

**COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION**

Estate of John Norman, an Incapacitated Person
O.C. No. 1063 IC of 2017
Control No. 180610

OPINION

John Norman was found to be a totally incapacitated person by this Court by Decrees dated December 7, 2017 and January 22, 2018, following hearings on the matter. Upon consideration of testimony and other evidence presented at the hearings, the Court further determined that it was in Mr. Norman's best interest to appoint a neutral guardian and appointed Howard Soloman, Esq., as the plenary guardian of his person and estate in the January 22 Decree. Mr. Norman's daughter, Gwendolyn Norman Harmon ("Movant"), filed a Motion for Reconsideration of this Court's decision to appoint Mr. Soloman as guardian of Mr. Norman's person and Estate. For the reasons stated below, the Motion is denied.

I. Background

Petitioner in this matter, the Philadelphia Nursing Home ("PNH") filed its petition for Adjudication of Incapacity and Appointment of a Plenary Guardian of the Person and Estate of John Norman on August 7, 2017. Proceedings were held on November 14, 2017, December 5, 2017, and January 17, 2018 to determine whether Mr. Norman is incapacitated and in need of guardianship services, and if so, who should be appointed to serve as his guardian.

Petitioner provided the Court with the deposition of Dr. Neal Satten as evidence of Mr. Norman's incapacity. After his examinations of Mr. Norman, Dr. Satten diagnosed him with dementia (unspecified with behavioral disturbance) and adjustment disorder with depressed mood. Dr. Satten reported that Mr. Norman requires assistance for all activities of daily living, is unable to meaningfully participate in any decisions regarding his health and finances, and that his condition was unlikely to improve due to the degenerative nature of dementia. (Dep. of Dr. Neal Satten, 2-4.) Dr. Satten also opined that Mr. Norman requires nursing home level care due to his limitations; currently, Mr. Norman receives round-the-clock supervision, blood sugar monitoring, medication administration, skin assessments, and help with bathing, dressing, and feeding in PNH. (Pet'r's Ex. 2, 4; Trial Tr. vol. 1, 52, Jan. 17, 2018.) Movant did not present any evidence that would rebut Dr. Satten's diagnosis, prognosis, or assessment of the level of care he requires. PNH proposed Howard Soloman, Esq., a neutral party, to be Mr. Norman's guardian; Movant proposed herself. Mr. Soloman is an attorney with a guardianship practice in



Philadelphia, is not employed by PNH, and does not provide PNH with legal representation.
(Pet'r's Mem. of Law)

Prior to the instant incapacity proceedings, Movant acted on Mr. Norman's behalf as his agent under a power of attorney dated September 14, 2009. (Trial Tr. vol. 1, 20, Dec. 5, 2017.) The power of attorney states that, in the event appointment of a guardian ever became necessary, Mr. Norman nominated Movant to serve. (Resp't's Ex. 2.) Mr. Norman did not name an alternate nominee to serve as guardian in the event Movant was unwilling or otherwise unable, but named his son, Movant's brother, Whaine C. Norman to serve as his agent if Movant herself was unwilling or unable to serve. (Id.) Whaine Norman did not take part in the proceedings and did not offer his qualifications or consent to serve as guardian for consideration.

During the hearings, the Court received testimony from James Gallagher, assistant director of finance and director of billing and accounts receivable at PNH. Mr. Gallagher testified that Ms. Harmon refused to turn over the entirety of Mr. Norman's income to PNH as is required for Mr. Norman to receive Medicaid assistance under Department of Human Services regulations, stating that Ms. Norman claimed to be using the money to pursue some legal action on her father's behalf—which Ms. Harmon later explained was a foreclosure dispute over the home Mr. Norman owned—and that her failure to turn over the entirety of his income caused Mr. Norman to accumulate arrearages in excess of \$44,000.00 to PNH. (Trial Tr. vol. 1, 10-14, Dec. 5, 2017.)

Movant testified that she had been unaware of the arrearages that had accumulated, claiming she had not received bills from PNH until the fall or winter of 2017, and that she was also unaware that she had to turn over all of Mr. Norman's income to PNH in order for him to qualify for a Medicaid nursing home grant. (Trial Tr. vol. 1, 21-23, Dec. 5, 2017.) She stated that the portion of Mr. Norman's income that she failed to turn over to PNH was being used to pursue multiple appeals related to a foreclosure dispute. (Id.; Trial Tr. vol. 1, 18-20, Jan. 17, 2018.) During her testimony, PNH introduced into evidence the report and recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, which found that: Movant failed to keep clients informed about the status of a matter and promptly comply with reasonable requests for information; failed to explain matters to the extent necessary to permit clients to make informed decisions regarding representation; commingled client money with her own; failed to promptly notify clients about funds received on their behalf and deliver such funds to them promptly; and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and recommended a three-year suspension of her license to practice law after a hearing held on the matter on August 27, 2004. (Pet'r's Ex. 1.) Movant was suspended for three years beginning December 13, 2004 and never applied for readmission to the bar following her suspension. (Id.; Trial Tr. vol. 1, 26-28, Dec. 5, 2017.) In both her testimony at the hearings and in her Motion,

Movant expressed a desire to remove Mr. Norman from PNH and have him live with her until such a time as she may be able to find placement for him in a Veterans Administration (VA) nursing home; however, no care plan to ensure that Mr. Norman would continue to receive the nursing home level care that he requires in a community setting has been established or presented to the Court. (Trial Tr. vol. 1, 31, Dec. 5, 2017; Trial Tr. vol. 1, 31-35, 50-52, 57, Jan. 17, 2017; Resp't's Mem. of Law.)

PNH also presented testimony from Sheri Gifford, Mr. Soloman, and Kevin Quinn, Esq. Ms. Gifford, who is the associate administrator of PNH, and Mr. Soloman, who served as interim guardian during the pendency of the proceedings, both gave testimony about an incident in which Movant removed Mr. Norman from PNH to take him out to dinner, without notice to or assent from Mr. Soloman, and was late in returning Mr. Norman to PNH after she took him to a VA hospital when she became concerned he was suffering from a sudden, acute health problem. (Trial Tr. vol. 1, 45-46, 68-73, 79, Jan. 17, 2018.) Ms. Gifford also testified to the care services Mr. Norman receives at PNH and normal procedures for determining the feasibility of and transitioning to community care for PNH residents. (Id. at 47-52.)

Mr. Quinn, who appeared under subpoena (Pet'r's Ex. 4), gave testimony about how the issue of Mr. Norman's capacity to contract and execute the power of attorney naming Movant as his agent arose in the foreclosure dispute between Movant and his client, Citi Mortgage. (Trial Tr. vol. 1, 60-63) In particular, he testified that Movant argued that the mortgage being foreclosed upon was invalid because Mr. Norman was incapacitated at the time of its execution. (Id.) However, the mortgage in question was executed before the power of attorney that gave Movant the authority to pursue the litigation on Mr. Norman's behalf. (Id.) Mr. Quinn recalled that Citi Mortgage argued that if Mr. Norman was incapacitated at the time he executed the mortgage, he would also have been incapacitated when he subsequently executed the power of attorney, rendering it invalid. (Id.) Mr. Quinn was unable to recall whether a decision regarding Mr. Norman's capacity was reached, and no further evidence on the matter was presented to the Court. (Id.)

At the close of the proceedings, this Court stated that it did not view Ms. Norman's nearly fourteen year old disciplinary issues or failure to turn over Mr. Norman's income to PNH as dispositive in determining the appropriate guardian for Mr. Norman. Explaining its rationale for appointing Mr. Soloman plenary guardian of Mr. Norman's person and estate, the Court stated:

Is it in [Mr. Norman's] best interest to be removed from [PNH], as the family may wish, and to be placed in a residential setting? It's not impossible for him to receive adequate care in a residential setting, but that would [need] to be evaluated by [the Philadelphia

Corporation for Aging (“PCA”)] and I’m willing to receive and entertain seriously a petition for review, if the family wishes to provide an evaluation by PCA that in-home nursing care is appropriate to his present needs and can address the very serious needs he has. **However, on the basis of the record today, I’m absolutely unwilling to see his removal from [PNH]. And since [Movant] focuses that as her interest and her decision, I will deny granting her guardianship over her father.** I’m reluctant to do that, because I know she loves him. She visits him. She cares for him and wants to be involved in his life. And if I thought that her decision making was more appropriate to his best interest and his long-term health, then I would readily accept her as his guardian. But I do not today. What is clear to me is that it is in his best interest to remain in [PNH] where is in need of daily assistance with all of his daily living requirements, bathing, food nourishment, medical monitoring, skin observations and everything that will be in his best interest and in his best care.

(Trial Tr. vol. 1, 87-88, Jan. 17, 2018)(emphasis added). The instant Motion for Reconsideration follows.

II. Discussion

That Mr. Norman is indeed incapacitated is not in dispute. Movant argues that: the Court erred in appointing Mr. Soloman as Mr. Norman’s guardian over Mr. Norman’s nomination of Movant in the power of attorney he executed naming her agent, or alternatively, that Whaine Norman should have been appointed over a neutral guardian; that appointment of a neutral guardian was not in Mr. Norman’s best interest; that Mr. Soloman’s appointment is a conflict of interest; and that Mr. Quinn’s testimony and her disciplinary record should not have been admitted into evidence.

The Motion’s focus on Mr. Quinn’s testimony and the admission of the report and recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania into evidence leads the Court to believe that Movant misunderstands why it appointed Mr. Soloman plenary guardian. Mr. Soloman was appointed instead of Movant because Movant expressed her intention to remove Mr. Norman from PNH without any established plan to ensure he receives the same level of care a nursing home provides in the community, and the Court found that removing him from PNH without such a care plan in place would not be in Mr. Norman’s best interest. Neither Mr. Quinn’s testimony nor Movant’s disciplinary record formed the basis of this Court’s decision. However, the Court will address each of Movant’s arguments in turn.

A. The Court's appointment of Mr. Soloman as guardian was an appropriate exercise of its discretion, and was in Mr. Norman's best interest.

Movant's first two arguments—that the Court erred in appointing Mr. Soloman as Mr. Norman's guardian over Mr. Norman's nomination as expressed in the power of attorney and that appointment of a neutral guardian was not in Mr. Norman's best interest—are inextricable from each other and therefore will be discussed together.

The selection of a guardian for a person adjudicated incapacitated lies within the discretion of the trial court, and should not be reversed absent an abuse of discretion. *Estate of Haertsch*, 437 Pa.Super. 187, 190, 649 A.2d 719, 720 (Pa. Super. 1994). An abuse of discretion exists when the trial court has failed to apply the law, is manifestly unreasonable, arbitrary, or capricious, or was motivated by partiality, prejudice, bias, or ill will. *Harman ex rel. Harman v. Borah*, 562 Pa. 455, 469, 756 A.2d 1116, 1123 (2000) (citations and quotations omitted). The paramount consideration in determining who should be appointed guardian is the best interest of the incapacitated person. *In re Duran*, 769 A.2d 497, 506 (Pa. Super. 2001) (“the trial judge may only appoint a guardian who will act in the best interest of his ward.”).

20 Pa.C.S. § 5511(f) permits courts to appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency, or a county agency, and instructs that preference should be given to the nominee of the incapacitated person where appropriate. Where an incapacitated person has previously executed a power of attorney,¹ courts are to make an appointment that accords with the principal's most recent nomination except for good cause or disqualification. 20 Pa.C.S. § 5604(c)(2).

Movant relies on *In re Sylvester* to support her argument that this Court erred in declining to appoint her guardian in spite of the nomination made in the power of attorney. Her reliance is misplaced. In *Sylvester*, the Superior Court reversed the Orphans' Court's decision to disqualify the agents under the incapacitated person's valid power of attorney and appoint different guardians. 409 Pa.Super. 439, 453-54, 598 A.2d 76, 83-84 (Pa. Super. 1991). In that case, though, the Orphans' Court had accepted as fact the allegations that the displaced agents had been misappropriating the incapacitated person's estate without any substantial evidence of malfeasance, after refusing to consider evidence to the contrary offered by the agents, and without considering their responsible conduct in their role as agents. *Id.* at 79, 84. The Superior Court further observed that the parties seeking to displace the agents as guardians failed to act in

¹ PNH questions the validity of the power of attorney Mr. Norman executed naming Movant as agent. However, PNH did not present any actual evidence that Mr. Norman was incapacitated at the time of its execution; while Mr. Quinn testified that the issue arose during the foreclosure litigation between Movant and Citi Mortgage, PNH did not present evidence of the holding on that issue in the foreclosure litigation, or any other evidence that would allow this Court to determine Mr. Norman's capacity when he executed the power of attorney in 2009.

the incapacitated person's best interest by, among other things, attempting to remove him from the nursing home he resided in despite his need for nursing home care. *Id.* at 83.

The decision to appoint Mr. Soloman as Mr. Norman's guardian was not made lightly. The Court credited the unrebutted testimony Dr. Satten offered via his written deposition that Mr. Norman suffers from dementia and adjustment disorder with depressed mood, that his condition is unlikely to improve due to the degenerative nature of his condition, and that he requires the extensive, round-the-clock supervision and care a nursing home provides. It found that it is in Mr. Norman's best interest for him to continue receiving the level of care PNH has provided and continues to provide to him. Movant has continuously expressed her desire and intention to remove Mr. Norman from PNH and have him reside in her home with her while she attempts to secure him long-term care in a VA facility, but she has not offered any sort of independent evaluation that would allow this Court to determine whether it is even feasible for Mr. Norman to continue receiving the high-level care he needs in the community setting. Even assuming, *arguendo*, that it is feasible for Mr. Norman to continue receiving the same level of care in the community, no care plan to ensure he actually would receive such services was developed or presented to this Court. In light of the uncertainty surrounding the availability of vital care services to Mr. Norman if he were to reside in Movant's home with her, the Court found that it is currently in his best interest to remain in PNH.

Given that no evidence regarding Whaine Norman's qualifications to serve as guardian or his consent to do so were ever presented to the Court, he cannot be properly considered. Movant's stated intention to remove Mr. Norman from PNH to her home without any adequate care plan in place is contrary to his best interest, and on the basis of that intention, the Court found that she would not be an appropriate guardian. Mr. Soloman—the only other nominee before the Court—is a professional guardian who is eminently qualified to serve. Mr. Soloman expressed no intention to remove Mr. Norman from PNH and the care he receives there, and the Court, therefore, found that his appointment as guardian would be in Mr. Norman's best interest.

B. Mr. Soloman has no conflict of interest.

Movant further argues that the Court erred in appointing Mr. Soloman as Mr. Norman's guardian because his appointment constitutes a conflict of interest. However, the allegation is baseless; Movant failed to actually demonstrate any conflict of interest, and the Court cannot find one.

In selecting a guardian for an incapacitated person, courts may not "appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person except where it is clearly

demonstrated that no guardianship support agency or other alternative exists.” 20 Pa.C.S. § 5511(f).

Mr. Soloman is not employed by PNH and does not provide the nursing home with legal representation. The record contains no evidence that even suggests that Mr. Soloman has any interest adverse to Mr. Norman’s, and Movant herself does not seem to suggest Mr. Soloman has any such adverse interest. The Court must conclude that no conflict of interest exists.

C. Mr. Quinn’s testimony and Movant’s disciplinary record are properly admitted relevant evidence.

Movant’s final argument is that the Court erred in admitting Mr. Quinn’s testimony and evidence of her disciplinary record into evidence because both were irrelevant² and should not have been considered when determining the appropriate guardian for Mr. Norman.

It bears repeating that neither Mr. Quinn’s testimony nor Movant’s disciplinary record served as the basis for denying Movant guardianship over her father. Movant was denied guardianship over Mr. Norman because she intended to remove him from PNH with no plan in place to ensure he continued to receive nursing home level care. Regardless, both Mr. Quinn’s testimony and Movant’s disciplinary record were properly admitted.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Pa. R.E. 401. Relevant evidence is admissible unless otherwise provided by law. Pa. R.E. 402.

Throughout the pendency of the present action, Movant has consistently maintained that Mr. Norman expressed his preference for her to serve as guardian via a clause in the power of attorney naming her his agent. Such an expression of preference is given a great deal of deference when selecting a guardian for an incapacitated person. See 20 Pa.C.S. § 5511(f); 20 Pa.C.S. § 5604(c)(2). Mr. Quinn’s testimony primarily revolved around how the issue of Mr. Norman’s capacity affected the foreclosure litigation between his client and Movant. In particular, he testified that Movant attempted to argue that the mortgage being foreclosed upon was invalid because Mr. Norman was incapacitated at the time of its execution. However, the mortgage in question was executed before the power of attorney that gave Movant the authority to pursue the litigation on Mr. Norman’s behalf. Mr. Quinn recalled that Citi Mortgage argued that if Mr. Norman was incapacitated at the time he executed the mortgage, he would also have been incapacitated when he subsequently executed the power of attorney, rendering it invalid.

² In her Motion, Movant attempts to argue that the admission of Mr. Quinn’s testimony and her disciplinary record violate Pa. R.E. 403; however, at the hearing, the only objection raised was to their relevance. Movant waived her Pa. R. Evid. 403 objection by failing to raise it during the hearing. Pa. R. Evid. 103.

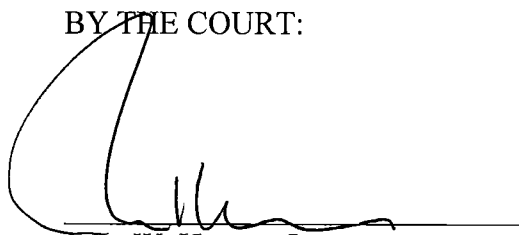
However, Mr. Quinn was unable to recall whether a decision regarding Mr. Norman's capacity was reached. While his testimony alone was far from sufficient to show that the power of attorney Movant relied on was invalid, Mr. Quinn's testimony is probative of its validity. Its validity is material in determining whether Mr. Norman actually nominated Movant to be his guardian via the power of attorney, which bears on this Court's selection of Mr. Norman's guardian.

Movant's disciplinary record is unquestionably relevant. After finding that a person is incapacitated, this Court is tasked with identifying and appointing an appropriate guardian, and must appoint a guardian that will act in the best interest of the incapacitated person. 20 Pa.C.S. § 5511; *In re Duran*, 769 A.2d 497, 506 (Pa. Super. 2001). Movant nominated herself to be guardian of Mr. Norman's person and estate. PNH nominated Mr. Soloman and advocated for his appointment as guardian, arguing that Movant was not fit to serve. Movant's disciplinary record is probative of her fitness to serve as guardian, particularly as guardian of Mr. Norman's estate, given that she was disciplined partially on the basis of her mishandling of client money held in her trust account. As the fitness of each potential guardian is central to determining who should be appointed, Movant's disciplinary record was properly admitted relevant evidence.

III. Conclusion

For the reasons stated above, the Court finds no error in its decision to appoint Mr. Soloman as guardian of Mr. Norman's person and estate. Accordingly, the Motion for Reconsideration is DENIED.

BY THE COURT:



John W. Herron, J.

Dated this 2nd day of April, 2018

Gwendolyn Norman Harmon, *pro se*
David Nagel, Esq.