IN THE COURT OF APPEALS OF IOWA

No. 2-570 / 11-1574
Filed October 31, 2012

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF F.W. JR.
Ward-Appellee.

B.W.,
Guardian-Appellant.

Appeal from the Iowa District Court for Dubuque County, John J. Bauercamper, Judge.

Former guardian and conservator appeals from the district court's order dissolving the guardianship and conservatorship of F.W. **AFFIRMED.**

Sheila A. O'Laughlin and Werner Hellmer of Day & Hellmer, P.C., Dubuque, for appellant.

Susan M. Hess of Hammer, Simon & Jensen, P.C., Dubuque, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

POTTERFIELD, P.J.

B.W., former guardian/conservator and the spouse of F.W., appeals from the district court's order dissolving the guardianship and conservatorship. Because B.W. failed to prove the requisites for guardianship and conservatorship, we affirm the termination.

I. Background Facts and Proceedings.

On January 5, 2010, B.W. filed a petition for the appointment of guardian and conservator. She alleged her spouse, seventy-three-year-old F.W., was no longer able to care for himself and was not able to carry out important decisions concerning his personal financial affairs. B.W. proposed she be named the guardian and conservator. The petition further alleged that a limited conservatorship and a limited guardianship pursuant to Iowa Code section 633.635 (2009) were not appropriate. Attorney C.J. May III was appointed as guardian ad litem (GAL) to represent the proposed ward. A hearing on the petition was scheduled for February 16, 2010.

May met with F.W. at the hospital on January 25 where F.W. was recovering from a fall and acute intoxication withdrawal. May met with F.W. again at F.W.'s home on February 9. On February 16, GAL May filed his report and answer to the petition, recommending that B.W. be appointed guardian and conservator, stating "[i]t is the opinion of the undersigned that sufficient information exists to conclude that it is in the best interest of [F.W.] that [B.W.] be appointed" guardian and conservator.

On February 16, the court held a telephonic hearing with GAL May and the attorney for B.W. F.W. was not on the phone. The court issued an order on

February 17 finding a "formal hearing would not be necessary" because the ward assented to the guardianship and conservatorship through his GAL. The court found the GAL confirmed "[t]he proposed ward is unable to adequately provide for his own physical needs and to adequately manage his own financial affairs." That same day, the court appointed B.W. as guardian and conservator. B.W. filed a motion requesting the file be "sealed from public examination," and the court ordered the matter sealed.

On April 7, guardian and conservator B.W. filed an initial report with the court reporting conservatorship assets in excess of $1,000,000.

On June 11, counsel entered an appearance on F.W.'s behalf and filed an application for permission for medical examination of the ward. B.W. filed a resistance, asserting only the guardian had authority to determine whether a medical examination was necessary. She further opined there was no reason to perform an examination because "the condition of the Ward had not changed significantly" to allow the Ward to handle his own affairs.

On September 21, a hearing was held on the application for an examination after which the court ruled: "Based on the evidence presented at hearing, it is clear that the Ward has substance abuse issues and some cognitive difficulties. However, the Ward's request is not unreasonable. It will not be burdensome, nor is there an issue as to payment." An examination was ordered.

On November 9, counsel for F.W. filed an application to terminate the guardianship and conservatorship or, in the event it was not terminated, to appoint a new guardian and conservator. B.W. resisted the application, asserting no examination had yet occurred.

On January 10, 2011, the court entered an order prohibiting F.W. from utilizing the physical address or a post office box of his lawyers' firm for purposes of receiving mail. The court also ordered F.W. was not to "engage in any further financial transactions without the knowledge and approval of the conservator and/or this court." Further, the court ordered that B.W. be issued letters of appointment by the clerk of court for purposes of "making appropriate representations to financial institutions or other appropriate entities for purposes of compliance with the court's directives concerning her appointment as guardian and conservator. No other documentation contained in this file shall be provided as previously ordered . . . ." Finally, the court ordered the guardian to make the necessary arrangements for the examination of the ward.

A hearing was eventually held on June 9-10 and August 4-5, 2011, at which the court was to determine whether or not this guardianship and conservatorship should be terminated and, if not, whether the guardian and conservator should be removed and replaced.

