552 S.W.3d 873

In the GUARDIANSHIP OF A.E., an Incapacitated Person

NO. 02-17-00189-CV

Court of Appeals of Texas, Fort Worth.

DELIVERED: June 14, 2018

ATTORNEY FOR APPELLANTS: STEPHEN E. DUBNER, LAW OFFICE OF STEPHEN E. DUBNER, LEWISVILLE, TEXAS.

ATTORNEY FOR APPELLEE: MARY H. BARKLEY, CANTEY HANGER LLP, FORT WORTH, TEXAS.

ATTORNEYS FOR AMICUS COOK CHILDREN'S HEALTH CARE SYSTEM: RICKEY J. BRANTLEY, ALEX PELLEY, FORT WORTH, TEXAS, LISA H. JAMIESON, POPE, HARDWICKE, CHRISTIE, SCHNELL, KELLY & TAPLETT, L.L.P., FORT WORTH, TEXAS.

ATTORNEYS FOR AMICUS DISABILITY RIGHTS TEXAS: RICHARD LAVALLO, BRIAN EAST, DISABILITY RIGHTS TEXAS, AUSTIN, TEXAS.

PANEL: GABRIEL, PITTMAN, and BIRDWELL, JJ.

MARK T. PITTMAN, JUSTICE

[552 S.W.3d 876]

This is an appeal from the denial of an uncontested guardianship application. In nine issues, Appellants H.E. and P.E. challenge the probate court's denial of their application to be appointed guardians of the person of their intellectually-disabled adult daughter, A.E. Because we hold the probate court abused its discretion in denying the guardianship, we reverse and remand.

BACKGROUND

A.E. has a moderate intellectual disability and moderate encephalopathies. She has an IQ between 50 and 55, and she lives with her mother, H.E., and her father, P.E. Shortly before her eighteenth birthday, A.E.'s parents filed an application for guardianship of her person. *See* Tex. Est. Code Ann. § 1103.001 (West 2014) (providing that a person may file an application for a minor who, because of an incapacity, will require a guardianship after the proposed ward is no longer a minor). A.E. turned eighteen two weeks before the hearing on the application.

The guardianship was not contested by A.E.'s court-appointed attorney ad litem. At the hearing, A.E.'s parents testified about the need for a guardianship and introduced a certificate of medical examination from A.E.'s treating physician stating that she may decline to treat A.E. in the future due to A.E.'s inability to give informed consent. The court investigator testified that she did not believe a guardianship was necessary because supports and services and alternatives to guardianship were sufficient, but she conceded that she would change her mind on that point if A.E.'s doctor refused to treat A.E.

At the conclusion of the hearing, the probate court denied the guardianship application, finding that A.E.'s parents had not shown by clear and convincing evidence that supports and services and alternatives to guardianship were not feasible. The probate court subsequently filed findings of fact and conclusions of law, including findings that A.E. had not experienced any problems in receiving medical treatment since becoming an adult (that is, in the two weeks between her eighteenth birthday and the hearing) and that A.E. is agreeable to allowing her parents to assist her in making medical treatment decisions. The probate court further concluded that it is not in A.E.'s best interest to take away her rights and appoint a guardian; that A.E.'s rights do not need to be protected by the appointment of a guardian; and that all of A.E.'s needs are being met.

fastcase Smarter legal research.

Parents, H.E. and P.E., now appeal.

STANDARD OF REVIEW

We review a probate court's guardianship determinations for an abuse of discretion. *In re Guardianship of Alabraba* , 341 S.W.3d 577, 579 (Tex. App.—Amarillo 2011, no pet.) ; *In re Guardianship of Parker* , No. 2-06-217-CV, 2007 WL 4216255, at *4 (Tex. App.—Fort Worth Nov. 29, 2007, no pet.) (mem. op.). A trial court abuses its discretion if the court acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry* , 221 S.W.3d 609, 614 (Tex. 2007) ; *Cire v. Cummings* , 134 S.W.3d 835, 838–39 (Tex. 2004). A trial court also abuses its discretion by ruling without supporting evidence. *Ford Motor Co. v. Garcia* , 363 S.W.3d 573, 578 (Tex. 2012). But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character

[552 S.W.3d 877]

supports its decision. *Unifund CCR Partners v. Villa* , 299 S.W.3d 92, 97 (Tex. 2009) ; *Butnaru v. Ford Motor Co.* , 84 S.W.3d 198, 211 (Tex. 2002) (op. on reh'g).

In guardianship proceedings, legal and factual sufficiency are not independent, reversible grounds of error but are factors to consider in assessing whether the trial court abused its discretion. *In re Guardianship of Erickson* , 208 S.W.3d 737, 743 (Tex. App.—Texarkana 2006, no pet.) ; *see In re J.P.C.* , 261 S.W.3d 334, 336 (Tex. App.—Fort Worth 2008, no pet.) (noting that in appropriate cases, legal and factual sufficiency are relevant factors in assessing whether the trial court abused its discretion). "We view the evidence in the light most favorable to the probate court's decision, and an abuse of discretion does not occur when the court's decision is based on conflicting evidence." *In re Guardianship of Laroe* , No. 05-15-01006-CV, 2017 WL 511156, at *5 (Tex. App.—Dallas Feb. 8, 2017, pet. denied) (mem. op.).

DISCUSSION

H.E. and P.E. argue that the probate court abused its discretion by: (1) not finding that A.E. is totally incapacitated; (2) not finding it is in A.E.'s best interest to have H.E. and P.E. appointed as her guardians of the person; (3) not finding that A.E.'s rights or property will be protected by the appointment of a guardian; (4) not finding that alternatives to guardianship are infeasible; (5) not finding that supports and services available to A.E. are infeasible; (6) not finding that H.E. and P.E. are eligible to act as guardians and are entitled to be appointed; (7) not finding that there is evidence of A.E.'s incapacity by recurring acts or occurrences in the preceding six months that are not isolated instances of negligence or bad judgment; (8) creating a new standard as to whether there is a necessity for a guardianship; and (9) denying the guardianship application when it met all of the factual and legal requirements and was not otherwise contested. We discuss the evidence and the law relating to these issues together.

I. Findings Required Before Appointment of a Guardian

"When interpreting a statute, we look first and foremost to its text." *United States v. Alvarez–Sanchez* , 511 U.S. 350, 356, 114 S.Ct. 1599, 1603, 128 L.Ed.2d 319 (1994) (Thomas, J.). Under the Estates Code, the probate court could not appoint a guardian of the person for A.E. unless the court found by clear and convincing evidence that:

> (A) [A.E.] is an incapacitated person;
>
> (B) it is in [A.E.'s] best interest to have the court appoint a person as [her] guardian;
>
> (C) [A.E.'s] rights ... will be

fastcase Smarter legal research.

> protected by the appointment of a guardian;
>
> (D) alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
>
> (E) supports and services available to [A.E.] that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

See Tex. Est. Code Ann. § 1101.101(a)(1) (West Supp. 2017).[1]

[552 S.W.3d 878]

The probate court would be further required to find by a preponderance of the evidence that A.E.'s parents are eligible for and entitled to the appointment and that A.E. either (i) is totally without capacity to care for herself and to manage her property, or (ii) lacks the capacity to do some, but not all, of the tasks necessary to care for herself or to manage her property. *See id.* § 1101.101(a)(2)(B), (D).[2] Any determination of A.E.'s incapacity would have to be "evidenced by recurring acts or occurrences in the preceding six months and not by isolated instances of negligence or bad judgment." *See id.* § 1101.102 (West 2014).

II. The Evidence Before the Probate Court

H.E. and P.E.'s evidence included their own testimony, a certificate of medical examination and affidavit from A.E.'s treating physician, and the court investigator's testimony. The probate court also had before it the court investigator's report and a brief report from A.E.'s attorney ad litem.

A. Testimony of A.E.'s Parents

A.E.'s mother, H.E., testified that A.E.'s intellectual disability is one that will not change. A.E. has a tendency to agree with whatever is said to her yet would not necessarily understand what was being asked of her or the significance of saying yes to a question. H.E. stated that A.E. is not capable of making medical decisions even with help, A.E. does not have the capacity to execute a power of attorney or supported decision-making agreement, and A.E. would not understand such a document even if it were explained to her. Also, A.E. would not be able to understand a consent form given to her by a doctor.

H.E. further testified that A.E.'s school has a program for special needs children, that she can empty the dishwasher, and that she is learning to fold towels at a volunteer job. At her volunteer job, A.E. also takes chairs off tables at a restaurant and sets out salt and pepper containers on the tables. If her clothes are laid out for her, she can partially dress herself. A.E. had not yet been denied medical treatment, but she had not been to the doctor in the two weeks since she had turned eighteen. P.E., A.E.'s father, testified that he agreed with all of his wife's testimony.

B. Testimony and Documentary Evidence from A.E.'s Physician

If an application for guardianship is based on a proposed ward's alleged incapacity, the applicant must provide the court with a letter or certification that (1) complies with Estates Code section 1101.103 and (2) shows that a physician or psychologist has examined the proposed ward. *Id.* § 1101.104 (West Supp. 2017). Section 1101.103 provides that the letter or certification must include a description of the nature, degree, and severity of the proposed ward's incapacity and be provided by a Texas-licensed physician who has examined the proposed ward no more than 120 days before the date of the application's filing. *Id.* § 1101.103 (West 2014) (specifying certain

Also available as part of the eCourse
[2020 Guardianship Bundle for Attorneys Ad Litem]

First appeared as part of the conference materials for the
22nd Annual Estate Planning, Guardianship and Elder Law Conference session
"Did I Do That? Understanding Supports and Services and Alternatives to Guardianship"