

DA 23-0682

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 223

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IN THE MATTER OF THE GUARDIANSHIP  
AND CONSERVATORSHIP OF:

J.F.R.,

A Protected Person and Appellant.

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APPEAL FROM: District Court of the Third Judicial District,  
In and For the County of Granite, Cause No. DG-23-02  
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lawrence E. Henke, David L. Vicevich, Vicevich Law, Butte,  
Montana

For Appellee:

Julie R. Sirrs, Shelby K. Towe, Boone Karlberg, P.C., Missoula,  
Montana

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Submitted on Briefs: August 7, 2024

Decided: October 8, 2024

Filed:



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Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 J.F.R., a protected person, appeals the Third Judicial District Court’s November 20, 2023 order appointing Western Montana Chapter for Prevention of Elder Abuse (Western) as J.F.R.’s temporary full conservator, and Western, Stephanie Ross (Stephanie) and Jana Cooke (Jana), as temporary full co-guardians. J.F.R. contends the District Court erred in determining a temporary guardianship and temporary conservatorship were necessary. J.F.R. further argues the District Court did not follow statutory procedure, failed to recognize a conflict of interest created by the appointment of Western, and otherwise abused its discretion in making the appointments.

¶2 We restate the issues on appeal as follows:

1. *Whether the District Court erred by determining that the welfare of J.F.R. required immediate appointment of a temporary guardian under § 72-5-317, MCA.*
2. *Whether the District Court erred by determining that the welfare of J.F.R. required immediate appointment of a temporary conservator under § 72-5-421, MCA.*
3. *Whether the District Court’s appointment of Western, Stephanie, and Jana as temporary co-guardians and Western as temporary conservator was an abuse of discretion as violating the statutory order of priority.*
4. *Whether the District Court erred by determining that Western could serve as both temporary co-guardian and temporary conservator.*
5. *Whether the District Court erred by appointing a neuropsychologist instead of a doctor of medicine to evaluate J.F.R. for purposes of a temporary guardianship and temporary conservatorship.*

¶3 We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

¶4 J.F.R. is 80 years old and has two children, Jana and Stephanie. J.F.R. currently lives in Phillipsburg, Montana, with Stephanie in a home purchased in J.F.R.'s name, where Stephanie moved her from Idaho in 2022. Jana resides in Washington state. This matter is centered on a dispute between the sisters regarding the management of J.F.R.'s finances and her welfare. J.F.R. was diagnosed with mild cognitive impairment in 2018, with dementia in January 2020, and with late onset of Alzheimer's Disease in August 2022. Early in 2022, a previously open line of communication between Jana, J.F.R., and Stephanie became restricted, and Jana experienced difficulties in communicating with J.F.R. Communication between the sisters became adversarial, which diminished Jana and J.F.R.'s communications. In May 2023, Jana filed a verified petition for appointment of both Jana and Stephanie as temporary and permanent co-guardians and co-conservators. J.F.R. has recognized her decline in health and consented to a guardianship, joining in Stephanie's cross petition for appointment of Stephanie as sole guardian and conservator.

¶5 The District Court issued a prehearing order appointing the sisters as temporary co-guardians and co-conservators, Bonnie Malcolm (Malcolm) as visitor, and Dr. Loretta Bolyard (Dr. Bolyard) as physician. After a hearing, in which J.F.R.'s counsel assured the District Court that J.F.R.'s finances were being protected by a decision-making team, the District Court vacated its temporary appointments of co-guardians and co-conservators, but ordered the parties to proceed with discovery. The District Court also ordered that there should be no interference with Jana's communication with J.F.R., and J.F.R.'s counsel assured the court there would be none.

¶6 Jana proceeded to serve discovery requests upon Stephanie, some of which were not answered or produced by the time of the hearing on the petition. J.F.R.'s counsel also sought to quash subpoenas that Jana propounded to J.F.R.'s financial institutions to obtain J.F.R.'s account information.

¶7 Malcolm, the appointed visitor, conducted interviews with J.F.R., Jana, and Stephanie. Her report reflected that J.F.R. was experiencing cognitive and short-term memory impairment, had no understanding of her finances, including bill payments and the contents of her accounts, and noted that J.F.R. felt torn between her two daughters, both of whom she wanted in her life. She reported that J.F.R.'s remote Phillipsburg home was accessible, according to the District Court, "only by an extremely rough rutted dirt road and that in case of an emergency, Stephanie told Ms. Malcolm that an air ambulance from Butte would be required." The report recommended that the court appoint Western as sole conservator, and Stephanie, Jana, and Western as co-guardians.

¶8 J.F.R.'s counsel initially refused to allow J.F.R. to attend an evaluation with Dr. Bolyard, a neuropsychologist and the appointed physician, but after the District Court issued an order on a motion to compel, Dr. Bolyard completed an evaluation of J.F.R. Dr. Bolyard estimated that 80 percent of her practice addresses aging and dementia. She diagnosed J.F.R. with major neurocognitive disorder and determined that J.F.R.:

lacks the necessary capacity for a range of decisions and tasks. She would have severe limitations in her ability to independently understand, appreciate, and communicate choices regarding her personal well-being, financial affairs, and other personal matters.

Dr. Bolyard's report confirmed Ms. Malcolm's observations that J.F.R. felt stuck between her two daughters and was generally confused about her finances, expressing surprise to learn that she had a \$400,000 mortgage on the Phillipsburg property.

¶9 Upon receipt of Malcolm's and Dr. Bolyard's reports, Jana filed a Verified Emergency Petition for Appointment of Temporary Conservator and Temporary Co-Guardians (the Emergency Petition). The Emergency Petition alleged that Jana continued to deal with difficulties in contacting J.F.R. despite the District Court's direction to the contrary. Discovery answers from Stephanie explained that J.F.R.'s counsel had directed her to change her phone number and block Jana's phone number. Previously, J.F.R. had granted Jana joint access to her Charles Schwab accounts, but in January 2023, Jana noticed that nearly all the funds in the accounts had been withdrawn or transferred. Financial statements from Raymond James showed that in a five-month period J.F.R. had withdrawn \$200,000 from a trust account, and \$36,000 from an IRA held in that institution. By the end of May 2023, all funds in these accounts had been withdrawn.

¶10 J.F.R.'s response to the Emergency Petition conceded that in a ten-month span following a change in J.F.R.'s financial advisor from Raymond James to Fidelity, her assets had diminished by approximately \$300,000, from \$1.9 million to \$1.6 million. Jana served a subpoena on Fidelity for account statements, which J.F.R.'s counsel moved to quash. The District Court observed that, due to the unavailability of J.F.R.'s account statements, the reason for the reduction in her accounts remained unclear. Discovery disclosures revealed that Stephanie had been added to J.F.R.'s Wells Fargo checking account, which Stephanie explained was necessary for her to assist with management of J.F.R.'s affairs.

Stephanie also stated that J.F.R. paid her \$2,400 monthly for providing caregiving services. An account statement from April 2023 showed multiple transfers to Stephanie's account in the amount of \$6,878 in that month, including: a \$2,500 transfer, two transfers for \$1,689 each, and an additional transfer of \$1,000. Stephanie testified that the two transfers for \$1,689, or \$3,378 total, were for her monthly provision of caregiving services to J.F.R., but she was unable to remember the reasons for the other transfers. Jana requested production of additional bank statements from this account in discovery, which Stephanie failed to produce. Pursuant to a subpoena, Jana obtained a statement from J.F.R.'s Wells Fargo savings account spanning September 2022 to September 2023. This statement showed that, in that year, approximately \$297,000 had been transferred from J.F.R.'s account to Stephanie's account.

¶11 The District Court conducted a hearing on October 27 and 30, 2023. On November 20, 2023, the District Court granted the Emergency Petition, appointed Western as J.F.R.'s temporary conservator, and Western, Stephanie, and Jana as temporary co-guardians. The District Court concluded that substantial evidence established "an immediate need for the appointment of a temporary conservator," noting that J.F.R.'s assets "are being drained at an alarming rate." The court concluded that "[J.F.R.'s] current advisors are insufficient to meet her immediate need for financial protection." It explained that "[p]erhaps a thorough accounting will show that some transfers from [J.F.R.] to Stephanie are legitimate reimbursements for expenses incurred by Stephanie on [J.F.R.'s] behalf, but no one currently around [J.F.R.] is making that effort." The court likewise concluded that there was an immediate need for the appointment of co-guardians to act in J.F.R.'s best interests.

¶12 J.F.R. appeals.

### STANDARD OF REVIEW

¶13 A district court's order granting a temporary guardianship is immediately appealable and considered final. M. R. App. P. 6(4)(a); *In re Guardianship & Conservatorship of A.M.M.*, 2015 MT 250, ¶ 22, 380 Mont. 451, 356 P.3d 474. This Court reviews a district court's findings of fact to determine whether those findings are clearly erroneous. *In re A.M.M.*, ¶ 14 (quoting *In re J.R.*, 2011 MT 62, ¶ 17, 360 Mont. 30, 252 P.3d 163). A finding of fact will be considered clearly erroneous if "substantial evidence does not support it, if the district court misapprehended the effect of the evidence, or, if after reviewing the record, this Court is left with a firm conviction that a mistake has been made." *In re A.M.M.*, ¶ 14 (citation omitted).

¶14 We review conclusions of law made by a district court to determine if that court's conclusions are correct. *In re A.M.M.*, ¶ 14. Additionally, "[w]e exercise de novo review to determine whether the court correctly interpreted and applied the relevant statutes." *In re Estate of M.D.*, 2017 MT 22, ¶ 9, 386 Mont. 234, 388 P.3d 954. "Subject to statutory restrictions, the selection of the person to be appointed guardian or conservator is committed largely to the discretion of the trial court. This Court will interfere with such an appointment only in the case of a clear abuse of discretion." *In re Guardianship of J.S.M.*, 2021 MT 86, ¶ 10, 404 Mont. 21, 484 P.3d 939 (citation omitted).

## DISCUSSION

¶15 *I. Whether the District Court erred by determining that the welfare of J.F.R. required immediate appointment of a temporary guardian under § 72-5-317, MCA.*

¶16 J.F.R. argues that Jana failed to allege, and the District Court failed to find, that an “emergency” existed to justify appointment of a temporary guardian, which she argues is required under § 72-5-317, MCA.

¶17 Section 72-5-317(1), MCA, provides, “[i]f an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian *pending notice and hearing.*” Section 72-5-317(1), MCA (emphasis added). J.F.R. cites *In re Klos* for the proposition that a district court shall only appoint a temporary guardianship when a showing of “emergency” is made. *In re Klos*, 284 Mont. 197, 204, 943 P.2d 1277, 1281 (1997). However, *Klos* involved an incapacitated person who had not been served with notice of a temporary guardianship hearing, and appointment of the temporary co-guardians was made by the District Court *ex parte*. *In re Klos*, 284 Mont. at 204, 943 P.2d at 1281. No record had been prepared, and therefore no showing of emergency was made. *In re Klos*, 284 Mont. at 203, 943 P.2d at 1281. We held that, absent a finding of emergency circumstances, proper notice of the temporary guardianship hearing must be given. *In re Klos*, 284 Mont. at 204, 943 P.2d at 1281.

¶18 Here, in contrast, J.F.R. received proper notice, and the District Court held a two-day hearing, after which it entered findings of fact and conclusions of law upon which the temporary co-guardianship was ordered. Therefore, we are not concerned here with an emergency guardianship entered “pending notice and hearing.” Section 72-5-317(1),

MCA. Rather, J.F.R.'s argument is properly considered to be a challenge to the temporary guardianship, entered after notice and hearing, as not being necessary or justified under § 72-5-317(2), MCA, which provides:

[I]f there is no appointed guardian and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed 6 months.

Section 72-5-317(2), MCA. In this context, a district court must find that the welfare of an incapacitated person requires "immediate action" necessitating appointment of a temporary guardian.

¶19 J.F.R. consented to the appointment of a guardian, and no party challenges the District Court's determination that J.F.R. is incapacitated. As the court stated:

Convincing evidence establishes that J.F.R. is incapacitated. Dr. Bolyard's report and testimony described in detail the basis for her conclusion that J.F.R. lacks the necessary capacity for a range of decisions and tasks and has severe limitations in her ability to independently understand, appreciate, and communicate choices regarding her well-being, financial affairs, and other personal matters.

¶20 Conflicting testimony was offered regarding whether J.F.R.'s best interests are being served as she is currently cared for, and the District Court was entitled to assess the credibility of this testimony as factfinder. Stephanie argues that J.F.R. has chosen a support team and purposefully excluded Jana from it. She is dismissive of Jana's action in filing the Emergency Petition and the contentions therein as motivated by revenge. Regardless of motive, the District Court found that Jana has been largely cut out or limited in her communication with her mother, and that "[t]he Court's prior direction to not interfere in [J.F.R.'s] communications with Jana have not been followed." J.F.R. expressed a desire

for a continuing relationship with both of her daughters. Jana, as a physician herself, formerly was able to aid Stephanie with care and diagnoses related to J.F.R., but due to more recent communication problems, was delayed in learning of J.F.R.'s potentially serious hospitalization.

¶21 Jana's petition did not seek to replace Stephanie in managing J.F.R.'s care, but to share that role, a point which the District Court found to undermine Stephanie's allegation of an ill motive by Jana. We conclude that the District Court's findings were supported by substantial evidence, including its finding that, while J.F.R. "appears to be appropriately cared for in her current living arrangement, the current decision makers around [her] are making decisions that are not in her best interests." Consequently, the District Court did not err by determining that J.F.R.'s welfare required immediate action when taking all of the circumstances into account, which justified appointment of a temporary guardian.

¶22 *2. Whether the District Court erred by determining that the welfare of J.F.R. required immediate appointment of a temporary conservator under § 72-5-421, MCA.*

¶23 J.F.R. likewise argues that appointment of a conservator was not necessary. Section 72-5-421(1), MCA, provides, "[i]f the court finds that the welfare of the person requires immediate action, it may, with or without notice, appoint a temporary conservator for the person for a specified period not to exceed 6 months." Thus, a district court must find that the welfare of a protected person requires "immediate action" necessitating appointment of a temporary conservator.

¶24 Again, there was conflicting testimony regarding the management of J.F.R.'s finances, and J.F.R. argues, as she did before the District Court, that she had a competent

“decision-making team” in place. Remarkable, however, was the extent of the uncertainty about J.F.R.’s finances and the insufficiency of answers regarding significant transfers of J.F.R.’s funds. The District Court reasoned that “there appears to be an active effort to prevent the information needed for an accounting from coming to light,” and that, without such oversight, “[J.F.R.] is at genuine risk of running out of funds for her care before the end of her life.” Jana was hindered in receiving discovery answers and subpoenaed materials, which included financial statements that appeared to be of importance to evaluating the state of J.F.R.’s accounts. The District Court expressed concern at the hearing on the Emergency Petition about the uncertainty surrounding who was acting as trustee of J.F.R.’s “Exemption Trust,” which contained over a quarter million dollars. Accounts for which Jana had supervisory access were closed and the funds removed. Explanations for large transfers from J.F.R. to Stephanie remained unclear. The District Court reasoned that “[a] significant portion of [J.F.R.’s] funds were invested in her current home, which appears to have been a questionable decision.”

¶25 When considering the circumstances as a whole, we conclude the District Court’s findings were supported by substantial evidence and established that “immediate action” was necessary to protect J.F.R.’s estate, justifying appointment of a temporary conservator. Section 72-5-421(1), MCA.

¶26 *3. Whether the District Court’s appointment of Western, Stephanie, and Jana as temporary co-guardians and Western as temporary conservator was an abuse of discretion as violating the statutory order of priority.*

¶27 Citing to the priority listing set forth in § 72-5-312(2), MCA, for appointment of a guardian, and in § 72-5-410(1), MCA, for appointment of a conservator, J.F.R. argues the

District Court violated the statutes and abused its discretion by appointing temporary co-guardians and a temporary conservator that were inconsistent with the statutory order of priority for each position. However, each of these statutes also contains an express provision authorizing the court to deviate from the respective priority listing. For guardians, § 72-5-312(3), MCA, provides that “[t]he priorities established in subsection (2) are not binding, and the court shall select the person, association, or nonprofit corporation that is best qualified and willing to serve.” *See also In re Co-Guardianship of D.A.*, 2004 MT 302, ¶ 19, 323 Mont. 442, 100 P.3d 650 (“Subsection (1) clearly indicates that persons and entities may serve as guardians for incapacitated persons. Subsection (2) goes on to identify the order of priority a district court may appoint eligible guardians, however, subsection (3) permits the court to deviate from the priority schedule in order to ensure the guardian appointed is the best qualified and willing to serve.”). For conservators, “[t]he court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.” Section 72-5-410(3), MCA; *see In re A.M.M.*, ¶ 45. Consequently, we review the appointment decisions made pursuant to these statutes by a district court for abuse of discretion. *In re J.S.M.*, ¶ 10.

¶28 Here, the conflict between J.F.R.’s daughters was clearly evident in the litigation. Upon review of these difficult circumstances, the District Court concluded that a tripartite team of Stephanie, Jana, and a neutral third-party entity with professional experience as both a guardian and conservator would best serve J.F.R.’s interests. Similarly, the uncertainty surrounding J.F.R.’s finances, and the lack of open communication between Stephanie and Jana regarding those finances support the designation of a neutral third party.

The District Court found that, “[g]iven the strained relationship between Stephanie and Jana, it is appropriate that Western Montana Chapter be appointed as a third co-guardian to act as a neutral facilitator and to assist the parties as needed. The Western Montana Chapter is well-qualified to serve in this role and its involvement will benefit [J.F.R.]”

¶29 Upon our review of the record, we find no abuse of discretion in this determination, despite its deviation from the statutory priority listings, in accordance with the statutory authority to do so.

¶30 *4. Whether the District Court erred by determining that Western could serve as both temporary co-guardian and temporary conservator.*

¶31 J.F.R. makes a brief argument that the District Court also erred by appointing Western as guardian because Western is providing services as conservator, including “professional accounting, bookkeeping, and financial management,” which she argues would violate § 72-5-312(4), MCA, relating to conflicts of interest:

(4) Except as provided in subsection (5), the court may not appoint a person, institution, association, or nonprofit corporation to be the guardian of an incapacitated person if the person, institution, association, or nonprofit corporation:

(a) provides or is likely to provide during the guardianship substantial services to the incapacitated person in the professional or business capacity other than in the capacity of guardian.

Section 72-5-312(4), MCA.

¶32 “Subsection (4) anticipates potential conflicts of interest between identified guardian types and the incapacitated person, thereby prohibiting appointments of such guardians.” *In re D.A.*, ¶ 19. “The aim of the statute is to protect an incapacitated person from commercial relationships that can cause harm to the person. Accordingly,

we . . . hold that § 72-5-312(4)(a), MCA, requires a court to disqualify a person engaged in a business or professional relationship with an incapacitated person *when that relationship is likely to harm the interests of the incapacitated person.*” *In re M.D.*, ¶ 14 (emphasis added).

