20-P-2 Appeals Court

GUARDIANSHIP OF A.R.

No. 20-P-2.

Middlesex. January 8, 2021. - March 24, 2021.

Present: Blake, Desmond, & Hand, JJ.

Guardian, Incompetent person, Consent to medical treatment. Incompetent Person, Consent to medical treatment. Probate Court, Incompetent person, Guardian, Uniform practices. Evidence, Expert opinion, Hearsay, Medical record, Testimonial privilege. Witness, Expert. Moot Question. Practice, Civil, Guardianship proceeding, Motion in limine, Appointment of guardian, Hearsay, Moot case.

Petition for appointment of a guardian filed in the Middlesex Division of the Probate and Family Court Department on December 8, 2016.

The case was heard by Maureen H. Monks, J.

Ilse Nehring for A.R.
LaRonica Lightfoot, Assistant Attorney General for Department of Mental Health.

BLAKE, J. Following a trial, a judge of the Probate and Family Court found A.R. incapacitated and entered a decree and order appointing a limited guardian on A.R.'s behalf and

approving a treatment plan authorizing the administration of antipsychotic medications.[1] A.R. appeals, contending that there was insufficient evidence that he is incapable of caring for himself by reason of mental illness and not competent to make informed decisions regarding his medical treatment. A.R. also maintains that the judge erred in concluding that his substituted judgment if he were competent would be to consent to the administration of antipsychotic medication. The gravamen of A.R's complaint is that the judge improperly admitted in evidence the medical certificate and the clinician's affidavit filed in connection with the guardianship petition.[2] We affirm the portion of the decree and order that appointed a limited

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[1] A.R. retained certain rights and responsibilities for self-care and home and community life. He also retained the right to consult privately with medical, psychiatric, and other mental health professionals who may supplement, but not supplant, mental health professionals selected by the guardian.

[2] A medical certificate must be filed for an incapacitated person who is mentally ill. The respondent must be examined within thirty days of each hearing date. A registered physician, a licensed psychologist, or a certified psychiatric nurse clinical specialist must sign the medical certificate. See G. L. c. 190B, §§ 5-303 (b) (11), 5-306 (b). See also Probate and Family Court Guardianship and Conservatorship Form MPC 400. For a Rogers treatment plan, see Rogers v. Commissioner of Dep't of Mental Health, 390 Mass. 489 (1983), a clinician's affidavit as to the respondent's competency and treatment must be filed by a licensed physician, psychiatrist, or certified psychiatric nurse clinical specialist who treats or has evaluated the respondent. See Probate and Family Court Guardianship and Conservatorship Forms MPC 800 and MPC 823.

guardian, but vacate the portion of the order authorizing the use of antipsychotic medications.[3]

Background. Following A.R.'s inpatient treatment on at least four occasions, in July 2012, A.R.'s parents were appointed as his temporary coguardians with authority to monitor the administration of antipsychotic medication to him, pursuant to Rogers v. Commissioner of Dep't of Mental Health, 390 Mass. 489 (1983) (hereinafter, referring to Rogers treatment plan, Rogers authority, or Rogers monitor). Thereafter, Richard Bevins was appointed as A.R.'s special guardian and Rogers monitor.[4] The Rogers treatment plan was extended until December 2013. At the conclusion of Bevins's appointment, Melissa Luongo was first appointed A.R.'s temporary limited guardian and, thereafter, his permanent limited guardian, both with Rogers authority. In March 2015, Luongo sought permission to resign as A.R.'s guardian. Although no action was taken at this time, it is uncontested that Luongo took no further action as A.R.'s guardian or Rogers monitor. A decree entered in October 2018 formally terminated Luongo's role as guardian.

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[3] By necessity, we also vacate the order appointing a monitor pursuant to Rogers v. Commissioner of Dep't of Mental Health, 390 Mass. 489 (1983).

[4] A Rogers monitor is appointed by the judge to make sure that the respondent is being medicated as set forth in a court-approved treatment plan. The Rogers monitor must report to the court in writing regularly, and must file an annual report.

In December 2016, the Department of Mental Health (department) filed a petition seeking the appointment of a limited guardian for A.R. with Rogers authority.[5] In December of 2017, the department filed a motion for allowance of a temporary Rogers treatment plan as the department alleged that A.R.'s mental health declined; he refused to meet with his treating psychiatrist, Dr. Miriam Goodman; and he neglected his hygiene. During this time, not only had Luongo failed to act on behalf of A.R. due to a breakdown in their communication, but the Rogers treatment plan had also expired. The judge suspended Luongo's appointment, appointed a successor special guardian with Rogers authority, canceled the January 2018 trial date, and scheduled a review in April 2018. Thereafter, the temporary appointment was extended, and the case was tried on October 30, 2018.

1. Motion in limine. Prior to trial, A.R. filed a motion in limine to exclude the department's two proposed exhibits: the medical certificate dated October 12, 2018, and the clinician's affidavit dated October 4, 2018, both signed by Dr. Goodman (collectively, contested exhibits). First, A.R. argued that the contested exhibits were inadmissible pursuant to

[5] After Luongo stopped acting as guardian, but before the department filed this petition, A.R.'s parents filed a petition to remove Luongo and to appoint a successor guardian. The judge deferred ruling on the petition in part due to the pending petition filed by the department.

statute. See G. L. c. 231, § 87 ("In any civil action pleadings shall not be evidence on the trial, but the allegations therein shall bind the party making them"). In the alternative, A.R. sought to exclude certain portions of the contested exhibits because they contained inadmissible hearsay and were unduly prejudicial, speculative, or privileged. The judge deferred ruling on the motion as discussed infra.

2. The trial. Dr. Goodman was the only witness to testify.[6] Dr. Goodman was qualified as an expert witness in mental capacity and psychopharmacology, without objection. Dr. Goodman began treating A.R. in 2012; at the time of the trial, A.R. was thirty-one years old. In the period prior to trial, Dr. Goodman only saw A.R. once every two to three months in connection with upcoming court hearings because A.R. had refused to go to see her. As part of her work, Dr. Goodman spoke with the director of the group home where A.R. resided for many years. She also reviewed A.R.'s medical records.[7] Over

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[6] A.R. chose not to attend the trial. Although G. L. c. 190B, § 5-306A (d), requires that the putatively incompetent or incapacitated person is to be present at the hearing unless the judge finds that there "exist extraordinary circumstances requiring [his] absence," neither party has raised this issue on appeal. See Matley v. Minkoff, 68 Mass. App. Ct. 48, 52 n.8 (2007), quoting Foley v. Lowell Sun Publ. Co., 404 Mass. 9, 11 (1989) (appellate court "need not address" issue not raised by parties).

[7] Dr. Goodman had not been in contact with A.R.'s parents since the most recent temporary guardian was appointed.

objection, Dr. Goodman testified that in her opinion, A.R. suffered from schizophrenia -- a major mental illness. Her opinion was based on her own observations and treatment of A.R., reports of his behavior from staff at the group home,[8] and a review of his medical records.

Dr. Goodman described how A.R.'s illness affects his judgment. For example, Dr. Goodman opined that A.R. is unable to make decisions regarding his housing based on past extensive periods of homelessness. And, with the exception of one instance, A.R. refused routine medical care for the past six years. He also has very poor hygiene,[9] and refused to discuss his treatment, goals, or needs with Dr. Goodman. In Dr. Goodman's opinion, A.R.'s prognosis without treatment was poor.

Dr. Goodman testified that A.R. does not have the ability to provide informed consent to treatment for his mental illness as he is unable to weigh the risks and benefits of treatment. She opined that the appropriate treatment for A.R. is antipsychotic medication, preferably in an injectable form. At

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[8] This included that A.R. would only walk backwards, refused to urinate in a toilet, does not shower and bathe regularly, and wears the same clothing every day.

[9] Specifically, Dr. Goodman testified from her own observations that A.R.'s nails are long, he is dirty and unshaven, and he smells strongly of body odor. Over objection, Dr. Goodman testified that in the past, A.R. had symptoms including catatonia, mutism, and refusal of food and water.

the time of trial, A.R. voluntarily took Prolixin, an ingested medication, as prescribed; however, he objected to the use of Invega Sustenna, an injectable medication. A.R. described feeling dizzy with the injectable medication, but refused to clarify what he meant when asked by Dr. Goodman. Based on this, Dr. Goodman testified that with antipsychotic medication, A.R. would be able to care for himself, access appropriate medical care, and resume familial relationships.

Discussion. 1. The guardianship. As relevant here, after conducting a hearing, a judge may appoint a guardian where the petitioner proves that a qualified person seeks appointment; venue is proper; the required notices have been given; any required medical certificate is dated and the examination has taken place within thirty days prior to the hearing; the person for whom a guardian is sought is an incapacitated person; the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person; and the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance. G. L. c. 190B, § 5-306 (b). An incapacitated person is "an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the

ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." G. L. c. 190B, § 5-101 (9).

"The standard of proof to be applied in a guardianship proceeding is a preponderance of the evidence, and the burden of proof rests with the petitioner to prove that a person is incapacitated. A guardianship may be general or limited in scope." (Citations omitted.) Guardianship of D.C., 479 Mass. 516, 523 (2018). "[T]he ability to create a limited guardianship is intended to maximize the liberty and autonomy of a person subject to guardianship." Guardianship of B.V.G., 474 Mass. 315, 323 (2016), citing G. L. c. 190B, § 5-306 (b) (8).

2. Admission of contested exhibits. It is without question that in order to file a petition for the appointment of a guardian of an incapacitated person, the petitioner, here the department, must file a medical certificate and a clinician's affidavit with the petition (or explain why it is impossible to do so). G. L. c. 190B, § 5-303 (b) (11). See Probate and Family Court Guardianship and Conservatorship Form MPC 120, par. 6; note 3, supra. The statute does not provide for the admissibility of a medical certificate or a clinician's affidavit in a contested proceeding. Contrast G. L. c. 123A, § 14 (c) (report of qualified examiner, which is required to be

filed to initiate sexually dangerous person petition, admissible at trial).

The medical certificate form, as promulgated by the Probate and Family Court, includes a statement on the first page that it will be used in the process of determining whether to appoint a guardian.[10] See Probate and Family Court Guardianship and Conservatorship Form MPC 400. The department contends that with this disclaimer, and because the judge had access to the contested exhibits as part of the court record, it would be futile to allow a motion to exclude documents that were already before the judge. This argument, however, conflates the filing requirement with the petitioner's burden at trial. A requirement that the petition must be filed with a medical certificate does not, ipso facto, mean the document is admissible. Although different from the contested exhibits at issue here, a comparison to the admissibility of a medical certificate affidavit helps to inform our decision.[11] A medical

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[10] Completed forms promulgated by the Probate and Family Court in anticipation of litigation, such as the contested exhibits, are not medical records as defined by G. L. c. 233, § 79G. Compare Bouchie v. Murray, 376 Mass. 524, 531 (1978) (four-part test to determine admissibility of medical records).

[11] The purpose of a medical certificate affidavit is to eliminate the need for a new medical certificate for patients who have been and continue to be medically stable as indicated on the most recently filed medical certificate. See Probate and Family Court Guardianship and Conservatorship Form MPC 403.

certificate affidavit may be used at the time of the final determination of incapacity in the limited circumstances when counsel for the incapacitated person does not object to its use. See Probate and Family Court Standing Order 2-10 (2010). There is no comparable standing order for the contested exhibits.

Although a judge's findings may "be based exclusively on 'affidavits and other documentary evidence,'" they may only do so where there are no contested issues of fact. Guardianship of Moe, 81 Mass. App. Ct. 136, 141 (2012), quoting G. L. c. 190B, § 5-306A (d). As there were contested issues of fact here, the judge erred in relying on the contested exhibits. Moreover, neither party offered them in evidence.[12]

The department contends that A.R. offered the contested exhibits in evidence, but a fair reading of the transcript suggests otherwise. On cross-examination, A.R.'s attorney inquired about certain statements contained in the medical certificate. For example, counsel asked about a statement in the medical certificate that A.R. had not engaged in any behaviors that are dangerous to him. The judge interrupted counsel and, sua sponte, suggested that she "mark what you're entering." A.R.'s attorney responded that it was "subject to

[12] The department did not offer the contested exhibits in evidence, and did not refer to them during Dr. Goodman's direct examination.

[her] motion[] in [l]imine."[13] After a discussion about the motion, the judge overruled the objection ruling that the contested exhibits were "both pleading and opinion, a medical record."[14] A.R.'s attorney then asked the judge to strike certain portions of the documents as multilevel hearsay, unattributed hearsay, and speculation.[15]

Here, the questions posed by A.R.'s attorney were carefully constructed to impeach or to cast doubt on Dr. Goodman's ultimate opinion. Contrary to the department's assertion, however, a fair reading of the transcript does not support the conclusion that A.R. introduced the contested exhibits. We are likewise unpersuaded by the department's argument that A.R. opened the door to this evidence. Our decision in Motsis v. Ming's Supermkt., Inc. 96 Mass. App. Ct. 371 (2019), relied upon by the department, is not to the contrary. In Motsis, we held

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[13] Because A.R. filed a motion in limine to exclude these documents or, in the alternative, to strike certain portions of them, the objection is preserved.

[14] The department adopted the judge's use of a hybrid theory to refer to the contested exhibits as a hybrid of a pleading and an expert opinion, but this theory finds no support in our statutory or common law.

[15] The judge only struck one word, "bizarre," ruling that "[i]t's the type of information where the doctor would routinely rely upon so the objection is overruled." Counsel's statement, "Thank you, your Honor," following the ruling, cannot be construed as a waiver of the claims for which she had just zealously advocated.

that the judge did not abuse his discretion in allowing a witness to provide an expert opinion where the judge initially precluded the witness from offering such an opinion, because in cross-examining the witness, opposing counsel elicited extensive information about the witness's knowledge of the subject matter in issue. Id. at 381-382. On redirect, the witness was again asked his expert opinion, and the judge ruled that opposing counsel had effectively opened the door to such testimony. Id. at 382. Here, A.R. did not elicit extensive information from Dr. Goodman about the medical certificate. Indeed, counsel asked only one question, at which point the judge interrupted and suggested that the contested exhibits be marked. As such, counsel did not open the door.

3. Pleadings as evidence. A.R. contends that the judge's findings of fact are legally insufficient because they were based on the contested exhibits, which were inadmissible by statute. General Laws c. 231, § 87, provides that "[i]n any civil action pleadings shall not be evidence on the trial, but the allegations therein shall bind the party making them." See Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 138 n.6 (1995) (unverified answer in pleadings inadmissible in evidence at trial). Cf. Boston Police Patrolmen's Ass'n v. Boston, 60 Mass. App. Ct. 672, 675 (2004) (complaint asserting factual propositions, and answer responding thereto, subject to G. L.

c. 231, § 87). At bottom, the contested exhibits are hearsay,[16] not subject to any exception. Although they are necessary to file a petition, the contested exhibits remain pleadings and, accordingly, absent an agreement otherwise, they are inadmissible.

4. Sufficiency of the evidence. We next consider whether, after excising the contested exhibits from the record, there is sufficient evidence to issue a limited guardianship. We are confident that there is. Without objection, Dr. Goodman was qualified as an expert witness. As A.R.'s psychiatrist of many years, Dr. Goodman personally observed A.R., noted his declining personal hygiene, reviewed A.R.'s medical records, and testified that his circumstances had materially worsened in the three months preceding the guardianship proceedings.[17]

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[16] "Hearsay is defined as an out-of-court statement offered to establish the truth of the words contained in the statement." Adoption of Luc, 484 Mass. 139, 148 n.20 (2020). See Mass. G. Evid. § 801(c) (2021). "Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule" (quotation and citation omitted). Commonwealth v. Shangkuan, 78 Mass. App. Ct. 827, 830 (2011).

[17] A.R. contends that Dr. Goodman violated the patient-psychotherapist privilege, as established by G. L. c. 233, § 20B (applicable to psychiatrists, psychologists, and psychiatric nurses), and G. L. c. 112, § 135A (applicable to social workers). Dr. Goodman testified that she warned A.R. at every meeting that she would share the contents of their discussions with the court. Cf. Commonwealth v. Lamb, 365 Mass. 265, 270 (1974) (communications made in adversarial legal proceeding not privileged). See Matter of M.S., 99 Mass. App. Ct. 247, 256 (2021). And, although A.R. elected not to speak with Dr.

An expert witness may base her opinion on facts that she has observed, evidence in the record that "will be admitted" during the proceedings, and facts not in evidence but are otherwise independently admissible and "are a permissible basis" for her to consider in formulating an opinion. Commonwealth v. Markvart, 437 Mass. 331, 337 (2002), quoting Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986). See Mass. G. Evid. § 703 (2021). In determining whether facts or data are independently admissible, the judge must determine whether the underlying facts or data would potentially be admissible in any form through appropriate witnesses. See Commonwealth v. Greineder, 464 Mass. 580, 583 (2013); Markvart, supra at 337-338. These witnesses need not be immediately available in court to testify. See Markvart, supra. See also Mass. G. Evid. § 703 & note (2021). Here, the testimony of the staff of A.R.'s group home -- to the extent it was based on firsthand observation --

