

STATE OF MICHIGAN
COURT OF APPEALS

In re TASHA MARIE GROVE.

CALHOUN COUNTY ADULT PROTECTIVE
SERVICES,

Petitioner-Appellee,

v

TASHA MARIE GROVE,

Respondent-Appellant.

UNPUBLISHED
February 17, 2011

No. 295157
Calhoun Circuit Court
Family Division
LC No. 2009-002135-DD

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from an order appointing a plenary guardian for her. We reverse and remand for further proceedings.

Philip Granish, on behalf of petitioner Adult Protective Services, filed the petition seeking the appointment of a guardian for respondent. The petition indicated that respondent, who was 26 years of age at the time,

has a developmental disability described as a severe, chronic condition that meets all of the following: 1) it is attributable to a mental or physical impairment or a combination of mental and physical impairments; 2) it was manifested before the individual was 22 years old; 3) it is likely to continue indefinitely; and 4) it results in substantial functional limitations in the major life activities of: self-care, self-direction, capacity for independent living, learning, and economic self-sufficiency.

The petition described the specific nature and extent of the disability as “Mild mental retardation, bi-polar disorder, Adjustment Disorder, Mood Disorder NOS, and Borderline Personality [sic] Disorder.” The petition indicated that “A report and evaluation required by law does not accompany the petition.” The petition requested that the “court order evaluations performed and a report prepared,” that “the court determined that the individual requires guardianship as an individual with a developmental disability,” and that the court appoint a plenary guardian of both respondent and her estate.

A hearing on the petition scheduled for July 27, 2009, was adjourned on the court's own motion "To allow the Michigan Department of Human Services to do further investigations." The rescheduled hearing on the petition was conducted on August 24, 2009. Respondent was not present at the hearing. At the hearing, Granish reiterated respondent's condition, adding that she had "multiple, very dangerous, unstable romantic relationships which has caused her to be a victim of a great deal of abuse financially and physically." Granish averred that respondent had acknowledged being incapable of handling her money, and noted a recent eviction notice and exploitation by numerous persons. Further, he indicated that while a "social security payee to help with the financial aspects" was originally contemplated, it was ultimately decided, after an "in-depth investigation" and review of "Dr. Haugen's psychological report," that a "guardianship would be more appropriate to help her overall living conditions." With little analysis and no fact finding, the trial court appointed a plenary guardian for respondent "given the fact that she has had troubles both in terms of criminal law violations and – in her own aspects in the past, and she has had a guardian, I will appoint a guardian." On September 2, 2009, the trial court entered an "Order Appointing Guardian for Individual with a Developmental Disability."¹

Respondent first argues that the trial court failed to comply with MCL 330.1600 *et seq.*, the portion of the Mental Health Code governing the appointment of guardians for developmentally disabled people. See *In re Neal*, 230 Mich App 723, 726; 584 NW2d 654 (1998). We agree.

MCL 330.1612 provides in pertinent part:

(1) The petition for the appointment of a guardian for an individual who has a developmental disability shall be accompanied by a report that contains all of the following:

(a) A description of the nature and type of the respondent's developmental disability.

¹ The order indicated that

Findings of fact are more fully stated on the record regarding the individual's nature and extent of general intellectual functioning, extent of impairment of adaptive behavior, capacity to manage his/her estate and financial affairs, and capacity to care for self by making and communicating responsible decisions concerning his or her person.

The order further recited the trial court's finding that respondent "is totally without capacity to care for her person." The court appointed Guardian Finance and Advocacy Services as plenary guardian for respondent.

(b) Current evaluations of the respondent's mental, physical, social, and educational condition, adaptive behavior, and social skills. These evaluations shall take into account the individual's abilities.

(c) An opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and a specific statement of the reasons for the guardianship.

(d) A recommendation as to the most appropriate rehabilitation plan and living arrangement for the individual and the reasons for the recommendation.

(e) The signatures of all individuals who performed the evaluations upon which the report is based. One of the individuals shall be a physician or psychologist who, by training or experience, is competent in evaluating individuals with developmental disabilities.

(f) A listing of all psychotropic medications, plus all other medications the respondent is receiving on a continuous basis, the dosage of the medications, and a description of the impact upon the respondent's mental, physical and educational conditions, adaptive behavior, and social skills.

* * *

(3) If a report does not accompany the petition, the court shall order appropriate evaluations to be performed by qualified individuals who may be employees of the state, the county, the community mental health services program, or the court. . . .

