IN THE COURT OF APPEALS OF IOWA

No. 8-1062 / 08-1408
Filed February 4, 2009

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF JOHN R. JOHNSON,

JOHN R. JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

A ward appeals his placement at a secure facility, on the basis this was not the least restrictive alternative. **AFFIRMED.**

Webb L. Wassmer, Mark A. Roberts, and Jacob R. Koller of Simmons Perrine, P.L.C., Cedar Rapids, for appellant.

Brent B. Green, Christine B. Long, Lynn M. Gaumer, and Kirk W. Bainbridge of Duncan, Green, Brown & Langeness, P.C., Des Moines, for the guardians and conservator.

Scott E. Schroeder of Schroeder Law Office, Burlington, guardian ad litem for the ward.

Considered by Vogel, P.J., and Mahan, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.

I. Background Facts & Proceedings

John Johnson has been diagnosed with moderately-progressing dementia. He has memory loss and cognitive difficulties. Johnson has been a successful businessman who owns several companies and has assets worth about $40 million. He has a home in Burlington. Johnson has four children: Cristy Schmidt, J. Scott Johnson, Jay Johnson, and Wayne Johnson. Scott lives in Clive, while the other three children live in Burlington.

Johnson was temporarily committed for psychiatric care in May 2007 after he threatened to commit suicide. He was released with the understanding that he would accept in-home care, but he later changed his mind about accepting help. He began to again make statements about ending his life. On March 30, 2008, he accidentally caused his home to fill with smoke when he placed an ice cream sandwich on a stovetop.

On April 10, 2008, Johnson's children filed a petition for the appointment of a guardian and a conservator for their father. All of the physicians who examined Johnson agreed that he could no longer live independently or take care of his own affairs. The children sought to have Johnson placed at Arbor Springs, a facility dedicated to dementia care, in West Des Moines. Counsel for Johnson presented evidence that Johnson preferred to remain in his home, with around the clock supervision.

At the hearing, Dr. Thomas Boyd testified Johnson "would be much better served in a facility designed to treat and support his dementia." Dr. Boyd stated

Johnson would receive more attention, socialization, and activities at a facility like Arbor Springs, rather than remaining in his home. Dr. Gary Szymula testified it would not be appropriate for Johnson to remain in his home with supervision. Dr. Szymula testified that in a facility Johnson would be exposed to programs specifically designed for patients with dementia. He stated Johnson would not get the stimulation he needed at home. Dr. Francis Sanchez testified he did not believe Johnson could receive all the care that he needed in a home environment.

Johnson presented the testimony of Dr. Nils Varney, who gave the opinion that Johnson should be placed in his home with twenty-four hour supervision. Dr. Varney referred to placement at a facility like Arbor Springs as "incarceration." Dennis Schendler testified his security company, Preferred Security Services, could provide a twenty-four hour guard for Johnson, although he would need to hire six additional people for his company. Sarah Lunsford, a general manager for Comfort Keepers, testified her company could provide twenty-four hour, non-medical, in-home care. She also testified she would need to hire an additional six employees if Comfort Keepers provided care for Johnson.

The district court named Johnson's four children as co-guardians for him. The court appointed Two Rivers Bank & Trust as conservator. The court ordered Johnson placed at Arbor Springs. The court found:

> Johnny needs socialization, activities and professional care that can be received in a facility designed to treat his advancing dementia which cannot be provided in an in-home care arrangement. The Court is satisfied, and so finds and concludes,

> that Arbor Springs is the least restrictive and most appropriate placement for Johnny at this time. Such conclusion is, again, supported by medical professionals who have had regular and ongoing contact with Johnny and provided care and treatment for an extended period of time.

Johnson appeals the provision in the district court's order placing him at Arbor Springs.

II. Standard of Review

The district court ruled that the issue of an appropriate placement for Johnson would be tried in equity. *See* Iowa Code § 633.33 (2007) (noting an action for the appointment of guardians and conservators is triable as a law action, "and all other matters triable in probate shall be tried by the probate court as a proceeding in equity"). In an equitable proceeding our review is de novo. Iowa R. App. P. 6.4. We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by the court's findings. Iowa R. App. P. 6.14(6)(*g*).

III. Standing

The guardians and conservator (guardians) filed a motion to dismiss the appeal, claiming Johnson lacks standing to appeal the district court's decision. They assert Johnson does not have sufficient capacity to make the decision to appeal the issue of his placement. They state that because Johnson was adjudicated incompetent, he can only act through the guardians, the conservator, or the guardian ad litem. None of these parties, however, appealed. Johnson's appeal was filed by privately-retained counsel.

The legal theory of standing requires that a party have a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Berent v. City of Iowa City*, 738 N.W.2d 193, 202 (Iowa 2007). A party must (1) have a specific, personal, and legal interest in the litigation, and (2) be injuriously affected. *Birkhofer ex rel. Johannsen v. Brammeier*, 610 N.W.2d 844, 847 (Iowa 2000). Both of these requirements must be satisfied for a party to have standing. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004).

