NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0553-10T4

IN THE MATTER OF SUSAN KEETER,
AN ALLEGED INCAPACITATED PERSON

Argued March 22, 2011 - Decided May 11, 2011

Before Judges Yannotti and Roe.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, P-184-10/S#224356.

Michael J. Fasano argued the cause for appellant Patricia D. Valentine (Lomurro, Davison, Eastman & Munoz, P.A., attorneys; Mr. Fasano, of counsel and on the brief).

Angela White Dalton argued the cause for respondent Susan Keeter (Zager Fuchs, P.C., attorneys; Ms. Dalton, of counsel and on the brief).

PER CURIAM

Plaintiff, Patricia Valentine, appeals from the dismissal of her complaint for guardianship of her mother, Susan Keeter, as an alleged incapacitated person. We affirm.

Plaintiff filed a complaint for guardianship for her mother based on her alleged incapacity on June 10, 2010. Keeter is age

eighty-nine. In addition to Valentine, Keeter has a son, Richard.

On June 21, 2010 the court appointed Suzana Hot, Esq. as attorney for Keeter. Hot opposed the motion for guardianship at Keeter's request.

In support of her complaint for guardianship, Valentine produced sworn certifications from two doctors to support her position that Keeter was sufficiently incapacitated so as to require a full plenary hearing. An order to show cause scheduling a hearing was signed on June 10, 2010 to determine whether Keeter needed a guardian.

According to Keeter's treating physician, Dr. Jeanne Tomaino, Keeter suffers from dementia, uncontrolled diabetes, and atherosclerotic heart disease. Dr. Tomaino submitted a certification which the court characterized as a "fill in the blanks" form report. Dr. Tomaino noted that Keeter was not oriented to time or place, and she "cannot manage her medication or make informed health care decisions" and cannot manage her finances. Dr. Tomaino diagnosed Keeter with dementia, and stated that she was not capable of attending a court hearing due to "poor memory and inability to fully comprehend conversations."

Valentine also submitted a report from Dr. Jon Salisbury. Dr. Salisbury examined Keeter on May 25, 2010, and noted that Keeter could not name her medications or list her medical problems. He screened Keeter for cognitive impairment and determined that Keeter was "orientated to person, place and time" but "could not copy a shape or repeat a simple phrase." According to Dr. Salisbury, Keeter appeared "very comfortable" with Valentine managing her financial affairs. Dr. Salisbury opined that Keeter suffered from early dementia, and though "not completely incapacitated," has "significant areas of problems with cognition and her ability to handle her finances and extensive medication schedule." Dr. Salisbury suggested that as Keeter's illness was progressive, "[i]t would probably be in her best interest that [Valentine] be appointed guardian or at least [conservator]."

Keeter's court-appointed lawyer, Hot, met with Keeter twice, once at her son Richard's home in Freehold and once at Keeter's home in Englishtown. Hot described Keeter as "coherent and pleasant" and stated that Keeter explained that she had given Valentine her power of attorney and the two had handled her finances together for several years.

According to Keeter, in or around 2008, Valentine and Keeter had a falling-out after Valentine allegedly turned "mean

and domineering" and siphoned funds from Keeter's accounts by writing checks in amounts significantly higher than Keeter instructed. Keeter advised Hot that she wanted to substitute Richard as her power of attorney.

Keeter conceded that she had been hospitalized for failing to take her medications properly. Though persons from the Visiting Nurse Association had been engaged at some point to oversee medication administration, Keeter dismissed them, believing she did not need their assistance. Keeter was adamant that "she did not need or want a guardian."

During the second meeting with Hot at Keeter's home in Englishtown, Keeter was again "adamant that she did not need or want a guardian." She indicated that she takes multiple pills and she relies on Richard to dispense her medicine because she did not trust Valentine to do so. Keeter could not remember the names of her medications, but claimed she remembers what they look like. Keeter rejected Hot's suggestion that she employ a visiting nurse or an aide.

Hot interviewed Richard and Valentine. According to Richard, Keeter was competent and did not need a guardian. He was "willing to be her agent and assist her in any and every way." Specifically, Richard claimed that he transports Keeter to

and from doctors' appointments and other places Keeter likes to go.