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Goodman, he did not take any actions to end their meetings. Moreover, the patient-psychotherapist privilege does not preclude "the filing of reports or affidavits, or the giving of testimony . . . for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege." G. L. c. 190B, § 5-306A (e). And we give substantial deference to the trial judge in determining whether the waiver of the privilege was knowing and intelligent. See Adoption of Serena, 64 Mass. App. Ct. 260, 263 (2005). Finally, Dr. Goodman's observations are not communications, and therefore not privileged. There was no error.

would be admissible. See Commonwealth v. Moffat, 486 Mass. 193, 200 (2020) ("Lay witnesses may only testify regarding matters within their personal knowledge"). See also Mass. G. Evid. § 602 (2021). That they were not at the court, immediately available to testify, is of no moment. See Markvart, supra. In addition, A.R.'s medical records are independently admissible. See G. L. c. 233, § 79; Mass. G. Evid. § 803(6)(B) (2021). Because Dr. Goodman's consideration of this information was permissible, her ultimate expert opinion, which the judge was free to accept or to reject, was properly admitted in evidence.[18] Thus, the evidence sufficed to support the judge's finding that A.R. is not capable of caring for himself without a limited guardianship because he suffers from schizophrenia -- a major mental illness that impairs his thought process and causes him to experience delusional thinking.

5. Substituted judgment. We begin by observing that the treatment plan at issue expired on November 26, 2019. Because the order expired more than one year ago, A.R.'s appellate challenge to the substituted judgment component of the decree and order is now moot. See Guardianship of Erma, 459 Mass. 801, 804 (2011). Notwithstanding, because the issue of a treatment

[18] In so concluding, we do not consider the specific statements attributed to the group home staff as they were not called as witnesses.

plan is likely to reoccur in this case, we briefly touch upon the merits. As we held supra, it was error to admit the contested exhibits in evidence. We therefore must review the sufficiency of the evidence, without these documents, as it relates to the authorization of the use of antipsychotic medications.

In a substituted judgment determination, a judge must ascertain what a person would choose if he were competent. See Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 752-753 (1977). The determination is subjective rather than objective and requires consideration of a person's values and preferences. See Guardianship of Roe, 383 Mass. 415, 444 (1981). Several factors guide this determination: (1) a person's expressed preferences; (2) his religious convictions; (3) the impact on his family; (4) the probability of adverse side effects from treatment; (5) his prognosis with treatment; and (6) his prognosis without treatment.[19] See id.

Here, A.R. was voluntarily taking Prolixin (an orally ingested antipsychotic medication), but he objected to the use

[19] After excision of the contested exhibits, the record is devoid of any evidence about A.R.'s religious beliefs, the impact on A.R.'s family (despite their presence in the court room at the trial, they were not called as witnesses), and A.R.'s preference as to the other proposed alternative antipsychotic medications set forth in the treatment plan (Prolixin Decanoate, Clozaril, Invega, and Latuda). See Matter of R.H., 35 Mass. App. Ct. 478, 487-488 (1993).

of Invega Sustenna, an injectable medication. A.R.'s objection to Invega Sustenna was that it made him dizzy but, according to Dr. Goodman, he "refused . . . to clarify what he meant by dizzy which can mean different things to different people." Indeed, the parties do not contest the fact that dizziness is a potential side effect of Invega Sustenna. Here, the admissible evidence tended to establish that A.R. had the present capacity to weigh the risks and benefits of certain medications and to make informed treatment decisions related thereto.[20] This is underscored by A.R.'s choice to refuse Invega Sustenna because of its side effects, while simultaneously voluntarily taking Prolixin. In sum, Dr. Goodman's testimony alone was insufficient to meet the department's burden, but the department is not without recourse. In the event that A.R.'s mental health deteriorates or he refuses to take Prolixin, nothing herein precludes the filing of additional petitions.[21]

Conclusion. So much of the decree and order dated November 26, 2018, that authorizes the treatment of A.R. with antipsychotic medications or the guardian to consent to such treatment as detailed in the treatment plan is vacated. In all

[20] The judge's findings as to A.R.'s religious beliefs and impact on his family are drawn exclusively from the contested exhibits which were admitted in error.

[21] We express no view of the merits of any such petitions.

other respects the decree and order appointing a limited guardian is affirmed. The order appointing a Rogers monitor also is vacated.

So ordered.