

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5220-07T3

IN THE MATTER OF
FLORETTA SUTTON-LOGAN,

An Incapacitated Person.

Submitted August 11, 2009 - Decided August 31, 2009

Before Judges Lihotz and Baxter.

On appeal from Superior Court of New Jersey,
Chancery Division, Probate Part, Atlantic
County, Docket No. 105261.

Mark R. Talarico, attorney for appellant Ben
Logan.

Gary P. Levin, attorney for respondent Karen
Sutton-Bailey.

Thomas C. Haynes, attorney for respondent
Floretta Sutton-Logan.

PER CURIAM

Appellant Ben Logan is the husband of Floretta Sutton-Logan, an incapacitated person. Ben appeals from a June 9, 2008 judgment granting guardianship of the person and property of Floretta to her daughter Karen Sutton-Bailey. Ben also appeals from the court's February 27, 2008 order determining New Jersey, rather than Virginia, had jurisdiction to determine who would

serve as Floretta's guardian. After a thorough review of the record, the parties' briefs and applicable law, we affirm.

The facts are as follows. Floretta and Ben were married on June 15, 1996, in Atlantic City. This was the second marriage for each of them. Ben and Floretta had adult children born during their prior marriages.¹

Floretta lived in New Jersey throughout her first marriage and resided in Atlantic City prior to her marriage to Ben. Ben was the Pastor of Grace Cathedral Baptist Church in Atlantic City, where he served for twenty-seven years. After their marriage, the couple resided in Floretta's Atlantic City home.

Ben retired in 2004 and accepted an offer to assist his friend who served as a minister at the Miracle Temple Baptist Church in Newport News, Virginia. The position was unsalaried, except for a periodic stipend, and of no pre-determined duration. Ben reported Floretta stated to him, "where you go, I'll go." Thus, Floretta and Ben traveled to Virginia and rented a home in Newport News.

Approximately one year following their move to Virginia, the couple decided to purchase a home near the church where Ben was serving. At this time, Floretta obtained a Virginia

¹ At the time of their marriage, Ben was a widower and Floretta a widow.

driver's license, registered to vote, opened bank accounts and paid taxes using the Virginia address. However, Floretta frequently returned to New Jersey to visit family, consult doctors, and manage the couple's rental properties.² Additionally, her pension benefits and Social Security payments were directly deposited into a joint New Jersey bank account Floretta held with Karen.

In January 2007, Ben and Floretta traveled to Atlantic City to perform maintenance tasks on their properties. During this visit, Floretta, accompanied by Karen, visited an attorney, Michael Mallen, Esq. Mallen prepared a power of attorney and an advance directive for Floretta's medical care in the event she became unable to make her own decisions. Karen was named Floretta's attorney in fact. Additionally, Floretta designated Karen to make medical decisions on her behalf and serve "as [g]uardian in the event of her incapacity." Floretta did not tell Ben she executed these documents.

Later, in May, 2007, Floretta and Ben returned to New Jersey to attend Floretta's granddaughter's college graduation. Prior to the visit, Floretta was treated in Virginia for what

² In addition to the two homes the parties owned jointly, Floretta owned two homes titled solely to her. Ben owned one home titled solely to him.

was believed to be a cyst in her right eye. While in New Jersey, Floretta sought a second opinion and learned she had cancer. Ben returned to Virginia and Floretta stayed with Karen to commence cancer treatments. Floretta suffered a stroke on June 26, 2007 and was admitted to the Atlantic City Medical Center. Once stabilized, she was transferred to a skilled nursing facility in Pleasantville, where she remains. Neither party disputes Floretta is legally incapacitated due to the serious complications that resulted from her stroke.

Ben filed a complaint asserting Karen took control of Floretta's individual and jointly owned property, both real and personal, and denied him input in medical and financial decisions. He sought to enjoin Karen from impeding his access to or transferring Floretta's real and personal property, and he also sought a financial accounting.

On September 18, 2007, Karen filed a verified complaint seeking to be named Floretta's guardian. Thereafter, the court dismissed Ben's complaint without prejudice, as it was determined his contentions would best be settled in the course of a guardianship action. The court declared Floretta legally incapacitated and appointed Karen and Ben temporary co-guardians of the person of Floretta, and Karen as temporary guardian of her property.