Conversely, Valentine indicated to Hot that while Richard is indeed close to Keeter, her mother always "turn[s] to Valentine when she is ill." It is undisputed that Valentine handles Keeter's finances. Valentine noted her concern that Keeter spends her money so frivolously "that there will not be enough . . . to take care of [Keeter] as she begins to require more and more assistance." Valentine was also concerned that Keeter did not adequately watch her diet to control her diabetes or take her medications appropriately.

At Hot's request, Keeter was examined by Dr. Mark David Pass. According to Dr. Pass, Keeter demonstrated mild cognitive impairment. Keeter has "no deficits in attention, recall, language, praxis, or repetition" but displayed "mild visual-spatial perception difficulties." He found that Keeter had no need for assistance with activities of daily living but did require assistance driving and taking her medications.

Dr. Pass further opined that Keeter could understand her current health situation, and responded well to hypothetical medical emergencies. She was aware of her allergies to sulfa and penicillin, reported numerous hospitalizations, and knew what "all but [two] of her medicines are used for." Ultimately, Dr.

Pass found that Keeter exhibited "mild signs of cognitive impairment and functional deficits" and "possible . . . manifestation of very early dementia." He claimed that she displayed "an excellent ability" to make decisions and, as a result, "has the capacity to make decisions regarding her health, financial, and family affairs" and "does not require a guardian at this time."

Based on her interviews with Keeter, Richard, Valentine, Dr. Tomaino and the reports of the three doctors, Hot included in the report a number of recommendations. Specifically, Hot noted that while the doctors disagreed over the extent of Keeter's competency, she needed "some assistance with her finances and with health care decisions." Hot further stated that it was in Keeter's "best interests to, at the very least, have a conservator appointed to handle her finances" and that, "with regard to her medical decision-making, it may be in her best interests to have a guardian of her person, but require that her requests and/or desires relative to her healthcare be considered and adhered to where appropriate." Finally, Hot stated that while her responsibility was to advocate on Keeter's behalf, and Keeter indicated her desire to oppose the guardianship action, she was not bound to advocate decisions

"that are patently absurd or that pose undue risk of harm to the client."

On August 11, 2010, before the return date of the order to show cause and after the filing of Hot's report, Keeter hired private counsel to oppose the application.

On August 13, 2010, the return date of the order to show cause, Keeter, through her private counsel, waived testimony and the matter proceeded in a summary manner at the conclusion of which the court dismissed the guardianship complaint based on Hot's testimony and the affidavits submitted, having determined that plaintiff failed to meet her burden of proof by "clear and convincing evidence" that Keeter required a guardian.

I.

On appeal, plaintiff argues the court erred by failing to hold a hearing on the issue of Keeter's incapacity. She contends the court had an independent obligation under the *parens patriae* doctrine to hold a full plenary hearing where there was a serious dispute over Keeter's competency. We disagree.

An action for guardianship of an alleged incapacitated individual is governed by statute and court rule. N.J.S.A. 3B:12-24 to -29; R. 4:86(1)-(8). A person is incapacitated if (s)he "is impaired by reason of mental illness or mental

deficiency to the extent that [s]he lacks sufficient capacity to govern [her]self and manage [her] affairs." N.J.S.A. 3B:1-2. A complaint for a determination of incapacity and for the appointment of a guardian must include affidavits of two physicians having the qualifications set forth in N.J.S.A. 30:4-27.2(t), or one such physician and a licensed practicing psychologist as defined in N.J.S.A. 45:14B-2, stating "the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as, residential, educational, medical, legal, vocational or financial decisions." R. 4:86-2(b)(7). The affidavits which discuss the results of an examination of the person occurring within thirty days of the filing of the complaint must express an opinion and prognosis about the fitness of the alleged incapacitated person and her ability to govern herself or manage her affairs. R. 4:86-2(b).

A judge must determine by clear and convincing evidence that the individual satisfies the statutory definition of an incapacitated person. In re Guardianship of Macak, 377 N.J. Super. 167, 175-76 (App. Div. 2005). "Unless a trial by jury is demanded by or on behalf of the alleged incapacitated person, or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of

incapacity." R. 4:86-6(a); N.J.S.A. 3B:12-24. If no jury trial has been requested, "the court, with the consent of counsel for the alleged incapacitated person, may . . . dispense with oral testimony and rely on the affidavits submitted." R. 4:86-6(a). With or without the consent to waive testimony, "the court must still independently consider all of the evidence, including the doctors' reports and the report of the court appointed attorney, and must make findings by clear and convincing evidence as to whether the person is incapacitated." Macak, supra, 377 N.J. Super. at 175-76. A person who challenges another person's capacity to care for herself or her affairs carries the burden of proof. In re M.R., 135 N.J. 155, 169 (1994).

The rules governing guardianship matters are established to protect the alleged incapacitated persons from wrongly being declared incapacitated and having their rights taken away. In their *parens patriae* role, courts are the guardians of personal rights and they have a special responsibility to protect the rights of the alleged incapacitated. In re M.R., supra, 135 N.J. at 166; In re Conroy, 98 N.J. 321, 345 (1985).

So severe is the consequence of taking away constitutionally protected individual rights that courts must not permit that to occur unless there is a showing by clear and convincing evidence that the alleged incapacitated person needs

to be stripped of those rights for his or her own safety and protection, and that there is no less restrictive alternative. In re M.R., supra, 135 N.J. at 166, In re Conroy, supra, 98 N.J. at 321, Macak, supra, 377 N.J. Super. 167.

Here, the trial court, acting in its *parens patriae* role, acted to protect Keeter from the unnecessary and unjustifiable taking of her individual rights. The court properly found plaintiff failed to establish a *prima facie* case of incapacity by clear and convincing evidence. Considering the three doctors' reports, the court was not satisfied the statutory requirements for incapacity had been met.

The court found that Dr. Tomaino, Keeter's treating physician, had filed a report in which she merely filled in the blanks with no narrative or reasons for determining Keeter was incapacitated and in need of a guardianship. Dr. Tomaino also stated Keeter was not capable of attending a hearing when in fact, Keeter was present in court on the return date of the order to show cause.

Dr. Salisbury's report was inconclusive, stating that Keeter suffered from early dementia, was not oriented to time and place and needed help managing her medications. Dr. Pass filed a report concluding that Keeter had the capacity to make

her own decisions with regard to her finances, health and estate.

We are satisfied that there is sufficient credible evidence in the record for the trial court's finding that plaintiff failed to meet her burden of establishing by clear and convincing evidence that Keeter satisfied the statutory definition of incapacitated person. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); N.J.S.A. 3B:1-2. Thus, the court met its independent obligation under the *parens patriae* doctrine of protecting Keeter from wrongly being declared an incapacitated person.

II.

Plaintiff argues that the court erred as a matter of law by waiving the hearing requirement without the court appointed counsel's consent. We disagree.

The guardianship provisions in Title 3B "evoke the State's *parens patriae* authority[.]" In re Queiro, 374 N.J. Super. 299, 308 (App. Div. 2005). This authority is derived "from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability." In re Grady, 85 N.J. 235, 259 (1981). Such authority has been invoked "to allow decisions to be made for an incompetent that serve the incompetent's best

interests, even if the person's wishes cannot be clearly established." In re Conroy, supra, 98 N.J. at 365.

In Macak, this court reversed the finding of incapacity where the alleged incapacitated person entered into a "settlement" declaring him incapacitated because "by definition" an incapacitated person is unfit to manage his or her affairs, R. 4:86-2(b)(6), and "[u]nder no circumstances should . . . be coerced into agreeing to a guardianship[,]" Macak, supra, 377 N.J. Super. at 176.

The statutory scheme underscores the importance of protecting the alleged incapacitated person's interest, by providing for the appointment of counsel. Id. at 175-176; R. 4:86-4. We have noted that "[i]t is the duty of the court-appointed attorney to advocate . . . the client's position with respect to the underlying issue of whether the client is incapacitated." Macak, supra, 377 N.J. Super. at 176. While the attorney need not advocate for decisions that are "patently absurd or . . . pose an undue risk of harm to the client[,]" In re M.R., supra, 135 N.J. at 176, counsel must "serve as an independent legal advocate for the alleged incapacitated person." Macak, supra, 377 N.J. Super. at 176 n.3.

Here, the court followed the applicable statutes and rules to the letter. Hot, the court-appointed attorney filed a report

pursuant to Rule 4:86-4(b) and In re M.R., advocating for her client and simultaneously expressing her reservations about Keeter's abilities. Thus, Hot adequately performed her duties "not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." In re M.R., supra, 135 at 176. There was no negotiated "settlement" of incapacity. Quite the contrary, Keeter hired private counsel and her own expert to oppose the application.

Contrary to plaintiff's contention, we are satisfied the trial court acted within its authority by resolving the question of Keeter's capacity without an evidentiary hearing. Pursuant to Rule 4:86-6(a), "[u]nless a trial by jury is demanded by or on behalf of the alleged incapacitated person, or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of incapacity." If no demand for a jury trial is made, "the court, with the consent of counsel for the alleged incapacitated person, may . . . dispense with oral testimony and rely on the affidavits submitted." Ibid. While Rule 4:86-4(b) provides for the appointment of counsel, it also provides for the situation in which the alleged incapacitated person obtains private counsel, as Keeter did here.

Plaintiff's position that the court was required to obtain consent from both court-appointed counsel and private counsel before proceeding without oral testimony, is incorrect. Rule 4:86-6(a) does not require the consent of the court-appointed counsel for an alleged incapacitated person where, as in this case, the alleged incapacitated person has retained private counsel, who consents to having the court resolve the matter based on the affidavits submitted without oral testimony. The court-appointed counsel's refusal to waive testimony was not premised on reservations about Keeter's competency, but rather on her duty to advocate for Keeter's position that she was not incapacitated and because the matter was contested.

Court-appointed counsel was also present at the hearing and did not object when private counsel spoke on Keeter's behalf and stated that his client preferred to avoid a trial among her children in front of the court on the issue of her capacity. Private counsel also indicated that Keeter was willing to go forward with the voluntary conservatorship to seek a geriatric care manager or visiting nurse to assist with her medication. The court-appointed counsel conceded the imposition of a conservatorship was an acceptable arrangement.

III.

Next, plaintiff contends that the court erred by failing to consider the establishment of a limited guardianship. Again, we disagree. The consideration of the type of guardianship to be imposed is taken only after a determination that the person is incapacitated. N.J.S.A. 3B:12-24.1(a) ("[i]f the court finds that an individual is incapacitated . . . the court may appoint a general guardian . . . ")(emphasis added); N.J.S.A. 3B:12-24.1(b)("[i]f the court finds that an individual is incapacitated . . . the court may appoint a limited guardian . . . ")(emphasis added).

After considering the three doctors' reports and hearing from both court-appointed and private counsel, the court found plaintiff had failed to establish by clear and convincing evidence that Keeter was incapacitated. The court had no obligation to impose a limited guardianship where incapacity has not been established. Moreover, as the court found that Keeter was not incapacitated, it was well within her capacity to agree to a voluntary conservatorship. In Macak, supra, 377 N.J. Super. at 175 n.2 ("Where the person is not incapacitated, but he has sufficient mental or physical impairment that he requires assistance in managing his finances, he may ask the court to

appoint a conservator.") (citing In re Conservatorship of Halley, 342 N.J. Super. 457, 461-63 (App. Div. 2001)).

In our view, there was no legal error in the court's framing of the issue by setting out the applicable standard after considering all of the evidence, including the doctors' reports and the report of the court-appointed attorney. The court stated it had to decide "by clear and convincing evidence" that Keeter could not fundamentally perform the duties required to manage her affairs and herself.

Dr. Pass concluded that Keeter did not need a guardian. Dr. Salisbury opined that Keeter would "probably" benefit from a guardian, but also stated that she could benefit from a conservatorship, given the progressive nature of her disease. Thus, Dr. Tomaino was the only physician who recommended guardianship, while Keeter, Dalton and Hot all agreed with the resulting conservatorship chosen by the court.

In reviewing the findings of the trial judge sitting without a jury, this court does "not disturb the factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Rova Farms, supra, 65 N.J. at 484 (quoting Fagliarone v. Twp. of

N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). These findings are "binding on appeal when supported by adequate, substantial and credible evidence." Id. at 484.

Affirmed.