

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0527**

Tammy Ann Harris, and on behalf of Margaret M. Banks,
Respondent,

vs.

Richard Mark Gellerman,
Appellant.

**Filed January 25, 2021
Reversed and remanded
Jesson, Judge**

Goodhue County District Court
File No. 25-CV-20-283

Tammy Ann Harris, Lake City, Minnesota (pro se respondent)

Bruce K. Piotrowski, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Jesson, Judge; and
Slieter, Judge.

SYLLABUS

When reviewing a petition for a harassment restraining order on behalf of a person subject to guardianship, the court must consider not only the harassment restraining order request, but also the relevant provisions of the bill of rights of persons subject to guardianship or conservatorship, in conjunction with the guardianship order.

OPINION

JESSON, Judge

The issues presented in this case are at the intersection of protection against harassment and guardianship law. Margaret Banks, a person subject to guardianship, was granted a harassment restraining order (HRO) on her behalf against appellant Richard Gellerman. The district court granted the HRO at the request of her daughter and guardian, respondent Tammy Harris, who also obtained an HRO for herself against Gellerman. Despite the fact that Banks—invoking the bill of rights of persons subject to guardianship—had moved the district court to dismiss the HRO, it never determined the scope of Banks’s rights as a person subject to guardianship. Gellerman appeals, asserting that the district court abused its discretion when it issued both HROs. Because the district court considered the HRO on behalf of Banks without considering the relevant provisions of the bill of rights of persons subject to guardianship or conservatorship (bill of rights) and because there was insufficient evidence to support the HRO for Harris against Gellerman, we reverse both HROs and remand for reconsideration of the HRO petition with regard to Banks.

FACTS

For ten years, Richard Gellerman and Margaret Banks had an on-again-off-again relationship. When Gellerman began to visit Banks at her care facility in November 2019—after a previous HRO against Gellerman expired—Tammy Harris, Banks’s daughter and guardian, filed for an HRO on Banks’s behalf to prevent Gellerman’s visits.

Harris also filed for her own HRO against Gellerman after he called her workplace to question her character. The district court granted ex parte HROs and scheduled a hearing.

On February 21, 2020, Banks, with assistance from an attorney, requested that the HRO on her behalf be dismissed. In her motion, Banks asserted that she wanted legal representation, that Gellerman did not harass her, that his visits were wanted and invited, and that she wished to maintain contact with Gellerman.

When the district court first heard the matter on February 28, 2020, Banks's attorney was present on her behalf. In addition to reiterating Banks's request, the attorney challenged Harris's authority to deny Banks the right to visit with persons of her choice as guaranteed under the bill of rights. Minn. Stat. § 524.5-120(10) (2018). When the district court questioned the legal basis for ignoring Harris's HRO request on behalf of Banks and hearing Banks's motion to dismiss the HRO, the attorney reminded the district court that Banks "retains all rights not restricted by court order and the rights must be enforced by the court."

The district court rescheduled the hearing to ensure adequate opportunity to address this issue along with those presented by Harris's petition. In the meantime, Harris moved Banks to a new care facility. Then, on March 3, 2020, less than 24 hours before the rescheduled hearing, Banks's attorney withdrew from the case. Despite her attorney's withdrawal, Banks's request for dismissal remained. The next day, the hearing proceeded

as scheduled in front of a different judge. Both Gellerman and Harris—but not Banks—provided testimony in support of their positions.¹

With respect to the HRO on behalf of Banks against Gellerman, Harris testified that from December 2019, to February 2020, Gellerman visited Banks at her care facility nearly every weekend, despite being prohibited from doing so.² Such visits impacted Banks’s safety, security, and privacy, Harris testified, by causing Banks to be afraid and grind her teeth. In fact, Banks’s recent move to a new facility was done in an effort to keep Gellerman from visiting Banks. Harris stated that Banks was happy with the move because “she knows [Gellerman] can’t get to her.” In addition to the fear and teeth grinding, Harris alleged that Banks and Gellerman’s ten-year relationship involved alcohol and drug abuse and that Gellerman’s influence on Banks made her suicidal.

In his testimony, Gellerman admitted to visiting Banks every weekend since the expiration of his previous restraining order, but maintained that she was happy with his renewed visits. He denied that Banks grinds her teeth because of him. Gellerman also testified that Banks wanted to see him.

The district court then heard testimony about the HRO for Harris against Gellerman. Harris explained that she sought the HRO because, on one occasion, Gellerman made a phone call to her place of work—which also happened to be the care facility where Banks

¹ Banks was present in the courthouse, though not in the courtroom, and was available to testify. Neither Harris nor Gellerman called her as a witness. Banks was not represented by an attorney at the time.

² We note that Gellerman disputes Harris’s claim and testified that he was never told he could not visit Banks.

was residing. According to Harris, Gellerman accused her of poisoning Banks, referred to Harris as a psychopath, and requested a wellness check on Banks because she was “probably dead by now.” Gellerman admitted to making such a call but disputed what he said. This was the only incident occurring between Gellerman and Harris that was introduced in support of the HRO.

