

DA 18-0458

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 29N

IN RE THE MATTER OF THE CONSERVATORSHIP OF:

P.A.R.,

An Incapacitated Person.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Lake, Cause No. DC-17-11
Honorable Deborah Kim Christopher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tracey A. Lindgren, self-represented, Everett, Washington

For Appellees:

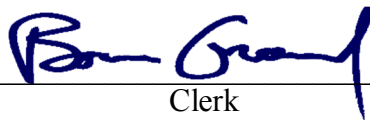
Casey Emerson, Clinton J. Fischer Law, Polson, Montana

Julie R. Sirrs, Boone Karlberg, Missoula, Montana

Submitted on Briefs: January 18, 2019

Decided: February 4, 2019

Filed:


Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Tracey Lindgren (Tracey) appeals from an Order entered in the Twentieth Judicial District Court, Lake County, concluding that P.A.R. lacked capacity to execute documents establishing a trust (Trust) and transfer by Quitclaim Deed to the Trust P.A.R.'s primary asset, real property identified as 46236 Meadowlark Lane located in Big Arm, Montana (Montana Real Property). The order appointed Casey Emerson as Full Conservator and returned the Montana Real Property to P.A.R. We affirm.

¶3 The District Court conducted a hearing on July 5, 2018, to determine whether P.A.R. had the requisite capacity in October 2016 when she created the Trust and executed a Quitclaim Deed transferring the Montana Real Property to the Trust. Based on the testimony, depositions, and evidence, the District Court made numerous findings of fact upon which it based its conclusions and order.

¶4 Crystal Bertellotti (Crystal) and Tracey are P.A.R.'s daughters. Crystal resides in Montana and Tracey resides in Washington. On July 15, 2013, Dr. Stephen Irwin (Dr. Irwin) first saw P.A.R. as a patient. P.A.R. was a nurse and Dr. Irwin knew and

worked with her for ten years prior to seeing her as a patient. In September 2013, P.A.R. was admitted to the hospital due to her altered mental state.

¶5 In April 2016, P.A.R. signed a Durable Power of Attorney appointing Crystal as her power of attorney. In May 2016, Dr. Irwin diagnosed P.A.R. with Alzheimer's disease with progressive severe dementia. In a letter dated June 14, 2016, Dr. Irwin further opined that P.A.R. needed to be placed in an assisted living facility or skilled nursing setting to ensure she was safe and that her basic needs were met. In July 2016, Dr. Irwin wrote a second letter indicating that P.A.R. needed assistance with bathing, dressing, and taking her medications due to her rapidly progressing severe dementia, arthritis, and lumbar disc disease. Dr. Irwin believed that P.A.R. was quite good at hiding her Alzheimer's symptoms and that a casual observer would have difficulty noticing anything unusual.

¶6 In July 2016, Tracey took P.A.R. to Washington and, around September 2016, P.A.R. moved into an assisted living community in Everett, Washington. At that time, Nurse Practitioner Allison Berglin (Berglin) conducted a Mini-Mental Status Examination, which is a preliminary screening tool and not a comprehensive long-term evaluation of a patient's cognitive status. Berglin believed P.A.R. was capable of consenting to treatment and giving directions about her care.

¶7 In October 2016, Tracey took P.A.R. to an attorney for the purpose of preparing the Trust. The Trust granted all of P.A.R.'s personal property to Tracey, allocated 45% of P.A.R.'s residuary estate to Tracey's family, and allowed Tracey to purchase the Montana Real Property from the Trust for a price and terms determined by Tracey. The Trust

provided it was to be governed by Montana law and named P.A.R. as the initial trustee and Tracey as successor trustee. On October 12, 2016, P.A.R. executed a Quitclaim Deed transferring the Montana Real Property to the Trust. A few days later, P.A.R. signed an irrevocable power of attorney, revoking Crystal as her power of attorney and designating Tracey.

¶8 Also in October 2016, Registered Nurse Rae Wheeler (Wheeler) visited P.A.R. at the assisted living facility and attended meals and activities with P.A.R. Wheeler opined that P.A.R. was social and able to take care of her daily necessities and make decisions, such as managing her property.

¶9 Crystal, although advised by Tracey of the creation of the Trust, became concerned when P.A.R.'s neighbors of the Montana Real Property alerted her that foreclosure warnings were posted on the property. In June 2017, Crystal filed a petition in Lake County District Court for appointment as P.A.R.'s conservator. Thereafter, Tracey, in her capacity as trustee of the Trust, filed an injunction petition in a separate Lake County proceeding, seeking to prohibit Crystal from entering the Montana Real Property. Next, Tracey, in her individual capacity, appeared in the conservatorship matter and filed a motion to dismiss for lack of jurisdiction. The District Court denied Tracey's motion to dismiss. Due to the contentiousness between the sisters, the District Court appointed attorney Casey Emerson as temporary conservator in September 2017. Tracey also filed for bankruptcy in Montana in the name of the Trust and averred, on behalf of P.A.R., that Montana had jurisdiction

because “[Montana] is my home state although I have been away for health reasons.” The bankruptcy proceeding was later dismissed.

¶10 During the July 5, 2018 hearing, the District Court considered Dr. Irwin’s testimony that, as of October 2016, P.A.R. needed a conservatorship and the basis for his opinion. The District Court observed that Dr. Irwin’s long history with P.A.R. as a colleague and patient, his medical knowledge and education, and his in-depth, long-term treatment of P.A.R. made his testimony “far more persuasive” than that of Wheeler, who made limited observations of P.A.R. at meals and during social activities, and that of Berglin, whose engagement with P.A.R. during the Mini-Mental Status Exam was simply a preliminary screening. The District Court also considered the report of the court-appointed visitor, Ann Marie McNeel (McNeel), who interviewed P.A.R. in August 2017, and reported that P.A.R. did not have an accurate understanding of her assets or her estate planning. McNeel also expressed concerns about Tracey.

¶11 The District Court concluded P.A.R. was incapacitated “on or well before” October 2016, with “evidence of significant mental concern as early as 2013.” The District Court determined it had jurisdiction over the conservatorship proceeding pursuant to § 72-1-201, MCA, due to P.A.R.’s incapacity and the Montana Real Property’s location in Montana. The District Court issued a written order of its findings and conclusions on July 5, 2018.

¶12 Tracey appeals, arguing the District Court erred in determining P.A.R. was incapacitated as of October 10, 2016. Tracey also argues Montana does not have jurisdiction over this conservatorship proceeding. Finally, Tracey argues the District Court

“breached its contract” with Tracey when the court did not transfer the proceeding to Washington after Tracey secured testimony of medical professionals located in Washington.

¶13 This Court reviews a district court’s findings of fact to determine whether they are clearly erroneous—i.e., whether they are supported by substantial evidence. *Larson v. Larson*, 2017 MT 299, ¶ 17, 389 Mont. 458, 406 P.3d 925. The evidence is reviewed in the light most favorable to the prevailing party, and the credibility of the witnesses and the weight assigned to their testimony is a matter left to the discretion of the trial court. *In re Estate of Lightfield*, 2009 MT 244, ¶ 24, 351 Mont. 426, 213 P.3d 468. This Court reviews a district court’s conclusions of law for correctness. *Lightfield*, ¶ 24.

¶14 Section 72-1-201(2), MCA, provides the Montana Probate Code applies to “the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state.” Here, P.A.R. had both personal and real property in Montana. Until Tracey took P.A.R. to Washington to live in an assisted living facility, P.A.R.’s residence was in Montana. The Montana Real Property was in Montana. Tracey admitted in her bankruptcy petition on P.A.R.’s behalf that Montana was P.A.R.’s “home state.” We conclude the District Court correctly determined it had jurisdiction over P.A.R.’s conservatorship proceeding and the Montana Real Property.

¶15 There is substantial evidence in the record supporting the District Court’s conclusion that P.A.R. lacked the capacity to execute the Trust and transfer the Montana Real Property to the Trust. The District Court’s conclusion is supported by the testimony

and documentation provided by Dr. Irwin, the physician who knew P.A.R. as a colleague for a lengthy period and was thereafter P.A.R.'s physician for many years. The District Court found Dr. Irwin's testimony that P.A.R.'s dementia was serious and progressive even earlier than October 2016 more credible and persuasive than that of Berglin and Wheeler, both of whom believed P.A.R. was still capable of managing her property. Reviewing the above evidence in the light most favorable to the prevailing party and recognizing a district court is in the best position to weigh the witnesses' credibility, we affirm the District Court's decision that P.A.R. lacked capacity to execute the Trust and transfer the Montana Real Property. *See In re Estate of Lightfield*, ¶ 24.

¶16 Lastly, the District Court made no contract with Tracey to rule in her favor.

¶17 The District Court's July 5, 2018 order, which will allow the Montana Real Property to be sold, is affirmed.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶19 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON