.J., D.N., and V.A.M. all filed responses to FIBT’s September 29, 2014, petition. App. 87-101. A hearing was held on November 3, 2014. App. 16-62. An Order approving the sale of the real and personal property and assignment of claims was filed on November 14, 2014. App. 102-03. T.M. and K.J. filed an objection to the Order on November 17, 2014. App. 104-06. D.N. filed an objection to the Order on November 18, 2014. App. 107-08. Notice of entry of the Order was filed on February 17, 2015. App. 115. Notice of appeal was filed by T.M. and K.J. on February 19, 2015; the notice only appeals paragraph five of the Order, which pertains to the assignment of potential claims to the children of V.A.M. App. 116.

STATEMENT OF THE FACTS

[¶5] A detailed recitation of the background concerning rationale for limited guardianship and conservatorship of V.A.M. is contained in the GAL's report and Order establishing the limited guardianship and conservatorship. App. 77-82; 119-138. To be clear, T.M. and K.J. do not challenge the Stipulation they entered into, and the subsequent Order, establishing a limited guardianship and conservatorship for V.A.M. The issue on appeal is whether the district court erred when it granted FIBT's petition to assign certain legal claims of V.A.M. to his children.

A. Limited Guardianship and Conservatorship

[¶6] V.A.M. is an 84 year old widower. In August 2012, V.A.M.'s wife passed away unexpectedly. After she passed away, V.A.M. lived on his own. T.M. or K.J. stayed with V.A.M. at his farmstead until October 11, 2012. The children of V.A.M., consisting of T.M., K.J., D.N., P.M., S.M., L.S., and P.S., then discussed taking turns to check on their father. In November 2012, the children of V.A.M. learned that a parcel of real property had been deeded to T.M. by V.A.M. This transaction caused a significant rift in the family, which led to P.M. petitioning the district court for guardianship and conservatorship of V.A.M. App. 1 (Dkt. 1); 119-138.

[¶7] P.M. sought to be conservator and D.N. sought to be guardian for V.A.M. *Id.* V.A.M. objected to the petition, stating he was not incapacitated; he argued in the alternative, that is, if he were deemed an incapacitated person or adjudged to need assistance with his finances, that T.M. should be conservator and K.J. guardian. App. 2 (Dkts. 28, 36). T.M. and K.J. also objected to the petition—mirroring V.A.M.'s position. *Id.* (Dkt. 26).

B. Stipulation

[¶8] All but one child of V.A.M. agreed to a limited guardianship and limited conservatorship on May 6, 2013, by stipulation.¹ The Stipulation, and subsequent Order adopting the Stipulation, sets forth the specifics of the limited conservatorship. App. 63-82. V.A.M. retained the right to vote and to testify in any judicial or administrative proceeding. App. 80. The district court's order concerning legal matters states:

The Limited Conservator will be involved in all legal matters and, when practical, will participate in meetings with attorneys. If [V.A.M.] has independent contact with his attorney, then his attorney shall notify the Limited Conservator. The Limited Conservator shall ensure that [V.A.M.] is able to participate in a meaningful way. The Limited Conservator will assist [V.A.M.] in understanding these matters. [V.A.M.] shall retain the right to make decisions regarding these matters unless it is determined by the Limited Conservator that the decision is not in his best interests or that [V.A.M.] does not have an understanding sufficient enough to enable him to make an informed decision regarding a particular matter. [V.A.M.]'s values must be considered and respected by the Limited Conservator regarding decisions about what is in his best interests.

App. 81.

[¶9] V.A.M. was questioned by the district court on the Stipulation and the following exchange occurred:

THE COURT: I just wanted to visit [talking directly to Mr. [V.A.M.]] you understand that we're appointing a limited guardian and a limited conservator to help you with your personal and financial matters, Mr. [V.A.M.]?

V.A.M.: Something like that, yeah.

THE COURT: Okay. And one of the reasons we're doing it is to keep down any family conflict, right?

V.A.M.: That's what you said.

¹ L.S. did not sign the stipulation. As stated on the record at the May 6, 2013, hearing, she lives in Washington state and the GAL stated that L.S. had been consulted and certain concerns had been addressed. App. 10-11. L.S. has not objected to the limited conservatorship or limited guardianship.

THE COURT: But, you want us to keep – you want us to keep down family conflict, don't you, sir?

V.A.M.: I suppose.

THE COURT: Yeah. I think so. And there will be people helping you with certain of your affairs going forward, but you're still maintaining some of your legal rights and you'll be working with – not only with your children, but with these institutions that we're appointing to help you. You understand that?

V.A.M.: Gonna have a home and I'm gonna run it.

THE COURT: Yeah. Your house is your home and you're going to run it. Absolutely. No one is intending to take that away from you. Okay?