On February 27, 2008, a hearing was held on Ben's challenge to the court's jurisdiction to determine the guardianship matter. Citing Floretta's long-time domicile of New Jersey prior to her move to Virginia, and her seeming intent to return to New Jersey after Ben's work was complete, Judge William C. Todd, III concluded, Virginia was not "the place [Floretta] intended to always return to[.]" Instead, he found "given all the circumstances[,] it's simply not established, it's not more probable than not . . . that the move to Virginia in any way was intended to affect a change in [Floretta's] domicile as we use the term in the law." Accordingly, the court concluded New Jersey was Floretta's domicile at the time of incapacity, and therefore, the appropriate forum to determine her guardianship.

A case management order was entered that provided for the exchange of discovery and scheduled the matter for a plenary hearing. At the hearing, Karen testified as to her mother's continued contacts with New Jersey, her relationship with her mother, and how she would be the most appropriate person to look after Floretta's best interests. Karen was comfortable attending to her mother's physical needs based on her own experience caring for her late husband, who also suffered from cancer and a stroke.

Karen believed Ben had a financial motive for seeking guardianship. She, on the other hand, did not. She currently uses all of Floretta's income to pay for her nursing home care.

Two additional witnesses, Floretta's daughter, Verona Sutton-Dunne, and her sister, Martha Lancaster, reinforced the closeness of the relationship between Floretta and Karen. They also reaffirmed Karen had assisted her mother in her financial affairs long before Floretta married Ben.

Ben testified in support of his request to act as his wife's guardian. He felt capable of aiding Floretta's medical and daily needs based on his prior experience caring for his first spouse, who was incapacitated by multiple sclerosis prior to her passing. Ben explained he travels to New Jersey each month and stays approximately three weeks to be with Floretta. He visits her twice daily, early each morning and in the evening.

Ben challenged Karen's request to act as her mother's guardian, suggesting she would exclude him. In support of his contention, he stated, despite his appointment as co-guardian regarding Floretta's medical care, Karen only discusses Floretta's medical needs with him "after she's already made the decision" and he has been denied copies of "papers from the hospital." Ben also described his unhappiness with the quality

of care extended to Floretta by the current facility and challenged Karen's refusal to consider an alternate placement.

In addition, Ben believed Karen influenced Floretta to execute the power of attorney and medical directive. He described how Floretta made independent financial decisions at times, such as co-signing a car loan for her grandson, but for the most part, he and Floretta maintained their finances together, which included all the rental properties.

Ben's son-in-law, Marvin Graham, related his observations of Floretta and Ben's relationship when the couple stayed in Graham's home for a month in January 2007. Graham described Ben's daily reminders to Floretta to take her medication, the fact he made her breakfast each morning and that the couple always held hands.

Ben also presented Vernon Summers, who stated the Logans were "his second family." Summers testified as to the care Ben extended to his first wife when she became ill, as well as Ben's "very loving" relationship with Floretta, both before and after her stroke.

In an oral opinion, the court acknowledged the close relationship Karen and Ben shared with Floretta, and generally found each was equally suitable "in the most general sense" as guardians. Judge Todd also cited the growing tension between

the family members, suggesting they could not share the guardianship role. Relying primarily on Floretta's power of attorney and medical directive, which appointed Karen her attorney in fact and guardian in the event of her incapacity, Judge Todd determined Karen would best serve Floretta's interests as the guardian of her person and property. This appeal ensued.

Appellant contends the trial court erred on two issues: first, in concluding subject matter jurisdiction rested in New Jersey, and second, in failing to appoint appellant as his wife's guardian. We address each of these matters.

"Jurisdiction over an incompetent person requires a determination of domicile." In re Seyse, 353 N.J. Super. 580, 586 (App. Div.) (citing In re Estate of Gillmore, 101 N.J. Super. 77, 90 (App. Div.), certif. denied, 52 N.J. 175 (1968)), certif. denied, 175 N.J. 85 (2002). Unlike a residence, "[d]omicile is a place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." Ibid. A change in residence for a specific purpose does not necessarily equate to a change in domicile. In re Michelsohn's Will, 136 N.J. Eq. 387, 390 (Prerog. Ct. 1944).

Every person has a domicile at all times, and no person has more than one

domicile at any one time. A domicile once established continues until it is superseded by a new one. Domicile may be acquired in one of three ways: (1) through birth or place of origin; (2) through choice by a person capable of choosing a domicile; and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice.

[Gillmore, supra, 101 N.J. Super. at 87 (internal citation omitted).]

Discerning domicile is a factual determination. "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence[,]" and will not be disturbed unless they are so wholly unsupportable as to result in a denial of justice. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

Our review of the record reveals ample factual support for Judge Todd's determination that Floretta considered New Jersey, not Virginia, her domicile. This includes: the move to Virginia was dependent on Ben's decision to continue his service with the Virginia church; New Jersey had been her long-time residence; Floretta made repeated trips to New Jersey for business and to visit family; she maintained real property, personalty and bank accounts in New Jersey; her primary medical and dental providers were located in New Jersey; and when faced with a serious medical condition, rather than return to her residence in Virginia with Ben, she stayed in New Jersey to obtain extended

care and treatment. Moreover, Floretta sought legal representation from New Jersey counsel to prepare documents designating her attorney in fact to handle her personal affairs and medical needs, and identifying the person she chose to act as her guardian in the event of her disability.

The court fully reviewed the additional facts evincing Floretta's ties to Virginia such as her home purchase, voter registration, driver's license, and joint bank account with Ben. However, in weighing the nature and depth of the ties to Virginia and New Jersey, Judge Todd concluded Floretta's choices favored New Jersey as her domicile. Consequently, we will not disturb the factual findings and legal conclusions of the trial judge, as we are not persuaded "that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid.

Turning to the challenge to the award of guardianship, N.J.S.A. 3B:12-25 provides:

Letters of guardianship shall be granted to the spouse . . . as defined in section 3 of [N.J.S.A. 26:8A-3], if the spouse is living with the incapacitated person as [husband] and wife . . . at the time the incapacitation arose, or to the incapacitated person's heirs, or friends, or thereafter first consideration shall be given to the Office of the Public Guardian for Elderly Adults in the case of adults

within the statutory mandate of the office, or if none of them will accept the letters or it is proven to the court that no appointment from among them will be to the best interest of the incapacitated person or the estate, then to any other person as will accept the same[.]

Appellant argues the court ignored the spousal preference stated in N.J.S.A. 3B:12-25, and further erred because Karen failed to rebut the allegation that Floretta's execution of the power of attorney and medical directive resulted from Karen's undue influence. We reject each of these contentions.

In N.J.S.A. 3B:12-25, the Legislature established a statutory preference in favor of family members in the appointment of special guardians. In re Queiro, 374 N.J. Super. 299, 309 (App. Div. 2005); In re J.M., 292 N.J. Super. 225, 239 (App. Div. 1996). It is clear the Legislature's intent affords the trial court the discretion to appoint a guardian in the best interests of the incapacitated person. The statute does not mandate that the first choice when appointing a guardian must be the incapacitated person's spouse. Instead, the statute presents a disjunctive list of potential persons whom the court must give "first consideration," prior to awarding guardianship to the Office of Public Guardian for Elderly Adults. Therefore,

both Ben and Karen were properly considered as Floretta's guardian.³

In making his determination, the trial judge could not ignore the evidence of Floretta's intent expressed in the powers of attorney, along with the scrivener's testimony regarding Floretta's direction to him in preparing the documents. See N.J.S.A. 3B:12-25 ("Consideration may be given to surrogate decision-makers, . . . chosen by the incapacitated person before the person became incapacitated by way of a durable power of attorney . . . , health care proxy or advance directive."). Floretta was competent when she sought to prepare the powers of attorney and Judge Todd found compelling attorney Mallen's testimony presented in the earlier proceeding to determine subject matter jurisdiction, that "the power of attorney expressed [Floretta's] legitimate intentions."

Moreover, the facts and circumstances of Floretta's relationship with Karen dispel the notion that Floretta's will was overborne by her daughter in executing the powers of attorney. Since the death of Floretta's first husband, Karen

³ In discussing the interpretation of the statute in its oral opinion, the court mentioned Ben had returned to reside in Virginia, leaving Floretta to live with Karen in New Jersey when her incapacity struck. The additional tangential comments about Ben's possible conflict of interest in the event of the parties' divorce were not dispositive and do not require further comment. R. 2:11-3(e)(1)(E).

was named on her bank accounts and assisted Floretta in managing her financial affairs centered in New Jersey. Floretta's Social Security and pension receipts were deposited into a joint account Karen managed and used to pay the expenses related to the New Jersey rental properties. Floretta hired New Jersey counsel in preparation for her possible incapacity. Then she chose not to advise Ben of her decision to appoint Karen, despite her competence and opportunity to do so.

Deferring as we must to the trial judge's factual findings, including the credibility determinations supported by the record, see Cesare v. Cesare, 154 N.J. 394, 412 (1998) (because the trial court "hears the case, sees and observes the witnesses, [and] hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses"), we find no error in Judge Todd's conclusion that Floretta's best interests were served by the appointment of Karen as her guardian.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION