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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-304

Filed: 21 January 2020

Wake County, Nos. 17E2314, 17SP1488

IN THE MATTER OF:
MICHAEL FRANCIS RIEGER, Ward.

Appeal by Appellant from judgment entered on 3 October 2018 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 3 October 2019.

Lewis & Roberts, PLLC, by Matthew D. Quinn, and Hopler, Wilms & Hanna, PLLC, by Adam J. Hopler, for Appellant Deborah Gates.

Leslee R. Sharp as Prospective Guardian of the Estate of Michael Francis Rieger.

No brief filed by guardian ad litem.

INMAN, Judge.

Appellant Deborah Gates (“Gates”) appeals from the Wake County Superior Court’s order affirming the Clerk of the Wake County Superior Court’s (“the Clerk”) orders denying Gates’ motion to transfer venue and appointing a guardian of the estate for the incompetent ward, Michael Francis Rieger (“Rieger”). Gates argues that multiple findings in the Clerk’s guardianship order are unsupported by

competent evidence and that the Clerk did not satisfy the statutory mandate to determine Rieger's assets and liabilities. Gates also argues that the Clerk misapprehended the law in denying her motion to transfer venue. After thorough review of the record and applicable law, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

The record tends to show the following:

Gates and Rieger have been companions for over forty years. Due to his physical and psychological ailments, on 11 April 2014, Rieger appointed Gates as his durable power of attorney and health care power of attorney, giving her powers to the extent North Carolina law allows. The durable power of attorney became effective immediately.

On 8 June 2017, an acquaintance of Rieger's petitioned in Wake County for him to be adjudicated incompetent. At the time of the petition, Rieger was residing in Wake County at an assisted living facility. That same day, in conjunction with the notice of hearing, the Clerk appointed Angela Lassiter ("Lassiter") as guardian *ad litem* to represent Rieger in subsequent proceedings. On 18 July 2017, the Clerk adjudicated Rieger incompetent and appointed LifeLinks, LLC ("LifeLinks") as the guardian of the person. Gates did not contest Rieger's adjudication or request to be the guardian of the person, despite Rieger's recommendation, in naming Gates as his healthcare power of attorney, that Gates be one of his guardians of the person. The

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Clerk did not appoint a guardian of the estate because Gates was essentially performing that role as Rieger's durable power of attorney.

After being appointed as Rieger's guardian, LifeLinks and its representative John Maynor ("Maynor") then attempted to work with Gates to establish the proper round-the-clock healthcare for Rieger. Gates failed to cooperate with LifeLinks. Despite not having the authority, Gates repeatedly sent health care workers away, leaving Rieger without professional assistance, and often remarked that his cost of care was too expensive. Gates said that she would have to sell their home to pay for Rieger's care. Over the next year, three different healthcare companies were put in place at the behest of Gates due to her concern over the cost.

On 27 February 2018, Gates petitioned the Clerk in Wake County to transfer venue to Durham County. Gates argued that, although Rieger resided in Wake County at the time of the petition to find him incompetent, Rieger had otherwise always been a resident of Durham County.

On 12 April 2018, Rieger's sister, Patricia Stull ("Stull"), filed a motion in the cause, pursuant to N.C. Gen. Stat. § 35A-1207(a), in Wake County requesting the appointment of a guardian of the estate. Stull alleged that Gates was not properly performing her role as durable power of attorney due to her lack of oversight of Rieger's finances. Lassiter remained Rieger's guardian *ad litem*.

On 26 April 2018, a hearing on both the petition to transfer venue and motion to appoint a guardian of the estate was held before the Clerk, with Stull, Maynor, and Lassiter testifying. Gates did not attend the hearing but was represented by counsel who objected to the appointment of a guardian of the estate. As of the date of the hearing, Rieger had been moved from LifeLinks' care to a residential facility in Durham.

On 17 May 2018, the Clerk denied Gates' motion to transfer venue and appointed Leslee R. Sharp as the guardian of Rieger's estate, while keeping LifeLinks on as his guardian of the person.

Gates then appealed the Clerk's orders to the Superior Court. Following a hearing, the Superior Court affirmed both orders on 3 October 2018.

Gates now appeals the Superior Court's decision to this Court.

II. ANALYSIS

A. Standard of Review

Section 1-301.3 of our General Statutes governs appeals from the clerk of court's decision on matters pertaining to guardianship of an incompetent person. *See* N.C. Gen. Stat. § 1-301.3(a) (2017) ("This section applies to matters arising in the administration . . . of estates of . . . incompetents[.]"); *see also In re Winstead*, 189 N.C. App. 145, 151, 657 S.E.2d 411, 415 (2008) (holding that Section 1-301.3 applies to appeals from orders appointing a guardian). When the Superior Court sits as an

appellate court reviewing decisions by the clerk, its standard of review is limited to determining the following:

- (1) Whether the [clerk's] findings of fact are supported by the evidence.
- (2) Whether the [clerk's] conclusions of law are supported by the findings of facts.
- (3) Whether the [clerk's] order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2017); *see also In re Estate of Mullins*, 182 N.C App. 667, 670-71, 643 S.E.2d 599, 601 (2007) (suggesting that competent evidence must support the clerk of court's findings). The superior court's appellate jurisdiction "is derivative and appeals present for review only errors of law committed by the clerk. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than *de novo*." *In re Flowers*, 140 N.C. App. 225, 227, 536 S.E.2d 324, 325 (2000) (quoting *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966)). Our standard of review mirrors that of the superior court. *In re Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995) (citing *In re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985)).

B. Appointment of Guardian of the Estate

In matters covered by Section 1-301.3, the clerk must determine all issues of fact and law and "enter an order or judgment, *as appropriate*, containing findings of fact and conclusions of law supporting the order or judgment." N.C. Gen. Stat. §

1-301.3(b) (2017) (emphasis added). Here, the Clerk's order appointing the guardian of the estate contains the following pertinent findings of fact:

3. The ward has diagnoses that include late stage Parkinson's disease, lewy body dementia, and post polio syndrome.

4. At the adjudication hearing, the ward was deemed incompetent and a disinterested third party, LifeLinks, LLC, was appointed as the guardian of the person. . . .

8. Deborah Gates . . . was not present at the adjudication hearing so there was no discussion with Ms. Gates about her control of the ward's finances and how she was managing the ward's finances in order to make sure his healthcare needs were being addressed and met.

9. After qualifying as the guardian of the person for the ward, LifeLinks, LLC, immediately began working with Deborah Gates to honor her wishes to bring the ward home as this was Ms. Gates' main focus.

10. LifeLinks, LLC agreed with the discharge of the ward so long as Ms. Gates was willing to allow in home healthcare aides in the home twenty-four (24) hours a day, which is what the medical professionals recommended. The daily level of care required by the ward was too much for Deborah Gates to handle making the assistance necessary.

11. Ms. Gates acknowledged that she was unable to care for the ward on her own and agreed to allow healthcare aides to come into the home twenty-four (24) hours a day.

12. Since the ward's discharge from [an in-patient facility], there have been multiple home healthcare agencies involved in the ward's care.

13. ComForCare HomeCare was the initial home

healthcare provider arranged by LifeLinks, LLC, and approved by Deborah Gates. ComForCare HomeCare was responsible for providing care and assistance for the ward for twenty-four (24) hours per day.

14. ComForCare HomeCare immediately had issues in getting payment from Ms. Gates for the services that they were providing to the ward. Multiple collection attempts had to be made to Ms. Gates demanding payment before this agency would be paid.

15. ComForCare HomeCare staff who were contracted to work during certain hours were routinely sent away during their work hours and asked to not return. Deborah Gates would follow up with a call to the agency asking that the staff not return.

16. Deborah Gates was constantly worried about money and the cost of the round the clock home healthcare

17. At one point, Deborah Gates contacted the management team for ComForCare HomeCare and requested a meeting to discuss their prices. Ms. Gates was concerned about cutting costs and was fearful that the ward's money would run out.

18. Sending staff home in the middle of their shift jeopardizes the ward's well-being and his overall safety as he requires assistance with everything.

19. Deborah Gates acknowledged to LifeLinks, LLC, that she is not in a position to care for the ward and cannot meet the ward's healthcare needs, but she still sent the healthcare aides home.

