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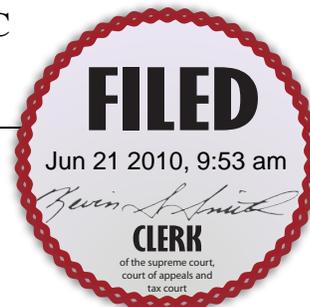
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**IN THE
COURT OF APPEALS OF INDIANA**



IN MATTER OF GUARDIANSHIP OF)
CARRIE ETTA McGOFFNEY,)
an incapacitated adult,)
)
KELLY McGOFFNEY,)
Appellant,)
)
vs.)
)
IVY McGOFFNEY,)
Appellee.)

No. 84A01-0906-CV-266

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0901-GU-686

June 21, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kelly McGoffney (“Kelly”) filed a petition in Vigo Superior Court seeking to establish a permanent guardianship over the person and property of her mother, Carrie Etta McGoffney (“Carrie”), with Kelly as the guardian. Kelly’s sister, Ivy McGoffney (“Ivy”), then filed a counter-petition seeking to be named Carrie’s guardian. The trial court appointed Ivy as guardian. Kelly appeals, claiming that the trial court abused its discretion in appointing Ivy as guardian. We affirm.

Facts and Procedural History

Carrie is the elderly mother of Kelly, Ivy, and their two brothers, Brian and Evan McGoffney. Following a heart attack and a stroke, Carrie was admitted to the Indiana University Medical Center in August 2008 and diagnosed with a rare blood disorder. Eventually, Carrie was moved to Kindred Hospital. When she was ready to be discharged from the hospital, her children decided to place her in the Royal Oaks nursing home. Kelly claims that the move to Royal Oaks was to be temporary until another nursing home could be found. At the time Carrie was transferred to Royal Oaks in late September 2008, Kelly held a durable power of attorney over her mother. However, on November 18, 2008, Carrie named Ivy as her attorney-in-fact.¹

In January 2009, Carrie was transferred from Royal Oaks to another hospital as a result of bedsores and later contracted sepsis as a result of an infection of the bedsores.

¹ In her Appellant’s Brief, Kelly seems to acknowledge that Carrie revoked the power of attorney held by Kelly and named Ivy as her new attorney-in-fact. See Appellant’s Br. p. 2 (“Carrie McGoffney signed a new power of attorney on November 18, 2008, naming [Ivy] as her new power of attorney.”). In her reply brief, however, Kelly claims that “no copy of the revocation of [Kelly]’s appointment as Carrie McGoffney’s power of attorney was introduced into evidence at the hearing.” Appellant’s Reply Br. p. 2. Kelly admits, however, that there was testimony indicating that Carrie did appoint Ivy as her attorney-in-fact.

At least by this point, Kelly considered Royal Oaks to be providing substandard care and wanted her mother to be transferred to a different nursing home. Ivy, however, reported that her mother did not want to leave Royal Oaks and did not move Carrie to another nursing home.

Ultimately, the conflict between the two sisters could not be resolved, and on January 23, 2009, Kelly filed a petition to establish a permanent guardianship over Carrie's person and property, naming Kelly as Carrie's guardian. Ivy responded by filing a counter-petition, also seeking to establish a guardianship, but with Ivy as Carrie's guardian. A hearing on the petitions was held on April 1, 2009, and at the conclusion of the hearing, the trial court issued an order appointing Ivy as Carrie's guardian. Kelly filed a motion to correct error on April 30, 2009, which the trial court denied on May 1, 2009. Kelly now appeals.

Standard of Review

The trial court is vested with discretion in making determinations as to the guardianship of an incapacitated person, and we review the trial court's determination only for an abuse of that discretion. In re Guardianship of Atkins, 868 N.E.2d 878, 883 (Ind. Ct. App. 2007) (citing Ind. Code § 29-3-2-4). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. Id. On appeal, "[w]e consider only the evidence most favorable to the prevailing party, and we neither reweigh the evidence nor reassess witness credibility." Chavis v. Patton, 683 N.E.2d 253, 255 (Ind. Ct. App. 1997).

