



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00096-CV

IN THE MATTER OF THE GUARDIANSHIP OF James E. FAIRLEY

From the Probate Court No. 2, Bexar County, Texas
Trial Court No. 2011PC1068
Honorable Polly Jackson Spencer, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: January 18, 2017

AFFIRMED

This is an appeal from an order appointing Mauricette “Sophie” Fairley as the permanent guardian of her husband, James E. Fairley. On appeal, James’s daughter Juliette argues the trial court erred by dismissing her application to be appointed James’s guardian based on her failure to provide security for the probable costs of the proceeding. Because we conclude any error was harmless, we affirm the trial court’s judgment.

BACKGROUND

Juliette and Sophie each filed an application to be appointed James’s permanent guardian. Finding Juliette lacked just cause in contesting Sophie’s application, the trial court ordered Juliette to deposit money with the clerk “as a security for probable costs of this proceeding.” The trial

court thereafter found Juliette failed to comply with the trial court's order and dismissed Juliette's application.

The case proceeded to a trial on Sophie's application. Juliette's counsel argued the dismissal of her application was based on an erroneous order requiring her to deposit money as security for probable costs of the proceeding. The following exchange then occurred between the trial court and Juliette's counsel:

THE COURT: Suppose I agreed with all or any of that, would you not agree that Mrs. Fairley is the priority person to serve?

[COUNSEL]: I agree that absent any disqualification, Ms. Fairley [sic] is the priority person to serve.

THE COURT: So what then would be -- would you try to a jury her qualification or lack thereof?

[COUNSEL]: I think that would be the issue. . . . And I think that's -- and I haven't gone back and studied all of the pleadings from the very beginning, but I think that was the issue that has been raised from the beginning is whether or not she's qualified to serve.

After this exchange, Sophie testified she is James's wife and she managed James's affairs "under the medical power of attorney and durable power of attorney." She further testified she had not been convicted of assault, sexual assault, abandoning or endangering a child, or terroristic threats.

The trial court thereafter appointed Sophie as James's guardian. The trial court found by clear and convincing evidence that James is an incapacitated person; appointing Sophie as his guardian is in his best interest; and James's rights will be protected by the appointment. Juliette appeals.

DISCUSSION

Sophie contends Juliette waived her appellate issues by agreeing Sophie was the "priority person" to be appointed as James's guardian and any error in dismissing her application was harmless because Juliette does not challenge Sophie's eligibility or qualification to serve as

James's permanent guardian. We may not reverse a trial court's judgment unless the complained of error probably caused the rendition of an improper judgment or prevented the appellant from properly presenting the case on appeal. TEX. R. APP. P. 44.1(a)(1); *In re Guardianship of Jones*, No. 02-15-00367-CV, 2016 WL 4474353, at *8 (Tex. App.—Fort Worth Aug. 25, 2016, no pet.) (mem. op.). Juliette argues the trial court's dismissal of her application denied her the opportunity (1) to participate in the proceeding and contest Sophie's application, and (2) to be considered as James's proposed guardian.

Juliette's counsel appeared on her behalf at the trial on Sophie's application, requested relief from the trial court, and cross-examined Sophie. Juliette's counsel sought to prove Sophie was disqualified, but did not offer evidence that Sophie was disqualified or ineligible to serve as James's guardian. Thus, Juliette had the opportunity to participate—and did participate—in the proceedings and contested Sophie's application.

Furthermore, the trial court generally may appoint only one guardian of an incapacitated adult. *See* TEX. EST. CODE ANN. § 1104.001 (West 2014).¹ If the incapacitated person's spouse is eligible to be the guardian, the spouse "is entitled to guardianship in preference to any other person" and shall be appointed the guardian. *Id.* § 1104.102(1); *Novak v. Schellenberg*, 669 S.W.2d 162, 164 (Tex. App.—Corpus Christi 1984, no writ).² As Juliette's counsel conceded at trial, the trial court was required to appoint Sophie as James's permanent guardian unless she established Sophie was disqualified or ineligible. Because Juliette does not argue on appeal that Sophie is disqualified or ineligible, Sophie is entitled to be James's sole guardian as a matter of law. *See*

¹ Section 1104.001 permits a co-guardianship of an adult as authorized by the law of another jurisdiction, but Juliette has not pled, proved, or argued that another jurisdiction's laws authorize a co-guardianship of James. *See* TEX. EST. CODE ANN. § 1104.001(b)(3).

² Section 1104.102 provides the court shall appoint the eligible person who is "best qualified to serve" only if an eligible spouse refuses to serve. TEX. EST. CODE ANN. § 1104.102(1).

§§ 1104.001, 1104.102(1); *Novak*, 669 S.W.2d at 164. Thus, the dismissal of Juliette's application did not cause the rendition of an improper judgment or prevent Juliette from properly presenting this case. *See* TEX. R. APP. P. 44.1(a)(1).

CONCLUSION

Because we conclude any error in dismissing Juliette's application or ordering her to provide security was harmless, we may not reverse the trial court's order appointing Sophie as James's permanent guardian. *See id.* The trial court's order is therefore affirmed.

Luz Elena D. Chapa, Justice