20. The safety concern has been consistently raised by LifeLinks, LLC with Deborah Gates. Ms. Gates[] responses include, "If we have to continue with 24/7 care, we will have to sell the home," or "ComForCare is too expensive and he didn't need overnight care."

21. At Ms. Gates' request, LifeLinks, LLC consented to the hiring of a new home healthcare agency, Well Care.

22. Well Care was to provide [round-the-clock] services as well to the ward, but according to Ms. Gates, this agency's prices were cheaper.

23. The same issues that arose with ComForCare HomeCare began arising with Well Care. The aides were being sent home in the middle of the night. Deborah Gates became very negative with the in home health aides that were spending time at the home and caring for the ward making the work environment uncomfortable for the healthcare aides.

24. LifeLinks, LLC received reports that the gaps in coverage were becoming increasingly longer, which again, raised a safety concern for LifeLinks, LLC since medical professionals recommended twenty-four hour care.

25. Well Care informed LifeLinks, LLC after this most recent hospitalization at Duke Regional Hospital that they were no longer going to be able to staff the home and provide in home services for the ward due to the issues that had arisen.

26. LifeLinks, LLC indicated that there was always some hesitation on the part of Deborah Gates to pay any providers. She threatened nonpayment due to her dissatisfaction with them even though she agreed to the terms of twenty-four hour in home healthcare so that the ward could move back home.

27. LifeLinks, LLC raised concerns about the ward's diet while at the home and about how the medication was being administered by Deborah Gates when the in home healthcare aides were not around.

28. At one point, Deborah Gates gave the ward an expired

medication because she didn't want to spend the money on refilling the current prescription provided by the ward's treatment provider.

29. LifeLinks, LLC has found it very difficult to continue to ensure that the ward's needs are being met when Deborah Gates is consistently sabotaging all efforts put in place to ensure that the ward has coverage [all the time].

30. LifeLinks, LLC has no knowledge of the ward's assets because Deborah Gates does not discuss this with LifeLinks, LLC and only makes comments regarding her concerns that too much money is being spent on his care.

31. Deborah Gates has made comments to LifeLinks, LLC indicating that the home she shares with the ward will need to be sold if [round-the-clock] care is going to continue to be required. No inquiries have been made by Ms. Gates regarding selling the primary residence or any of the other two parcels owned by the ward.

32. The 2017 property taxes due on the ward's primary residence were due on January 5, 2018, but were delinquentely paid on April 13, 2018.

33. Deborah Gates, as the agent for the ward under the Durable Power of Attorney, has not filed any inventories or accountings with the Durham County Clerk of Superior Court, which is where the Durable Power of Attorney is registered.

34. The Durable Power of Attorney does not waive the accounting requirement for Deborah Gates acting as attorney-in-fact.

Gates first argues that findings of fact 16, 17, 20, 22, 30, and 31 are supported only by her inadmissible hearsay statements. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying

at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). One exception to the rule prohibiting hearsay as evidence is when such statements are made by a party-opponent, *i.e.*, statements offered against the opposing party who made them in their individual or representative capacity. *Id.* § 8C-1, Rule 801(d)(A). Here, Stull’s motion in the cause specifically requested the appointment of a guardian of the estate, alleging Gates was derelict in her duty as Rieger’s power of attorney. Gates then intervened in the guardianship proceedings and attempted to frustrate the potential appointment. Gates is therefore considered a party-opponent—as she was an adverse party to Stull’s motion—and her statements produced against her were admissible under Rule 801(d)(A)’s hearsay exception. *Cf. In re J.M.*, __ N.C. App. __, __, 804 S.E.2d 830, 834 (2017) (holding that testimony regarding a parent’s out-of-court statements are valid because parents are adverse parties in termination of parental rights proceedings).

At the hearing, Maynor testified that Gates had made the following statements to him: she was fearful of the cost of Rieger’s constant and ongoing healthcare needs; she would have to sell their home to pay for Rieger’s care; and that overnight care was unnecessary. Maynor also testified that Gates told him she switched to a new healthcare provider in Well Care because it was less expensive. This testimony was admissible and supports the Clerk’s challenged findings.

Gates further contends that findings 14, 28, and 32 are unsupported by the

evidence. Findings 14 and 28 rely on testimony relaying other witnesses' statements to them that multiple collection attempts were made before Gates paid for Rieger's healthcare and that Gates gave Rieger an expired medication in lieu of paying for a new prescription. Finding 32 states that Gates delinquently paid Rieger's 2017 property taxes. Assuming these findings were made in error, they do not render the Clerk's order invalid because the Clerk's conclusions were supported by other findings that were supported by competent evidence. *See Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2 (“[E]ven though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk’s order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings.”).

Subchapter I of Chapter 35A of our General Statutes governs the adjudication of incompetent individuals, N.C. Gen. Stat. §§ 35A-1101 *et seq.*, while Subchapter II controls the procedures for appointing their guardians. *Id.* §§ 35A-1201 *et seq.* To adjudicate someone incompetent, the clerk of court must find by “clear, cogent, and convincing evidence that the respondent is incompetent.” *Id.* § 35A-1112(d). Once the ward is found incompetent, “a guardian or guardians shall be appointed in the manner” dictated by Subchapter II. *Id.* § 35A-1120; *accord id.* § 35A-1112(e) (“Following an adjudication of incompetence, the clerk shall [] appoint a guardian pursuant to Subchapter II[.]”).

Unlike the evidentiary burden for adjudicating incompetency, Subchapter II

provides that, to appoint a guardian, the clerk need only hold a hearing and “make such inquiry and receive such evidence as the clerk deems necessary” to determine:

- (1) The nature and extent of the needed guardianship;
- (2) The assets, liabilities, and needs of the ward; and
- (3) Who, in the clerk’s discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward’s capacity justifies ordering a limited guardianship, the clerk may do so.

Id. § 35A-1212(a). If the clerk, in its discretion, decides that a guardian should be appointed, Subchapter II provides who may be considered a guardian and what powers and duties those guardians possess. *Id.* §§ 35A-1213, -1214, -1251 & -1252.

Gates argues that the Clerk did not sufficiently inquire into and make findings regarding Rieger’s assets and liabilities. Gates’ argument suggests that such findings were a prerequisite to appointing a guardian of his estate. We disagree.

Unlike the evidentiary burden provided by Section 35A-1112(d) to adjudicate a person incompetent, Section 35A-1212(a) provides no similar evidentiary standard that we can review to determine whether the Clerk erred in appointing a guardian. Subchapter II only obligates the clerk to hold a hearing and inquire into and receive evidence of a ward’s overall health and circumstances until the clerk is comfortable deciding whether a guardian of the estate is warranted. *Id.* § 35A-1212(a). It would be unduly burdensome to delve into the minutiae of a ward’s finances before appointing a guardian of the estate because (1) that is the duty of a guardian of the

estate, *id.* §§ 35A-1251, -1253, -1261; and (2) before appointing a guardian, the clerk would have already determined through clear, cogent, and convincing evidence that the ward cannot make his own independent decisions. *See id.* § 35A-1101(7) (defining an incompetent adult). If the General Assembly intended to require a more thorough determination by the clerk following the adjudication of incompetence, it would have prescribed it in the statute.

Here, a year prior to the Court's appointment of the guardian of his estate, Rieger was adjudicated incompetent and a guardian of the person was appointed to oversee his healthcare needs. Gates did not contest these decisions. Upon Stull's request to appoint a guardian of the estate, the Clerk held a hearing and heard testimony surrounding Rieger's finances. Gates does not contest the finding that Rieger "requires assistance with everything," as he suffers from Parkinson's disease and dementia. Maynor and Stull both testified that they were unaware of the extent of Rieger's financial health. The Clerk also questioned each witness about Rieger's assets and liabilities.

As mentioned above, Gates further challenges findings of fact 14, 28, and 32. But none of these findings is relevant to the Clerk's duties under Section 35A-1212, so we do not address them. Gates does not argue how the absence of these findings, assuming they are unsupported by sufficient evidence, would render the Clerk's guardianship order invalid. In its order, the Clerk found that the amount of assets

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in Rieger's estate was unclear, that the amount of assets needed to sustain his recommended level of care was unclear, and that the Clerk was concerned over the management of his estate.¹ The Clerk then concluded:

A guardian of the estate is necessary at this time to gather an accurate picture of what assets are in the ward's estate so that a workable budget can be created to ensure that the ward's assets are being used for his healthcare needs and to ensure that the ward is getting the best care possible while keeping in line with the recommendation of medical professionals.

