COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2513 **Cir. Ct. No. 2016GN463T**

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

IN THE MATTER OF THE TEMPORARY GUARDIANSHIP OF J.A.H.:

ORLIN J. ROOT-THALMAN AND CRAIG P. ROOT-THALMAN,

APPELLANTS,

V.

EAMON GUERIN, GUARDIAN,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Reversed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Orlin Root-Thalman and Craig Root-Thalman (collectively, the Root-Thalmans)[1] appeal a circuit court order voiding a quitclaim deed. The order was issued at a hearing on a petition for temporary guardianship of Jane, the grantor of the quitclaim deed.[2] The Root-Thalmans allege the circuit court erred in voiding the quitclaim deed because: (1) the court violated their due process rights to notice and an opportunity to be heard; (2) the court lacked the statutory authority to void a deed during a temporary guardianship proceeding; and (3) the court did not have personal jurisdiction over them. The temporary guardian appointed during the same proceedings, attorney Eamon Guerin, contends the Root-Thalmans waived or forfeited their arguments on appeal. We agree with the Root-Thalmans, reject Guerin's forfeiture argument, and reverse the order voiding the deed.

BACKGROUND

¶2 The Root-Thalmans lived next door to Jane, a ninety-two-year-old woman. Orlin was Jane's financial power of attorney, and Craig was her health care power of attorney. On September 16, 2016, the Milwaukee County Department on Aging filed a petition for temporary and permanent guardianship of Jane. The Department alleged Jane was incompetent because she was suffering from dementia and was incapable of making decisions for herself.

[1] We will refer to the Root-Thalmans individually by their first names where necessary.

[2] For ease of reading, we refer to the subject of the temporary guardianship proceeding by a pseudonym, rather than her initials. *See* WIS. STAT. RULE 809.19(1)(g) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 The Root-Thalmans were named as interested parties in the petition. They attended a circuit court hearing on the petition for temporary guardianship without legal representation. Also appearing were: Milwaukee County Assistant Corporation Counsel Dewey Martin; the guardian ad litem, attorney Patricia Foley; and Guerin.

¶4 Nicole Bickerstaff-Wieting, from the Department on Aging, testified that she investigated Jane's assets after the case was referred to her by a hospital in August 2016. In her investigation, Bickerstaff-Wieting found what she believed was evidence that the Root-Thalmans were financially exploiting Jane. She testified that Jane had owned a home and had significant liquid assets. Bickerstaff-Wieting explained that she attempted to freeze Jane's assets. She discovered a quitclaim deed dated July 2016 from Jane, conveying her home to the Root-Thalmans. She found no evidence of any consideration to Jane for the transfer of her home. Also in July 2016, the Root-Thalmans became Jane's new powers of attorney. Previously, Jane's first cousin and his wife were Jane's powers of attorney. Bickerstaff-Wieting testified that she discovered a second transaction involving a "starter check" for an amount over $100,000.[3] The check, which was written to Jane, and signed and endorsed by Orlin, "cleared out [Jane's] account with a balance of zero." She explained that a starter check indicates "[e]ither a brand new account or [that] it's not an established book of checks, so to speak, and it could be a suspicious check."

[3] The record reflects that the check to which Bickerstaff-Wieting referred was actually written for $212,000.

¶5 Bickerstaff-Wieting further testified that her investigation revealed Jane was not staying in her home; rather, Jane was at a hotel in a different county. Bickerstaff-Wieting went to Jane's home on September 16, 2016, and she found a moving company at the home. Jane was not there. Someone from the moving company put Bickerstaff-Wieting in contact with Orlin, who told her Jane was at a hotel. Bickerstaff-Wieting called the hotel and was able to confirm that Jane was there. Based upon her investigation, Bickerstaff-Wieting asked Dr. Peder Piering to perform a psychological assessment of Jane. Piering opined in his report that Jane was incapable of making decisions, needed twenty-four-hour supervision, and needed a guardian.

¶6 The circuit court asked Foley her position on these matters, and Foley explained that she met with Jane at the hotel. Foley understood that Jane was currently living in the hotel while her home—the property Jane had conveyed to the Root-Thalmans—was being renovated "to put it back into livable condition." She also stated "it [was her] understanding that Orlin and Craig's plan [was] to move [Jane] back into that home after the repairs [were] made." The court expressed skepticism about Jane having been moved to the hotel for the purpose of renovating the home, asking, "[L]ast time I checked one could rehab one's house even extensively without having to move out of it, let alone be put in a Residence Inn, right; anybody disagree with that?" Orlin, from the gallery, responded that he disagreed.

