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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0885-12T4

IN THE MATTER OF S.H., AN
ALLEGED INCAPACITATED PERSON

Submitted December 17, 2013 – Decided September 22, 2014

Before Judges Reisner, Alvarez and Ostrer.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-404-11.

John J. Flynn, attorney for appellant B.H. (Mr. Flynn and Oleg Nekritin, on the briefs).

Nancy L. Holm, attorney for respondent S.H.

Respondents J.H., M.H. and Adult Protective Services have not filed briefs.

The opinion of the court was delivered by

OSTRER, J.A.D.

This is an appeal from a contested guardianship trial. There was no dispute that S.H. (Sarah)[1], then a twenty-eight-year-old woman, is incapacitated and needs a guardian of the person and

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[1] We use pseudonyms to protect the privacy of S.H. and her family members.

property. She has Soto's Syndrome, and suffers from cognitive limitations, impaired speech, and anxiety and depressive disorders. According to one expert, she functions at the intellectual level of a first or second-grader. She requires specialized caretaking, schooling, and medical oversight.

The principal issue at the seven-day trial was whether Sarah's guardian should be her mother, B.H. (Barbara), who filed the guardianship action; or J.H. (Joan), Sarah's adult sister. Joining Joan in opposing Barbara's appointment were: Barbara's ex-husband, M.H. (Mark), the father of Joan and Sarah; Adult Protective Services (APS), which the Court allowed to intervene in the action; and the attorney the court appointed to represent Sarah.

Barbara had dutifully and selflessly cared for Sarah her whole life. Barbara secured various services for Sarah. Mother and daughter had a strong emotional bond. However, the court found that Sarah's welfare was threatened by Barbara's live-in boyfriend, T.O. (Ted). Over the course of several years, Ted frequently touched and embraced Sarah in a way that observers stated appeared excessive, and inappropriate. It was behavior typical of persons romantically involved, and, as the court found, not what "one would expect from a father figure and an adult child." Ted's behavior did not rise to the level of substantiated unlawful sexual contact or assault. APS so concluded after it

investigated reports in 2005 and 2010 of abuse of Sarah by Ted. Although sexual abuse was never proven, the court found that Ted's actions were inappropriate, and his excessive touching was a source of confusion and anxiety for Sarah.

Some incidents of inappropriate touching occurred in Barbara's presence. However, she failed to protect Sarah from Ted. Even after APS stepped in, and secured Barbara's and Ted's agreement that Ted's excessive touching would stop, Barbara failed to shield Sarah. As a result of Barbara's continuing failure, the court found that Sarah's best interests would be served by appointing her sister Joan as her guardian. The court also awarded fees to Sarah's appointed counsel, holding Barbara, Joan and Mark equally responsible for the award.

On appeal, Barbara principally asserts that the trial court's findings regarding Ted's behavior and its impact on Sarah were not supported by sufficient credible evidence; and the court erred by failing to favor Barbara as Sarah's closest relative. Barbara also challenges the court's fee award, and its order permitting APS to intervene. Having reviewed Barbara's arguments in light of the factual record and applicable legal principles, we affirm.

A.

We give great deference to the judge's findings and conclusions after a bench trial, based on his or her ability to

perceive witnesses and assess credibility. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974); see also Pascale v. Pascale, 113 N.J. 20, 33 (1988). We shall not disturb the trial court's findings "unless they are so clearly insupportable as to result in their denial of justice." Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). We do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). However, we review de novo the trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In selecting a guardian for an incapacitated adult, a court shall prefer the ward's spouse, or if there is none, the next closest relative. See In re Roll, 117 N.J. Super. 122, 123 (App. Div. 1971); see also In re Quiero, 374 N.J. Super. 299, 311 (App. Div. 2005) (recognizing "a kinship-hierarchy preference" for appointment of non-testamentary guardians); N.J.S.A. 3B:12-25 (stating that letters of guardianship shall be granted to the spouse or domestic partner . . . or to the incapacitated person's heirs, or friends); R. 4:86-6(c) (stating the court shall appoint "the incapacitated person's spouse . . . or . . . the incapacitated person's next of kin"); Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 4:86-6 (2014) (Pressler & Verniero) (stating

that the court shall follow the traditional table of consanguinity to determine who is preferred).

However, the court may override that preference if it would be "affirmatively contrary to the best interests of the incompetent or his estate in the sense of being deleterious thereto in some significant way." In re Roll, supra, 117 N.J. Super. at 124. In Roll, a man's sister-in-law and nephew vied for guardianship. The trial court found both fit and equally interested in the incapacitated man's welfare. The trial court favored the sister-in-law, however, as she was socially closer to her prospective ward and his late wife than was the nephew. The court concluded "the 'best interests' of the incompetent's estate would 'probably' be served by [her] appointment." Id. at 123. We held this was insufficient grounds to override the statutory preference for the nephew as next-of-kin. "The statute does not mean that of two entirely fit persons, one a next-of-kin and the other not, the court may indulge in a weighing contest as to whose appointment would better serve the interests of the incompetent or his estate." Id. at 124.

Against this backdrop, we discern no error in the court's decision to bypass Sarah's mother, in favor of Sarah's sister. Having carefully reviewed the record, there is sufficient credible evidence to support the court's findings. The trial judge reviewed

the record in detail in her extensive opinion, and we need not do so here. Suffice it to say that there was ample evidence — presented by the testimony of numerous eyewitnesses, including representatives of APS, school employees, and Sarah's appointed counsel and the counsel's husband — that Ted engaged in inappropriate and harmful physical contact with Sarah.

The contact was intimate, and included lengthy body-to-body embraces. One witness described an embrace where Sarah's breasts were pressed against Ted's chest, and Sarah's private parts were against Ted's private parts. Barbara — despite her commitment and love for her daughter — failed to intervene on Sarah's behalf, despite numerous opportunities. The trial judge was unpersuaded by the testimony of several of Barbara's siblings who minimized Ted's touching. Thus, it was established that appointing Barbara as guardian would be affirmatively contrary to Sarah's best interests.

There also was sufficient evidence in the record to support the court's determination that Joan was a suitable alternative candidate for guardian. The court had appointed Joan and Mark temporary guardians a few months after Barbara's complaint was filed, upon APS's motion. Thereafter, Sarah lived with Joan, and Barbara exercised parenting time without Ted. Joan shared a household with her fiancé, and their young child. During the

trial, Joan was pregnant. Sarah's counsel reported that Sarah appeared calmer, more relaxed, and happier in Joan's household, than she did in Barbara's.

Joan stated she was seeking a placement for Sarah in a group home for developmentally disabled adults, to take effect after Joan's second child arrived. Sarah's counsel asserted that while living with family was ideal, Sarah's placement in a group home would serve her best interests by enabling Sarah to become more independent.

Although we affirm the court's appointment of Joan as Sarah's guardian, we are constrained to note that the trial court failed to address Sarah's preferences in the course of its decision. A psychologist who evaluated Sarah during the litigation, upon APS's referral, found that Sarah was capable of expressing preferences. These included a clear desire to be with her mother and father. Sarah "strongly stated" she did not want to see Ted. She stated that she liked her sister Joan, but she did not want to see Joan because she was "sick" — a possible reference to Joan's pregnancy.

The psychologist opined that Sarah's "desire to avoid the company of certain individuals, as well as her comfort in the presence of others, needs to be honored to promote her well-being." Ultimately, however, the court's failure to consider Sarah's preferences was not harmful error under the circumstances of this

case. The need to protect Sarah from Ted's inappropriate contact overrode any preferences Sarah had to live with her mother; and, the court's decision fulfilled Sarah's apparent wish not to see Ted. The judgment of guardianship assured that Sarah would have scheduled visitation with Barbara, although contact with Ted was prohibited.

Nonetheless, and for future reference, it is important to emphasize that a trial court, in exercising its parens patriae role, must protect the incapacitated adult's personal rights, and maximize, to the extent feasible, the incapacitated adult's personal liberty. In re M.R., 135 N.J. 155, 166 (1994). The court must consider the preferences of the incapacitated adult. Id. at 171. "A person who is incapacitated may nonetheless still be able to express an intelligent view as to his choice of guardian, which view is entitled to consideration by the court." In re Guardianship of Macak, 377 N.J. Super. 167, 176 (App. Div. 2005). The court must also consider as a distinct question, where the incapacitated adult shall live. M.R., supra, 135 N.J. at 171-72 (suggesting that an incapacitated adult conceivably could choose to live someplace other than with the guardian); see also Queiro, supra, 374 N.J. Super. at 304 (noting that the court interviewed the incapacitated person to determine whether she had a preference).

Sarah's counsel was obliged to ascertain whether Sarah had a preference as to who should be her guardian, and where she wanted to live, and to advocate for that position. See R. 4:86-4(b)(3) (stating that incapacitated adult's counsel shall state in his or her report whether the incapacitated person "has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court"); see also Judiciary-Surrogates Liaison Committee, Guidelines for Court-Appointed Attorneys in Guardianship Matters 3 (May 2005) (stating that even if incapacity is uncontested, appointed counsel is obliged to represent incapacitated person's opinions and preferences "for example, about the identity of the proposed guardian or where they want to live").

Unfortunately, counsel expressly stated that, her "job [was] to look out for Sarah's best interests" — a role more appropriately assigned to a guardian ad litem, see Rule 4:86-4(d), as opposed to counsel for an incapacitated adult. See 4:86-4(b). "The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment." M.R., supra, 135 N.J. at 173-74 (internal citation and quotation omitted); see also In re J.M., 416 N.J. Super. 222, 225, n.4 (Ch.

Div. 2010) (converting to guardian ad litem appointed counsel who advocated for best interests instead of incapacitated adult's preference, and appointing second attorney to act as counsel and to advocate for client's wishes); In re Mason, 305 N.J. Super. 120, 127 (Ch. Div. 1997).

B.

The court initially ordered that almost $33,000 in fees of Sarah's appointed counsel be borne entirely by Barbara. In its decision, the court did not review the reasonableness of counsel's fees, nor explain the basis for placing the entire responsibility for payment on Barbara. After Barbara objected, the court reconsidered.

The court found that Sarah could not afford to pay the fees. She had no assets and her only income consisted of monthly Social Security Disability income of $989, and monthly support payments by her father of $559. The court also rejected the suggestion of APS's counsel that Barbara should bear the fees because her alleged intransigence regarding Ted was responsible for the protracted trial.

Counsel for Barbara agreed there should be an award of fees, and left it to the court's discretion to determine the reasonable amount. However, counsel urged the court to divide any fee award equally between Barbara, Joan and Mark. Counsel apparently did

so in a certification to the court that is not included in the appellate record, but he confirmed the position in oral argument.

The court accepted Barbara's counsel's suggestion and ordered an equal, three-way division of Sarah's counsel's fees. The court declined Sarah's counsel's suggestion that the court consider each family member's respective ability to pay, particularly Mark — who, Sarah's counsel asserted, lived on limited retirement income.

The court relied on Rule 4:86-4(e), which states, "The compensation of the attorney for the party seeking guardianship, appointed counsel, and of the guardian ad litem, if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct." See also In re Landry, 381 N.J. Super. 401, 410 (Ch. Div. 2005) (setting forth factors, including ability to pay and parties' motivations, in allocating fee under Rule 4:86-4(e)). The court concluded that all three family members participated in the case; Barbara prompted the litigation; and Joan and Mark received an indirect benefit from counsel's work, as she advocated a position in line with theirs.

On appeal, Barbara argues the total fee awarded to Sarah's attorney was excessive, particularly because Sarah's counsel allegedly duplicated the role of APS's attorney, who also urged the court to appoint Joan as guardian. Barbara also asserts the

three-way allocation of the fee among Sarah's two parents and sister was inequitable, because Mark was better able to bear a larger share of the fees, and Barbara had already sacrificed her financial livelihood and expended substantial money caring for Sarah.

Barbara's arguments are without merit, as she conceded through counsel before the trial court that a fee award to Sarah's counsel was appropriate. She also raised no issue before the trial court regarding the quantum or reasonableness of the fees; and Barbara's counsel suggested the three-way split of the fees. See Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (holding generally "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (internal quotation marks and citation omitted).

Barbara's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.