V.A.M.: Yep.

THE COURT: Okay. Then I'm satisfied, and with the assent of all the counsel I'll go ahead and execute the order, if that's agreeable, and then we'll look at the Letters as well....

App. 12-13.

C. Assignment of Claims

[¶10] Certain children of V.A.M. have asked FIBT to investigate possible claims of undue influence, breach of fiduciary duty, and lack of capacity regarding transactions between V.A.M. and T.M. prior to the limited guardianship and conservatorship order. App. 84-85. FIBT “does not believe incurring the cost to investigate any such claims is in [V.A.M.]’s best interests, particularly in light of [V.A.M.]’s Will and stated intent regarding his estate plan.” App. 85. Nonetheless, FIBT sought an order from the district court to allow it to “assign the right to pursue any such claims equally to all of [V.A.M.]’s children, as his ultimate heirs.” *Id.*

[¶11] V.A.M. opposed this, as did T.M. and K.J. App. 87-93; 100-101. V.A.M. stated: “I am happy with my relationship with my son [T.M.] and I expect I will continue to have

a good relationship with [T.M.]. I have no claims against [T.M.] and I am opposed to First International Bank & Trust assigning ‘any possible claims currently held by me’ to my children. It is my wish that all my children can be more family-like and friendlier to each other.” *Id.* The district court did not question V.A.M. on this issue at the November 3, 2014, hearing.

[¶12] The district court issued an Order dated November 14, 2014. The relevant portion states:

The Limited Conservator is authorized to assign to [V.A.M.]’s children, in equal shares, any and all possible claims currently held by [V.A.M.] against any child of [V.A.M.] or other party for undue influence, lack of capacity, or breach of fiduciary duty regarding prior gifts and transactions made by [V.A.M.]....

App. 103.

STANDARD OF REVIEW

[¶13] The abuse of discretion standard applies to the selection of a conservator by the district court. *In re Conservatorship of T.K.*, 2009 ND 195, ¶ 10, 775 N.W.2d 496. While the selection of FIBT as conservator, or the need for a conservator for V.A.M., is not in question, the effective result of any assignment by FIBT of its rights and duties as conservator of V.A.M., causes the creation of a sort of sub-conservator. The district court’s allowance of FIBT to assign the rights to pursue potential claims of V.A.M. to his children has created a unique circumstance where duties of the duly appointed limited conservator (FIBT) have been effectively carved out and given to “sub-conservators”—the children of V.A.M. It is the propriety of the assignment to sub-conservators that is subject to review.

[¶14] A district court abuses its discretion by acting in “an arbitrary, unreasonable, or unconscionable manner.” *Matter of Conservatorship of Kinney*, 495 N.W.2d 69, 71 (N.D. 1993). The abuse occurs when the district court’s discretion is not “the product of a

rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* (quoting *Matter of Altshuler*, 490 N.W.2d 1, 3 (Wis. 1992)). A district court abuses its discretion “if it misinterprets or misapplies the law.” *Id.*

LAW AND ARGUMENT

[¶15] The district court abused its discretion when it failed to follow the statutory procedure for a determination on who should serve as a conservator, failed to recognize that FIBT is limited conservator only because of a stipulation of the parties, and disregarded the opposition of V.A.M. to the assignment. Because a limited conservator was already established, through stipulation of interested parties, consent of V.A.M., and adherence to the statutory procedure, the district court’s decision to allow FIBT to assign potential claims held by V.A.M. to V.A.M.’s children, who will act as de facto conservators, should be reversed.

A. The District Court Abused its Discretion by Failing to Follow Statutory Procedure by Creating a Sub-Conservator Classification Not Found in Statute.

[¶16] District courts have “broad powers to handle the estate and affairs of a protected person.” *Matter of Conservatorship of Sickles*, 1994 N.W.673, 678 (N.D. 1994); N.D.C.C. § 30.1-29-08(2)(c). This is, however, tempered: “The court should not assume any greater authority over the protected person than the capacity and ability of that person necessitates.” N.D.C.C. § 30.1-29-08, Comments to UPC 5-407. North Dakota law does not provide for the carving out of portions of authority that were previously granted to a conservator to, what will effectively be, sub-conservators. The statute sets forth a specific process for evaluation of whether a conservator is to be named, and, if so, a process to select who should serve as conservator. In this case, the parties agreed that a conservator

should be appointed and all agreed it should be FIBT. Even if the parties had not stipulated to FIBT, it is likely the district court would have heeded the remarks of the GAL, who recommended a non-family member due to family discord. App. 136.

[¶17] FIBT has been asked by certain children of V.A.M. to investigate allegations made against T.M., apparently for alleged undue influence, breach of fiduciary duty, and/or lack of capacity with respect to transactions between T.M. and V.A.M. prior to institution of the guardianship and conservatorship. App. 84-85. FIBT has stated it has no evidence of this occurring and will not proceed with bringing any claim against T.M. *Id.* T.M. and V.A.M. deny any allegations of the sort. Despite this, FIBT sought to carve out a slice of its full authority, which is wholly vested in statute, and assign that slice of authority to the children of V.A.M. As with all decisions by FIBT, per the Order establishing the limited conservatorship, V.A.M.'s wishes must be considered and should be honored. And the best interests of V.A.M. must be considered and evaluated by the limited conservator. App. 81.

[¶18] The North Dakota Century Code provides who may be appointed conservator and what priority of appointment is to be considered:

1. The court may appoint an individual, limited liability company, association, corporation, or other entity with general power to serve as trustee, as conservator of the estate of a protected person.
2. Unless lack of qualification or other good cause dictates the contrary, the court shall appoint a conservator in accordance with the protected person's most recent nomination in a durable power of attorney.
3. Except as provided in subsection 2, persons who are not disqualified have priority for appointment as conservator in the following order:
 - a. A conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides.

b. An individual or corporation nominated by the protected person by other means than provided for in subsection 2 if the protected person is fourteen or more years of age and, in the opinion of the court, has sufficient mental capacity to make an intelligent choice.

c. The spouse of the protected person.

d. An adult child of the protected person.

e. A parent of the protected person, or a person nominated by the will of a deceased parent.

f. Any relative of the protected person with whom the protected person has resided for more than six months prior to the filing of the petition.

g. A person nominated by the person who is caring for or paying benefits to the protected person.

4. A person denominated in subdivision a, c, d, e, or f of subsection 3 may nominate, in writing, a substitute to serve instead and thereby transfer the priority to the substitute. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having higher priority and appoint a person having lower priority or no priority.

N.D.C.C. § 30.1-29-10.

[¶19] There is no provision in statute that allows for a named limited conservator to give up a portion of its rights. This is especially so when the report of the GAL indicate that the children of V.A.M. are not appropriate to be conservators for V.A.M. given the existence of discord in the family. App. 136. The district court abused its discretion when it created a new class of conservator that is not provided for in statute—that is the creation of a conservator that holds most of the authority for the ward generally, but accedes authority to family members on specific issues carved out by assignment.

[¶20] The practical effect of what has been permitted by the district court's Order all but guarantees continued family discord. If the district court is to consider the best interests of

the ward, as is FIBT, it is a clear abuse of discretion to disregard statutory constraint. While it may be logical in some respects for the *potential* for litigation to be resolved while V.A.M. is living, this logic cannot trump the statutory and factual evidence that exists on this record. Permitting FIBT to carve out certain authority by assigning it to the children of V.A.M., under the facts in this record, violates statutory considerations and is an abuse of the district court's discretion.

B. The District Court Abused its Discretion by Disregarding the Stipulation that Formed the Basis of the Order Naming FIBT as Limited Conservator.

[¶21] The GAL recommended a third party limited corporate conservator be appointed for V.A.M. App. 136. The GAL recommended that V.A.M.'s "values shall be considered and respected with respect to decision making about what is in his best interests." *Id.* The GAL recommended that V.A.M. "retain the right to make decisions regarding [legal matters] unless it is determined by the limited guardian or conservator that the decision is not in his best interests or that [V.A.M.] does not have an understanding sufficient enough to enable him to make an informed decision regarding a particular matter." *Id.* The GAL stated that V.A.M.'s "values must be considered and respected with respect to decisions about what is in his best interests." *Id.* The recommendations of the GAL were effectively adopted by stipulation of the parties. App. 63–76. The stipulation, and the Order establishing the limited conservatorship, effectively mirror the recommendations of the GAL. App. 63–82.

[¶22] Assigning rights held by FIBT, for V.A.M., flies in the face of the parties' stipulation, Order establishing the limited conservatorship, and the guidelines in place to procedurally approve a specific person or entity to serve as a conservator. The parties all agreed to FIBT. But when FIBT made a decision that it was not in the best interests of

V.A.M. to prosecute an action against T.M., other family members complained to FIBT. Presumably, FIBT had had enough and decided that attempting to carve out its authority and give a portion of it to the children of V.A.M. by assignment of “any and all possible claims currently held by [V.A.M.] against any child of [V.A.M.] or other party for undue influence, lack of capacity, or breach of fiduciary duty regarding prior gifts and transactions made by [V.A.M.]” was appropriate. App. 103.