¶7 The circuit court then questioned Orlin. Orlin stated that, at the time the quitclaim deed was drafted by Jane's attorney, Robert Kupfer, Jane was "much different" in terms of her dementia, and that her attorney had "c[o]me over to assess [Jane's] competency" at that time. Regarding Jane's home, Orlin explained, "[Jane] asked us to take care of certain things for her, so she can remain

in her home." When asked to explain the starter check, Orlin stated, "That check was just moved into her other U.S. Bank account. Because she's got so many accounts, we're just moving them together. I'm working with Nicholas from that bank to merge all of her accounts into a bank that she's been the longest standing on." The court again expressed skepticism about Orlin's explanation. Orlin also addressed why Jane was currently staying at a hotel, rather than at her home:

> She's actually in a Residence Inn. It's actually like a townhouse.
>
> ....
>
> Okay, and she's only there for a week, and it's because they couldn't take the carpeting out. The carpet is 70 years, so we found like the same carpet. They're taking the carpet out and putting it back in, but they had to move the stuff from the house to the garage to put the carpeting—because they had to scrape it off because it was filled with urine and decomposed. I have pictures of all that as well.

¶8 During additional questioning, the circuit court stopped Orlin from completing his answers on multiple occasions. The court then granted the temporary guardianship, appointed Guerin as Jane's guardian, and voided the quitclaim deed transferring Jane's home to the Root-Thalmans. Orlin attempted to interject comments during the court's oral rulings and, as a result, the court ordered Orlin to be arrested for contempt of court. The Root-Thalmans now appeal the separate order voiding the quitclaim deed.

DISCUSSION

A. Due process

¶9 The Root-Thalmans argue the circuit court erred by voiding the quitclaim deed during a hearing on a petition for temporary guardianship because

it violated their due process rights to notice and an opportunity to be heard. The right of access to the courts is secured by the First and Fourteenth Amendments of the United States Constitution. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997). Individuals are entitled to a fair opportunity to present their claims. ***Id.*** Judicial access must be adequate, effective, and meaningful. ***Id.*** Due process requires, at minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. ***Boddie v. Connecticut***, 401 U.S. 371, 377-78 (1971). Whether a litigant's due process rights have been violated is a question of law we review de novo. ***State v. Aufderhaar***, 2005 WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4.

¶10 The Root-Thalmans were not parties to the guardianship action. They appeared only as interested parties, apparently as defined in WIS. STAT. § 54.01(17). It is undisputed that the Root-Thalmans had no notice that either the quitclaim deed or their ownership of the property conveyed by the deed was going to be challenged at the temporary guardianship hearing. The petition for temporary and permanent guardianship did not mention the quitclaim deed. The record is clear that the Root-Thalmans were not given proper notice of any legal challenge to the quitclaim deed or an opportunity to present a defense or hire an attorney in relation to such a challenge. In addition, the circuit court repeatedly prevented Orlin from testifying in response to questions from the attorneys and from the court itself. Craig was not given any opportunity to testify.

¶11 Generally, the fundamental requirement of procedural due process of law is notice and hearing—that is, the opportunity to be heard. ***Mid-Plains Tel., Inc. v. Public Serv. Comm'n***, 56 Wis. 2d 780, 785-86, 202 N.W.2d 907 (1973). Due process is satisfied only when an individual is given a meaningful opportunity

to be heard. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 644, 482 N.W.2d 353 (1992). We conclude that the circuit court erred in voiding the quitclaim deed because the Root-Thalmans were not given prior notice or a meaningful opportunity to be heard on the issue of whether the quitclaim deed could be voided during the hearing on the petition for temporary guardianship.

B. Statutory authority

¶12 The Root-Thalmans also argue the circuit court lacked statutory authority, in this action, to void the quitclaim deed because the transfer of the property occurred prior to the court's order granting the temporary guardianship. Temporary guardianships are authorized by WIS. STAT. § 54.50. A circuit court may grant a temporary guardianship "[i]f it is demonstrated to the court that a proposed ward's particular situation ... requires the immediate appointment of a temporary guardian of the person or estate." Sec. 54.50(1). The statute mandates that the circuit court appoint a guardian ad litem and hold a hearing if any person petitions for the appointment of a temporary guardian for an individual. Sec. 54.50(3).

¶13 The Root-Thalmans concede that the circuit court is empowered to adjudicate all matters pertaining to a ward's property. However, they contend WIS. STAT. ch. 54 does not authorize the circuit court to reach property that is not currently owned by the ward. We agree. Pursuant to WIS. STAT. § 54.30, "[a] guardianship of the estate of any individual, once granted, shall extend to all of the ward's income and assets in this state." The statute makes no reference to assets the ward previously owned. *See* § 54.30. Moreover, WIS. STAT. § 54.47 specifically allows the court to void future gifts and sales:

> If a guardian is appointed after a hearing on the petition and if the court's order includes a finding that the ward may not make contracts, all contracts, except for necessaries at reasonable prices, and all gifts, sales, and transfers of property made by the ward after the filing of a certified copy of the order are void, unless notified by the guardian in writing.

Again, the statute makes no mention of gifts or sales made prior to the order appointing a guardian. *See* § 54.47.

¶14 There is no dispute that the quitclaim deed was signed and recorded in July 2016. The petition for temporary guardianship was filed and the hearing at issue both occurred in September 2016. Although the guardian may later seek to void the quitclaim deed on behalf of the ward, *see* WIS. STAT. § 54.20, that cannot be done during the temporary guardianship proceedings. Therefore, the circuit court lacked the statutory authority to void the prior quitclaim deed as part of the proceedings on the temporary guardianship petition.[4]

C. Personal jurisdiction

¶15 The Root-Thalmans also contend that because there was no other statutory authority for the circuit court to void the quitclaim deed during the temporary guardianship proceeding, the court needed personal jurisdiction over them to deprive them of their property interest. A judgment or order is valid when: (1) the court has subject matter jurisdiction; (2) the court has personal jurisdiction; and (3) adequate notice has been afforded the affected persons. ***State v. Campbell***, 2006 WI 99, ¶43, 294 Wis. 2d 100, 718 N.W.2d 649. Where, as

[4] Our ruling does not address the merits of a potential, appropriately-brought claim seeking to void the quitclaim deed, or in any way address the actions of the Root-Thalmans with regard to Jane or the quitclaim deed.

here, a party claims that the judgment is void for lack of personal jurisdiction, we determine whether the circuit court acquired jurisdiction in the proceedings that led up to the entry of the judgment or order. *See* ***West v. West***, 82 Wis. 2d 158, 166, 262 N.W.2d 87 (1978).

¶16 We agree that the circuit court needed personal jurisdiction over the Root-Thalmans to deprive them of their property interest and also that the court did not have personal jurisdiction over them when it entered an order voiding the quitclaim deed. WISCONSIN STAT. § 801.04(2) provides:

> A court of this state having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in s. 801.05 or 801.06 and in addition either:
>
> (a) A summons is served upon the person pursuant to s. 801.11; or
>
> (b) Service of a summons is dispensed with under the conditions in s. 801.06.

Here, it is undisputed that a summons was not served upon the Root-Thalmans.[5] We therefore conclude that the order voiding the quitclaim deed is void for lack of personal jurisdiction over the Root-Thalmans. *See* ***West***, 82 Wis. 2d at 166.

D. Waiver or forfeiture

¶17 The temporary guardian, Guerin, argues the Root-Thalmans waived or forfeited their above arguments by failing to seek rehearing under WIS. STAT. § 54.50(3)(d). An interested party to a temporary guardianship proceeding may

[5] We also note that Guerin does not contend the circuit court achieved personal jurisdiction under WIS. STAT. § 801.06, rather than by service of a summons.

request a rehearing. Sec. 54.50(3)(d). However, § 54.50(3)(d) only refers to a rehearing on the issue of the appointment of a temporary guardian,[6] and the Root-Thalmans do not contest the order appointing Guerin as Jane's temporary guardian on appeal. They only appeal the separate order voiding the quitclaim deed.

¶18 The Root-Thalmans did not otherwise waive or forfeit their defenses. As noted above, they were not parties to the guardianship proceedings, the circuit court had no personal jurisdiction over them, they had no notice that their property rights were at issue in the proceedings, and, to the extent they were "heard," they were prevented from presenting evidence. The circuit court cut Orlin's testimony short and ultimately ordered Orlin to be arrested for contempt of court when he attempted to speak. Under these circumstances, there was no waiver or forfeiture of the Root-Thalmans' defenses to the order voiding the quitclaim deed, and they do not appeal any other issue.

By the Court.—Order reversed.

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

[6] Specifically, WIS. STAT. § 54.50(3)(d) states: "If the court appoints a temporary guardian and if the ward, his or her counsel, the guardian ad litem, or an interested party requests, the court shall order a rehearing *on the issue of appointment of the temporary guardian* within 10 calendar days after the request." (Emphasis added.)