STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1279

In re the Guardianship and/or Conservatorship of Heidi Anne Vizuete

Filed July 8, 2013
Reversed and remanded
Hooten, Judge

Washington County District Court
File No. 82-PR-11-3715

Edison Vizuete, St. Paul, Minnesota (pro se appellant)

Timothy T. Ryan, Chisago City, Minnesota (for respondent Heidi Vizuete)

Miriam Vizuete, Woodbury, Minnesota (pro se respondent)

Considered and decided by Cleary, Presiding Judge; Johnson, Chief Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant father challenges the district court's order appointing respondent, his former spouse and mother of the proposed ward, as guardian of his daughter and denying his request for appointment of a conservator. He argues that the district court lacked jurisdiction to interfere with his custodial rights, failed to appoint a guardian ad litem, exhibited bias by providing his former spouse with a publicly financed attorney, and abused its discretion by appointing respondent as guardian with all of the statutorily-

enumerated powers set forth in the guardianship statute. Because appointment of respondent as the sole guardian of the parties' daughter unlawfully modified and abrogated the parties' custodial arrangement, we reverse and remand.

FACTS

This appeal results from competing guardian petitions filed by divorced parents. On June 13, 2011, respondent Miriam Rose Vizuete, the mother of the proposed ward, Heidi Anne Vizuete (Heidi), filed a petition for the appointment of a guardian. The petition claimed that "Heidi has been diagnosed with mild to moderate cognitive disability" and requires a guardian to manage her day-to-day affairs." Respondent nominated herself as Heidi's proposed guardian. On August 22, 2011, appellant Edison M. Vizuete, Heidi's father, filed a petition seeking appointment of himself as Heidi's guardian. On February 9, 2012, appellant filed an amended petition for appointment of himself as a guardian and conservator. The amended petition asserts that respondent is unqualified to manage Heidi's estate because she failed to disclose her own income in her initial petition and "has been irresponsible in the management of her personal financial affairs, and has engaged in financial exploitation of [Heidi]."

An evidentiary hearing was held over the course of two days in February and March of 2012. A social worker with Washington County Human Services who had worked with Heidi and her family since 2001 explained that Heidi received a developmental disabilities waiver and services through a program that permits respondent to pay herself to provide Heidi with care and services. He testified that respondent's home provides adequate stability and that he has observed respondent "to be very caring

and nurturing" toward Heidi. He also testified that appellant "wasn't really involved until 2008, but since that time he has been very actively involved and wanting to be involved as much as possible." He explained that appellant requested access to information regarding Heidi's participation in county services, but could not receive it without Heidi's approval. As of Heidi's 18th birthday in November 2011, the social worker was required to work with her directly, or her legal guardian. Respondent also testified that she did not, absent a guardianship, have access to all information pertaining to Heidi's schooling and social services after she turned 18 years of age.

At the time of the hearing, Heidi was a senior in high school, and stated that she was graduating from high school the year of the hearing. She planned on entering a transition program after graduating to become a pastry chef. Heidi has lived with respondent her whole life and has not seen appellant since October 2011. She explained that she had no desire to see him because she cannot handle his "anger issues" and because he failed to tell her that he was attempting to become her guardian.

Heidi testified that respondent helps her accomplish domestic tasks that she is unable to do on her own, such as cooking, arriving on time to school, and helping her in the morning. Heidi assists with dishes and cleaning and does her laundry, but does not yet have a driver's license and does not go shopping without an adult. She is able to manage her checking account, established by appellant, online with help from respondent. She also stated that she has a learning disability and that respondent has helped her make medical decisions. Heidi desired the appointment of respondent as guardian because she looks out for her best interests.

After the parties' dissolution, Heidi and her older sisters lived with respondent, but appellant and respondent shared legal custody. Appellant testified that he shares joint custody and was entitled to visitation every other weekend. Appellant objected to the appointment of respondent as guardian because he is "very concerned about some of the situations that have developed on [Heidi's] management as far as her developing opportunities," and is concerned about respondent's financial security. Both appellant and respondent made clear that appellant continues to pay child support. Generally, there did not appear to be any reasonable dispute as to the need for a guardian.

Respondent testified that Heidi has been diagnosed with autism spectrum disorder and is "considered mentally retarded with an IQ of 61 to 64," but described the impairment as "mild to moderate." She explained that Heidi is in need of cuing her daily activities and does not understand financial or health issues. She also described Heidi as vulnerable and stated that she has problems with memory.

On May 21, 2012, the district court found that respondent has had custody of Heidi and has been her primary care giver since 1998, and that Heidi would likely remain in respondent's home regardless of the outcome of the proceedings. The court's findings note Heidi's lack of "sufficient understanding or capacity to make or communicate responsible decisions concerning her person," as well as her deficient understanding of money, her ability to read and write at a middle school level, her "short-term memory issues" and disposition to frequently forget and lose items, and the fact that she "is overly trusting, vulnerable to exploitation by others, and requires supervision in order to live safely." The findings also state that Heidi's "demonstrated needs cannot be met with less

restrictive means," and that she "has ongoing educational, medical, vocational, recreational, and other needs that require continuing supervision and assistance from someone with authority to make decisions on her behalf." Given these findings, the district court appointed respondent as Heidi's guardian, with all of the statutorily enumerated powers, and denied appellant's request to be appointed as guardian and conservator.

On appeal, appellant argues that the district court lacked jurisdiction to interfere with the custody of Heidi while she was a minor, and that the guardianship order resulted in a de facto termination of his parental rights. He also asserts that the district court should have appointed a guardian ad litem, abused its discretion by awarding the powers set forth in Minn. Stat. § 524.5-313(b) (2012), displayed bias in favor of respondent by appointing counsel on her behalf and by qualifying her as indigent, improperly appointed an attorney for respondent, and based the appointment on biased and speculative findings.

D E C I S I O N

Appellant argues that the district court lacked jurisdiction to interfere with his parental rights through the guardianship proceeding. He asserts that the guardianship process "should have either been triggered by the ward becoming 18 years old or when the custody agreement would have elapsed as Heidi would ha[ve] finish[ed] high school." Although neither a copy of the dissolution judgment nor the specific parameters of the custodial arrangement appear in the record, the record reflects that appellant and respondent shared legal custody of their daughters and that appellant has continued to pay child support beyond Heidi's 18th birthday. In appointing respondent as Heidi's

guardian with all of the statutorily-enumerated powers, the district court did not address the effect that its order would have upon the custodial arrangement established in the dissolution proceeding.

Heidi argues that appellant waived his right to assert any jurisdictional defect by virtue of his petition and amended petition. The record reflects that appellant's argument submitted after the evidentiary hearing did not address the effect of the custodial arrangements set forth in the parties' dissolution judgment and decree on the guardianship proceeding. Earlier in the proceedings, however, appellant filed, with no apparent response from the district court, a document entitled "Petition for an Injunction Not to Interfere with Parental Rights." While "[a] reviewing court should consider only those issues the trial court was presented with and considered," "[a]n exception arises if the issue is dispositive of the entire controversy, and there is no advantage or disadvantage to the parties in not having a prior decision by the trial court." *Freundschuh v. Freundschuh*, 559 N.W.2d 706, 709 (Minn. App. 1997), *review denied* (Minn. Apr. 24, 1997). In light of our analysis, this issue is appropriately considered on appeal.

I.

We agree with appellant that the district court's appointment of respondent as guardian effectively, and improperly, terminated the parental rights of appellant as a joint legal custodian. Our analysis initially rests on the notion that the custodial arrangement under which appellant and respondent exercise joint legal custody over their three daughters after their dissolution remains effective with respect to Heidi, who, although she has turned 18 years of age, may remain unemancipated. "Whether an individual is

emancipated depends on the facts and circumstances of each case." *Maki v. Hansen*, 694 N.W.2d 78, 83 n.3 (Minn. App. 2005). Statutory construction and interpretation are questions of law subject to de novo review. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006).

"[I]n a dissolution or separation proceeding, . . . the court shall make such further order as it deems just and proper concerning . . . the legal custody of the minor children of the parties which shall be sole or joint." Minn. Stat. § 518.17, subd. 3(a)(1) (2012). However, beyond this initial custody determination, the duration of an arrangement of joint custody does not particularly depend upon a child's age. "'Legal custody' means the right to determine the child's upbringing, including education, health care, and religious training," Minn. Stat. § 518.003, subd. 3(a) (2012), and "'[j]oint legal custody' means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training," *id.*, subd. 3(b) (2012). In turn, "'[c]hild' means an individual under 18 years of age, an individual under age 20 who is still attending secondary school, or an individual who, by reason of physical or mental condition, is incapable of self-support." Minn. Stat. § 518A.26, subd. 5 (2012); *see also id.*, subd. 1 (2012) ("For the purposes of this chapter and chapter 518, the terms defined in this section shall have the meanings respectively ascribed to them."). However, the term "self-support" is not specifically defined under section 518A.26, subdivision 5.

The district court found that Heidi had turned 18 years of age, but at the time of the hearing, was still attending high school, where she received special education services

and had an Individualized Education Program. Although Heidi testified that she was graduating from high school sometime in 2012 and entering a transitions program after graduation, there was no description in the record of the program. The district court made detailed findings in support of its conclusion that Heidi is an "incapacitated person" for purposes of Minn. Stat. §§ 524.5-102, subd. 6, 5-310(a) (2012).

> "Incapacitated person" means an individual who, for reasons other than being a minor, 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.

Testimony established that, despite the mild-to-moderate nature of Heidi's cognitive disabilities, she requires regular cues for daily activities and has limited ability to prepare meals. She also requires assistance with managing her limited finances and is often forgetful. The record also supports the district court's findings that Heidi lacks the ability to make or communicate responsible decisions concerning her person, has limited ability to fulfill daily activities on her own, and has limited ability to manage her finances and comprehend medical needs.

Since the record is supportive of the district court's finding that Heidi is an incapacitated person within the meaning of the guardianship statute, the district court did not abuse her discretion in so finding. But, the record also supports a finding that Heidi is incapable of self-support for purposes of section 518A.26, subdivision 5. Thus, Heidi

was still a "child" within the meaning of Minn. Stat. § 518.003, subd. 3(a), (b), not only because she was attending high school at the time of the evidentiary hearing, but also because the evidence supports a finding that she was also incapable of self-support at that time.

This conclusion is consistent with the apparently uncontested fact that appellant's child support obligation remains in place. In *Jarvela v. Burke*, this court addressed a father's challenge to an order extending his support obligation for an indefinite period of time based on the finding that the child, who was 18 years of age and enrolled in secondary education, was incapable of self-support because of a physical or mental condition and therefore remained a child for purposes of Minn. Stat. § 518.54, subd. 2, which has since been renumbered as section 518A.26, subdivision 5. 678 N.W.2d 68, 72 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). Because of the child's status, we rejected the father's argument that the child's mother lacked standing to bring a modification motion because her custodial rights over the child terminated on his 18th birthday. *Id.* at 72. Instead, because there was no dispute that the child was incapable of self-support, we held that the mother "retain[ed] ongoing legal custody over" the child and had standing to bring the modification motion. *Id.*; s*ee also Krech v. Krech*, 624 N.W.2d 310, 312 (Minn. App. 2001) ("The district court has authority to require continuing child support even after a child has attained the age of 18 when that child is unable to support herself due to a mental or physical deficiency.").

Because Heidi still meets the definition of a "child" within the meaning of chapter 518 and 518A, and because appellant is still paying child support and otherwise

attempting to exercise his rights and responsibilities as her father, any modification of his parental rights should have been governed by those chapters.

II.

Having determined that Heidi remains in the joint legal custody of the parties, and that appellant's parental rights are governed by chapters 518 and 518A, we must consider the effect of the guardianship appointment on the custody arrangement. The Uniform Guardianship and Protective Proceedings Act (the act)

> applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this state, protective proceedings for individuals domiciled in or having property located in this state, and property coming into the control of a guardian or conservator who is subject to the laws of this state.

Minn. Stat. § 524.5-106 (2012). The act's reach specifically excludes "matters or proceedings arising under or governed by chapters 252A, 259, and 260C." *Id.* Chapter 252A governs the guardianship by the commissioner of human services of a developmentally disabled person, who is "age 18 or older" and "has been diagnosed as having significantly subaverage intellectual functioning existing concurrently with demonstrated deficits in adaptive behavior such as to require supervision and protection for the person's welfare or the public welfare." Minn. Stat. § 252A.02, subd. 2 (2012). However, a "[p]ublic guardianship or conservatorship may be imposed only when no acceptable, less restrictive form of guardianship or conservatorship is available." Minn. Stat. § 252A.03, subd. 4 (2012). Neither chapter 259, which governs changes of names

and adoptions, nor chapter 260C, which governs children in need of protection or services, applies to the current situation.

