

**COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**No. 1435 IC of 2015
Control Nos. 161151**

Estate of NORMA GUZMAN, An Incapacitated Person

OPINION SUR APPEAL

OVERTON, J.

Jose Bernacet has filed an appeal of this Court's May 19, 2016 Decree dismissing the Exceptions filed in response to the Court's March 17, 2016 Decree appointing Debra G. Speyer, Esquire as the Plenary Guardian of the Person and Estate of Norma Guzman, an Incapacitated Person.

Facts and Procedural History

Philadelphia Corporation for Aging ("PCA") filed a Petition for Adjudication of Incapacity and the Appointment of a Plenary Guardian of the Person and Estate on October 23, 2015. (Pet. for Adjudication). The Petition stated that Norma Guzman was a sixty-six year old female suffering from Alzheimer's dementia. (*Id.* at ¶¶ 2-4). The Petition alleged that Norma Guzman's conditions caused functional limitations that affected her ability to receive and evaluate information effectively and to make and communicate decisions. (*Id.* at ¶ 3). The Petition also stated that her conditions interfered with her ability to make informed judgments regarding her personal safety, medical care, and finances. (*Id.* at ¶ 4).

The Petition listed Norma Guzman's next of kin as her daughter, Yami Guzman, and her son, Jose Bernacet. (*Id.* at ¶ 7). PCA nominated Debra G. Speyer, Esquire as the proposed



guardian of the person and estate. (*Id.* at ¶ 11). The Petition stated that Debra G. Speyer, Esquire is licensed to practice law in the Commonwealth of Pennsylvania and concentrates her practice in elder law, elder fraud, investment fraud, guardianship, probate, wills, trusts and estates and is well-suited to be a guardian of the person and estate. (*Id.*).

On January 6, 2016, the Court appointed an attorney to represent her interests at the guardianship hearing. (01/06/16 Counsel Decree).

On February 9, 2016, the Court held a hearing on the Petition for Adjudication of Incapacity and the Appointment of a Plenary Guardian of the Person and Estate whereby the Court heard testimony from George S. Feuer, Ph.D., Shannon Mercadante, the PCA Investigator, Jose Bernacet and Lena Mejia, Norma Guzman's daughter. That hearing was continued until March 17, 2016 because Norma Guzman did not appear and the psychologist did not testify that it would be harmful for her to be in attendance. (N.T. 03/17/16, 2:20-3:14). Norma Guzman did not appear at the March 17, 2016 hearing and her attorney indicated to the Court that she did not wish to attend. (N.T. 03/17/16, 3:3-10). On the same date, the Court issued a Decree appointing Debra G. Speyer, Esquire as plenary guardian of the person and estate. (Final Decree).

On April 4, 2016, Appellant filed Exceptions to the Court's March 17, 2016 Decree. The Court held a hearing on the Exceptions on May 18, 2016. At the May 18, 2016 hearing, Jose Bernacet testified that his mother expressed to him that she wanted him to be her guardian. (N.T. 05/18/16, 8:9-13). He added that he had been taking care of her for nearly five years and that they live together. (N.T. 05/18/16, 8:14-25). He further testified that he helps her with bathing, taking medications and with preparing meals. (N.T. 05/18/16, 9:19-10:21). On May 19, 2016, the Court issued a Decree dismissing the Exceptions. (05/19/16 Decree).

On June 16, 2016, Appellant filed a timely Notice of Appeal. Statements of Matters Complained of on Appeal were requested and properly tendered on July 18, 2016. Appellant raised the following issues in his Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b):

1. The Honorable Trial Court Judge erred when appointing a guardian by not giving preference to the nominee of the Incapacitated Person pursuant to 20 Pa. Cons. Stat. § 5511(f).
2. The Honorable Trial Court Judge erred when appointing a guardian by not selecting the named party in the Incapacitated Person's properly executed durable power of attorney, as required by 20 Pa. Cons. Stat. § 5604(c)(2).
3. The Honorable Trial Court Judge erred by holding a guardianship hearing and issuing a decree without ensuring that all of the interested persons named in the Incapacitated Person's will had the notice of the hearing and an opportunity to file objections.

Discussion

A. Appointing a Plenary Guardian Is Within the Sound Discretion of the Court

Appellant asserts that the Court erred by not giving preference to him when considering who to appoint as the plenary guardian of the person and estate. This claim is without merit.

Pursuant to 20 Pa.C.S. § 5512.1, the Court must first determine capacity then determine who should be the guardian. It is well-settled that “[t]he selection of a guardian for an incompetent lies within the sound discretion of the court to which the application for such appointment has been made.” *In re Coulter's Estate*, 178 A.2d 742, 747 (Pa. 1962). When

choosing a guardian, “[i]f appropriate, the court shall give preference to a nominee of the incapacitated person.” 20 Pa. C.S. § 5511(f).

In its Petition, PCA nominated Debra G. Speyer, Esquire to be the proposed guardian. (Pet. for Adjudication at ¶ 11). At the February 9, 2016 hearing, Appellant testified that he is his mother’s the primary caregiver. (N.T. 02/09/16, 26:6-7). At the hearing on the Exceptions on May 18, 2016, Appellant presented himself as an alternate proposed guardian. (N.T. 05/18/16, 11:5-11).

On February 9, 2016, George S. Feuer, Ph.D. testified that Norma Guzman scored a one out of ten on the mental status questionnaire he performed. (N.T. 02/09/16, 7:19-21; 8:1-2). He stated that score was consistent with severe cognitive impairment. (N.T. 02/09/16, 8:2-3). Dr. Feuer also performed a clinical interview and found that Ms. Guzman suffers from Alzheimer’s dementia. (N.T. 02/09/16, 7:21-23; 8:3-5).

Shannon Mercadante, the PCA Investigator then testified about the results of PCA’s investigation. (N.T. 02/09/16, 12:5-20:4). She stated that PCA made efforts to transport Ms. Guzman to the February 9, 2016 hearing but that Jose Bernacet told PCA that she would not be coming to the hearing and that he would be coming instead. (N.T. 02/09/16, 12:18-21). The PCA Investigator also stated that Ms. Guzman had been assessed to determine the appropriateness of potential PCA services and added that all services had been declined. (N.T. 02/09/16, 13:6-8). Ms. Mercadante indicated that she was concerned that Ms. Guzman had been “isolated in her home,” unable to see the rest of her family members or neighbors. (N.T. 02/09/16, 13:11-16). Ms. Mercadante added that Ms. Guzman seemed depressed and that, in the year since PCA was involved, PCA had no knowledge of her seeing a doctor. (N.T. 02/09/16, 13:17-19; 14:8-9). She also testified that there was a disagreement between PCA and Jose

Bernacet regarding Ms. Guzman's ability to get the medical care that she needs. (N.T. 02/09/16, 14:5-6). Ms. Mercadante further stated that upon contacting the pharmacy, PCA confirmed that Ms. Guzman did not have her medications for dementia and diabetes refilled. (N.T. 02/09/16, 15:2-8). Finally, Ms. Mercadante testified that as a result of its investigation, PCA requested that a neutral, non-family member be appointed as the plenary guardian of the person and estate of Ms. Guzman. (N.T. 02/09/16, 16:3-5; 19:15-23).

Counsel for Ms. Guzman made a statement to the Court explaining his efforts to communicate with his client. (N.T. 02/09/16, 21:11-24:10). Counsel stated that he confirmed with Appellant that he would be visiting Ms. Guzman on a specific date and time, but that when he arrived, he was unable to gain admittance to the home. (N.T. 02/09/16, 23:1-12). Counsel added that Appellant called him and indicated that Appellant would not be communicating with his mother's attorney. (N.T. 02/09/16, 23:13-14).

Lena Mejia, Ms. Guzman's daughter, testified that the rest of the family had been prevented from seeing or speaking to Ms. Guzman. (N.T. 02/09/16, 29:12-17). She stated that wanted her mother to be in a safe environment. (N.T. 02/09/16, 30:9-10). She added that on numerous occasions she knocked on her mother's door and was unable to gain admittance to the home. (N.T. 02/09/16, 31:24-32:2). She testified that she preferred the appointment of a neutral guardian who would act her mother's best interest. (N.T. 02/09/16, 32:15-18).

No evidence was presented at the March 17, 2016 hearing.

In determining whether the Court should reconsider its decision to appoint Debra G. Speyer, Esquire as Ms. Guzman's guardian, it considered both the testimony presented at the hearing on the Exceptions as well as the previous testimony given to the Court. At the May 18, 2016 hearing on the Exceptions, Jose Bernacet indicated that he was living with his mother and

that he had been responsible for her care for nearly five years. (N.T. 05/18/16, 8:14-25).

However, there was no evidence presented that Debra G. Speyer, Esquire would be unqualified to serve as the plenary guardian of the person and estate. Contrarily, at previous hearings, there were multiple witnesses who testified that Appellant restricted access to Norma Guzman. (N.T. 02/09/16, 13:11-16; 23:1-12; 32:15-18). Furthermore, Ms. Guzman's daughter testified that a neutral guardian would serve in her mother's best interest. (N.T. 02/09/16, 32:15-18).

Additionally, the PCA Investigator testified that Ms. Guzman had not been to the doctor in at least a year and that PCA had concerns over whether Ms. Guzman was properly receiving her prescription medications. (N.T. 02/09/16, 14:8-9; 15:2-8).

