

State of Minnesota
In Court of Appeals

GUARDIANSHIP OF JEAN A. WELLS

Nancy J. Frey,

Appellant,

and

Diane L. Vandermolen, Jean A. Wells, and
Frank Sutherland/Sutherland Fiduciary, Inc.,

Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Based on the memoranda of Respondents Diane Vandermolen (“Vandermolen”) and Richard Ilkka (“Ilkka”) the issue, as framed by the parties, is:

Is a proposed guardian’s pre-appointment failure to provide certain medical information to the daughter of a proposed ward, by itself, sufficient reason to override the ward’s selection of a guardian, where it is undisputed the proposed guardian’s care of her mother has been flawless?

Petitioner Nancy Frey (“Frey”) argues that such a failure to provide medical information falls far short of the required standard:

1. Minnesota statutes establish a high threshold for overriding a ward’s preference for guardian.

2. Prior Minnesota cases consistently require jeopardy *to a ward* or other misconduct *toward the ward* (not a third party) before overriding the ward’s selection of a guardian or before selecting a stranger over a family member.

Respondents have not cited a single case that provides a basis for denying appointment of a guardian merely because of an alleged failure to provide information, pre-guardianship, to another family member. If a court determines that other family members should receive additional information, the court should order disclosure of such information, not deny the appointment of a guardian.

ARGUMENT

I. RESPONDENTS IGNORE THE APPLICABLE STATUTES

Respondents have provided this Court with virtually no response to Frey's argument on pages 11 through 20 of her opening brief that the Minnesota United Guardianship and Protective Proceedings Act and the Minnesota Health Care Directives Act limit the discretion of a district court in appointing a guardian. Ilkka does not address the proper statutory interpretation at all. Vandermolen dismisses Frey's argument by calling it "creative." Br. at 5. There is nothing creative, however, about following the law.

The Minnesota Uniform Guardianship and Protective Proceedings Act creates six priority categories for selecting a guardian. Minn. Stat. § 524.5-309(a). These generally involve family status or the preference of the ward. Frey meets three of the priorities. If a district court were free to ignore these statutory priorities, the priorities would become meaningless. Thus, in enacting the Minnesota Uniform Guardianship and Protective Proceedings Act, the Legislature required the District Court to give deference to the statutory priorities, and thereby limited the District Court's discretion. See In Re Guardianship and Conservatorship of Rhoda, No. A05-657, 2006 WL 771469 (Minn. Ct. App. March 28, 2006) (priority overcome on a showing that the person with priority "poses serious risks to [the ward's] well-being").

The Legislature further limited the District Court's discretion when the ward has formally nominated a proposed guardian through a Health Care Directive ("HCD"). The Minnesota Uniform Guardianship and Protective Proceedings Act expressly gives high

priority to an individual nominated by a ward through an HCD, and specifically cross-references the Minnesota Health Care Directives Act. See Minn. Stat. § 524.5-309(a); Minn. Stat. § 145C. The Health Care Directive Act creates an **evidentiary presumption that the “acting in the best interest of the principal.”** **The evidentiary presumption may be overcome only on a showing of “clear and convincing evidence.”** Minn. Stat. § 145C.10(c) (emphasis added); Minn. Stat. § 145C.01, subd.1(a) (emphasis added). Thus, the Legislature expressed a strong preference for obeying the choice of a principal in selecting his or her guardian through an HCD. Legislative intent will be thwarted, and the viability of Health Care Directives threatened, if a district judge is permitted to ignore this presumption and substitute his or her judgment for that of the ward’s.

None of the cases cited by either Respondent stand for the proposition that, following the passage of the Minnesota Uniform Guardianship and Protective Proceedings Act, the District Court retains unlimited discretion to appointing a guardian. With the exception of one decision, discussed below, all of the cases which Respondents cite pre-date the passage of the Minnesota Uniform Guardianship and Protective Proceedings Act in 2003.¹ See 2003, Minn. Laws, ch. 12, pt. 3, § 33. Because these cases were decided before the passage of the Act, they have no bearing on it. Moreover,

¹ Respondents cite to In Re Guardianship of Schober, 303 Minn. 226, 226 N.W.2d 895 (1975); In re Guardianship of Stanger, 299 Minn. 213, 217 N.W.2d 754 (1974); In Re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991); In re Conservatorship of Edwards, 390 N.W.2d 300 (Minn. Ct. App. 1986). On pages ii and 4-5 Vandermolen incorrectly states that Schober was decided in 1995 and Stanger in 1994. She correctly identifies the year of decision on page 1.

none of the cases involve an HCD. Thus, none involve the statutory presumption that an HCD agent is acting in the best interests of the ward.

The only case either Respondent cited which was decided after the passage of the Minnesota Uniform Guardianship and Protective Proceedings Act, In Re Guardianship and Conservatorship of Rhoda, No. A05-657, 2006 WL 771469 (Minn. Ct. App. March 28, 2006), does not involve an HCD, and therefore is inapplicable to the facts of this case. Even so, Rhoda's discussion of the requirements for overcoming a priority set out in the Minnesota Guardianship and Protective Proceedings Act supports Frey's position, not Respondents'. In Rhoda, the Court of Appeals determined that the statutory priorities could be overcome because the family member, if appointed guardian, would disrupt the ward's care and therefore such an appointment "poses serious risks to [the ward's] well-being." Id. at *3.

The facts in Rhoda support this standard. In Rhoda:

1. The ward had a condition known as spina bifida/Arnold-Chiari malformation which required 24-hour daily nursing care by medical professionals trained to address his special needs.

2. At the time of the hearing, the ward was living in a group home where he was thriving and was receiving appropriate specialized nursing services from registered nurses or licensed practical nurses on a one-to-one basis.

3. The proposed guardian, the ward's mother, intended to move him to a handicapped accessible apartment nearer to her residence.

4. The ward's nurses testified they were unable to work harmoniously with the ward's mother and would refuse to provide services to him if she were his guardian. The

alternative source of nursing services in the area lacked sufficient staff to provide 24-hour care to the ward.

5. If the ward did not receive 24-hour care, he would have to be hospitalized.

The Court of Appeals held the District Court “properly concluded that this new setting [the proposed apartment] would pose a risk of diminution of opportunities for socialization that [the ward] currently has, all to his detriment. More critically, the evidence revealed a substantial risk that moving [the ward] to an apartment would result in a shortage of available nursing care for him and, in that event, he **would have to be hospitalized, clearly to his serious detriment.**” *Id.* (emphasis added).

In the instant case, the preference was created by the ward’s nomination through her HCD, and such preference should be given greater deference than a priority status not due to a person’s right of self determination. As set forth in Frey’s opening brief, the District Court abused its discretion by not providing deference to the Guardianship Act’s priorities or to the statutory presumption in the Health Care Directives Act. There was absolutely no evidence that Frey “poses serious risks” to her mother’s well-being. To the contrary, the evidence was undisputed that Frey was a loving, careful, prudent daughter who would be a suitable guardian. If the District Court’s decision is upheld, the Minnesota Health Directives Act will be substantially weakened, and the Legislature’s priorities ignored.

II. FREY'S ALLEGED FAILURE TO PROVIDE VANDERMOLLEN MEDICAL INFORMATION IS INSUFFICIENT, AS A MATTER OF LAW, TO PRECLUDE FREY'S APPOINTMENT

Respondents argue that the District Court properly withheld appointment of Frey because she failed to provide Vandermolen with certain medical information pertaining to their mother. Not only does this argument fail because Respondents utilize the wrong standard (as discussed above), but it also fails because they completely ignore the undisputed testimony that

1. Wells expressed a preference for Frey through the HCD, through her conversations with Frey,² and through her conversations with a longtime friend;³ and

2. Frey had cared for her mother at home for an extended period and continued to care for her mother when she entered the nursing home. There was *zero* testimony that Frey's care for her mother was deficient in any way.

It is significant that Vandermolen admitted that Frey would be qualified as guardian for their mother. (A.A. at 32 (Vandermolen stated: "Both Frey and Vandermolen are suitable guardians of Wells.)); (A.A. at 69 ("Vandermolen does not contend Frey would take poor physical care of Wells. Vandermolen believes that both she and Frey are suitable as guardians.))).

² Frey's testimony was undisputed that she promised her father before he died that she would "take care of mom" and that Wells also asked her to take care of her. Tr. at 7.

³ Ronald Gerck, a 27-year friend of Wallace and Jean Wells, testified, "They have always trained Nancy, Wally and Jean, to take care of their health care and their financial business needs for as long as I can remember. It is over 20 years that I remember that." Tr. at 30.

Respondents have not pointed to a single case in which a court appointed a stranger as guardian, over the objections of a family member, where it was undisputed that the family member was suitable to serve as guardian and where there was uniform agreement that the family member had not and would not jeopardize the ward's well-being. All of the cases cited by the parties require jeopardy to the well-being *of the ward* before the court will disregard the ward's preference for guardian or appoint a stranger over a family member.

Both Respondents focus on the Court's finding that Frey interfered with Vandermolen's access to information about her mother's medical condition. The lack of information to Vandermolen is a red-herring. Vandermolen testified that prior to her mother's entering the nursing home she had access to her mother's doctors and in fact took her mother to the doctor on occasion when Vandermolen visited the Twin Cities. (Tr. at 43). After her mother entered the nursing home, six months before the hearing, there was but a single care conference. Frey testified that she was following her father's instructions in not including Vandermolen in some of the processes.⁴ Tr. at 19. The District Court disagreed with that judgment, but such a disagreement should have led to an order directing Vandermolen to have more access to information, not thwarting the ward's preference for guardian.

⁴ Vandermolen incorrectly states that Frey arranged for her mother to sign the Directive without informing Vandermolen. Vandermolen Br. at 2. The testimony at the hearing was that Jean Wells' husband, Wallace, arranged for Jean Wells to sign the HCD. Tr. at 15. Frey certainly had no duty to inform her sister when her mother signed the HCD if their father and mother elected not to disclose the HCD to Vandermolen. Frey should not be blamed for carrying out her parents' wishes.

The lack of medical information is irrelevant to Wells' well-being. There was no evidence, other than rank speculation, that the sisters' disagreement would harm Wells. Moreover, there was no evidence that appointing a stranger as guardian would in any way improve the relationship between the sisters. Vandermolen "does not contend that Frey would take poor physical care of Wells." Opposition of Diane Vandermolen To Motion For Amended Findings Or New Trial, at 2. Under Rhoda, the fact that it is conceded that Frey will take satisfactory care of Wells is dispositive, as Frey does not pose a risk to her mother's well-being. The quantum of information that Vandermolen received about her mother's condition is irrelevant to her mother's care, particularly where the HCD specifies that Frey was to serve as her sole HCD agent, except if Frey were unable to act.⁵ AA. at 06. If the District Court was concerned about the amount of information provided to Vandermolen, it should simply have ordered Frey, in connection with her service as guardian, to provide Vandermolen sufficient access to Wells' medical information. Because the statute requires the Court to impose the least restrictive alternative, such an order which avoided appointment of a stranger, where Wells had already nominated Frey, would have resolved the entire issue consistent with the law. See Minn. Stat. § 524.5-310(b).

CONCLUSION

This Legislature requires the courts to follow an individual's preference, as stated in a Health Care Directive, unless there is clear and convincing evidence that the agent is

⁵ Ilkka incorrectly suggests on page 1 of his brief that the HCD gave Vandermolen the authority to participate in Wells' health care decisions. The HCD specifies that Frey is to have sole responsibility, unless she is unable to serve as agent.

not acting in her principal's best interests. Here, the sole evidence for ignoring Wells' selection of Frey was a dispute between two sisters, primarily over information, which the Court speculated could escalate and then could possibly harm Wells. Such speculation falls far short of clear and convincing evidence that Frey would not act in Wells' best interests. Indeed, because the parties unanimously agree that Frey is a suitable guardian whose care for her mother has been exemplary, the District Court's decision should be reversed.

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