STATE OF MICHIGAN

COURT OF APPEALS

In re CONSERVATORSHIP OF ELAINE F. STRAITH.

KELLY LEONARD and KOREN RODDY, Co-conservators of ELAINE F. STRAITH ,

Petitioners-Appellees,

v

JAMES D. LITTELL,

Respondent-Appellant.

UNPUBLISHED
May 14, 2019

No. 346103
Kent Probate Court
LC No. 18-203944-CA

Before: GLEICHER, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Respondent James D. Littell appeals by right the probate court's order appointing petitioners Kelly Leonard (Leonard) and Koren Roddy (Roddy) as co-conservators of the estate of their mother, Elaine F. Straith (Straith).[1] Respondent is Straith's husband, and Straith had previously nominated him as her power of attorney. We affirm.

I. BACKGROUND

Respondent and Straith married in 2007, and have been together since 2000. Straith was diagnosed with Alzheimer's disease and late-onset dementia without behavioral disturbances in 2018. Respondent is in remission from cancer, and is disabled by the amputation of his right arm and partial paralysis on his right side. As noted, Straith had previously granted respondent a power of attorney prior to her Alzheimer's and dementia diagnoses. Petitioners are two of

[1] The probate court also appointed petitioners as Straith's co-guardians, but no party has sought to appeal the guardianship.

Straith's adult children. The need for Straith to have a conservator and guardian is undisputed; rather, the question in this matter is only who should serve in those roles.

Petitioners argue that respondent verbally and physically abused Straith, endangered her with unsecured weapons and unsecured medication, and isolated her by restricting her communication with her family and refusing to facilitate any social interactions. Petitioners also claim that respondent drank daily. Respondent denied that he drinks daily, kept weapons in unsecure locations; or verbally or physically abused Straith. Shortly after Straith returned home after visiting Leonard for five days, Leonard received a call from respondent asking Leonard to return and take Straith back to Leonard's house. Straith had started sobbing to respondent, saying she wanted to go back and live with Leonard. Leonard returned and picked up Straith, and since that time, Straith has continued to live with Leonard. Petitioners allege that respondent had been restricting their access to Straith's needed to pay for her medical bills and further care. Respondent denies this, and claims that petitioners had improperly cut him off from Straith.

On October 8, 2018, the probate court entered an order appointing petitioners as co-guardians and co-conservators and revoking prior durable powers of attorney for finance. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews a probate court's appointment of a conservator for an abuse of discretion. *In re Bittner Conservatorship*, 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*. This Court reviews for clear error the probate court's factual findings and reviews de novo its legal conclusions. *Id*. at 235-236. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011) (quotation marks and citation omitted). Statutory interpretation is a question of law and is reviewed de novo. *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

III. FACTUAL FINDINGS

Respondent argues that the probate court clearly erred by failing to follow the statutory requirements set forth in MCL 700.5401(3) because the probate court made no factual findings that Straith's property would be wasted or dissipated under the management of respondent. We disagree. Critical to this issue is the interpretation and significance of 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. [(emphasis added).]

"If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and further judicial construction is not permitted." *McElhaney ex rel. McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493, 711 NW2d 795 (2006).

There is no dispute that MCL 700.5401(3)(a) is satisfied. The use of the word "or" in MCL 700.5401(3)(b) is disjunctive, and it generally indicates a separation between two independent alternatives. See *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 35; 878 NW2d 799 (2016). Thus, the trial court needed *either* to find that Straith had "property that will be wasted or dissipated unless proper management is provided," *or* find that Straith needed money for her support, care, and welfare, "and that protection is necessary to obtain or provide money." The probate court made factual findings that respondent restricted Straith's funds from being used by petitioners to pay for Straith's medical bills and care, stating:

> "In regards to the conservatorship – all right, again, there's clear and convincing evidence that Ms. Straith is in need of a conservator. She's unable to manage her property and business affairs effectively, again, due to mental deficiency or mental illness. Money is needed for her support and care. There is liquidity to the estate. Bond must be filed.
>
> Again, the question is who serves. Ms. Straith – does not wish her husband to serve in that capacity of conservatorship any longer. She wishes to have her daughters serve in that capacity. There have been some restrictions on Ms. Straith's funds by her husband. But, again, Court finds both her daughters to be suitable to serve in the position of conservator. Ms. Straith nominates her daughters to serve in that capacity."

This constitutes a finding that money was needed for Straith's support, care, and welfare, and that protection was necessary to ensure the money was available. Therefore, the probate court was not required to make additional factual findings that Straith's assets were in danger of being wasted or dissipated under the management of respondent. Proper factual findings were made by the probate court permitting petitioners' appointments of conservatorship under MCL 700.5401.

IV. ORDER OF PRIORITY

Respondent argues that the probate court failed to apply the order of priority required under MCL 700.5409(1) by appointing petitioners over himself. We disagree. Petitioners do in fact have priority under MCL 700.5409(1), which states in relevant part:

> (1) The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in section 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. [(emphasis added).]

Straith nominated petitioners to serve as her conservators while meeting with her guardian ad litem. Her guardian ad litem testified to this, stating:

> I had the opportunity to meet with Ms. Straith in her home, with her daughter, on September 11 of 2018. We reviewed the court documents and her rights. We also reviewed a copy of the durable power of attorney for health care and finance. She indicated she does not want [Respondent] to be her durable power of attorney. She does not want – or she does want her daughters [Leonard] and [Roddy] to be appointed as co-guardians and co-conservators.

Straith's guardian ad litem also testified to her mental state. Straith's most recent neuro-psych evaluation was completed on August 15, 2018, approximately one month before Straith met with her guardian ad litem. Her guardian ad litem stated:

> I also had an opportunity to review some of the medical records and the durable powers of attorney.
>
> The outpatient neuro-psych eval that was completed by Dr. Donders on August 15, the diagnosis indicates Alzheimer's disease with late-onset and dementia without behavioral disturbances. And, as part of the impression and recommendation, he states Ms. Straith is definitely in need of supervision with regard to the management of her finances, as well as her medications. *However, I do believe that she has the mental capacity to make informed decisions about where she wants to live and who she wants to live with*. [(emphasis added).]

This testimony of the guardian ad litem is evidence that Straith had sufficient mental capacity to make an informed decision when she said that she wanted petitioners to be her co-conservators. Because this evidence of Straith's mental capacity and expressed wishes was presented before the probate court, the probate court did not clearly err in finding petitioners to hold priority under MCL 700.5409(1)(b). In contrast, respondent, as Straith's spouse, holds a lower priority pursuant to MCL 700.5409(1)(c). The probate court's appointment of petitioners as Straith's co-conservators properly applied the order of priority under MCL 700.5409(1).

Respondent's argument that he has priority under MCL 700.5503(2) is also a misinterpretation of the statute. MCL 700.5503(2) states:

> By a durable power of attorney, a principal may nominate the conservator, guardian of his or her estate, or guardian of his or her person for consideration by

> the court if a protective proceeding for the principal's person or estate is commenced after execution of the power of attorney. 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. [MCL 700.5503(2) (emphasis added).]

The statute does not define "good cause," but Black's Law Dictionary (8th ed) defines good cause as "[a] legally sufficient reason." *Richards v McNamee*, 240 Mich App 444, 451-453; 613 NW2d 366 (2000). Straith expressed to the guardian ad litem that she did not trust respondent to manage her assets in her best interests, and she wanted petitioners to be appointed as co-conservators. Additionally, the probate court found that respondent was restricting Straith's and petitioners' access to Straith's assets necessary for Straith's care. We conclude that these facts constitute a "legally sufficient reason" for the probate court to decline to appoint a conservator "in accordance with the principal's most recent nomination in a durable power of attorney."

We therefore need not address petitioners' argument, in reliance upon *In re Guardianship of Gerstler*, 324 Mich App 494; 922 NW2d 168 (2018), that respondent cannot be appointed as conservator because he never actually filed a petition nominating himself to serve as guardian or conservator. As discussed, there was good cause not to appoint respondent as conservator, and petitioners hold the highest priority for appointment as conservators.

V. FIDUCIARY AND FINANCIAL RESPONSIBILITIES OF SPOUSES

Respondent finally argues that the probate court erred by failing to recognize the fiduciary and financial duties imposed on respondent and Straith by marriage. We disagree. Respondent does not cite to any provision of the probate code or any other authority establishing that spouses automatically owe each other any kind of fiduciary duty. This Court generally will not seek out authority in support of an appellant's position. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, marriage "is a unique relationship based on mutual trust and commitment," but it "is not a relationship that has traditionally been recognized as involving fiduciary duties." *In re Estate of Karmey*, 468 Mich 68, 74-75; 658 NW2d 796 (2003).

Petitioners assert that even if a fiduciary relationship existed, respondent's conduct of restricting Straith's funds would have violated that relationship. Petitioners, however, also cite no authority in support of this position. Because no evidence of a fiduciary relationship has been provided, it is unnecessary to determine whether respondent would have breached a hypothetical.

Respondent argues that Straith could not revoke her nomination of respondent as her durable power of attorney, and therefore the trial court was required to appoint respondent as conservator pursuant to MCL 700.5409(b). We disagree. Under MCL 700.5409(1)(b), an individual may make a nomination for a conservator if that individual is "of sufficient mental capacity to make an intelligent choice, *including* a nomination made in a durable power of attorney." Thus, a nomination in a durable power of attorney is merely one option, and here, the evidence established that Straith was of sufficient mental capacity to make an intelligent choice. The probate court was not precluded by Straith's marriage to respondent or by any mental incapacity Straith suffered from appointing petitioners co-conservators of Straith's estate.

VI. CONCLUSION

We conclude that the probate court did not err in its appointment of petitioners as co-conservators of Straith and its revocation of prior durable powers of attorney for finance.

Affirmed. Petitioners, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien