THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2014-0655, In re Guardianship of M.P., the court on September 14, 2015, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. The petitioner, Jeannette Marino, appeals a decision of the Circuit Court (Leonard, J.) finding, among other things, that she violated multiple National Guardianship Association (NGA) standards as the former guardian of M.P. We affirm.

The following facts are derived from the circuit court's order. M.P. lived as a resident at the Assisted Living Unit at the Peabody Home for four and a half years. She is in her 70s, and has been diagnosed with dementia, including poor memory, confusion, and depression. M.P. lived in a private room with "24/7" nursing supervision and ready access to a primary care physician and other providers. She enjoyed a close relationship with another resident at the Peabody Home.

In 2011, while M.P. was a resident at the Peabody Home, the court appointed the petitioner as guardian over M.P. and her estate. In the summer of 2013, the petitioner spoke with the Peabody Home's nursing director about possibly relocating M.P. to Long Island. There were no further discussions about relocating M.P. until April 22, 2014, when the petitioner spoke with Blanche Lunn, a nurse at the Peabody Home, about relocating M.P. to a facility on Long Island. On June 9, Lunn saw a clearance form for The Birches, a facility in Concord, to be completed by M.P.'s attending physician. Lunn called the petitioner to express surprise about transfer to Concord, as opposed to Long Island, and the petitioner explained that M.P.'s daughter was comfortable with a transfer to The Birches. No one else at the Peabody Home had been informed of the possible move to The Birches.

On June 17, two individuals from The Birches arrived at the Peabody Home to interview M.P. Meg Miller, the executive director of the Peabody Home, called the petitioner twice to inquire about the transfer to The Birches. The petitioner had not consulted with M.P. or her care team as to whether a transfer to The Birches would be in M.P.'s best interest. During the conversation, Miller inquired about the transfer, noting that it would take M.P. away from her care team, primary physician, good friend, and support system. The petitioner explained that she had spoken with M.P.'s daughter, and because of M.P.'s decline in condition, it was decided that she should be

transferred. Miller responded that the Peabody Home continued to meet M.P.'s needs, and that a move would be mentally and physically difficult for M.P.

On June 20, the petitioner emailed the Peabody Home requesting that M.P. be available to meet with her on June 24; Miller requested that the petitioner meet with her, M.P. and M.P.'s care team during the visit. On June 24, the petitioner arrived at the Peabody Home and met with M.P., Miller, and members of M.P.'s care team. M.P. did not know who the petitioner was, and when she was informed that she might be moving to The Birches, she indicated that she did not want to go there. The petitioner then told M.P., in front of the care team, they would be going to lunch. Two hours later, the Peabody Home was informed that M.P. had been admitted to The Birches and would not be returning to the Peabody Home.

After the events of June 24, Miller filed a letter of complaint with the court concerning the petitioner's conduct as guardian of M.P. In her letter, she alleged that the petitioner violated certain provisions of the NGA Standards of Practice and Model Code of Ethics for Guardians. The court ordered that a hearing be held on July 7, with court-appointed counsel for M.P. After the hearing, the court found, based upon the complaint and the testimony, that the petitioner violated NGA standards three through seven, nine, twelve and thirteen, and that it was in M.P.'s best interest that the petitioner be removed as her guardian. The court also ordered that a copy of the order would be given to the "Administrative Judge of the Probate Court for consideration of further sanctions." This appeal followed.

In her appeal, the petitioner does not ask that she be reinstated as M.P.'s guardian; rather, she asks only that we vacate the trial court's findings that she violated multiple NGA standards. "Our standard of review of a probate division decision is determined by statute: The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." In re Estate of Couture, 166 N.H. 101, 105 (2014) (quotation omitted), cert. denied, 135 S. Ct. 411 (2014). See RSA 567-A:4 (2007); RSA 490-F:3, :17 (Supp. 2014). "Consequently, we will not disturb the probate division's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law." Id. In assessing the judge's findings, "we review the record of the probate proceedings to determine if the probate court's findings could be reasonably made given the testimony and the evidence before it." In re Guardianship of E.L., 154 N.H. 292, 296 (2006). "We defer to the judgment of the probate court to resolve conflicts in testimony, measure the credibility of witnesses, and determine the weight to be given to testimony, recognizing that as the trier of fact, it is in the best position to measure the persuasiveness and credibility of evidence." Id. (quotations, brackets, and citation omitted). "It lies within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented." Id. (quotation omitted).

We first address the petitioner's allegations regarding the impropriety of the hearing. Because the ward was not present during the hearing, and her presence was not waived, the petitioner argues, based upon RSA 464-A:8, I (2004), that it was erroneous for the judge to conduct the hearing in the ward's absence. We disagree and find this statute inapplicable to the petitioner's argument.

RSA 464-A:8, I, provides in pertinent part: "If the proposed ward is within the state and able to attend, he or she must be present at the hearing unless excused under the provisions of this chapter." RSA 464-A:8, I (emphasis added). The statute makes clear that a "proposed ward" must be present at a hearing on a requested guardianship. Id. This statute addresses the conduct of a hearing to appoint a guardian, which requires a finding that a ward is incapacitated. Here, however, the object of this proceeding was removal of a guardian, for reasons unrelated to the ward's continuing need for a guardian, an entirely dissimilar scenario, making this statute inapplicable. Thus, the circuit court did not err in conducting the hearing despite the ward's absence.

The petitioner next argues that it was improper for the circuit judge to rely on hearsay testimony to make her findings. While we agree that reliance upon hearsay evidence is generally improper, see N.H. R. Ev. 1101(a), 802, here, there was ample non-hearsay evidence upon which the judge could rely, and therefore any error resulted in no prejudice to the petitioner because it cannot reasonably be found to have affected the outcome. See Patch v. Arsenault, 139 N.H. 313, 320 (1995). Miller testified to the following: while caring for M.P., she was not aware that M.P. was included in any discussions regarding her transfer; she spoke with the petitioner about her concerns related to the possible transfer of M.P.; she was not informed of the actual transfer until after it took place; she was present when the petitioner met with the care team and transferred M.P. on the pretext of going to lunch; she was given the required 30-day advance notice of M.P.'s transfer the day after M.P. had been transferred; and M.P. had a close relationship with a fellow resident at the Peabody Home. Much of this testimony is uncontroverted by the petitioner. Given the ample testimony presented during the hearing, excluding the hearsay evidence in the complaint letter and at the hearing, we find no reversible error with respect to the admission of hearsay.

The petitioner also takes issue with the lack of expert testimony during the hearing and asserts that an expert was necessary to testify as to the standard of care for guardians under these circumstances. Because this argument was not raised before the circuit court, it was not preserved for appeal and, therefore, we will not address it. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004).

Finally, we turn to the question of whether the record supports the findings of the circuit court as to the petitioner's violation of certain NGA standards. Based upon the testimony from Miller, as well as the testimony from the petitioner, we conclude under RSA 567-A:4 that the circuit court's order is supported by the evidence, Estate of Wilber, 165 N.H. at 251, and the "findings could be reasonably made given the testimony and the evidence before it," In re Guardianship of E.L., 154 N.H. at 296. The trial court based its findings on evidence of M.P.'s relationship with her care team and her friend at the Peabody Home, the infrequency of the petitioner's visits to the Peabody Home, the lack of information presented to M.P. and M.P.'s care team regarding her transfer, and the events that transpired on June 24. Accordingly, because the findings are supported by the record, we affirm the circuit court's order.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

Eileen Fox,
Clerk

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