STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0701

In re the Guardianship and Conservatorship
of Scott W. Roberts,
Ward and Protected Person.

Filed December 24, 2012
Affirmed
Rodenberg, Judge

Washington County District Court
File No. 82PR117256

Robert A. McLeod, Lindquist & Vennum, PLLP, Minneapolis, Minnesota (for appellant Scott W. Roberts)

Jennifer A. Lammers, Diane B. Bratvold, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents Nicholas Roberts and Anna-Marie Roberts)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Hooten, Judge.

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

RODENBERG, Judge

In this guardianship appeal, appellant-ward challenges a district court order appointing respondents as guardians and limited conservators. Appellant argues that, although the evidence supports his diagnosis of frontotemporal dementia, it does not support a finding that he is presently incapacitated so as to warrant a guardianship or conservatorship. We affirm.

FACTS

Appellant Scott Roberts is a successful businessman who was diagnosed with frontotemporal dementia (FTD) in December 2011. FTD is a neurodegenerative brain disorder that progressively disrupts cognitive abilities and causes the brain to atrophy. The disorder impairs judgment, memory, and decision-making. No cure is available, and the condition is usually fatal within four to eight years.

Respondents Nicholas and Anna-Marie Roberts, who are appellant's adult children, first noticed changes in appellant's personality and memory during 2011. Medical tests revealed cognitive abnormalities, and MRI and PET scans revealed atrophy of the brain. Appellant's memory, attention span, judgment, and decision-making were significantly impaired, and medical records reveal that he had "no insight into his difficulties," thinking his symptoms to be related to his longstanding tinnitus.

In December 2011, appellant was hospitalized at Mayo Clinic after making suicide threats when he struggled with cognitive testing during a neurological exam there. Before being discharged about a week later, appellant and respondents met with a team of doctors to discuss appellant's need for 24-hour, in-home assistance. The doctors also recommended that appellant no longer drive. Upon arriving home a few hours later, appellant did not recall meeting with the doctors earlier that same day. He did not remember why the in-home assistant was there, and he demanded to have his car keys. Respondents became concerned about his safety. They ultimately called an ambulance, and appellant was rehospitalized.

At the recommendation of Mayo Clinic's inpatient psychiatry unit, respondents filed a petition for emergency guardianship on December 27, 2011. The district court granted the petition that same day.

Respondents then filed a petition for permanent guardianship on January 4, 2012. By that time, appellant was residing at an assisted-living facility in Oak Park Heights. Respondents subsequently filed an amended petition seeking appointment of a limited conservator as well.

The parties agree that appellant has substantial wealth. Most of his assets were held in a revocable trust established by appellant prior to the filing of the petitions. However, approximately $2.3 million in assets, including significant real estate titled in appellant's name, remained outside the trust.

At an evidentiary hearing held in February 2012, appellant's neurologist testified that appellant lacked decisional capacity due to his cognitive deficits stemming from FTD. The neurologist testified that appellant was vulnerable to exploitation because of his lack of insight and inability to understand the ramifications of his decisions. Respondent Nicholas Roberts testified regarding appellant's declining mental condition. Appellant himself also testified at the hearing.

Following the hearing, the district court appointed respondents as joint guardians and limited conservators. It limited the conservatorship to the purpose of transferring appellant's remaining assets into the previously established revocable trust and providing periodic independent accountings.

This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court clearly erred in finding that he was in need of a guardian. The determination of whether to appoint a guardian is "peculiarly within the discretion" of the district court. *In re Guardianship of Kowalski*, 478 N.W.2d 790, 792 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). We will uphold the district court's findings of fact if they are "reasonably supported by the evidence." *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 407 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). Because the district court has "broad powers" in appointing a guardian, we will interfere with its discretion only in the event of clear abuse. *In re Conservatorship of Lungaard*, 453 N.W.2d 58, 63 (Minn. App. 1990).

The district court may appoint a guardian upon finding, by clear and convincing evidence, that the proposed ward is an "incapacitated person" whose "identified needs cannot be met by less restrictive means." Minn. Stat. § 524.5-310(a) (2010). An "incapacitated person" is someone 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 (2010).

In this case, the district court found by clear and convincing evidence that appellant is "incapacitated with regard to the person" because he is unable to "make or communicate responsible decisions" regarding his "personal needs for medical care,

nutrition, clothing, shelter, or safety." It found that appellant's short-term memory and judgment are impaired as a result of FTD. Specifically, it found that appellant lacks the capacity "to exercise judgment or understand the impact his decisions will have on his safety and well-being," and that he is unable to "adequately provide for his own level of care, medical decisions, or supervision." In light of his "very complex life that requires insight into his significant finances and his manner of living," the court found that appellant is susceptible to exploitation. It found that no less restrictive alternatives to guardianship are available.

The medical and testimonial evidence in the record supports these findings. At the evidentiary hearing, appellant's neurologist testified in detail about appellant's medical condition. Appellant's MRI scans showed "areas of atrophy" where brain cells had died, resulting in "a pattern of shrinkage." Appellant's cognitive and neurological test results were abnormal. During the neurologist's examination of appellant, appellant fixated on topics that were not relevant. Appellant also had difficulty recognizing things, he did not know basic biographical information, and he had no insight into his illness.

The neurologist testified that FTD "significantly and completely disrupts a person's ability to make decisions." He agreed with the assessment that appellant "lacks decisional capacity with regard to place of abode, legal or financial decisions, estate planning or medical decisions."[1] The medical records in evidence, the testimony of

[1] Appellant argues that the neurologist had no direct knowledge of the extent of appellant's impairments. But the neurologist testified extensively regarding the cognitive deficits he observed during a neurological exam of appellant. Based on these observations, the neurologist testified that appellant lacks decisional capacity.

respondent Nicholas Roberts, and appellant's own testimony all support the district court's finding that appellant is incapacitated within the meaning of the statute.

Appellant argues that, because he retains the ability to dress himself, cook for himself, use a cell phone, and keep his room clean, the finding of incapacity was unwarranted. As noted above, the definition of "incapacitated person" encompasses those with demonstrated deficits in meeting their personal needs for medical care, nutrition, or safety. *See* Minn. Stat. § 524.5-102, subd. 6. In this case, clear and convincing evidence demonstrates that appellant is unable to meet his personal needs for medical care. Appellant has essentially no understanding of his condition and suffers from significant memory impairments. Clear and convincing evidence also demonstrates that he is unable to meet his personal needs for safety. The efforts of appellant's children to provide him with 24-hour, in-home assistance were not successful, because appellant was unwilling or unable to understand and cooperate with that arrangement. Finally, clear and convincing evidence demonstrates that appellant is not able to meet his nutritional needs. Respondent Nicholas Roberts testified that, when appellant was living on his own, he lost significant weight, failed to keep the refrigerator stocked, and became fixated on eating only frozen waffles. The district court properly found that, despite

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Appellant also argues that his score of 4.62 out of 5.5 on a particular cognitive test, and a score of 23 out of 38 on another test, demonstrate that he is not incapacitated. But the neurologist testified that these tests are designed so that a normal-functioning person would score the highest number. The uncontroverted medical evidence established that appellant's cognitive test results were abnormal. The neurologist also correlated these abnormal test results to the FTD diagnosis.

appellant's ability to perform basic tasks, his life is more complex than those fundamental tasks.

Appellant also argues that the district court clearly erred in finding that no less restrictive alternatives are available. Appellant argues that "[t]here is nothing in the record that reflects why hired 24 hour care cannot provide the supervision and care needed to protect [him]." But, as discussed above, appellant's children tried to provide him with 24-hour care in his home. Appellant became agitated, did not remember who the assistant was or why she was there, and appellant ultimately had to be rehospitalized. Thus, the record supports the district court's finding that no less restrictive alternatives are available. *Cf. Lungaard*, 453 N.W.2d at 60, 62–63 (affirming the district court's finding that no less restrictive alternatives were available because the ward was unable to meet her ongoing needs due to short-term memory loss and dementia).

Appellant also argues that the evidence depicts only a future likelihood of impairment, not a present incapacity. But the evidence clearly demonstrates appellant's current impairments, including his deficits in memory and judgment and his inability to provide a safe environment for himself. The medical evidence supports the district court's finding on the record that appellant's incapacity is "not something that's in the future, it's now."

Finally, appellant argues that the district court clearly erred in failing to credit certain evidence, such as appellant's testimony regarding his motivation for demanding the return of his car keys when he returned home from Mayo Clinic. As the district court personally observed appellant and the other witnesses, it was in the best position to make

factual and credibility determinations. *See Prokosch v. Brust*, 128 Minn. 324, 327, 151 N.W. 130, 131–32 (1915) (observing that "much must be left, in proceedings of this kind, to the sound judgment and discretion of the trial court" due to its ability to personally observe the witnesses). It is not the role of this court to reweigh evidence or second-guess the district court's credibility determinations. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

In sum, clear and convincing evidence supports the district court's determination that appellant is an incapacitated person whose identified needs cannot be met by less restrictive means than guardianship.

II.

Appellant argues that clear and convincing evidence does not support the district court's findings regarding conservatorship. As with guardianship decisions, the district court has broad discretion in determining whether to appoint a conservator. *See Lungaard*, 453 N.W.2d at 63. The district court may appoint a conservator upon finding that (1) clear and convincing evidence demonstrates that the proposed ward "is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions," and (2) a preponderance of the evidence demonstrates that "the individual has property that will be wasted or dissipated unless management is provided." Minn. Stat. § 524.5-409, subd. 1(a)(1)–(2) (2010). As with the guardianship determination, the district court must find that the protected person's "identified needs cannot be met by less restrictive means." *Id.*, subd. 1(a)(3) (2010).

Here, the district court found that appellant is unable to manage his property and business affairs due to impairments in his ability to receive and evaluate information and make decisions. It found that his significant cognitive deficits stemming from FTD render him extremely vulnerable to exploitation. Additionally, it found that appellant is unable to pay his bills and supervise his own finances. In light of appellant's significant wealth, the district court found that a limited conservatorship is necessary to prevent waste or dissipation of his assets.

Clear and convincing evidence in the record supports these findings. In addition to the medical evidence discussed above, appellant's neurologist testified that FTD patients are vulnerable to exploitation because they do not understand the ramifications of their actions. With respect to appellant as an individual diagnosed with FTD, respondent Nicholas Roberts testified that appellant struggled with paying bills, and that he was no longer involved in his company's business affairs because he struggled with computer passwords. Respondent Nicholas Roberts also testified that multiple women had come forward as self-proclaimed girlfriends and fiancées of appellant. One fiancée announced an intention to marry appellant and have children with him. The transcript of the hearing reflects that appellant struggled to remember these girlfriends and the district court found that appellant "does not recall their names, ages, or places of residence and he does not see how he is subject to extreme exploitation." Clear and convincing evidence supports this finding, and the district court's determination that a limited conservatorship is appropriate.

Appellant argues that the findings regarding the risk of waste or dissipation are unsupported because the record is silent as to the management of appellant's assets. But the evidence demonstrates that appellant's assets were subject to waste and dissipation due to his difficulty in paying bills, his inability to supervise his finances, his excessive spending on online purchases, and the potential for exploitation arising from the multiple women who were seeking to marry him. *Cf. Lungaard*, 453 N.W.2d at 60, 62–63 (affirming appointment of a conservator where the ward suffered from short-term memory loss and dementia and was unable to understand her finances or pay her bills).

Appellant argues that a less restrictive alternative to establishment of a conservatorship was available because he is not opposed to transferring his assets into the revocable trust. He argues that such a transfer could be accomplished through a power of attorney. But appellant did not offer evidence of this proposed alternative before the district court. Because he did not raise this argument below, he may not assert it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that appellate courts must generally consider only those issues that were presented to the district court).[2]

[2] In any event, the record is unclear as to whether appellant established a durable power of attorney before he became incapacitated. The guardianship petition lists respondent Nicholas Roberts as his attorney-in-fact, without further elaboration. The parties did not develop the issue at the evidentiary hearing. And because the district court found that appellant lacked the capacity to transfer real estate, appellant cannot accomplish the transfer himself.

Additionally, in order to merit reversal on appeal, an appellant must demonstrate error resulting in prejudice. *In re Welfare of D.T.N.*, 508 N.W.2d 790, 797 (Minn. App. 1993), *review denied* (Minn. Jan. 14, 1994). Because appellant here does not object to the sole purpose of the limited conservatorship—to transfer assets into the trust and

In sum, the district court did not abuse its discretion in determining that a limited conservatorship is appropriate due to the uncontroverted evidence regarding appellant's inability to manage his financial affairs, his impaired ability to receive and evaluate information and make decisions, his vulnerability to financial exploitation, and the likelihood that his property would be wasted or dissipated unless properly managed. The district court appropriately determined that a limited conservatorship, carefully tailored to appellant's particular financial situation, is the least restrictive means available for meeting appellant's identified needs.

III.

Appellant asserts that the district court erred as a matter of law in failing to make specific factual findings regarding the necessity of each statutory power granted to the guardians and conservators. He frames this argument partly as a procedural due process issue. However, appellant did not raise a constitutional issue below, nor did he notify the attorney general of a constitutional challenge to the guardianship and conservatorship statutes. As a result, he has not preserved any constitutional or due-process issues for appeal. *See* Minn. R. Civ. App. P. 144 (requiring parties to serve notice on the attorney general whenever the constitutionality of a statute is questioned); *Thiele*, 425 N.W.2d at 582 (providing that appellate courts must generally only consider those issues that were presented to the district court).

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provide periodic independent accountings—he has not articulated any prejudice resulting from the challenged findings. Thus, he has not established grounds for reversal.

Appellant also argues that the district court's findings were insufficiently detailed under the guardianship and conservatorship statutes. The guardianship statute requires courts to make written findings regarding the demonstrated need for the powers specifically granted to the guardian. *See* Minn. Stat. § 524.5-310(c) (2010) ("Any power not specifically granted to the guardian, following a written finding by the court of a demonstrated need for that power, is retained by the ward."). [3]

Here, the district court made those requisite findings. It enumerated each of the powers granted to the guardians and conservators, and it made detailed and specific factual findings to support the grant of each power. It is evident to us that the district court thoughtfully arrived at its findings with specific reference to the evidence in the record and the particular circumstances of appellant. The court granted the guardians and conservators only those powers and duties with regard to which it found appellant incapacitated. Its thorough factual findings indicate the demonstrated need for each of the powers granted.

We recognize the tragic nature of appellant's deteriorating condition and the abruptness with which his life changed. The district court commendably handled this difficult situation in its detailed and considered determination. It appropriately applied the statutory requirements to the evidence before it, and carefully tailored the

[3] The conservatorship statute does not contain a similar provision requiring specific written findings. *See* Minn. Stat. § 524.5-409, subd. 1 (2010).

guardianship and conservatorship to appellant's unique circumstances and demonstrated needs.

Affirmed.