For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE:	)	**S. Ct. Civ. No. 2018-0071**
	)	Re: Super. Ct. GU. No. 11/2017 (STX)
GUARDIANSHIP OF IVAN FARRELLY	)	
	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Denise A. Hinds Roach

Considered: November 17, 2020
Filed: April 29, 2021

Cite as: 2021 VI 8

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **RENÉE GUMBS CARTY**,[1] Designated Justice.

APPEARANCES:

Ronald E. Russell, Esq.
The Russell Law Firm, LLP
St. Croix, U.S.V.I.
Attorney for Appellant,

Eszart A. Wynter, Sr., Esq.
Law Offices of Eszart A. Wynter, Sr., P.C.
St. Croix, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Denise Farrelly ("Denise") appeals the Superior Court's judgment appointing Lynette Quinones Farrelly ("Lynette") as the guardian of Ivan Farrelly, Sr. ("Ivan"). For the reasons that

[1] Associate Justice Maria M. Cabret is recused from this matter. The Honorable Renée Gumbs Carty has been designated in her place pursuant to title 4, section 24 of the Virgin Islands Code.

follow, we will vacate the Superior Court's judgment and remand this case so that the proper statutory procedures are followed, including the appointment of a "visitor."

I. BACKGROUND

¶ 2 This case arises over a dispute between Ivan's daughter, Denise, and his current wife, Lynette, regarding which person should serve as his guardian. Ivan, the proposed ward, is an 84-year-old resident of St. Croix. Ivan began dating Lynette in 1992 and married her in 1995. At the time of the marriage, Ivan, who already had seven children,[2] was 59 years old and Lynette was 30. All the children live outside the Virgin Islands, except for Denise, who lives on St. Croix.

¶ 3 Ivan and Lynette divorced in 2005 and Lynette had a temporary restraining order placed against Ivan.[3] Despite the divorce, the couple remained friendly.

¶ 4 Ivan began living with Denise starting sometime in 2015. In December of 2015, Denise left the island to seek medical care, leaving Ivan in the care of his brother, David Edwards, and his partner, Gwendolyn Meyers. Denise remained off island until January 2017.

¶ 5 During this time in 2015, Ivan's friends noticed that he had symptoms of memory loss and that he would forget conversations. As a result of these observations, on December 4, 2015, while Ivan was staying with David and Gwendolyn, they took him to a doctor to have an MRI performed.

¶ 6 Later, in 2016, Ivan was examined by Dr. David Weisher, a neurologist on St. Thomas. Dr. Weisher performed a mini-mental status exam and reviewed the December 2015 MRI. He issued a report on August 30, 2016, concluding that Ivan was moderately cognitively impaired and

[2] The children are: Beryl, Denise, Myrtle, Brenda, Anthony, Patrick, and Ivan Jr.

[3] Lynette testified that during their marriage, Ivan physically attacked her after his children accused her of being unfaithful. She claims the children were upset that he married her, rather than their mother.

suffered from moderately advanced Alzheimer's disease, and he therefore recommended that someone take care of Ivan's affairs.

¶ 7 According to Ivan's son, Ivan, Jr., Ivan called him at some point in 2015 to request help with his living condition. In response, Ivan Jr. travelled from Florida to St. Croix to check on his father. He alleges that when he arrived on St. Croix, his father was undernourished, that he did not recognize him, and that he was living in a house with no food. Ivan Jr. claims he discovered that Denise had withdrawn funds from Ivan Sr.'s bank accounts. He also claims that his father requested that his former wife Lynette take care of him. Lynette confirmed that Ivan lived in poor conditions and that in the past Denise and Ivan's brother, David, had taken Ivan to bars where he would drink heavily. Sometime in late 2015, or 2016, Ivan began living with Lynette again.[4]

¶ 8 On February 17, 2017, while Ivan was living with Lynette, Denise filed an emergency petition for guardianship of Ivan. The basis for the petition was Ivan's age, Dr. Weisher's diagnosis of moderate Alzheimer's, and that he was being manipulated and controlled by his former wife, Lynette. Denise's concerns were triggered in part when Lynette and Ivan closed the bank account she shared with her father. Denise claims Lynette prevented his adult children from contacting him.

¶ 9 Ivan, through attorney Eszart Wynter, filed an answer and amended counterclaim on March 1, 2017. Ivan, claimed, among other things, that Denise had depleted his bank accounts and that he was capable of managing his own affairs. He also requested an accounting of his accounts over which Denise had control. Later, on November 28, 2018, Ivan amended this filing to request that if a guardian was to be appointed that it be Lynette.

[4] It is not clear from the record what happened to the restraining order preventing Ivan from contacting Lynette.

¶ 10 The Superior Court held a hearing concerning the emergency petition on March 16, 2017. However, it determined that Ivan's other children had not been adequately notified, and re-scheduled the hearing. The Court also discharged Ivan's court-appointed attorney because Ivan had retained attorney Wynter. On May 17, 2017, Ivan re-married Lynette.

¶ 11 The Superior Court held its final hearings on November 27 and 28, 2018. In addition to the parties, the following persons appeared and provided testimony: Ivan Jr.; Gwendolyn Meyers; and Dr. David Weisher and psychologist Dr. Ramona Moss, by telephone.

¶ 12 Dr. Weisher testified that Ivan had moderately advanced Alzheimer's disease. He recommended the appointment of a guardian, reasoning that Ivan was vulnerable to manipulation.

¶ 13 Dr. Moss had examined Ivan in March of 2017. She testified that she agreed with Dr. Weisher's conclusion that Ivan was cognitively impaired and diagnosed him with having an "unspecified neurocognitive disorder." She agreed that he needed supervision. Dr. Moss noted that Ivan had problems with executive functioning and would need daily physical and emotional support.

¶ 14 Ivan also testified at the hearing. While testifying he could not remember his phone number, who was representing him, or why he was in court. When asked to whom he was married, he pointed to his wife but incorrectly identified her as Denise.

¶ 15 On December 5, 2018, the Superior Court issued its written decision and order appointing Lynette as Ivan's sole guardian. Denise timely filed a notice of appeal with this Court on December 28, 2018. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 16 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). The Superior Court's December 5, 2018 judgment was a final order because it "ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment." *Pub. Employees Relation Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 433 (V.I. 2012). This Court exercises plenary review over applications of law and reviews findings of fact for clear error. *See St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

B. The Failure of the Superior Court to Appoint a Visitor

¶ 17 Denise, Ivan's adult daughter, commenced this action seeking to be appointed as his guardian. Lynette, Ivan's current wife,[5] filed an appearance and also later sought appointment as his guardian. Ivan's son, Ivan Jr., who interceded to facilitate the removal of his father from Denise's residence to that of Lynette, supported Lynette's request to be appointed as Ivan's guardian.[6] All the other siblings and Ivan's brother supported Denise's appointment as Ivan's guardian. Attorney Eszart Wynter appeared on behalf of Ivan and supported Lynette's appointment as guardian.

[5]Ivan and Lynette were not married at the time of Denise's filing in February of 2017. However, they subsequently remarried in May of 2017.

[6] Ivan Jr. and Denise were both Ivan's children, but by different mothers. He was the only one of the children to support Lynette's appointment as guardian. The other children, who all supported Denise's appointment as guardian, shared the same mother as Denise.

¶ 18 Despite these conflicting claims the court decided the merits of this guardianship case without ever appointing the statutorily required visitor to assist it in its determination. Guardianships are designed to help others when they are incapable of managing their own affairs. *See Cianci v. Chaput*, 64 V.I. 682, 689 (V.I. 2016). In 2016, the Legislature enacted Act No. 7958, the "Virgin Islands Uniform Guardianship and Protective Proceedings Act" ("VIUGPPA"). The statute provides that "[u]pon receipt of a petition to establish a guardianship, the Court *shall* set a date and time for hearing the petition *and appoint a visitor*." 15 V.I.C. § 5-305(a) (emphasis added). The responsibilities of the visitor include interviewing the respondent to determine the respondent's views about the proposed guardian, explaining the nature of the petition and its effects, and informing the respondent of the right to a lawyer. *See* 15 V.I.C. § 5-305(c). The visitor must also interview the petitioner and proposed guardian, visit the respondent's dwelling, and produce a written report to the court with recommendations regarding the appropriateness of guardianship. *See* 15 V.I.C. § 5-305(d)-(e).

¶ 19 This procedure is important to guardianship proceedings because a guardianship can severely restrict a ward's liberty and significantly affect property interests. These proceedings require due process of law. *See In re Guardianship of Smith*, 54 V.I. 517, 532 (2010) (discussing the failure of the Superior Court to provide the proposed ward with proper notice and a full hearing).

¶ 20 The VIUGPPA is based on the Uniform Guardianship and Protective Proceedings Act of 1997 ("UGPPA"). The prefatory note to the UGPPA explains that the court "must appoint a visitor" before the hearing. The UGPPA Comment to Section 305, the equivalent to 15 V.I.C. § 5-305, explains that the visitor "serves as the information gathering arm of the court." The visitor serves an important role, providing the court with recommendations regarding the appropriateness

of guardianship, and acting as the "eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court." UGPPA § 305, cmt. Pursuant to the dictates of the VIUGPPA, 5 V.I.C. § 5-434, we are required to interpret the statutory requirements to promote the statute's underlying purpose and to help make the law uniform among the jurisdictions that have enacted it.

¶ 21 In this case, no visitor was appointed. The Superior Court requested briefing on the issue of a visitor in its June 20, 2017 order, but none of the parties responded. The Superior Court erroneously concluded in its August 8, 2017 order that a visitor was not required because this matter fell under 15 V.I.C. § 5-406(a).[7] This provision specifies that an appointment of a visitor is not required upon the filing of a protective order if the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The court's conclusion was in error because section 5-406 does not apply to guardianships. Unlike protective orders, where the appointment of a visitor may be optional some of the time,[8] guardianship actions pursuant to section 5-305 require the appointment of a visitor. *See Arguello v. Balsick*, 446 P.3d 937, 938 (Colo. App. 2019) (stating that Colorado's similar version of UGPAA required the court to appoint a visitor for every petition for guardianship filed and that all prospective guardians must undergo the statutorily mandated process before the court can appoint a guardian). Here, a petition for

[7] This statute provides as follows: "Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the Court shall set a date for hearing. The Court shall appoint a visitor unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer."

[8] "Appointment of a visitor is mandatory when a conservatorship is sought for reasons other than minority even if the respondent is represented by a lawyer . . . . Only when the respondent is represented by counsel and the petitioner is seeking a protective order other than the appointment of a conservator is the appointment of a visitor waived." UGPPA § 406, cmt.

guardianship was filed, and a guardian was ultimately appointed. Accordingly, the Superior Court was statutorily required to appoint a visitor in the initial hearing following receipt of the petition.

¶ 22 In prior incompetency proceedings, this Court has held that if a statute prescribes a certain method for determining competency, such procedures must be strictly followed. *Smith*, 54 V.I. at 526 (citing *In re Swanson*, 804 P.2d 1, 5 (Wash. 1990)). Here, the statute is clear that the appointment of a visitor was required. Neither party has briefed this issue on appeal. However, this Court has held that the "failure to comply with statutory requirements intended to safeguard the ward's rights . . . may be raised by an appellate court *sua sponte* . . . ." *Id.* at 527.

¶ 23 Although in this case a guardian has been appointed and in place for over two years, we have no way of knowing whether the appointment of a visitor would have resulted in a different outcome. *See Arguello*, 446 P.3d at 943 (remanding the case for the court to appoint a visitor despite the fact that the court had previously appointed a guardian). We also emphasize the importance of following the law, which requires the appointment of a visitor in guardianship cases and that requirement needs to be fulfilled in all such cases.[9] Therefore, this Court vacates the Superior Court's order appointing Lynette as Ivan's guardian and remands this case so that a visitor may be appointed in accordance with 15 V.I.C. § 5-305(a).

C. Finding of "equal priority" for Lynette

¶ 24 Having determined that this case must be remanded for the appointment of a visitor, there ordinarily would be no need to address the parties' other arguments. However, certain of those

[9] In reviewing the statutes it appears that the Superior Court's failure to appoint a visitor upon the filing of the petition may have prejudiced Denise as the court did not have the benefit of the visitor's report at that time. Subsequently, Lynette's remarriage to Ivan after two doctors had found Ivan to be cognitively impaired may have given her an advantage in the proceeding.

issues could recur on remand, and thus we address those here. *See Smith v. Turnbull*, 54 V.I. 369, 374 (2010) ("[A]n appellate court, when ordering a remand to a trial court for further proceedings based on its disposition of one issue may, in the interests of judicial economy, nevertheless consider other issues that, while no longer affecting the outcome of the instant appeal, are likely to recur on remand.") (internal quotation marks and citation omitted).

¶ 25 Denise argues on appeal that the Superior Court erred in finding that Lynette had "equal priority" to Denise to be Ivan's guardian. The VIUGPPA statute lays out a priority hierarchy with respect to whom the court should consider when appointing a guardian. *See* 15 V.I.C. § 5-310(a).[10] The Superior Court placed both Denise and Lynette in the second tier, which encompasses "a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference." 15 V.I.C. § 5-310(a)(2). The Superior Court considered Denise to be in that category because in May of 2016, Ivan had executed a power of

[10] The statute lays out the following seven tiers of priority for a court to consider in appointing a guardian:

> (1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in the Virgin Islands or elsewhere;
> (2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;
> (3) an agent appointed by the respondent under the durable power of attorney for health care;
> (4) the spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;
> (5) an adult child of the respondent;
> (6) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and
> (7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

attorney appointing Denise his attorney-in-fact. The Superior Court also considered Lynette to be in that category because Ivan requested, through a court filing by his counsel, that his wife be appointed his guardian, if a guardian was found to be necessary.

¶ 26 Denise has cast doubt on the validity of Ivan's supposed expressed preferences because a doctor had found in 2015 that Ivan was unable to make serious life decisions.[11] Denise argues that Ivan's grant of a power of attorney to her should give her priority over Lynette. This same argument would also appear to apply to Denise as well however, as Ivan executed the power of attorney to Denise in 2016, well after the initial medical finding.

¶ 27 We conclude that the Superior Court failed to comply with the statute's requirement to consider persons nominated by the guardian, only "if at the time of the nomination the respondent had sufficient capacity to express a preference." 15 V.I.C. § 5-310(a)(2). If a respondent does not have sufficient capacity to express a preference, any expressed preference should be disregarded. *See In re Estate of Runyon*, 343 P.3d 1072, 1077 (Colo. App. 2014) (disagreeing with the party's assertion that an incapacitated person's nomination can never create priority for the nominee, but agreeing that a remand was necessary because "the record does not show that the trial court found that [the proposed ward] had sufficient capacity to express a preference at the time of the nominations.").

¶ 28 In this case, the Superior Court did not make an affirmative finding as to whether Ivan had sufficient capacity to express a preference at the time his attorney made the representation that he wanted Lynette to be his guardian. The Superior Court explained that at the time Ivan moved to

[11] Ivan's request for Lynette to be his guardian also came after Dr. Moss's March 2017 examination and her conclusion agreeing with Dr. Weisher that Ivan was cognitively impaired. (JA 10.)

amend his pleadings to nominate Lynette, there was not enough evidence to prove by the clear and convincing standard that Ivan was incompetent and therefore lacking the mental ability to consent to his wife's appointment as a guardian. Therefore, the Superior Court reasoned it could not presume that he was incompetent, and therefore had to consider his motion to include Lynette as his proposed guardian as valid.

¶ 29 This reasoning is a flawed interpretation of the statute. The statute requires that the court consider whether "at the time of the nomination the respondent had sufficient capacity to express a preference." *See* 15 V.I.C. § 5-310(a)(2).[12] The court should not merely assume capacity, but rather, must affirmatively find that Ivan had sufficient capacity to make such a nomination. Because the respondent is only found to be incompetent at the end of the proceedings, under the Superior Court's approach, every respondent's expressed preferences would always be considered valid regardless of actual competency. In this case, the lack of such a finding by the Superior Court is concerning because two doctors had already testified to Ivan's diminished capacity and when he testified, he stated that he did not know why he was there in court or who was representing him.[13] The court need not find that Ivan was in fact not incapacitated at the time the preference was expressed, but merely that he had sufficient wherewithal to express a preference. *see In re Guardianship of Macak*, 377 N.J. Super. 167, 176 (N.J. Super. Ct. App. Div. 2005) ("A person

[12] *See supra* note 10.

[13] It is noteworthy that when Ivan testified he was not asked by the court or either lawyer who he would like to be his guardian. He was not even asked if he wanted a guardian at all. As explained in the prefatory notes to the UGPPA, "limited guardianships . . . should be used whenever possible, and the guardian . . . should always consult with the ward or protected person, to the extent feasible, when making decisions."

who is incapacitated may nonetheless still be able to express an intelligent view as to his choice of guardian, which view is entitled to consideration by the court.").

¶ 30 On remand, the Superior Court must determine whether or not Ivan had the capacity to express a preference—both when he granted Denise a power of attorney, and when Ivan's lawyer, Wynter, filed a motion during the trial stating that Ivan preferred Lynette as his guardian.[14]

III. CONCLUSION

¶ 31 We vacate the Superior Court's December 5, 2018 judgment and remand this case for fulfillment of the statutory requirements, including the appointment of a visitor.

DATED this 29th day of April 2021.

BY THE COURT:

_/s/ Rhys S. Hodge_____
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

[14] On remand the Superior Court should also determine whether Attorney Wynter is representing both Lynette and Ivan or only one or the other. We note that many courts have held that ordinarily a lawyer should not represent both a putative ward and a third-party petitioning for guardianship. *See, e.g.*, *In re Discipline of Laprath*, 670 N.W.2d 41, 58 (S.D. 2003) (citing ABA Opinion No. 96-404's holding that a lawyer may not represent a third party in seeking to have a court appoint a guardian for his client); *but see In re Thetford*, 574 S.W.3d 362, 378-79 (Tex. 2019) (holding that a lawyer may represent a third-party seeking guardianship over his incapacitated client if the lawyer reasonably believes the representation is in his client's best interests as the client would have defined it when the client had capacity).

By: /s/ Natasha Illis
Deputy Clerk

Dated: **April 29, 2021**