COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP585 **Cir. Ct. No. 2015GN60**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE GUARDIANSHIP OF E.T.:

J.T.,

APPELLANT,

V.

E.T., R.V. AND K.T.,

RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: KRISTINE E. DRETTWAN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. J.T. (Jennifer) appeals an order dismissing her petition to appoint a permanent guardian of the person and estate for her eighty-

eight-year-old mother, E.T. Jennifer contends the trial court improperly dismissed the petition because E.T. executed conflicting powers of attorney (POAs) for health care and finances; should have revoked or significantly curtailed the POAs that named as agents two other of E.T.'s adult children, K.T. (Kenneth) and R.V. (Rebecca); and failed to recognize that appointing a guardian is in E.T.'s best interest. We disagree and affirm the order.

¶2 In 2012, E.T. sold the Walworth County home in which she had lived since 1987 and moved to an apartment in Waukesha County. Two years later, she moved back to Walworth County. Rebecca lives in Walworth County; Kenneth, Jennifer, and a third daughter, Kathryn, live in Waukesha County.

¶3 E.T.'s mental acuity began to slip; in addition to her long-standing anxiety and depression, she was diagnosed with dementia. The siblings disagreed about E.T.'s care and where she should live. Kenneth and Rebecca were in one camp, Jennifer and Kathryn in another.

¶4 E.T. executed several POAs between 2009 and 2012. On March 10, 2009, she signed two: one designated Rebecca as her primary financial agent and Kenneth as her alternate; the second named Kenneth as primary financial agent and Rebecca as alternate. Both POAs nominated Rebecca as guardian of her person and estate. In February 2010, E.T. signed a POA for health care naming Kathryn, a nurse, as primary POA and Jennifer, a radiologist, as alternate.

¶5 In October 2012, E.T. told Rebecca she had several concerns about the 2010 POA for health care. E.T. revoked it and executed a new one designating Rebecca primary health care agent and Kenneth alternate.

¶6 In June 2015, E.T.'s primary care physician and her neurologist certified that she met the statutory definition of incapacity, thereby activating her 2012 POA for health care. *See* WIS. STAT. §§ 54.01(15), 155.05(2) (2015-16).[1] Rebecca admitted E.T. into RidgeStone Gardens, a Walworth County community-based residential facility minutes from Rebecca's house. Within days, E.T. was transferred to RidgeStone's memory care unit. A month later, Jennifer petitioned to have Kathryn appointed permanent guardian. E.T., by Rebecca and Kenneth as her financial POAs, filed a response that included a motion to dismiss the petition.

¶7 Trial was to the court. Besides the four siblings, the court heard testimony from a psychologist who examined E.T. for the purpose of a guardianship determination; E.T.'s treating psychiatrist who is board certified in geriatric psychiatry; two RidgeStone representatives; Rebecca's adult daughter, Jessica; and the director of a business that oversees supervised visits who observed one between Jennifer and E.T.

¶8 The psychologist opined that E.T. was permanently incapacitated and needed a guardian. The psychiatrist testified that E.T. was adamant that Rebecca continue to make decisions for her and opined that E.T. receives appropriate care at RidgeStone.[2] Advocacy counsel and the guardian ad litem told

[1] Kathryn and Jennifer say they were not aware of the October 2012 POA until E.T. filed her response to the guardianship petition.

All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

[2] The psychiatrist declined to perform a competency evaluation for guardianship determination so as to preserve the doctor-patient relationship. Also, Jennifer asserts that the psychiatrist's testimony was admitted over her objection, citing only to "R. 40," a 275-page transcript. This court need not sift the record for facts to support an appellant's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

the court that E.T. repeatedly has voiced her desire to keep the status quo as to the POAs, that she does not want a guardianship, that she is happy at RidgeStone, and that Jennifer's and Kathryn's visits are upsetting to her. The GAL added that, if the court thought guardianship appropriate, he believed Rebecca, with Kenneth as alternate, would be a more suitable appointment.

¶9 The court concluded that what currently is in place for E.T. reflects the financial and health care decisions she made while still competent, that the POAs were meeting her needs, and that Jennifer had not met her burden of showing that a guardianship was necessary. The court dismissed the petition. Jennifer appeals.[3]

¶10 At a hearing on a petition for guardianship, the petitioner bears the burden of proving by clear and convincing evidence that the proposed ward is incompetent within the meaning of WIS. STAT. § 54.10(3). *See* WIS. STAT. §§ 54.44(2), 54.01(16). "[T]he overriding concern in a guardianship proceeding is the best interests of the [proposed] ward." ***Winnebago Cnty. Dep't of Soc. Servs. v. Harold W.***, 215 Wis. 2d 523, 528, 573 N.W.2d 207 (Ct. App. 1997).

¶11 Jennifer misapprehends the standard of review; it does not require statutory interpretation. Rather, determining the proposed ward's best interests is committed to the trial court's discretion. ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. We affirm discretionary decisions if the court applied the proper legal standard to the relevant facts and used a rational process to reach a reasonable result. ***Id.*** Findings of fact will not be upset on

[3] The GAL advised this court that he did not file an appellate brief because his position on E.T.'s best interests aligns with the respondents'. *See* WIS. STAT. RULE 809.19(8m).

appeal unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether discretion was exercised erroneously is a question of law we review de novo. ***Anna S.***, 270 Wis. 2d 411, ¶7.

¶12 Jennifer alleges a host of wrongs involving E.T., among them, abuse by Rebecca and RidgeStone, inadequate or inappropriate medical and psychiatric care, E.T.'s questionable competence to sign the October 2012 health care POA, mismanagement of her finances, Rebecca and Kenneth making decisions in secret, and invalidity of the two March 2009 POAs for finances and property.

¶13 The trial court found it significant, as do we, that Jennifer put forth no evidence, expert or otherwise, to support her allegations.[4] Despite some conflicting testimony that could give rise to other reasonable inferences, when it acts as the fact finder, the trial court is the ultimate arbiter of witness credibility and we must accept the reasonable inferences that it drew. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶14 As the court correctly noted, to appoint a guardian, it had to find by clear and convincing evidence that all of the WIS. STAT. § 54.10(3) factors were true. Sec. 54.10(3)(a). Among its many findings were that the GAL deemed a guardianship unnecessary, an opinion the court accorded "great weight" because he spoke for E.T.'s best interests; Jennifer's psychologist expert recommended a guardianship, but he had not met E.T. before evaluating her in person for an hour;

[4] Jennifer did introduce a letter E.T. wrote to Jennifer while E.T. still lived at home purporting to illustrate Rebecca's abuse of their mother. The letter said Rebecca wanted to kill E.T.'s cat and also described an incident where Rebecca yelled at E.T. using "foul language." The court accepted Rebecca's explanations of the underlying circumstances and rejected the letter as proof of abuse.

E.T. "clearly" engaged in advanced planning; the most credible testimony came from Rebecca's daughter, who said she was there to testify as to what E.T. said she wanted and what she herself knew her grandmother wanted, not to take sides among her aunts and uncle; it was "incredibly important" to the court that E.T. consistently expressed her wish to her psychiatrist, caregivers, GAL, advocacy counsel, Rebecca, and Kenneth that "Becky be in charge"; while Jennifer opines that E.T.'s medical and psychiatric care is inadequate or inappropriate, as medical director of a firm that evaluates whether requests for "high-end imaging" meet standard of care, she does not have the expertise to make that determination; E.T. would not insist that "Becky be in charge" if Rebecca was abusing her; Rebecca and/or her daughter visit E.T. virtually every day; a guardian currently is not the least restrictive means of providing for E.T.'s needs, *see* WIS. STAT. § 54.10(3)(c)4.; and the siblings' disagreement about how and where to care for E.T. comes down to them simply having differing opinions.

¶15 Jennifer has not shown that any of the court's carefully made findings are clearly erroneous or proved by clear and convincing evidence that a guardianship is in E.T.'s best interest. Therefore, the court properly dismissed the petition. *See* WIS. STAT. § 54.46(1)(a)3. (if court finds elements of petition not proved, court "shall dismiss the petition").

¶16 Lastly, the respondents argue that the trial court erroneously ordered each of the four siblings to pay one-fourth of the GAL fees, *see* WIS. STAT. § 54.74, and ask that we find the appeal frivolous and award actual attorney's fees under WIS. STAT. RULE 809.25(3).

¶17 To their first point, we cannot grant relief to a respondent who seeks modification of an order but did not cross-appeal. WIS. STAT. RULE 809.10(2)(b);

State v. Huff, 123 Wis. 2d 397, 408, 367 N.W.2d 226 (Ct. App. 1985). To their second, they did not file a separate motion regarding frivolousness. A statement in a brief is insufficient notice to raise the issue. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.