

NO. A06-1500

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.***BRIEF OF RESPONDENT DIANE L. VANDERMOLEN**

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STATEMENT OF THE ISSUES

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN APPOINTING AN INDEPENDENT GUARDIAN AS THE GUARDIAN OF JEAN A. WELLS.

District Court ruling: The District Court found that the appointment of Nancy J. Frey and the appointment of Diane L. Vandermolen was not in the best interests of Jean A. Wells.

Legal Authority:

Minnesota Statute § 524.5-309

In re Guardianship of Stanger, 299 Minn. 213, 217 N.W.2d 754 (1974)

In re Guardianship of Schober, 303 Minn. 226, 226 N.W.2d 895 (1975)

In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. App. 1991)

In Re Guardianship and Conservatorship of Rhoda, 2006 WL 771469 (Minn. App. 2006)

STATEMENT OF THE CASE

Respondent Diane L. Vandermolen (“Vandermolen”) adopts the Statement of the Case of Appellant Nancy J. Frey (“Frey”), with two exceptions. First, Vandermolen clarifies that the District Court’s finding of untimeliness as to Vandermolen’s petition related to her petition to be appointed conservator for Jean A. Wells (“Wells”), which petition was not tried to the Court. (Transcript of February 21, 2006 hearing (hereinafter “Tr.”) at 41). Second, even though Vandermolen’s petition sought her appointment as guardian over Wells, Vandermolen was willing to accept either the appointment of an

independent guardian or her co-appointment as guardian with Frey as acceptable alternatives. (Appellant's Appendix ("A.A.") at 28-29).

STATEMENT OF FACTS

The following additional facts are important for the Court's consideration:

1. Vandermolen lives in New Jersey, but has frequently traveled to Minnesota to visit and participate in the care of Wells (Tr. 42, 44-47);
2. Frey met with the lawyer who prepared the Health Care Directive for Wells (Tr. 15);
3. Frey did not advise Vandermolen of her intention to obtain a Health Care Directive for Wells (Tr. 16);
4. Wells was admitted to Boutswells Landing in August 2005 because of Alzheimer's dementia (Tr. 17);
5. Although Frey participated in the care of Wells for years, she claims not to know when Wells was first diagnosed with Alzheimer's dementia (Tr. 17-18);
6. Although Frey participated in the care of Wells for years, she claims not to know whether Wells was suffering from Alzheimer's dementia when Wells signed the Health Care Directive in March 2005 (Tr. 17-18);
7. That the Health Care Directive appoints Vandermolen as a successor health care agent for Wells (A.A. 5-6);
8. That the Health Care Directive grants Vandermolen, even while only a successor health care agent, the right to "receive, review, obtain copies, and otherwise have access to and obtain disclosure of [Wells'] health care records. . ." (A.A. 5-6);

9. Frey filed a petition to appoint herself guardian of Wells without first advising Vandermolen (Tr. 18);

10. Frey did not include Vandermolen in the care conference for Wells at Boutswells Landing (Tr. 19);

11. Vandermolen has visited Wells at Boutswells Landing and has attempted to obtain information about Wells' condition and care (Tr. 56-57, 75);

12. Frey has instructed the staff at Boutswells Landing not to give information about Wells to Vandermolen (Tr. 75-78);

13. Vandermolen is a registered nurse who filed a petition to have herself appointed guardian of Wells (Tr. 41-42);

14. Vandermolen loves her mother and wants to participate in her care (Tr. 43-44, 55);

15. Vandermolen believes Wells would benefit from the involvement of both of her daughters in her care (Tr. 56);

16. Frey has excluded Vandermolen from information about two family trusts (Tr. 18-19).

By order dated March 17, 2006, the District Court appointed an independent professional guardian, Frank Sutherland/Sutherland Fiduciary, Inc., to be the guardian of Wells. The District Court found that it was the intention of Wells that Vandermolen have access to and be informed of health care issues and decisions. The District Court also found that Frey had "willfully and intentionally obstructed" efforts by Vandermolen to obtain such information. The District Court also found that the sisters were involved in

ongoing, significant disputes, including disputes that had involved Wells' health care provider. The District Court found that these disputes did not serve the interests of Wells. (A.A. 41-49)

ARGUMENT

Frey's discussion of self-determination, the Health Care Directives Act, the Uniform Guardianship and Protective Proceedings Act, and her argument about the best interests of Wells ignores the most important finding of the District Court and the reason that Vandermolen opposed Frey's petition for appointment of guardian – namely, that Frey has “willfully and intentionally obstructed efforts by [Vandermolen] to obtain information about [Wells'] care.” (A.A. 47).

Despite Frey's arguments and the mean-spirited testimony of Gerk about Vandermolen's alleged failings, Wells clearly wanted Vandermolen to be involved in her care and Frey has gone to great lengths to interfere with that intention. Frey's conduct is inexcusable and is a distinguishing factor from the otherwise general guardianship principles cited in her brief. Frey has over-simplified the issues before the District Court and has failed to establish that the District Court abused its discretion in appointing an independent guardian.

THE DISTRICT COURT PROPERLY APPOINTED AN INDEPENDENT GUARDIAN FOR WELLS

The issue of the appointment of a guardian is “uniquely in the discretion of the appointing court.” *In re Guardianship of Stanger*, 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1994). On appeal, the decision of the District Court should not be disturbed unless

it can be shown that discretion has been clearly abused. *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. App. 1991). When deciding whom to appoint as guardian, the best interests of the ward should be “the decisive factor.” *In re Guardianship of Schober*, 303 Minn. 226, 230, 226 N.W.2d 895, 898 (1995).

Frey’s argument that the District Court abused its discretion in appointing Sutherland is creative, but unpersuasive. Apparently recognizing the great deference attached to district courts in guardianship matters, Frey argues that the Health Care Directives Act created a presumption in favor of the appointment of Frey under Minn. Stat. § 524.5-309 which could not be disturbed unless the District Court found, by clear and convincing evidence, that Frey was not acting in the best interest of Wells.

Vandermolen disagrees with Frey’s argument that the Health Care Directives Act imposes any restrictions upon the District Court in appointing a guardian beyond those identified in Minn. Stat. § 524.5-309(a). Indeed, Section 524 fully considers the effect of the appointment of a health care agent in the selection of a guardian. The District Court simply is not required to appoint as guardian the person with the highest statutory priority and the District Court may, in fact, appoint as guardian a person having a lower or no priority. *See* Minn. Stat. § 524.5-309(a).

Frey goes to great length to argue that the District Court has either overridden or ignored the statutory priorities. This simply is not true. To the contrary, the District Court clearly considered both Frey’s and Vandermolen’s relative statutory priorities, and ultimately concluded that it was in the best interest of Wells to appoint an independent guardian. The decision by the District Court is consistent with a recent decision by the

Court of Appeals which clarified that the District Court may properly select an independent guardian over a family member.

In Re Guardianship and Conservatorship of Rhoda, 2006 WL 771469 (Minn. App. 2006) involved an appeal following a district court's denial of a mother's petition to be appointed guardian and conservator of her adult disabled son. In *Rhoda* the Court of Appeals affirmed the district court's decision even though it recognized that the appellant enjoyed first priority for consideration for appointment as guardian and conservator under the Minnesota statute. Indeed, the Court of Appeals discussed the district court's statutory authority to appoint a person of lower priority or a person of no priority if the ward's best interest would be better served by appointing another.

In *Rhoda*, the evidence was undisputed that the appellant was a wonderful mother whose appointment as guardian was supported by her son's physicians. In making the hard decision to choose an independent guardian over the appellant, the Court of Appeals was compelled by the fact that the ward was doing well physically and psychologically. The Court of Appeals was also concerned about the "risk of diminution of opportunities for socialization" for the ward if the appellant had been appointed.

Rhoda is important not only because it clarifies that the additional hurdles sought by Frey are not the law in Minnesota, but also because it teaches that the District Court should look at the entire set of circumstances for a ward when choosing a guardian. In other words, circumstances can exist which support the selection of an independent guardian over a family member.

Frey chooses to characterize the issue rather simplistically, indicating that the choice before the District Court was merely that between a family member and a non-family member. Frey also argues that the evidence either is clear or would be clear that Wells would not prefer to have a non-family member acting as her guardian.

It stretches credulity, however, for Frey to suggest that Wells would prefer what actually occurred before an independent guardian was appointed – Frey’s exclusion of Vandermolen from any discussion involving Wells and, indeed, even from obtaining information about Wells. Vandermolen agrees that, in a perfect world, a family member would be preferable as the guardian for Wells. However, Vandermolen also believes that Wells clearly prefers that her two daughters get along and that one would not exclude the other in all information about and decision making involving her care. This is particularly true where, as here, the Health Care Directive permitted Vandermolen’s involvement in the care of Wells.

Issues involving the selection of a guardian are properly left to the District Court’s discretion. Frey’s arguments suggest that it is not in Wells’ best interest to have both of her daughters participate in her care, as the evidence is clear that Vandermolen has been excluded and Frey does not present any evidence or argument indicating that she would permit Vandermolen’s participation if Frey were appointed guardian. *Accord; In re Conservatorship of Edwards*, 390 N.W.2d 300 (Minn. App. 1986) (affirming appointment of third party conservator where children of proposed ward could not agree on who should take care of ward).

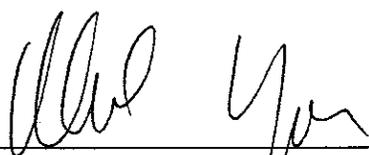
Vandermolen believes the District Court made the correct decision under the difficult circumstances before it. The decision of the District Court should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the district court's decision.

MOSS & BARNETT
A Professional Association

Dated: October 9, 2006

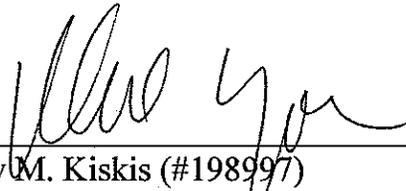
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 1,728 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

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