¶33 Western is a nonprofit entity that charges for its services as a conservator. According to the record, it acts as a neutral third party in a variety of different roles, including as court-appointed guardian, conservator, and trustee. At the time of the Emergency Petition hearing, Western was serving in 47 guardianships, 9 of which were co-guardianships, and 63 conservatorships. The range of duties Western provides as conservator includes reviewing financial transactions to assure that they are in the best interests of the protected person. Its specific approach is largely determined by the needs of an individual case. Western’s role when appointed a co-guardian includes helping with communication and with tasks for which other co-guardians need assistance.

¶34 “Section 72-5-423, MCA, provides that in the exercise of the conservator’s powers, the conservator is to act as a fiduciary and observe the standards of care applicable to trustees as specified in Title 72, chapter 34, part 1.” *In re J.R.*, ¶ 21. Thus, the law places duties upon Western mirroring those of a trustee. *In re J.R.*, ¶ 21. Western is providing financial services, not personal care or medically-related services to J.F.R., the provision of which could provide a motive for Western to authorize additional personal services as J.F.R.’s co-guardian to increase its own revenue. While all trust relationships carry the risk of abuse, there is nothing in this record demonstrating that the accounting and financial services provided by Western in addition to serving as a co-guardian currently constitutes

a relationship “likely to harm the interests of the incapacitated person.” *In re M.D.*, ¶ 14. It is possible that the potential for a conflict of interest could develop over the course of the proceedings. However, at this juncture, we conclude that Western’s appointment as conservator was not a violation of § 72-5-312(4), MCA.

¶35 5. *Whether the District Court erred by appointing a neuropsychologist instead of a doctor of medicine to evaluate J.F.R. for purposes of a temporary guardianship and temporary conservatorship.*

¶36 J.F.R. argues the District Court’s appointment of Dr. Bolyard, a licensed neuropsychologist, to evaluate her for purposes of a guardianship was in violation of the requirement that a “physician” be appointed. Section 72-5-315(3), MCA. J.F.R. also argues the District Court’s appointment of Dr. Bolyard to evaluate her for purposes of a conservatorship was in violation of § 72-5-408(2) and (3), MCA.

¶37 However, J.F.R.’s argument conflates the requirements for *temporary* and *permanent* guardianships and conservatorships. “A proceeding for a temporary guardianship is a proceeding separate and apart from a permanent guardianship proceeding. In fact, it appears under its own statutory heading at § 72-5-317, MCA.” *In re Klos*, 284 Mont. at 201, 943 P.2d at 1279. This Court has further addressed the distinctions between temporary and permanent guardianship proceedings. *See In re D.A.*, ¶ 29. The same distinctions are made in statute between temporary and permanent conservatorship proceedings. *See* §§ 72-5-408(2), -421, MCA. For purposes of the issue raised here, the appointment of a physician under § 72-5-315(3), MCA, is a requirement of the statutes governing the appointment of a permanent guardian. In contrast, there is no requirement that a physician’s evaluation and report be filed before appointment of a temporary

guardian can be made under § 72-5-317, MCA, which, as discussed above, is an abbreviated procedure premised upon a demonstrated need for “immediate action” on behalf of the incapacitated person. Section 72-5-317(2), MCA. Therefore, the physician requirement provided in § 72-5-408, MCA, is not a prerequisite for appointment of a temporary conservator. Before us here is only the District Court’s appointment of temporary guardians and temporary conservator pursuant to the Emergency Petition.

¶38 That said, there is nothing statutorily improper about a district court appointing a physician to evaluate a prospectively incapacitated person for purposes of a temporary guardianship or conservatorship. And, in doing so, a district court is not bound by the requirements of statute governing permanent guardianships. Consequently, no error is demonstrated on this issue.

¶39 Affirmed.

/S/ JIM RICE

We Concur:

/S/ BETH BAKER

/S/ INGRID GUSTAFSON

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA