

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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*In re* Conservatorship of UEAL E. PATRICK.

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MARK PATRICK, Conservator for UEAL E.  
PATRICK,

UNPUBLISHED  
October 12, 2017

Petitioner-Appellee,

v

KATHERINE G. PATRICK,

No. 335521  
Jackson Probate Court  
LC No. 16-000739-CA

Respondent-Appellant,

and

BRIANNE PATRICK,

Other Party.

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Before: TALBOT, C.J., and O'CONNELL and O'BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order naming petitioner as the conservator for Ueal E. Patrick (Ueal) pursuant to MCL 700.5401(3). We affirm.

At the time this case commenced, respondent was involved in a separate divorce proceeding with Ueal. Ueal's son, petitioner, was handling Ueal's divorce litigation with respondent based on a previously granted durable power of attorney. However, during the proceedings in that dispute, respondent alleged that petitioner was inappropriately handling Ueal's affairs. This ultimately created a need for a conservator for Ueal.

For this reason, on August 11, 2016, petitioner filed a petition for appointment of a conservator for Ueal. The petition alleged that Ueal was an adult individual unable to manage his property and business affairs effectively because of "mental deficiency" and had property that would be wasted or dissipated unless proper management was provided. The petition further provided that Ueal "has suffered significant cognitive decline which has been exacerbated by the

stress of litigation.” The petition alleged that Ueal nominated petitioner as conservator and requested that petitioner be appointed as conservator based on that nomination.

On September 13, 2016, respondent filed a response and objection to the petition. In the response, respondent admitted “that [Ueal] is an adult unable to manage his property and business affairs effectively because of mental deficiency for the reason that it is true.” It also admitted that Ueal “has suffered significant cognitive decline for the reason that it is true.” However, respondent objected to the appointment of petitioner as conservator because, respondent alleged, Ueal “lack[ed] the requisite mental ability to effectively nominate a conservator requiring this Court to make the appropriate order of appointment of conservator.”

At the time that the August petition was filed, Ueal was also in a dispute with Brianne Patrick (Brianne), who was respondent’s daughter, regarding Brianne’s removal from Ueal’s trusts. In that dispute, petitioner was also acting pursuant to his power of attorney to handle the litigation. On September 22, 2016, Brianne filed an objection and response to the petition requesting to appoint petitioner as conservator. Like respondent, Brianne admitted that Ueal was “an adult unable to manage his property and business affairs effectively because of mental deficiency” and was “suffering from significant cognitive decline.” Also like respondent, Brianne objected to “Ueal’s ability to nominate a conservator.”

On October 11, 2016, the trial court held a hearing on the petition. Initially, the trial court was hesitant to accept the parties’ stipulation that Ueal was mentally deficient because it did not have medical evidence proving that. The trial court then questioned Ueal directly, and he indicated that he wanted petitioner to take care of his affairs, “[h]owever we word it.” The trial court then reiterated that it could not conclude that Ueal “lacked cognitive ability” without “any medical information that supports that,” and it allowed petitioner, Ueal, and their attorney to discuss in private how they wished to proceed.

Following the recess, Ueal was sworn in to testify. Ueal stated that he recently began “having trouble with [his] short term memory,” which made it difficult to handle his affairs, particularly in the context of his ongoing divorce and trust litigations. He indicated that he wished for petitioner to handle his affairs because they had worked together for 30 years. The trial court asked whether Ueal was “stipulating . . . by clear and convincing evidence that he’s a person that requires a [conservator] and is unable to manage his property and business affairs effectively as a result of short term memory issues,” to which Ueal’s attorney confirmed.

The trial court then heard argument from Brianne’s counsel. Brianne’s counsel stated, “I don’t really think that we have any objection to the appointment of a conservator,” but rather had an objection to Ueal’s nomination of petitioner. Brianne’s counsel argued that Ueal did not have the capacity to make that nomination and that an independent medical evaluation (IME) was necessary “so the court has information to know how much weight it should give to his nomination.” Brianne’s counsel also objected to petitioner being named as conservator for Ueal because he had an “innate conflict of interest” with the ongoing litigation involving Ueal’s trust. Specifically, Brianne’s counsel argued that there was a conflict of interest because any decrease in Brianne’s share of the trust necessarily increased petitioner’s share. Respondent’s counsel likewise stated that respondent was “opposed to the court going forward at this point without having an [IME] so that [it] can make an informed decision.”

The trial court stated that Brianne's and respondent's "arguments [were] without merit" because Ueal was "willing to stipulate . . . by clear and convincing evidence as a result of memory deficiency, he's a person that can't manage his own property and business affairs." After taking testimony from petitioner confirming that he had no criminal history and was willing to serve as Ueal's conservator, it appointed petitioner as Ueal's conservator based on Ueal's "stipulation by clear and convincing evidence as a result of mental deficiency" that he "is unable to manage his property and business affairs effectively and that those assets need proper management or they will be wasted or dissipated."

On appeal, respondent first argues that the trial court erred by appointing a conservator pursuant to MCL 700.5401(3) because MCL 700.5401(4) precludes stipulation to subsection (3). We disagree. "We review a probate court's appointment or removal of a fiduciary for an abuse of discretion." *In re Conservatorship of Shirley Bittner*, 312 Mich App 227, 235; 879 NW2d 269 (2015). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.* "We review issues of statutory interpretation de novo." *Id.* at 236.

The trial court found that a conservator was proper pursuant to MCL 700.5401(3), which states:

The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

MCL 700.5401(4) provides as follows:

The court may appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment.

Respondent argues that, because MCL 700.5401(4) is voluntary, subsection (3) necessarily cannot be voluntary, but rather must be proved.

However, respondent waived challenge to the appointment of a conservator under MCL 700.5401(3). Waiver is "the *intentional* relinquishment of a known right." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009). "A party cannot stipulate with regard to a matter and then argue on appeal that the resulting action was erroneous." *Hodge v Parks*, 303 Mich App 552, 556; 844 NW2d 189 (2014). In her objection and response to the

petition, respondent “[a]dmitted that Ueal E. Patrick is an adult unable to manage his property and business affairs effectively because of mental deficiency for the reason that it is true” and that he had “property that will be wasted or dissipated unless proper management is provided for reason that it is true.” In a later response, respondent reiterated, “It is Respondent’s position that it is clear that [Ueal] needs a full Conservator who is not an interested person.” Respondent never amended her response or otherwise indicate that she believed that a conservator was inappropriate for Ueal. Indeed, even on appeal respondent contends that any error by the trial court in appointing a conservator was “not because Ueal does not require a conservator.” Because respondent stipulated in the lower court that Ueal satisfied the requirements of MCL 700.5401(3), she cannot now argue on appeal that the trial court’s decision to appoint a conservator for Ueal pursuant to MCL 700.5401(3) was error. See *id.* Respondent’s waiver eliminated any error. See *The Cadle Co*, 285 Mich App at 255.

Even if this issue were not waived, respondent’s argument fails. Respondent’s argument that MCL 700.5401(4) precludes stipulation to subsection (3) is based on an incorrect reading of MCL 700.5401(3). Respondent incorrectly asserts MCL 700.5401(3) applies to “mentally incompetent” persons. This is simply not the case. Nowhere does MCL 700.5401(3) state that a person must be mentally incompetent for that provision to apply. See *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013) (“The courts may not read into the statute a requirement that the Legislature has seen fit to omit.”). Instead, this Court has interpreted MCL 700.5401(3) as applying to persons that need a conservator for one of the stated reasons or some other reason “of a similar nature and quality.” *In re Townsend Conservatorship*, 293 Mich App 182, 188-189; 809 NW2d 424 (2011). Thus, MCL 700.5401(3) clearly does not require a person to be “mentally incompetent,” as respondent suggests. And because MCL 700.5401(3) does not require a person to be mentally incompetent to apply, respondent’s assertion that the Legislature intended for MCL 700.5401(3) and (4) to apply to mutually exclusive groups of persons thereby precluding conservatorships by stipulation in subsection (3) is incorrect. Accordingly, because “stipulations are favored by the judicial system and are generally upheld,” *Napora v Napora*, 159 Mich App 241, 246; 406 NW2d 197 (1986), the trial court did not err by accepting Ueal’s stipulation as satisfying the requirements of MCL 700.5401(3).

To the extent that respondent argues that the trial court should have ordered an IME, her argument is without merit. MCL 700.5406(2) states in relevant part as follows:

If the alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may direct that the individual alleged to need protection be examined by a physician or mental health professional appointed by the court, preferably a physician or mental health professional who is not connected with an institution in which the individual is a patient or is detained. The individual alleged to need protection has the right to secure an independent evaluation at his or her own expense.

“In general, our courts have said that the term ‘may’ is ‘permissive,’ as opposed to the term ‘shall,’ which is considered ‘mandatory.’ ” *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (internal citations omitted). As such, MCL 700.5406(2) did not require the trial court in this case to order an IME. Based on the parties stipulation that Ueal was mentally deficient, the trial court did not err by not ordering the IME because the only purpose an IME would have

served would have been to confirm what the parties had already stipulated to. Moreover, respondent provides no case law to support her proposition that the trial court should have ordered an IME to assist it in determining what weight should be given to Ueal's nomination for a conservator. Accordingly, the trial court's decision to not order an IME in this case was within the range of reasonable and principled outcomes. *In re Conservatorship of Shirley Bittner*, 312 Mich App at 235.

Respondent also argues that the trial court erred by appointing petitioner as Ueal's conservator because he had conflicts of interest that made him unsuitable to serve as conservator. We disagree.

A conservator is included in the definition of a "fiduciary" under Michigan law. MCL 700.1104(e). "[A] conservator shall act as a fiduciary and observe the standard of care applicable to a trustee." MCL 700.5416. A "trustee shall act as would a prudent person in dealing with the property of another." MCL 700.7803. "To be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment." *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988). "In addition, the courts have imposed on the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith." *Id.* Pursuant to MCL 700.5409(1):

The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in [MCL 700.5106] to serve as conservator of a protected individual's estate. The following are entitled to consideration for appointment in the following order of priority:

(a) A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.

(b) *An individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney.*

(c) The protected individual's spouse.

(d) An adult child of the protected individual.

(e) A parent of the protected individual or a person nominated by the will of a deceased parent.

(f) A relative of the protected individual with whom he or she has resided for more than 6 months before the petition is filed.

(g) A person nominated by the person who is caring for or paying benefits to the protected individual.

(h) *If none of the persons listed in subdivisions (a) to (g) are suitable and willing to serve*, any person that the court determines is suitable and willing to serve. [Emphasis added.]

At trial, Ueal nominated petitioner to act as his conservator. The trial court, apparently accepting Ueal's nomination, appointed petitioner pursuant to MCL 700.5409(1)(b). On appeal, respondent never directly states that Ueal did not have "sufficient mental capacity" to nominate a petitioner as required in MCL 700.5409(1)(b). Although respondent asserts in her reply brief that this was her argument, an issue raised for the first time on appeal in a reply brief is not properly before this Court. See *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012), lv den 493 Mich 939 (2013). Because respondent failed to properly brief the issue, see MCR 7.212(C)(7), or provide the basis for this Court to decide the issue, it is abandoned, see *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 518; 885 NW2d 861 (2016) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

Even if this argument were not abandoned, it is meritless. Ueal signed a power of attorney on October 23, 2015, naming petitioner as conservator in the event that Ueal became incapacitated for any reason. This power of attorney has gone completely uncontested. It was attached to the petition for appointment of a conservator and, therefore, was part of the lower court record and is now part of the record on appeal. See MCR 7.210(A). Under MCL 700.5409(1)(b), Ueal was able to nominate a conservator pursuant to a power of attorney, and it is not contested that, at the time he signed the power of attorney, Ueal had sufficient mental capacity to make an intelligent choice. Accordingly, even if the trial court erred by accepting Ueal's recommendation for conservator at the hearing, the error was harmless because Ueal named a conservator almost one year before in his durable power of attorney. See MCR 2.613(A).

Respondent's main argument is that petitioner could not serve as Ueal's conservator due to his alleged conflicts of interests. However, respondent did not actually identify any conflicts of interest. A conflict of interest involves more than a purported disagreement—it, instead, is defined as "incompatibility between one's private interests and one's . . . fiduciary duties." *Black's Law Dictionary* (10th ed). As conservator to Ueal, petitioner only owed fiduciary duties to Ueal; he did not owe fiduciary duties to other interested persons,<sup>1</sup> such as Ueal's spouse or heirs. As such, when the trial court was considering whether petitioner was an appropriate conservator for Ueal, it did not need to consider conflicts of interest between petitioner and other affected parties. The trial court's only concern was whether petitioner's interests conflicted with

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<sup>1</sup> " 'Interested person' or 'person interested in an estate' includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual . . . ." MCL 700.1105(c).

Ueal's, and there is no indication that they did. Because this is the only basis for respondent's argument that petitioner was not "suitable" to act as conservator for Ueal, her argument fails.

Affirmed.

/s/ Michael J. Talbot  
/s/ Peter D. O'Connell  
/s/ Colleen A. O'Brien