The Court notes that Norma Guzman did not express a preference for Jose Bernacet to be her plenary guardian at any hearing nor did she communicate a preference to her attorney.¹ In the instant case, she did not attend the hearings on February 9, 2016, March 17, 2016 or May 18, 2016 whereby she could have expressed her desires to the Court. The Court gave full consideration to Appellant's ability to serve as a proposed plenary guardian. However, after multiple hearings and upon consideration of the testimony of the witnesses as well as the attestations of her counsel, the Court in the exercise of its sound discretion appointed Debra G. Speyer, Esquire as the plenary guardian of the person and estate of Norma Guzman. Therefore, this claim is without merit.

¹ Although Appellant did assert that his mother told him she wanted Appellant to be her guardian, she did not communicate this to the Court either directly or by and through counsel. *See* N.T. 05/18/16, 8:9-11.

B. The Court is Not Required to Appoint the Agent Under Power of Attorney As Plenary Guardian

Appellant states the Court erred in appointing Debra G. Speyer, Esquire as plenary guardian of the person and estate because the durable power of attorney document explicitly stated it was irrevocable despite adjudication of incapacity. This claim is without merit.

Appellant states when an agent under power of attorney has been appointed, 20 Pa. C.S. § 5604(c)(2) requires the Court to make guardianship decisions in accordance with the principal's most recent nomination in a durable power of attorney. Section 5604(c)(2) states that:

A principal may nominate, by a durable power of attorney, the guardian of his estate or of his person **for consideration** by the court if incapacity proceedings for the principal's estate or person are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney **except for good cause** or disqualification.

20 Pa. C.S. § 5604(c)(2) (emphasis added).

Appellant asserts that pursuant to 20 Pa. C.S. § 5604(c)(2), the Court did not make a determination of “good cause” when it appointed Debra G. Speyer, Esquire instead of Appellant as the plenary guardian of the person and estate. Section 5604(c)(2) only requires that the Court consider an agent under power of attorney and make such an appointment except for good cause or disqualification. 20 Pa. C.S. § 5604(c)(2). As previously stated, the PCA Investigator recommended a non-family member to be appointed as guardian. (N.T. 02/09/16, 16:3-5; 19:15-23). There was a statement to the Court that Ms. Guzman’s counsel was unable to gain admittance to the home despite pre-arranging a date and time with Appellant. (N.T. 02/09/16, 23:1-12). There was also testimony that Ms. Guzman had not been to the doctor in at least a year and that there were concerns about whether she had been receiving her prescription medications. (N.T. 02/09/16, 14:8-9; 15:2-8). Ms. Guzman’s daughter also stated that she felt that a neutral

guardian would be in her mother's best interest. (N.T. 02/09/16, 32:15-18). Therefore, the Court finds that there was good cause shown for why Appellant should not be appointed as the plenary guardian of the person and estate.

Additionally, while Norma Guzman's Durable Power of Attorney document states "[t]his Power of Attorney shall not be affected by my subsequent disability or incapacity" (Pet. for Adjudication at Ex. A, p. 7), this language is not binding on the Court. In accordance with the Court's standard practice, its Final Decree dated March 17, 2016 states that "all powers of attorney executed or purportedly executed by Norma Guzman are declared null and void." (Final Decree at 3). Again, because the Court appointed Debra G. Speyer, Esquire as plenary guardian of the person and estate upon consideration of the testimonial evidence of Appellant, the independent psychologist, the PCA investigator, and Ms. Guzman's daughter, this claim is without merit.

C. The Court Ensured Proper Service on Interested Persons Named In the Petition

Appellant states that the Court did not ensure that all interested persons named in Norma Guzman's Will had received notice of the hearing. This claim is without merit.

Appellant asserts that Teresa Baez was named in Norma Guzman's Will and was not given notice of the guardianship proceedings. (1925(b) Statement at ¶¶ 3.1, 3.4). Appellant also states that she now seeks to raise objections to Debra G. Speyer's appointment as plenary guardian of the person and estate. (1925(b) Statement at ¶ 3.8). While Appellant contends that "Norma Guzman's Will was submitted to the Court and put into the record," (1925(b) Statement at ¶ 3.2), the Will of Norma Guzman was not admitted into evidence or attached as an exhibit to any filing. Furthermore, to the extent that Teresa Baez Gonzalez is named in the Will and did not receive notice of the guardianship hearing, no objections were raised at any of the hearings

on February 9, 2016, March 17, 2016, or May 18, 2016. The Court finds this claim to be waived and therefore is without merit.

Conclusion

Based on the record, this Court's Decree dated May 19, 2016 dismissing the Exceptions should be **AFFIRMED**.

BY THE COURT:

Date: 11/2/16



OVERTON, J.

Mario C. Lozada, Esquire
David Nagel, Esquire
Jerome A. Zaleski, Esquire
Debra G. Speyer, Esquire