

**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.,)

District Court No.
49-2012-PR-00051

Petitioner,)

vs.)

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.)

-----)
T.M. and K.J.,)

Appellants.)
_____)

Appeal from the Order Approving Sale of Real and Personal Property and
Assignment of Claims entered on November 14, 2014
County of Traill, East Central Judicial District
Honorable Douglas Herman, Presiding

APPELLEE’S BRIEF

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STATEMENT OF THE ISSUES

[¶1] Whether the district court abused its discretion by allowing the Limited Conservator to assign possible claims held by V.A.M. where there was no authority for the assignment under the conservatorship statutes or the Stipulation.

[¶2] Whether the district court abused its discretion by allowing the Limited Conservator to assign to V.A.M.'s children possible claims held by V.A.M. against his children where the assignment was against the best interests and wishes of V.A.M.

ARGUMENT

I. Standard of Review

[¶3] “The district court has discretionary authority regarding the management of a protected person’s estate, and the court’s decision on those matters will only be reversed on appeal for an abuse of discretion.” In re Estate of Allmaras, 2007 ND 130, ¶ 12, 737 N.W.2d 612. “A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Id.

[¶4] The issues on appeal also involve the district court’s interpretation and application of North Dakota’s conservatorship statutes. “The interpretation and application of a statute is a question of law which is fully reviewable on appeal.” Id. at ¶ 13.

II. Whether the district court abused its discretion by allowing the Limited Conservator to assign possible claims held by V.A.M. where there was no authority for the assignment under the conservatorship statutes or the Stipulation

A. The assignment goes beyond what is permitted in the parties’ Stipulation

[¶5] By a Stipulation filed on May 7, 2013, the parties agreed to the appointment of First International Bank & Trust (“FIBT”) as Limited Conservator in order to assist

V.A.M. with decisions on legal and financial matters. APP. 63. In conjunction with the Stipulation, the district court appointed FIBT as Limited Conservator. APP. 77. FIBT's authority as Limited Conservator was restricted under the Stipulation and the district court's Order. For instance, Virgil retained the right to make decisions regarding legal matters and financial matters. APP. 78-79. The only enumerated rights of V.A.M.'s that were removed under the Stipulation and the district court's Order were the right to seek a change in marital status and rights regarding the operation of a motor vehicle.

[¶6] By allowing the Limited Conservator to assign possible claims against V.A.M.'s children, the district court impermissibly exceeded the terms and scope of the parties' Stipulation. Nothing in the Stipulation allowed the Limited Conservator the power to assign possible legal claims held by V.A.M. to third parties. Simply put, the parties stipulated to providing certain powers to the Limited Conservator, not V.A.M.'s children, and therefore it is improper for V.A.M.'s children to be assigned powers they were not given in the Stipulation.

[¶7] Moreover, while the Stipulation provided the Limited Conservator with the power to be involved in legal matters, the Limited Conservator was also directed to "ensure that [V.A.M.] is able to participate in a meaningful way" with respect to these matters, and V.A.M. "retain[ed] the right to make decisions regarding these matters[.]" *Id.* at 78. The district court's Order allowing the assignment of claims strips V.A.M. of his right to make decisions regarding these legal matters, because it transfers legal claims held by V.A.M. to a third party, and it gives that third party unfettered discretion in deciding whether to prosecute possible legal claims held by V.A.M. The assignment does not even require V.A.M.'s children to ensure V.A.M. is able to participate in a meaningful way with respect

to the legal claims, which the Limited Conservator was required to do in assisting V.A.M. in these matters. Accordingly, the assignment violates the plain terms of the parties' Stipulation, from which the Limited Conservator's powers derive.

B. The assignment goes beyond what is permitted in the statute

[¶8] The district court's Order allowing the Limited Conservator to assign claims further violates the conservatorship statutes. "A conservator is a fiduciary and therefore owes a high degree of good faith to the ward, the estate of the ward, and other persons interested in the estate." In re Estate of Allmaras, 2007 ND 130, ¶ 17. "However, although conservators are vested with broad discretionary powers, they cannot invest and distribute assets of the estate without regard for the protected person's estate plan." Id. at ¶ 18. "Thus, a conservator has discretionary authority to manage the protected person's property and finances, subject to the conservator's fiduciary responsibilities and taking into account any known estate plan of the protected person." Id.

[¶9] The district court has similar authority over a protected person's estate. Matter of Conservatorship of Kinney, 495 N.W.2d 69, 71 (N.D. 1993); see also N.D.C.C. § 30.1-29-08 (setting forth powers of the court that can be exercised directly or through a conservator). In fact, the one power courts expressly lack under the statute is the power to make a will for a protected person. See In re Estate of Dion, 2001 ND 53, ¶ 27, 623 N.W.2d 720 ("[N.D.C.C. § 30.1-29-08(2)(c)] forbids a court from making a will for a protected person."). This is true not only under the statute, but the district court's Order appointing FIBT as Limited Conservator as well, which forbids the Limited Conservator from changing "Virgil's Last Will and Testament or estate planning in any manner[.]" APP. 79.

[¶10] In this case, the Limited Conservator lacked the power to assign claims in contravention of V.A.M.'s estate plan. Similarly, the district court abused its discretion by failing to take into account V.A.M.'s estate plan when it permitted the assignment of claims.

III. Whether the district court abused its discretion by allowing the Limited Conservator to assign to V.A.M.'s children possible claims held by V.A.M. against his children where the assignment was against the best interests and wishes of V.A.M.

[¶11] At the very least, even if the assignment was not expressly forbidden under the Stipulation or the conservatorship statutes, it was surely against V.A.M.'s wishes, which were to be taken into account under the limited conservatorship. Once again, the district court's Order establishing the conservatorship indicates the Limited Conservator "shall ensure that [V.A.M.] is able to participate in a meaningful way" when it came to legal matters, and the "Limited Conservator will assist [V.A.M.] in understanding these matters." APP. 78. V.A.M. expressly retained "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." Id. Moreover, V.A.M.'s "values must be considered and respected by the Limited Conservator regarding decisions about what is in his best interests." Id. Similarly, in the provision of the court's Order regarding financial matters, the Limited Conservator was required to take into consideration V.A.M.'s "values . . . with respect to decision making about what is in his best interests." Id. at 79.

[¶12] V.A.M. could not have expressed his wishes and values any more clearly in this matter. In a sworn statement submitted to the district court, V.A.M. expressed his desire to sell the farmstead to T.M. for its current appraised value, with the price being reduced by

what T.M. had paid for thus far. APP. 100. V.A.M. explained how important it was for T.M. to be able to buy the farmstead at this point in time, in order for T.M. to be allowed to make financial plans for the purchase and plan effectively for his future use and development of the farmstead. Id. V.A.M. also declared his wish that farm equipment and machinery be sold to T.M. without an auction. Id. Further, V.A.M. stated he was happy with the relationship he maintained with T.M., and he had “no claims against [T.M.]” and was “opposed to [FIBT] assigning ‘any possible claims currently held by [V.A.M.]’” Id. Instead, V.A.M. declared it was his “wish that all [his] children can be more family-like and friendlier to each other.” Id. at 101.

[¶13] There is nothing in the Limited Conservator’s request to assign claims, or the district court’s Order allowing the assignment, that takes into consideration V.A.M.’s wishes. Because the Limited Conservator and the district court were required to take V.A.M.’s wishes and values into account, the district court abused its discretion by disregarding the wishes and values expressed by V.A.M. See APP. 78 (stating V.A.M.’s “values *must* be considered and respected by the Limited Conservator regarding decisions about what is in his best interests.”) (emphasis added).

[¶14] It also bears repeating that V.A.M. retained the power to engage in transactions like transferring the farm to T.M. See In re Estate of Gleeson, 2002 ND 211, ¶ 8, 655 N.W.2d 69 (recognizing protected persons can still enter into contracts or engage in other transactions). This principle is in line with N.D.C.C. § 30.1-29-08(1), which provides, “[t]he court shall exercise the authority conferred in this chapter consistent *with the maximum self-reliance and independence of the protected person* and make protective orders only to the extent necessitated by the protected person’s actual mental and adaptive

limitations and other conditions warranting the procedure.” (emphasis added). The assignment violates V.A.M.’s right to engage in transactions with T.M., and it denigrates his self-reliance and independence, by giving V.A.M.’s other children the right to assert legal claims based on V.A.M.’s decision to transfer assets to T.M.

[¶15] Moreover, V.A.M.’s decisions were to be followed “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.” APP. 78. No determination was ever made by the Limited Conservator or the district court that V.A.M.’s decision to transfer the farm to T.M. was not in V.A.M.’s best interests or that V.A.M. did not have a sufficient understanding to enable him to make an informed decision. To the contrary, the Limited Conservator stated it had “no specific knowledge of facts to support such claims and does not believe incurring the cost to investigate any such claims is in [V.A.M.’s] best interest, particularly in light of [V.A.M.’s] Will and stated intent regarding his estate plan.” APP. 84-85. Because the Limited Conservator concluded it was not in V.A.M.’s best interests to pursue the claims alleged by V.A.M.’s children, V.A.M.’s wishes should have been followed. The district court thus abused its discretion by allowing the assignment of claims to V.A.M.’s children against V.A.M.’s wishes.

CONCLUSION

[¶16] The district court abused its discretion by allowing the Limited Conservator to assign to V.A.M.’s children possible claims held by V.A.M. Nothing in the parties’ Stipulation, the district court’s Order appointing the Limited Conservator, or the conservatorship statutes permits the assignment. Each of these authorities further required

V.A.M.'s wishes and estate plan to be taken into consideration. V.A.M. declared it was his desire to transfer property to his son, T.M., which is also reflected in V.A.M.'s estate plan. Moreover, the Limited Conservator determined it was not in V.A.M.'s best interests to pursue the claims alleged by V.A.M.'s other children.

[¶17] Under these circumstances, the district court abused its discretion by allowing the Limited Conservator to assign possible claims held by V.A.M. The provision of the district court's Order Approving Sale of Real and Personal Property and Assignment of Claims that allows the assignment should be reversed.

Dated: May 14, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellee V.A.M. in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 1,877 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 8,000 words.

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-----)
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I hereby certify that on May 14, 2015, I caused to be electronically filed the **Appellee's Brief** with the Clerk of the North Dakota Supreme Court (at supclerkofcourt@ndcourts.gov) and served the same electronically as follows:

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