Following the hearing, the district court found that Gellerman had harassed Harris and Banks and granted both HROs. In doing so, the district court did not explicitly address Banks’s motion to dismiss the HRO. Nor did the district court reference the guardianship order.³

Gellerman appeals.

ISSUES

- I. **Did the district court abuse its discretion when it granted the HRO against Gellerman on behalf of Banks?**
- II. **Did the district court abuse its discretion when it granted the HRO for Harris against Gellerman?**

ANALYSIS

We review a district court’s application of law de novo. *Harlow v. State, Dep’t of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). Where, as here, the application of law occurs as part of a discretionary decision to grant an HRO, we review that decision for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). With these standards in mind we review Gellerman’s

³ Despite being a required part of the HRO petition, the guardianship order was not included.

claims. We begin by considering whether the district court abused its discretion in its application of Minnesota guardianship law when granting the HRO against Gellerman on behalf of Banks. Then we address whether the district court abused its discretion in granting the HRO against Gellerman for Harris.

I. The district court abused its discretion in granting the HRO against Gellerman on behalf of Banks.

Gellerman first argues there was insufficient evidence to support the conclusion that he harassed Banks, particularly given Banks’s affidavit stating she sought continued contact with him. Citing the bill of rights of persons subject to guardianship, he further designates as error the district court’s refusal to address the applicability of that law, including protections involving visitation.

To address these intertwined arguments, we begin by describing the protections guaranteed by the bill of rights. We then turn to apply them to the HRO proceeding before us.

Bill of Rights of Persons Subject to Guardianship

The current bill of rights represents a sweeping tide of change in guardianship law across the last 50 years. As recently as the 1970s, little consideration was given to the rights of persons subject to guardianship. Alexis Anderson, *Guardianship: A Violation of the Americans with Disabilities Act and What We Can Do About It*, 13 St. Thomas J.L. & Pub. Pol’y 117, 120 (2019). At that time, guardians had “charge of the person of the ward” with no appreciable limits on the guardian’s duties or powers. Minn. Stat. § 525.56, subd. 1 (1978). But as concern about the rights of those under guardianship evolved, so did

Minnesota law. Elizabeth M. Winchell, *If You Want Something Done Right, You've Got To Do It Yourself: Minnesota Guardians, Group Homes, and the Impermissible Delegation After In Re Guardianship of Jeffrey DeYoung*, 35 Hamline L. Rev. 675, 695, 700 (2012); Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead's Promise Get Here Faster*, 42 Mitchell Hamline L. Rev. 873, 880-82, 890 (2016). Significant change resulted in statutes with two critical objectives: to make guardianships rare and, when they are in place, to only give powers to the guardian that are truly necessary. Minn. Stat. § 525.56, subd. 2 (1980) (limiting a guardian's powers to only those "necessary to provide for the demonstrated needs" of the person in their care); Winchell, *supra*, at 700.

Now, a court may only appoint a guardian if it finds by clear and convincing evidence that an individual is incapacitated and their identified needs cannot be met by less restrictive means than the proposed guardianship. Minn. Stat. § 524.5-310(a) (2018).

Further, a court may only grant a guardian

those powers necessitated by the ward's limitations and demonstrated needs and, whenever feasible, make appointive and other orders that will *encourage the development of the ward's maximum self-reliance and independence. Any power not specifically granted to the guardian, following a written finding by the court of a demonstrated need for that power, is retained by the ward.*

Id. (c) (emphasis added).⁴ But the evolution of guardianship law did not end with restrictions on the issuance of the original guardianship order. The law now also identifies specific rights retained by the individual under guardianship, absent court order.

Under the bill of rights of persons subject to guardianship, originally passed in 2009, individuals maintain a non-exhaustive list of rights, including the right to visitation unless restricted by court order. Minn. Stat. § 524.5-120 (2018). Specifically identified by the bill of rights are the rights to

- (1) treatment with dignity and respect;
- (2) due consideration of current and previously stated personal desires . . . ;
-
- (4) exercise control of all aspects of life not delegated specifically by court order to the guardian . . . ;
-
- (6) petition the court to prevent or initiate a change in abode;
-
- (9) personal privacy;
- (10) communication *and visitation* with persons of the ward’s or protected person’s choice . . . ;
-
- (12) petition the court for termination or modification of the guardianship; [and]
- (13) be represented by an attorney in any proceeding or for the purpose of petitioning the court . . . [.]

Id. (emphasis added). Finally, the statute provides that rights retained by the person subject to guardianship “*must be enforced by the court.*” *Id.* (emphasis added).

⁴ Under the 2020 amendments to the Minnesota Uniform Guardianship and Protective Proceedings Act, “wards” are now “persons subject to guardianship.” *Compare* Minn. Stat. § 524.5-102, subd. 17 (2018), *with* 2020 Minn. Laws ch. 86, art. 1, § 7, at 296 (to be codified at Minn. Stat. § 524.5-102, subd. 13b (2020)).

Application of the Bill of Rights in this HRO Proceeding

With these rights in mind, we turn to the proceeding before us. Here, although the judge at the initial hearing rescheduled the matter explicitly so that Banks's arguments (including her bill-of-rights assertion) could be considered, the district court did not do so. Rather, the district court heard only from Harris and Gellerman, even though the transcript reflects that Banks was elsewhere in the courthouse. It did not inquire into whether Banks sought new representation by an attorney. It did not consider Banks's stated desire to have visits with Gellerman. It did not review the guardianship order to ascertain which (if any) rights were retained by Banks.

This was error. As described above, courts have an affirmative duty in any proceeding involving a person subject to guardianship to examine the bill of rights, determine the rights retained by the person in question, and enforce those retained rights. *Id.* (“The ward or protected person retains all rights not restricted by court order and these rights *must* be enforced by the court.” (emphasis added)); *see* Minn. Stat. § 645.44, subd. 15a (2018) (stating that “[m]ust’ is mandatory”). Given the dispute over visitation, Banks's rights should have been front and center here. As a result, the district court had an obligation to not only hear from the guardian when considering the HRO request, but to also consider Banks's rights as a person under guardianship. The failure to consider Banks's rights was especially troubling here, where it was explicitly raised in a motion to dismiss, but we note that the obligation to consider the bill of rights in an HRO proceeding involving a person under guardianship is not limited to cases in which the issue is explicitly raised by a party.

This obligation to consider an individual's preference regarding visitation predates the bill of rights. In *In re Guardianship of Kowalski*, we emphasized the importance of both the protected person's best interests, as well as their stated preference regarding visitation. 382 N.W.2d 861, 867 (Minn. App. 1986), *review denied* (Minn. Apr. 18, 1986). And we noted that preference on visitation may change. *Id.* We concluded that

the guardian is bound by the trial court order to balance [the person subject to guardianship's] wishes with her best interest. These factors may not be in agreement. Evidence of whether the guardian has abused his authority as ordered by the trial court to properly consider both the [person subject to guardianship's] best interest and her desires *may be brought to the trial court's attention as the guardianship progresses.*

Id. (emphasis added). Under our decision in *Kowalski*, as well as the subsequent bill of rights, courts have an ongoing responsibility to ensure that a person subject to guardianship's right to visitation is protected. *Id.*

In sum, when reviewing a petition for an HRO filed on behalf of a person subject to guardianship, a district court must not only consider the HRO request, but also the relevant provisions of the bill of rights, in conjunction with the guardianship order. The district court abused its discretion by not doing so here when granting the HRO on Banks's behalf.⁵

⁵ On remand, the district court should also inquire as to Banks's desire for counsel. Minn. Stat. § 524.5-120(13).

II. The district court abused its discretion in granting Harris an HRO against Gellerman.

Gellerman further asserts that there is insufficient evidence to support the HRO between himself and Harris because his actions were not repeated. We review a district court's grant of an HRO for an abuse of discretion. *Kush*, 683 N.W.2d at 843.

Harassment is defined as “*repeated* incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” Minn. Stat. § 609.748, subd. 1(a)(1) (2018) (emphasis added). A district court may grant an HRO if there are “reasonable grounds” to believe that harassment occurred. *Id.*, subd. 5(b)(3) (2018). To reach its decision, “[a] district court must base its findings in support of a restraining order on testimony and documents properly admitted.” *Kush*, 683 N.W.2d at 844.

Here, the only alleged incident of harassment between Harris and Gellerman was a phone call to Harris's place of work. Harris testified that Gellerman called her workplace, alleged that she was poisoning her mother, referred to her as a psychopath, and requested a wellness check for Banks. Gellerman admitted to making the call, but disputed what was said. The record is devoid of any other interactions between Gellerman and Harris beyond that single, isolated phone call. Indeed, the district court's only finding with regard to the HRO between Harris and Gellerman was that Gellerman “contacted petitioner Harris'[s] employment” and “maligned [her] . . . trying to get her fired.” Despite this, the district court still granted the HRO.

Because harassment requires *multiple* incidents of adverse and unwanted contact, and the record does not indicate that repeated contact occurred, we conclude that the district court abused its discretion by granting the HRO between Gellerman and Harris.

DECISION

Courts have an obligation to determine the rights of persons subject to guardianship and ensure those rights are protected. Minn. Stat. § 524.5-120. Here, the district court failed to fulfill that duty by neglecting to consider the bill of rights of persons subject to guardianship in this HRO proceeding. We therefore reverse the grant of the HRO as to Banks and remand to the district court for renewed consideration of that HRO request in light of the relevant provisions of the bill of rights and the underlying guardianship order. With regard to the HRO for Harris against Gellerman, the district court further abused its discretion when it granted the HRO without evidence of repeated instances of harassment. Accordingly, we reverse the grant of the HRO for Harris against Gellerman.

Reversed and remanded.