Here, Johnson has a specific, personal and legal interest in the litigation. The result of the appeal will affect his residence. Furthermore, he claims he was injuriously affected by the district court's decision that he could no longer remain in his home. We determine Johnson meets the legal test for standing.

In addition, sections 633.561(1) and 633.575(1) provide that a proposed ward is entitled to representation by an attorney during proceedings to establish a guardianship and/or conservatorship. Representation under these sections is separate from the representation by a guardian ad litem. *See Estate of Leonard, ex rel. Palmer v. Swift*, 656 N.W.2d 132, 144 (Iowa 2003). Thus, it is clear a proposed ward may have counsel acting in his or her behalf, in addition to a guardian ad litem, during these proceedings.

We note that under section 633.679 a person under a guardianship or conservatorship may petition the court to terminate the guardianship or conservatorship. Thus, although the person is under a guardianship or conservatorship, the person is not considered incompetent to challenge the

guardianship/conservatorship proceedings. We conclude counsel for the ward may file an appeal on behalf of the proposed ward to challenge the terms of the guardianship. We determine Johnson has standing to appeal the district court's decision.

IV. Justiciable Controversy

The guardians assert this case does not present a justiciable controversy, and is moot. They note that Dr. Varney testified that eventually Johnson would not be able to stay in his own home. They claim that by the time this appeal is completed it may be that even in the opinion of Johnson's expert he will no longer be able to live in his home with twenty-four hour a day assistance, and it will be impossible for the court to issue relief.

An appeal may be dismissed when a judgment, if rendered, would have no practical legal effect upon the existing controversy. *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001). An appeal is considered moot if it no longer presents a justiciable controversy because the contested issue has become academic or nonexistent. *Id.* The guardians merely speculative that this case may have become moot. We conclude they have not shown this case no longer presents a justiciable controversy. The appeal should not be dismissed as moot.

V. Least Restrictive Alternative

Johnson contends the district court improperly used a "best interests" standard instead of the standard of "least restrictive alternative" in determining where Johnson should be placed. Iowa guardianship law uses the standard of least restrictive alternative. *In re Guardianship of Hedin*, 528 N.W.2d 567, 583

(Iowa 1995). This means "the court must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing the guardian of the person." *Id*. at 577 (citing *In re Boyer*, 636 P.2d 1085, 1091 (Utah 1981)). The "court must consider the availability of third-party assistance to meet a ward's or proposed ward's need for such necessities." *Id.* at 579.

We determine the district court used the proper standard in this case. Near the beginning of the court's thirty-four page decision, the court states, "[t]he fighting issue to be resolved by way of this litigation is the most appropriate placement of the proposed Ward in an environment that is least restrictive of the proposed Ward's liberty interests consistent with the proposed Ward's decision-making capacity . . . ."

The court went on to carefully consider the evidence on the issue of whether Johnson could receive adequate care in his home. In addition to the proposed around-the-clock care to be provided by Preferred Security Services and Comfort Keepers, the court noted that Johnson would require in-home medical care and supervision. The court found Preferred Security Services and Comfort Keepers did not currently have sufficient staff to provide care to Johnson, and the employees of these companies were not trained to deal with patients with dementia. The court stated, "[b]ased upon the evidentiary record, the Court is not satisfied that the proposed businesses are equipped and able to provide the necessary supervision and care for Johnny that would be required to prevent physical injury or illness from occurring."

The court noted Johnson had previously agreed to in-home care, and then later refused to follow through. The court also noted Johnson's past history of aggressive and belligerent behavior. Considering all of these factors, the court concluded Johnson needed 24/7 supervision in a secure facility. The court determined "Arbor Springs is the least restrictive and most appropriate placement for Johnny at this time."

It is clear the district court did not place Johnson at Arbor Springs based on a finding that this was in his "best interests." The court's conclusion was based on a finding that the least restrictive alternative that met Johnson's needs was placement at a secure facility, such as Arbor Springs.

On our de novo review, we agree with the district court's conclusions. If Johnson remained at home under the scenario proposed at the hearing, his needs would not be adequately met. The proposal did not include any medical care.[1] Dr. Sanchez testified he believed there was a potentially greater risk that Johnson would harm himself if he remained at home.

Also, Johnson's proposal did not provide for socialization, which his physicians testified was important for the treatment and support of his dementia. Dr. Boyd testified that it was "a basic tenet of dementia care to provide a nurturing and supportive environment that helps the patient continue to participate in the world around them." Dr. Szymula testified "the ideal type of services he needs are from individuals that have direct experience with stimulating environments for individuals with dementia." Dr. Sanchez testified he

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[1] While Johnson did not need twenty-four hour medical care, but he would occasionally need medical and nursing care. Johnson had been prescribed several medications.

did not believe Johnson could receive well-rounded and complete care if he remained in his home.

We affirm the decision of the district court finding that placing Johnson at Arbor Springs was the least restrictive alternative under the facts of this case.

AFFIRMED.