F.W. presented the testimony of a clinical neuropsychologist, Dr. Daniel Tranel, who conducted an extensive examination of F.W. Dr. Tranel found F.W. had some mental impairments such as slowed processing speed and poor memory, but concluded F.W. was not in need of guardianship or conservatorship. Dr. Tranel was aware of F.W.'s alcoholism and recommended that he "will do better for longer if he does not drink." Dr. Tranel also stated F.W. "has a degree of underappreciation of his problems." Nonetheless, Dr. Tranel opined that F.W. was capable of making financial decisions and caring for his health.

Robert Byrne testified he joins F.W. for lunch often. Though he has seen F.W. have wine at lunch, he stated he never saw F.W. "fall down or show any signs of overimbibing." He described F.W. as an "inveterate reader" and

> [i]ntellectually I find him completely normal and sharp, and after all, he's written a book in the last couple of years. Can't do that if you're mentally handicapped, and I've never found him to be muddled or indecisive or any way off-kilter mentally.

John Viner, M.D., testified he had been F.W.'s primary physician for about twenty-five years. He stated that F.W. handles his own medications for several diagnoses (hypertension, osteoporosis, hypercholesterolemia, and prostate carcinoma) and "does a good job taking his medication." Dr. Viner testified he conducts physical examinations of F.W. every six months for the purpose of "prostate cancer surveillance." Dr. Viner explained F.W. had a history of "on and off" alcohol dependence and overuse starting as a young adult, and F.W. has had alcohol precipitated hospitalizations. He provided a letter to F.W.'s counsel outlining F.W.'s many medical conditions, a head trauma in 1997, and surgical interventions.[1] The letter concludes:

> In the last two years [F.W.] has been "slipping"; I think it is very true that he has had "cognitive reserve," that is, he has lost some ground, but began at a high functioning point. I must rely on expert advice in the area of neuropsychiatry regarding the issues of competency. I have not personally found any psychiatric or psychological diagnosis. He has had neurologic and cognitive decline.

[1] In May 2008 F.W. had a hip replaced. Dr. Viner wrote, "[H]e had impairment aggravated by alcohol. He suffered a fall after his hip operation and he fractured his right greater trochanter. He had a lengthy hospitalization requiring more orthopedic surgery. Alcohol withdrawal was part of the problem and he has had subsequent alcohol admissions."

F.W. testified on his own behalf. He outlined his work career and stated he retired some years ago. However, he maintains an office and a personal secretary. He testified about his residence where he lived with his wife, B.W., with the assistance of their housekeeper, and a handyman. He described his collection of racing automobiles, including three in England. He testified he had financial dealings in several types of investments, but was unable to detail where those were. He was not able to recite his social security number. On the whole, his testimony was lucid and rational. He was able to comprehend the questions posed and answered them logically.

GAL May testified he is a practicing attorney in Iowa and has served as a GAL on more than fifty occasions. He stated that since first meeting with F.W., F.W. was in a far better position. F.W. had come to GAL May's office prior to the hearing concerning the termination of the guardianship and conservatorship and was very aware of what was happening around him, understood the discussion, and asked "very pointed questions." He stated F.W. is fortunate in that he is financially able to hire third-party assistance to help care for his daily needs. GAL May also testified it was his understanding that prior to the conservatorship, F.W. had people helping manage his finances (much of which are in a trust), including a financial planner, broker, personal secretary, and an attorney who helped with estate planning; those resources were still available.

At the conclusion of F.W.'s case in chief, B.W. acknowledged that F.W. had made a prima facie showing of some decision making capacity; consequently, the burden shifted to B.W. to show by clear and convincing evidence that a guardianship/conservatorship was warranted. B.W. presented

the testimony of three expert witnesses, all of whom opined F.W. was in need of a guardianship and conservatorship.

Michael Fishman testified he had been practicing addiction medicine[2] since 1990 or 1991. He also owns a legal consulting firm. Dr. Fishman met with F.W. in May 2011 for about an hour and a half. He reviewed F.W.'s past medical records, some of which were more than ten years old. Dr. Fishman expressed "major concerns in regards to [F.W.'s] lack of insight. . . . He believes he has abused alcohol in the past, doesn't believe the alcoholism has caused very many consequences." Dr. Fishman's report indicates F.W. "would be a danger to himself if he continues to drink alcohol. I believe his decision–making could harm him." He concludes guardianship and conservatorship are "beneficial and necessary": a guardianship because F.W. has fallen in the past and "it would be very difficult for him to get up after a fall especially if he were injured"; and a conservatorship because continued consumption of alcohol comes with "progressive cognitive impairment. This could jeopardize his financial security."

Thomas Hammeke, who has a Ph.D. in neuropsychology, testified on behalf of the guardian and conservator. He interviewed F.W. in May 2011 and arranged for F.W. to be seen by a neurologist, Dr. Diane Book. According to Dr. Hammeke, Dr. Book noted F.W.'s "walking difficulties were related to a peripheral neuropathy with very poor sensation coming from the joints and limbs" and so "he is prone to fall." This is a permanent condition. Dr. Hammeke noted F.W. had a good vocabulary and knowledge of many facts, but stated this created a

[2] Dr. Fishman stated, "Addiction medicine is the treatment of alcoholism and chemical dependencies. It can include detoxification."

problem because it masks the deficits F.W. has in memory, processing speed, and decision-making. Dr. Hammeke also interviewed B.W. and the housekeeper. He testified B.W. mentioned a number of strategies that she used to curtail F.W.'s alcohol consumption during the guardianship, which included cancelling accounts, credit cards, and arrangements with various liquor stores. He testified B.W. reported that F.W. was "pretty reliable" in taking his medications, as did the housekeeper.[3] Both indicated F.W. was incontinent and did not always timely inform someone when it occurred. Based on his interviews and review of F.W.'s medical records, Dr. Hammeke opined that F.W.'s "judgment was sufficiently impaired that appointment of a guardian and a conservator remains warranted." He explained that F.W. has lost brain function and did not appreciate the loss, and that "will get him into trouble."

On September 8, the court filed its findings of fact, conclusions of law, ruling, and order. The court concluded "the Ward presently possesses adequate decision making capacity in both personal and financial matters. Although there are many things he can no longer do for himself, he is financially able and personally willing to secure third party assistance when needed." The court granted the petition to terminate the guardianship and conservatorship.

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[3] The housekeeper testified that F.W.'s alcohol consumption had decreased "since the money has been cut off." She stated his health had improved. But for the two years prior to the guardianship, she testified:

> For two years, I would come into work, I wouldn't know if he was going to be alive or dead. He was drinking so heavily. He didn't go a [sic?] place in two years. He consumed so much alcohol that I didn't know how he could still be alive. . . . And since the conservative/guardianship [sic] has been in place, he's out and about now. He goes to lunch. He's not drinking as much because he doesn't have as much money. He is safer, you know, because he's not drinking as much.

B.W. appeals, contending the district court failed to apply the law properly, made findings unsupported by substantial evidence, failed to consider a limited guardianship/conservatorship (although she still argues a limited guardianship/conservatorship would not be appropriate), and erred in finding F.W. was able to hire third-party assistance.

II. Scope and Standard of Review.

Our review is de novo. *See* Iowa Code § 633.33 (2011) (action to remove fiduciary not included among actions cited as triable at law; such a proceeding is included in the catchall phrase "all other matters triable in probate shall be tried by the probate court as a proceeding in equity"); *see also In re Guardianship of Hedin*, 528 N.W.2d 567, 582 (Iowa 1995).

III. Discussion.

B.W. first asserts the district court erred "when it failed to properly apply criteria set in *Hedin* and statutory law." She complains the district court found this case was "only about controlling alcoholism." B.W. mischaracterizes the district court's ruling. While the court did find the policy statement, definitions of terms, and available procedures of Iowa Code chapter 125 (related to chronic substance abuse) "helpful in analyzing this case," the court correctly noted and applied the statutory factors related to guardianships and conservatorships.

There really is no question that F.W.'s mental functioning has been diminished by his alcoholism. Nor is there a question that his continued drinking is not in his best interests. But that is not the standard.

Iowa Code section 633.675 sets forth the standard for termination of guardianships and conservatorships. It provides:

> A guardianship shall cease, and a conservatorship shall terminate, upon the occurrence of any of the following circumstances:
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> . . . .
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> c. A determination by the court that the ward is no longer a person whose decision-making capacity is so impaired as to bring the ward within the categories of section 633.552, subsection 2, paragraph "a," or section 633.566, subsection 2, paragraph "a." In a proceeding to terminate a guardianship or a conservatorship, the ward shall make a prima facie showing that the ward has some decision-making capacity. Once the ward has made that showing, the *guardian or conservator has the burden to prove by clear and convincing evidence that the ward's decision-making capacity is so impaired*, *as provided in section 633.552*, *subsection 2*, *paragraph "a"*, *or section 633.566*, *subsection 2*, *paragraph "a*," *that the guardianship or conservatorship should not be terminated*.
>
> d. Upon determination by the court that the conservatorship or guardianship is no longer necessary for any other reason.

Iowa Code § 633.675 (emphasis added).

Because the guardian and conservator acknowledged that the ward had made a prima facie showing of some decision-making capacity, *see id.* § 633.675(c), the question presented to the court is whether the guardian established by clear and convincing evidence that F.W. "[i]s a person whose decision-making capacity is so impaired that the person is unable to care for the person's personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur." Iowa Code § 633.552(2); *see Hedin*, 528 N.W.2d at 581. Clear and convincing evidence means "that there is no serious or substantial doubt about the correctness of the conclusion drawn from it." *Raim v*. *Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983).

As to the conservatorship, the question is whether B.W. proved by clear and convincing evidence F.W.'s "decision-making capacity is so impaired that the

person is unable to make, communicate, or carry out important decisions concerning the person's financial affairs." Iowa Code § 633.566(2)(a).

Under the test for incompetency explained in *Hedin*, "evidence must be submitted showing that the ward or proposed ward is unable to think or act for himself or herself as to matters concerning the ward's personal health, safety, and general welfare." 528 N.W.2d at 579 (internal quotation marks and citation omitted). "In making a determination as to whether a guardianship should be established, modified, or terminated, the court must consider the availability of third-party assistance to meet a ward's need for such necessities." *Id*.

1. *Guardianship*. Upon our de novo review, we conclude B.W. has failed to meet her burden to show F.W. "[i]s a person whose decision-making capacity is so impaired that the person is unable to care for the person's personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur." Iowa Code § 633.552(2). F.W. testified he lives on the first floor of his residence, where he lives with his spouse, B.W. F.W. testified he dresses himself, brushes his teeth, and takes care of his personal hygiene, including showering. F.W. keeps a list of his medications and orders refills as needed. He is able to move around by motorized wheelchair, walker, or cane. These capabilities were confirmed in the most part by the testimony of the housekeeper, and to a lesser extent, by B.W. He does have incontinence issues, but has the assistance he needs when he needs it. B.W. prepares most of the meals. F.W. and B.W. have a housekeeper who has worked for them for eleven years. The housekeeper testified she performs basic cleaning, does laundry, prepares some

meals for F.W., takes F.W. to doctor appointments, and runs errands. They also employ a part-time handyman who performs yard work and various odd jobs.

GAL May testified,

> I think he is capable of taking care of himself, his person. I think he's capable of taking care of his finances. He clearly has the ability to call upon those that he needs help from, if he needs help, whether it's [the housekeeper], or [handyman], or some other persons in the financial arena, and I mean, he clearly has made a huge, I guess, recovery from where he was . . . a year and a half or so ago.

Upon our de novo review, we find the guardian failed to prove the necessity of a guardianship. This court has observed:

> The liberty interests as well as the stigma in being defined as an incapacitated person require before there be a determination of whether an adult can make responsible decisions with regard to his or her safety or property, there must first be a finding his or her decision-making process is so impaired he or she is not able to care for his or her own personal safety and is not able to provide necessities of life.

In re Guardianship & Conservatorship of Teeter, 537 N.W.2d 808, 810 (Iowa Ct. App. 1995) (citations omitted). While B.W. has shown F.W. is not as capable as he once may have been, B.W. has failed to prove that F.W. is not able to care for his personal safety or provide his necessities for life, particularly with the assistance available to him from his wife and employees. The court did not err in terminating the guardianship.

