STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1894

In re the Emergency Guardianship and/or
Conservatorship of: Gary Burke.

Filed July 22, 2019
Affirmed
Halbrooks, Judge

Chisago County District Court
File No. 13-PR-18-54

Jessica Buberl, J. Buberl Law, Osceola, Wisconsin (for appellant Gary Burke)

Janet Reiter, Chisago County Attorney, Aimee S. Cupelli, Assistant County Attorney, Center City, Minnesota (for respondent Chisago County Health & Human Services)

Lutheran Social Service of Minnesota, St. Paul, Minnesota (respondent)

Considered and decided by Slieter, Presiding Judge; Halbrooks, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

On appeal from the grant of guardianship, appellant-ward argues that (1) the record does not support the appointment of a guardian, (2) the district court granted the guardian more powers than are necessary, and (3) the district court improperly admitted hearsay evidence. We affirm.

FACTS

On April 18, 2018, law enforcement was dispatched to the home of appellant Gary Michael Burke to conduct a welfare check. At the time, Burke was 69 years old and lived alone. They discovered Burke on the couch in his apartment, moaning and unable to complete sentences. Law enforcement asked Burke to turn down the volume on the television. But he was unable to, despite the remote being right next to him. Law enforcement placed Burke on a 72-hour hold and transported him to the VA Hospital. The following day, Trent Struck, an adult-protection investigator with respondent Chisago County Health and Human Services (the county), was notified of the welfare check and subsequent police report. He attempted to identify which hospital Burke was taken to, but was unable to make contact with medical staff until April 23. A nurse told Struck that Burke was likely to be discharged later that afternoon. At that time, Struck attempted to contact Burke to set up a meeting at his home, but did not hear back from him.

Burke was discharged from the VA Hospital on April 26. On April 28, law enforcement responded to a possible medical call at Burke's apartment. It was suspected that Burke had suffered a stroke. When law enforcement arrived, Burke was able to talk but had bruising and scabs on his face. His apartment was cluttered with garbage and there was a sticky substance on the floor. Burke was transported to Fairview Hospital in Wyoming, Minnesota. On April 30, Struck met with Burke at Fairview. Burke indicated that he had fallen at his home. He also stated that the VA Hospital had arranged for home-health services, but the services did not show up following his discharge from the hospital. The medical staff at Fairview recommended that Burke be transferred to a transitional-care

unit for ongoing therapy and services. Burke declined and was discharged against medical advice on May 3.

Shortly after Burke was discharged from Fairview, Struck met with Burke at his apartment. Burke was in a wheelchair. Struck observed that the garbage was overflowing, there was a sticky substance on the floor, and that the apartment was generally cluttered. Burke authorized Struck to contact his primary-care physician, Viorel Guter, M.D., to inquire about the home-health services being set up for Burke. Dr. Guter's nurse informed Struck that Burke received several home services, including medical services and assistance with cleaning and bathing. On May 10, Burke had a follow-up visit at the VA Hospital. He indicated that he was no longer receiving services because his home-health aide and visiting nurse quit, and he fired his housekeeper. On May 22, Burke had an appointment with Dr. Guter to refill his medication. Dr. Guter's notes from that visit indicate that Burke was continuing to live independently in spite of Dr. Guter's advice that he needed to enter a nursing home and that Burke "needs a nursing home, he is a vulnerable adult and living independently could be catastrophic for him."

On June 8, law enforcement was again dispatched to Burke's residence to conduct a welfare check after a neighbor reported seeing Burke lying in the hallway partially out of his apartment and moaning. After law enforcement helped Burke back into his wheelchair and brought him inside his apartment, Burke started kicking the couch and saying that someone was sitting on the couch and speaking to him. No one was there. Burke was placed on 72-hour hold and admitted to the VA Hospital. Struck spoke with staff at the VA Hospital and learned that Burke had been diagnosed with unspecified depressive

disorder, post-traumatic stress disorder (PTSD), unspecified personality disorder, alcohol-use disorder, mild cognitive impairment, cerebellar ataxia, ischemic stroke, and failure to thrive. He was also diagnosed with lithium toxicity, likely due to inadequate food intake. His physician at the VA Hospital recommended a higher level of care—at minimum an assisted-living facility. Burke did not believe that he needed to enter assisted living and expressed his desire to continue living in his apartment.

On June 21, Patricia Dickmann, M.D., Burke's attending physician at the VA Hospital, signed a Physician's Statement in Support of Guardianship/Conservatorship. The statement indicated that, based on assessments performed on June 12 and June 19, Dr. Dickmann was of the opinion that Burke lacked the capacity to make decisions regarding his place of abode, that his prognosis was poor, and that he was in need of a guardian. On June 29, the county filed a petition for emergency appointment of a guardian for Burke. The district court issued an order appointing respondent Lutheran Social Service of Minnesota (LSS) as emergency guardian of Burke.

On August 16, the county petitioned for the appointment of a guardian for Burke. The district court held a hearing on the petition on August 28. Struck, Burke, and Katie Jenson, a guardian with LSS, testified. The county moved to admit into evidence Dr. Dickmann's statement in support of guardianship and Burke's medical records. Burke's counsel objected on the ground that the documents contained hearsay. The district court overruled the objection. Following the hearing, the district court left the record open for one week for the parties to submit additional evidence. On September 20, the district court issued an order appointing LSS as guardian of Burke. This appeal follows.

D E C I S I O N

"The appointment of a guardian is a matter within the discretion of the district court and will not be disturbed absent a clear abuse of that discretion." *In re Guardianship of Autio*, 747 N.W.2d 600, 603 (Minn. App. 2008). We do not stand in a position to retry the case and assess the evidence as the district court did. *See Grant v. Malkerson Sales, Inc.*, 108 N.W.2d 347, 351 (Minn. 1961) (explaining that even when there is conflicting evidence and the appellate court "might find the facts to be different" if it were the fact-finder, that is not its role). "A reviewing court is limited to determining whether the district court's findings are clearly erroneous, giving due regard to the district court's determinations regarding witness credibility." *In re Guardianship of Wells*, 733 N.W.2d 506, 510 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). If there is reasonable evidence to support the findings of fact, we will not disturb those findings. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

I.

The district court may appoint a limited or unlimited guardian if it finds, by clear and convincing evidence, that an individual is incapacitated and that the individual's needs cannot be met by less-restrictive means. Minn. Stat. § 524.5-310(a) (2018). The term "incapacitated person" is defined as "an individual who . . . is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance." Minn. Stat. § 524.5-102, subd. 6 (2018).

The district court determined that Burke is incapacitated because, despite the risks posed to his health and safety by living alone, he had failed to set up the necessary services to address those concerns. The district court noted that Burke had been hospitalized multiple times due to falls, welfare concerns, a possible stroke, and other health problems and that he appeared to have an inability to care for himself as evidenced by body odor, stained clothing, cigarette burns, and his falling asleep with a lit cigarette in his hand. Additionally, he had lost 40 pounds in the past year and been diagnosed with lithium toxicity based on inadequate "oral intake" or eating. Despite these concerns, Burke refused to follow the doctors' recommendations for his medical care. And when the home-health services that the VA Hospital arranged for ended after his home-health aide and nurse quit and Burke fired his housekeeper, he failed to take the necessary steps to secure new services.

Burke argues that there is not clear and convincing evidence to support the district court's determination that he meets the definition of an "incapacitated person." He argues that he is not incapacitated because he arranges for his own medical care, handles his own finances, and based his decision not to enter assisted living on financial reasons. He argues that this conduct shows that he makes responsible personal decisions. He also argues that the evidence does not show that he has demonstrated an inability to meet his personal needs for medical care, nutrition, clothing, shelter, or safety. But the district court's findings plainly reflect that the district court rejected these arguments. And there is record support for the district court's findings. The county presented evidence regarding Burke's history of hospitalizations and medical issues, that Burke repeatedly refused to follow the

recommendations of medical staff, that the condition of his apartment was both unsanitary and made it difficult for him to maneuver in his wheelchair, and that after his home-health services ended, he did not arrange for new services. Because there is reasonable evidence to support the district court's findings, we will not disturb those findings. *Fletcher*, 589 N.W.2d at 101. Accordingly, the district court did not abuse its discretion in determining that Burke is unable to meet his own health and safety needs.

Burke also argues that he is not incapacitated because his needs could be met by less-restrictive means. He argues that in-home services could meet his needs in a less-restrictive manner and that the record shows that when such services were in place his safety needs were met. The district court rejected this argument, reasoning that "[a]t most the services would be similar to what [Burke] had in place when his hospitalizations began in the spring of 2018." Again, the record supports the district court's determination. Burke had services in place prior to the petition for guardianship, but those services failed to mitigate the risks to his health and safety. Several agencies stopped working with Burke and refused to work with him in the future because he failed to follow the recommendations of his doctors and exhibited behavior that concerned the staff. And after Burke's nurse quit and he fired his housekeeper, he did not arrange for new services. Moreover, the services available to Burke only included a nurse one day a week and a home-health aide twice per week, far less than the level of supervision and care recommended by the medical staff. On this record, the district court did not abuse its discretion in determining that Burke's needs could not be met by less-restrictive means.

II.

When appointing a guardian, the district court "shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs." Minn. Stat. § 524.5-310(c) (2018). "[T]he powers of the guardian should be kept to the bare minimum necessary to care for the ward's needs." *In re Guardianship of Mikulanec*, 356 N.W.2d 683, 687 (Minn. 1984).

Burke argues that the district court abused its discretion in appointing a guardian because it granted LSS more powers than the bare minimum necessary to provide for his needs. He argues that the district court could have granted LSS the limited power of coordinating and ensuring that he is receiving in-home services "such as cleaning, home making, bathing, nursing, and the power and duty to ensure such services are being appropriately provided" and that "granting anything more was an abuse of discretion." We disagree. Burke's argument is premised on his assertion that his health and safety needs could be adequately addressed through home-health services. As discussed above, the district court determined that the in-home services available to Burke were insufficient to meet his needs. Even when such services were in place, they failed to prevent Burke from falling and being hospitalized. And the services available were far less intensive and frequent than the level recommended by his doctors.

Moreover, the district court left the record open after the hearing for the parties to present additional evidence on services that "could be put in place to meet [Burke's] daily needs to live independently." The parties did not identify any such services. Accordingly, there is no record evidence to support Burke's contention that there are in-home services

available that could adequately address his needs. The only services identified were those that failed to mitigate the risks to Burke's health and safety prior to the petition and were deemed inadequate in light of the recommendations made by medical staff. We conclude that the district court did not abuse its discretion in granting additional supervisory powers to LSS.

III.

Burke argues that the district court abused its discretion by admitting into evidence Dr. Dickmann's statement in support of guardianship and his medical records because they contained hearsay statements. Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801. Generally, hearsay is not admissible. Minn. R. Evid. 802. However, the rules provide express exceptions for statements that are sufficiently trustworthy. *See* Minn. R. Evid. 803, 804.

The district court determined that Dr. Dickmann's statement in support of guardianship and Burke's medical records were admissible under Minn. R. Evid. 803(4) and 803(6). Rule 803(4) creates an exception for "[s]tatements made for purposes of medical diagnosis or treatment." Minn. R. Evid. 803(4). Rule 803(6) creates an exception for records "kept in the course of a regularly conducted business activity," including opinions and diagnoses. Minn. R. Evid. 803(6). But the exception does not apply to records "prepared for litigation." *Id.* Burke concedes that the statement in support of guardianship and medical records were admissible to the extent they were being admitted to show his diagnoses. But he argues that the documents are inadmissible to the extent that they contain statements other than those made for the purpose of seeking medical diagnoses

or treatment. He asserts that the documents are not admissible under rule 803(6) because the record does not establish that the records were kept in the course of a regularly conducted business activity and were not introduced through a custodian or qualified witness.

The county contends that any error in admitting the records was harmless and therefore does not entitle Burke to relief. On appeal, Burke must show both error and that he was prejudiced by the error. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987). Harmless error is to be disregarded. Minn. R. Civ. P. 61. We agree with the county that any error in admitting the documents was harmless. Our review of the record reflects that the evidence relied on by the district court in making its determination was properly admitted. While the medical records were not admitted through a qualified witness as required by Minn. R. Evid. 803(6), the evidence relied on by the district court is admissible under Minn. R. Evid. 803(4). Statements made for the purpose of seeking a diagnosis or treatment include descriptions of "medical history, or past or present symptoms, pain, or sensations." Minn. R. Evid. 803(4). The majority of the information contained in the medical records is therefore admissible under rule 803(4). Additionally, Struck provided extensive testimony regarding the incidents that led to Burke being hospitalized and the petition for guardianship, as well as Burke's refusal to follow the recommendations of his doctors. Burke himself testified that he refused to consider moving to an assisted-living facility.

The district court's determination that Burke is in need of a guardian was based on his history of medical issues and hospitalizations, the failure of in-home services to prevent

those incidents, and Burke's refusal to follow the recommendations of his doctors. Accordingly, the district court's determination that Burke is in need of a guardian was based on properly admitted evidence. Any error in admitting the relatively small portion of the statement in support of guardianship and medical records that constitutes hearsay is therefore harmless.

Affirmed.