Discussion and Decision

The appointment of a guardian is guided by several statutes. A guardianship action is initiated by filing a petition seeking appointment to serve as guardian of an incapacitated person. See Ind. Code § 29-3-5-1 (1994). Indiana Code section 29-3-5-3 (1994) then provides that the trial court “shall appoint a guardian” if the court finds that “(1) the individual for whom the guardianship is sought is an incapacitated person . . .” and “(2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person”

In the present case, Kelly and Ivy both agree that the appointment of a guardian was proper; they simply disagree regarding who should have been appointed as guardian. In this regard, Indiana Code section 29-3-5-5(a) (1994) provides that the following people are “entitled to consideration for appointment as guardian” in the order listed:

- (1) a person designated in a durable power of attorney;
- (2) the spouse of an incapacitated person.
- (3) an adult child of an incapacitated person;
- (4) a parent of an incapacitated person, or a person nominated by will of a deceased parent of an incapacitated person . . . ;
- (5) any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six (6) months before the filing of the petition;
- (6) a person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

Indiana Code section 29-3-5-4 (1994) also provides that “[t]he court shall appoint as guardian a qualified person or persons most suitable and willing to serve, having due regard to . . . [a]ny request made by a person alleged to be an incapacitated person, including designations in a durable power of attorney” And Indiana Code section

30-5-3-4(a) (2009) provides that “the court shall make an appointment [of a guardian] in accordance with the principle’s most recent nomination in a power of attorney except for good cause or disqualification.”

Thus, “a person designated in a durable power of attorney is entitled to primary consideration as the person to be appointed as guardian and shall be appointed guardian unless good cause or disqualification is shown.” In re Guardianship of Hollenga, 852 N.E.2d 933, 938 (Ind. Ct. App. 2006). Still, the trial court is authorized to “pass over a person having priority and appoint a person having a lower priority or no priority” if the court believes that action to be in the incapacitated person’s best interest. Atkins, 868 N.E.2d at 883. The trial court’s paramount consideration in making its determination of the person to be appointed guardian is “the best interest of the incapacitated person.” Id.

Here, in arguing that the trial court should have appointed her as guardian instead of her sister Ivy, Kelly refers to her concerns that her mother would be better off in another nursing home. However, Kelly refers almost exclusively to the evidence which does not favor the trial court’s decision. In fact, Kelly’s appellate argument is essentially little more than a request that we reweigh the evidence and believe her testimony. This is not our prerogative as an appellate court.

Instead, the facts most favorable to the trial court’s decision reveal that Ivy was designated as Carrie’s attorney-in-fact pursuant to a durable power of attorney. Thus, pursuant to statute, Ivy was the preferred choice as guardian unless she was disqualified or there was otherwise good cause not to choose her. See Hollenga, 852 N.E.2d at 937-38. The facts favorable to the trial court’s decision show no indication why Ivy was

disqualified or why there was good cause not to appoint her as Carrie's guardian. To the contrary, Ivy had long acted as her mother's caregiver.

Although Kelly may disagree with Ivy's choice to keep their mother in her current nursing home, this does not by itself establish that Ivy was unfit to be appointed as guardian. Ivy testified that, although the current nursing home was not perfect, she believed it was adequate to care for her mother, and that the nursing home had taken measures to alleviate the problem with her mother's bedsores. Further, Ivy testified that her mother did not want to move to another nursing home. And both of Carrie's sons testified that they preferred their sister Ivy, not their sister Kelly, to be their mother's guardian. Under the facts and circumstances of the present case, we are unable to conclude that the trial court abused its discretion in appointing Ivy, as opposed to Kelly, as Carrie's guardian.

Affirmed.

RILEY, J., and BRADFORD, J., concur.