Although matters arising under chapters 518 and 518A, which encompass, in part, custody, modification of custody, and child support obligations, are not specifically excluded from the act, this court has commented that "[t]he appointment of a guardian does not *ipso facto* divest the parent of the right to custody." *In re Guardianship of D.M.S.*, 379 N.W.2d 605, 608 (Minn. App. 1985) (quotation omitted). In *D.M.S.*, this court held that a probate court had jurisdiction to consider a petition, brought by the mother and aunt of the mother's minor children, to remove an unrelated individual in whose care the mother had placed her children and appoint the aunt as guardian. *Id.* at 606–07. After addressing the jurisdictional issue, this court addressed whether the probate court erred by concluding that removal of the guardian was not in the children's best interest. After noting that "strong public policy interests . . . favor natural parents as custodians of their minor children" and that "the withdrawal of mother's consent to the guardianship . . . raise[s] the issue of the natural parent's right to make decisions about her children's welfare," we noted the probate court's lack of inquiry into the fitness of any of the parties and recognized that, absent the mother's consent, "the probate court's ruling goes beyond a review of statutory duties and operates as a de facto termination of mother's parental rights." *Id.* at 607–08.

In this case, appellant and respondent initiated competing petitions for the appointment of a guardian pursuant to Minn. Stat. § 524.5-303 (2012). Each sought appointment as guardian, and respondent was ultimately appointed guardian with powers

and duties enumerated in Minn. Stat. § 524.5-313(c)(1)–(7). Specifically, these powers and duties implicate "the power to have custody of the ward and the power to establish a place of abode," *id.* (c)(1); "the duty to provide for the ward's care, comfort, and maintenance needs, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate, training, education, and habilitation or rehabilitation," *id.* (c)(2); "the duty to take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects," *id.* (c)(3); "the power to give any necessary consent to enable the ward to receive necessary medical or other professional care, counsel, treatment, or service," *id.* (c)(4)(i); "the power to approve or withhold approval of any contract, except for necessities, which the ward may make or wish to make," *id.* (c)(5); "the duty and power to exercise supervisory authority over the ward in a manner which limits civil rights and restricts personal freedom only to the extent necessary to provide needed care and services," *id.* (c)(6); and "the power to apply on behalf of the ward for any assistance, services, or benefits available to the ward through any unit of government," *id.* (c)(7).

It is readily apparent that these guardianship powers closely parallel, if not completely subsume, appellant's status and rights as a joint legal custodian. Perhaps the only remaining portion of appellant's status as joint legal custodian not subsumed by respondent's powers as guardian is the authority to influence religious training. Thus, similar to the de facto termination of the mother's parental rights in *D.M.S.*, the appointment of respondent as guardian, with all attendant powers set forth by statute, effectively nullifies the parties' custodial arrangement.

Just as the definition of a child set forth in section 518A.26, subdivision 5, applies to the meaning of joint legal custody set forth in section 518.003, subdivision 3(b), this definition of a child also applies to the modification of custody standard set forth in Minn. Stat. § 518.18(d) (2012), which controls modification of custody as to a "child." Aside from noting that respondent "has had custody of Heidi and has been the primary care-giver since" the divorce in 1998, the district court makes no mention of the parties' custody arrangement or the effect of chapters 518 and 518A in its extensive findings and analysis supporting the appointment of respondent as guardian.

We recognize that the current proceeding was limited to addressing the competing guardianship petitions. The act "applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this state." Minn. Stat. § 524.5-106. However, in light of the particular facts presented by the parties at the evidentiary hearing, the duly-established custodial arrangement between appellant and respondent is incompatible with the appointment of respondent as the sole guardian, and there has been no showing that the requirements to modify custody have been satisfied. Moreover, because there has been no showing that Heidi's needs are not being met within the current custody arrangement, the guardianship and effective modification of legal custody runs afoul of the statutory requirement that a guardian may be appointed only if the proposed ward's "identified needs cannot be met by less restrictive means." Minn. Stat. § 524.5-310(a).

We do not intend to imply that Minnesota law disallows the appointment of a sole guardianship for a ward over whom parents exercise custodial rights. The act, however,

cannot be used to completely or substantially abrogate existing custodial rights over the objection of a custodial parent. Because the district court failed to consider the custodial arrangement between the parties, and whether modification of custody was permitted under Minn. Stat. § 518.18 (2012), the order appointing respondent as guardian must be reversed. This matter is remanded for consideration of the competing guardianship petitions in light of the current custodial arrangement between the parties and the requirements for modification of appellant's legal custody under chapter 518.[1]

Reversed and remanded.

[1] Given our disposition, we do not address appellant's remaining arguments that the district court should have appointed a guardian ad litem, displayed bias in favor of respondent by qualifying her as indigent, and based the appointment on biased and speculative findings.