We hold that the Clerk performed its statutory duty under Section 35A-1212 in inquiring into Rieger's assets and liabilities before appointing a guardian of Rieger's estate.

C. The Venue Order

Gates also contends that the Clerk erred in denying the motion to transfer venue from Wake County to Durham County. We hold that any error was not prejudicial to the outcome. Gates does not take issue with any of the Clerk's findings of fact or demonstrate that, but for the alleged error, her motion to transfer venue would have been allowed.

Venue to adjudicate someone incompetent is "in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility." N.C.

¹ Although labeled as conclusions of law in the Clerk's order, they are findings of fact. See, e.g., *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

Gen. Stat. § 35A-1103(b) (2017). The clerk, upon motion by a party or on its own motion, “may order a change of venue upon finding that *no hardship or prejudice to the respondent* will result from a change of venue.” *Id.* § 35A-1104 (emphasis added).

Once adjudicated, venue for the appointment of a guardian for an incompetent person is in the same county where the ward was adjudicated incompetent. *Id.* § 35A-1204(a). Any time before or after a guardian is appointed, “the clerk may, on a motion filed in the cause or on the court’s own motion, *for good cause* order that the matter be transferred to a different county.” *Id.* § 35A-1205 (emphasis added).

Gates does not argue that the hearing finding Rieger incompetent and appointing a guardian of the person should have proceeded in a venue different from Wake County. It is undisputed that at the time of the petition to have him adjudicated incompetent, Rieger was residing in a healthcare facility in Raleigh.

Gates does contend, however, that the Clerk applied the wrong statute in ruling that venue should not be transferred to Durham County a year later. The Clerk cited Section 35A-1104 in concluding that transfer to “Durham County would be prejudicial” toward Rieger. Because the proceeding before the Clerk solely involved appointing a guardian of the estate rather than adjudicating Rieger incompetent, the Clerk erroneously applied the “prejudice or hardship” standard. The Clerk should have reviewed the motion to transfer under the “good cause” standard in Section 35A-1205.

While the Clerk may have misapprehended Chapter 35A's venue statutes, we nevertheless affirm its judgment. "[W]here a court's ruling [is] based upon a misapprehension of law, [but] the misapprehension of the law does not affect the result[,] . . . the judgment will not be reversed." *Ball v. Maynard*, 184 N.C. App. 99, 105, 645 S.E.2d 890, 895 (2007) (citations and quotations omitted) (alterations in original).

The Clerk did not find that Gates' trial counsel produced evidence tending to show any reason to transfer Rieger's proceedings to Durham County. The Clerk found that a change in venue would deprive LifeLinks from being his guardian of the person because it "does not have a contract with Durham County." As a result, Durham County Social Services would need to be appointed, yet Gates' counsel failed to notify the county of such potential circumstances. These findings expressly overruled counsel's argument at the hearing that a transfer would not strip Rieger of the care he needed from LifeLinks.

The only other argument put forth by counsel was that, but for the matters being in Wake County, Rieger would be able to attend, and possibly participate, in future proceedings. However, counsel only speculated that Rieger would want to attend the proceedings and admitted that Rieger never indicated his intent to participate and that it was difficult to determine whether he was lucid and could perceive his surroundings. Counsel further admitted that no alternative attempts

were made to have Rieger attend the proceedings. Additionally, any needed participation would seem to defeat the purpose of Lassiter as guardian *ad litem*, and no evidence was presented as to the necessity of Rieger's attendance at any hearings going forward. *See* N.C. Gen. Stat. § 35A-1107(b) (2017) ("The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings.").

In sum, although the Clerk did rely on the improper statute in denying Gates' motion to transfer venue, we hold that the misapprehension of law did not affect the result because the trial court found no facts showing good cause to transfer Rieger's proceedings to Durham County.

III. CONCLUSION

We affirm the Superior Court's order affirming the Clerk's orders appointing a guardian of Rieger's estate and denying Gates' motion to transfer venue.

AFFIRMED.

Judges DIETZ and BROOK concur.

Report per Rule 30(e).