[¶23] The district court failed to account for the fact that the limited conservatorship was founded and based upon the stipulation of the family. And key to the agreement was that the limited conservator would be a third-party corporate entity. It was specifically negotiated and agreed that FIBT should serve as limited conservator of V.A.M. The district court abused its discretion when it did not consider that the basis of the limited conservatorship was founded upon agreement of the parties, including V.A.M., which required the limited conservator to be FIBT.

C. The District Court Abused its Discretion when it Failed to Take Into Account the Wishes of V.A.M.

[¶24] The district court did not ask V.A.M. his opinion at the hearing and ignored his resistance to the assignment. When the question of whether FIBT would be permitted to disclose financial records of V.A.M. to his children, the district court directly asked V.A.M. what he thought about this. V.A.M. objected and the district court denied FIBT’s request to disclose this information. App. 57-59.

[¶25] V.A.M. may face a situation where he is forced to bring a lawsuit against his son T.M. The November 14, 2014, Order would allow V.A.M.’s children to bring an action against T.M. on V.A.M.’s behalf. The district court, through a letter to the parties, stated that the Order establishing the conservatorship must be followed. App. 113-14. It is

unclear whether V.A.M. would be forced to pay for any litigation that may result if attempts are made to undo the conveyance of real property to T.M. If an action were brought by V.A.M. against T.M., by one of V.A.M.'s children who had received an assignment of duties and powers, V.A.M. may have to pay for the prosecution of that case even though he opposes any action. And V.A.M. will certainly have to pay for his own legal representation in any action brought by his children, on his behalf, against T.M.

[¶26] V.A.M.'s wishes are not being followed. Certain children of V.A.M. may bring an action against T.M., on behalf of V.A.M., in violation of the order establishing the limited conservatorship, which requires V.A.M.'s wishes to be considered. If V.A.M. wishes to investigate T.M. and bring allegations against him, then V.A.M. should be the one asking for this to occur. Instead, V.A.M. has stated on the record he is opposed to any such potential action. App. 100-01. Inserting family dynamics where children of V.A.M. are aligned against other children is not in the best interests of V.A.M. Why should the district court delegate the authority it has already given to a professional third-party corporate limited conservator to a matter in which the conservator has made a decision not to pursue? V.A.M. is central to the discussion and his wishes must be taken into consideration. Any ensuing hypothetical lawsuit would be absurd, a plaintiff (V.A.M.) would be forced to unwillingly sue his son (T.M.) with whom he has a good relationship and has no desire to sue. FIBT should not have been permitted to assign claims to others it has already determined are not worthwhile pursuing and are not in the best interests of V.A.M.

[¶27] T.M. and K.J. have nothing to hide. As an alternative argument, if the district court is affirmed, then the language of the current Order should at least require that V.A.M.'s wishes and best interests be taken into account—in the same way that FIBT is bound by

the current conservatorship Order. Further, it should be clear that V.A.M. not be required to pay for something he does not wish to pursue. If claims are brought against T.M. by other family members, then V.A.M. should not have to pay the legal costs and fees for these allegations.

CONCLUSION

[¶28] V.A.M. does not want an assignment of his legal claims from his limited conservator to his children. V.A.M. retains the legal right to testify and provide his input on legal matters concerning his property. The district court erred by not recognizing V.A.M.'s explicit wishes, not recognizing the paradigm that was established by stipulation of the parties involved, and not adhering to statutory procedure. The district court abused its discretion when it issued an Order authorizing FIBT to carve out FIBT's legal duties and assign these carved out duties to the children of V.A.M. The North Dakota Supreme Court should reverse the portion of the district court's Order authorizing the assignment.

Dated this 21st day of April, 2015.

PEARCE & DURICK

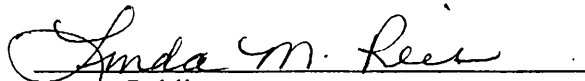
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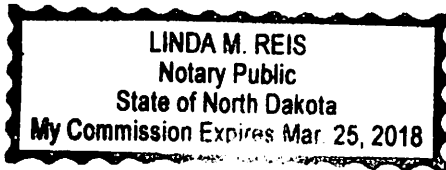
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Annette Kirschenheiter

Subscribed and sworn to before me this 21 day of April, 2015.


Notary Public

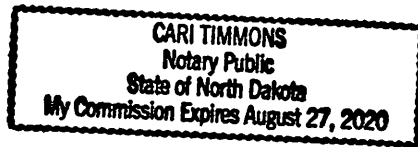


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Subscribed and sworn to before me this 28 day of April, 2015.



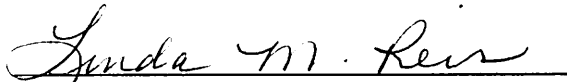

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Annette Kirschenheiter

Subscribed and sworn to before me this 29 day of April, 2015.


Notary Public