2. *Conservatorship*. B.W. testified she did not believe F.W. had the "kind of math skills to handle large amounts of money." She notes he signed a charitable pledge that was contrary to the directions of a charitable trust and federal regulations. While we appreciate the concern B.W. has for the decline she perceives in F.W.'s intellectual capacity, we cannot say she has shown by

clear and convincing evidence F.W.'s "decision-making capacity is so impaired that [he] is unable to make, communicate, or carry out important decisions concerning [his] financial affairs." Iowa Code § 633.566(2)(a).

F.W. has a significant personal estate. He testified he has an estate plan for his assets prepared by an attorney. The fact F.W. may spend money in a manner B.W. disagrees with is not in itself sufficient. *See Teeter*, 537 N.W.2d at 810 (finding the requisite impairment was not shown where the proposed ward had transferred her major assets in the form of a bank account and her house to an irrevocable trust, controlled by a trustee).

We read the remainder of B.W.'s asserted issues, except her claim that the district court erred when it failed to consider a limited guardianship as different means of attacking the termination decision, without any real difference in substance. We have reviewed the record de novo and we come to the same conclusion as did the trial court: B.W. has failed to meet her burden to maintain the guardianship and conservatorship.

As to B.W.'s claim that the court erred in failing to consider a limited guardianship or conservatorship, we observe that the district court must consider whether a limited guardianship or limited conservatorship is appropriate.[4] Iowa

[4]Section 633.551(3) provides, "In determining whether a guardianship or conservatorship is to be established, modified, or terminated, the district court *shall* consider if a limited guardianship or conservatorship pursuant to section 633.635 or 633.637 is appropriate." (Emphasis added.)

Section 633.635(4) provides:

> The court may take into account all available information concerning the capabilities of the ward and any additional evaluation deemed necessary, including the availability of third-party assistance to meet the needs of the ward or proposed ward, and may direct that the guardian have only a specially limited responsibility for the ward. In that event, the court shall state those areas of responsibility which shall be

Code § 633.551(3). Under Iowa Code section 633.635(4) concerning limited guardianships and conservatorships,

> The court may take into account all available information concerning the capabilities of the ward and any additional evaluation deemed necessary, *including the availability of third-party assistance to meet the needs of the ward or proposed ward*, and may direct that the guardian have only a specially limited responsibility for the ward.

The district court did consider the capabilities of the ward and the availability of third-party assistance and concluded "the ward presently possesses adequate decision making capacity in both personal and financial matters. Although there are many things he can no longer do for himself, he is financially able and personally willing to secure third party assistance when needed." The court's conclusion implies no need for a limited guardianship or conservatorship: having found adequate decision making capacity, the court necessarily concluded the guardian had failed to meet her burden.

> supervised by the guardian and all others shall be retained by the ward. The court may make a finding that the ward lacks the capacity to contract a valid marriage.
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> Section 633.637 states:
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> A ward for whom a conservator has been appointed shall not have the power to convey, encumber, or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity, unless the court determines that the ward has a limited ability to handle the ward's own funds. If the court makes such a finding, it shall specify to what extent the ward may possess and use the ward's own funds.
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> Any modification of the powers of the ward that would be more restrictive of the ward's control over the ward's financial affairs shall be based upon clear and convincing evidence and the burden of persuasion is on the conservator. Any modification that would be less restrictive of the ward's control over the ward's financial affairs shall be based upon proof in accordance with the requirements of section 633.675.

We also noted earlier that B.W. specifically asserted in the original petition that a limited guardianship and conservatorship was not appropriate. She further states in her brief that "the guardian and conservator argued that a limited guardianship and conservatorship is not appropriate because any funds available to F.W. are used primarily for the purchase of alcohol. We would find it difficult to conclude the district court erred in failing to consider that which the guardian asserted it would be inappropriate to do and argued the court should not do. *See Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 643 (Iowa 1969) ("'It is elementary a litigant cannot complain of error which he has invited or to which he has assented.'" (citation omitted)).

In any event, we have not found B.W. proved the requisite incompetence to warrant the maintenance of a guardianship and conservatorship at this time, limited or otherwise.

AFFIRMED.