As previously noted, a report did not accompany the petition as required by MCL 330.1612(1). Although a hearing on the matter was adjourned to allow the Michigan Department of Human Services "to do further investigation," there was no order for "evaluations by qualified individuals." MCL 330.1612(3). Although Granish made reference to a doctor's evaluation at the hearing, the record does not reveal that the evaluation was presented to the trial court, and no such evaluation has been provided to this Court.²

Additionally, MCL 330.1614 provides in pertinent part:

(1) Upon the filing of a petition, the court shall fix a date and a place for a hearing to be held within 30 days after the filing date of the petition.

² Under MCL 330.1612(4), a "report prepared under this section shall not be made part of the public record of the proceedings but shall be available to the court or an appellate court to which the proceedings may be appealed . . ."

* * *

(3) Notice of the time and place of the hearing shall be given to the petitioner, to the respondent, to the respondent's presumptive heirs, to the preparer of the report or another appropriate person who performed an evaluation, to the director of any facility in which the respondent may be residing, to the respondent's guardian ad litem if one has been appointed, and to the respondent's legal counsel.

The register of actions indicates that a hearing initially set for July 27, 2009, was adjourned to August 24, 2009. The register of actions indicates that a proof of service was filed with regard to this order. However, the record does not indicate who was served. The record does not establish that respondent was personally notified of the hearing as required by statute. This potential lack of notice is problematic given that respondent did not appear for the hearing. Moreover, the court did not follow the statute addressing her appearance. MCL 330.1617(4) provides:

The respondent shall be present at all proceedings conducted pursuant to this chapter. However, the respondent's presence may be excused by the court only on a showing, supported by an affidavit signed by a physician or psychologist who has recently examined the respondent, that the respondent's attendance would subject him or her to serious risk of physical or emotional harm.

Apart from the attendance issue, the showing at the hearing was deficient. MCL 330.1617(5) provides:

A guardian shall not be appointed under this section unless the person who prepared the report or at least 1 of the persons who performed an evaluation serving in part as basis for the report testifies in person in court.

At the hearing, Granish presented the case for appointing a guardian on behalf of respondent. It was not established that Granish was the person who prepared the report. Moreover, he merely presented a statement, not testimony. "Testimony" is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit." Blacks Law Dictionary (8th ed). Here, there was no oath or affirmation.

Finally, MCL 330.1618 provides:

(1) The court, at a hearing convened under this chapter for the appointment of a guardian, shall do all of the following:

(a) Inquire into the nature and extent of the general intellectual functioning of the respondent asserted to need a guardian.

(b) Determine the extent of the impairment in the respondent's adaptive behavior.

(c) Determine the respondent's capacity to care for himself or herself by making and communicating responsible decisions concerning his or her person.

(d) Determine the capacity of the respondent to manage his or her estate and financial affairs.

(e) Determine the appropriateness of the proposed living arrangements of the respondent and determine whether or not it is the least restrictive setting suited to the respondent's condition.

(f) If the respondent is residing in a facility, the court shall specifically determine the appropriateness of the living arrangement and determine whether or not it is the least restrictive suited to the respondent's condition.

(2) The court shall make findings of fact on the record regarding the matters specified in subsection (1).

(3) If it is determined that the respondent possesses the capacity to care for himself or herself and the respondent's estate, the court shall dismiss the petition.

(4) If it is found by clear and convincing evidence that the respondent is developmentally disabled and lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or the respondent's estate, the court may appoint a partial guardian to provide guardianship services to the respondent, but the court shall not appoint a plenary guardian.

(5) If it is found by clear and convincing evidence that the respondent is developmentally disabled and is totally without capacity to care for himself or herself or the respondent's estate, the court shall specify that finding of fact in any order and may appoint a plenary guardian of the person or of the estate or both for the respondent.

In the instant case, the court's cursory statement was woefully deficient given the requirements of the statute. Moreover, there was no finding that respondent lacked the capacity to do all of the tasks necessary to care for herself. In this regard, the petition indicated that respondent was living alone. While Granish made a vague statement that a guardianship would be appropriate to help with her overall living conditions, the record does not establish that a plenary guardianship was warranted.

Given our disposition of this issue, we need not address respondent's remaining issues. Since the trial court did not adhere to the statutory requirements governing guardianships of developmentally disabled persons, we reverse and remand for proceedings consistent with the statute.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering