

STATE OF MICHIGAN
COURT OF APPEALS

In re GUARDIANSHIP OF DIXIE LEE EARL.

QWUAN EARL, as Guardian for DIXIE LEE
EARL, a Legally Incapacitated Person,

UNPUBLISHED
April 19, 2018

Petitioner-Appellee,

v

ROBERT LEE EARL,

Appellant.

No. 340155
Calhoun Probate Court
LC No. 2017-000402-GA

Before: STEPHENS, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Appellant, Robert Earl, appeals the probate court's appointment of his son, Qwuan Earl, as guardian of Robert's mother, Dixie Lee Earl.¹ For the reasons set forth below, we reverse and remand for further proceedings.

Dixie Earl is an elderly woman with several relatives, including Robert (her son), Qwuan (Robert's son and her grandson), and Jessica (Qwuan's daughter and Dixie's great-granddaughter). Dixie suffers from dementia and some chronic medical conditions. According to the parties, sometime earlier, Dixie had executed a power of attorney naming Robert as Dixie's primary attorney-in-fact and Jessica as secondary or successor attorney-in-fact.²

On May 25, 2017, Qwuan filed a petition for appointment of himself as guardian for Dixie. Dixie was 86 years old at the time, and had been living with Robert but had intermittently been in a rehabilitation or nursing home facility that provided 24-hour care. Qwuan's petition alleged that Robert had failed to provide adequate care and supervision of Dixie. The court appointed a guardian ad litem (GAL), and set a hearing date of July 13, 2017, to determine

¹ Because of the number of relatives with the same last name, we use first names to refer to the family members involved in this case.

² The power of attorney is not in the record provided to this Court.

whether to appoint a temporary guardian pending a hearing on the full guardianship. In her first report to the court, the GAL reported Dixie's statement that although she had a good relationship with Qwuan, "she would prefer her son Robert Earl to be appointed as her guardian." Nevertheless, given the concerns raised by Qwuan concerning Robert's ability to care for Dixie at his home, the court appointed Qwuan as temporary guardian.³ The court noted that from the testimony "apparently [Robert] has taken some action here that is to the clear detriment to Dixie Earl in that he removed her from a facility where she was receiving 24 hour care prior to her removal." Qwuan also testified that Robert did not always give Dixie her medication, was not always available for doctors to contact him, that Dixie was not eating well, and that she had fallen on at least one occasion.

Robert, thereafter, filed his own petition for guardianship of Dixie in which he requested that he be appointed. In his petition, Robert stated that he

take[s] [Dixie's] care very seriously. I provide medication for her on a daily basis, and there is no way that Qwuan Earl even knows about what I give her. He is estranged from me, and does not have regular contact with me. Also, my mother did suffer a fall while living in my home, but I made sure she had appropriate help and have always made arrangements for her to have the appropriate help she needs. The allegations in the petition are false. My mother eats, sleeps, gets dressed appropriately each day, is properly-socially [sic] engaged, takes her medications as prescribed and attends Dr.'s appointments when scheduled (except when her ride has neglected to call or show up which has been a few times). My mother is well cared for.

After being appointed temporary guardian, Qwuan removed Dixie from Robert's house and placed her in a Heartland assisted living facility. The GAL filed a second report on July 28, 2017, in which she reported that the social worker at Heartland opined that Dixie needed 24-hour care and assistance due to her dementia. She also reported Dixie's statement that "she wanted to be with her family in her own home and requested Robert's presence."

The GAL filed a third report on August 8, 2017. She noted that during her visit, Dixie was "visibly upset and more disoriented than before." The GAL spoke with Qwuan who told her that Dixie's emotional upset occurs after visits with Robert. Robert denied that this occurs. The GAL did not recommend barring Robert from visiting his mother as Qwuan wished. A fourth report was filed on August 11, 2017. The GAL reported that she had spoken with the administrator of the assisted living facility where Dixie was living who advised that the facility had investigated a recent incident in which Dixie became combative. The administrator told her that "it is impossible to conclude that [Robert's] visits are the . . . cause of Dixie's behavior." She also told the GAL that Robert does not sign in when he visits, and that when he visits, he

³ Robert was not present at the July 13th hearing. He later told the court that he did not receive any notice of the hearing until after it had taken place. His statement appears consistent with the proof of service of the notice of hearing. It indicates that it was not mailed until July 10, 2017, just 3 days before the hearing.

takes his mother to a private area and speaks to her privately. Finally, she advised the GAL that Qwuan is “always available to come in and calm his grandmother down . . . [and that he] is usually successful” in doing so.

The final GAL report, dated August 21, 2017, stated that Qwuan had told her that while he and Robert were at the facility at the same time, Robert attempted to hit him with a cane, which instead touched Dixie. No injuries resulted and no charges were filed.

The hearing on a permanent guardianship was held on August 24, 2017. During the hearing, Qwuan testified, on direct, as to errors or failings on the part of Robert. He stated that Robert leaves Dixie alone at times, and that Dixie had fallen. He stated that Robert knew that Dixie needed 24-hour care but did not have it for her at his home, and that he had not installed a handicap ramp for her despite it being recommended two years prior. He also stated that Robert was late to care meetings at which he sometimes has alcohol on his breath. According to Qwuan, Dixie previously had her own place but after she developed medical problems, she stayed with Robert except when in the hospital or in a nursing home following a hospitalization. He also testified that upon being appointed temporary guardian, he removed Dixie from Robert’s home and placed her in an assisted living facility. On cross examination he conceded that he had personal knowledge of only one incident, two years earlier, when Dixie was left alone by Robert, that he is aware of Robert being late to only one care meeting, and that Dixie had a history of falling before moving in to Robert’s home. He also agreed that Dixie wanted to live in Robert’s home.

Robert testified that Dixie had been living with him for four years except for two hospitalizations and post-hospital stays in rehabilitation facilities. He denied most of the incidents described by Qwuan and offered explanations for the others. He testified that if Dixie’s doctor told him that it was in her best interest to move her into a nursing home, he would follow that advice. He explained that approximately three months earlier, Dixie had fallen and broken her hip and that while in a rehabilitation facility after hospitalization, she developed complications and had to stay there for about three months. He stated that when Dixie was discharged from that facility, he was advised for the first time that she needed 24-hour care, which he provided for her at his home through himself and service providers who came in the morning and in the evening. He stated that Dixie was signed up to begin participating in a day program but that this was not possible after Qwuan removed her from his home. On questioning by the court, he conceded that he had not installed the recommended ramp or grab bars. He also testified that someone had reported to adult protective services (APS), that he was misappropriating Dixie’s money, and that he provided all the bank statements to APS, which concluded that there had been no misappropriation.

Dixie’s counsel advised the court that it was Dixie’s wish that the temporary guardianship be lifted and that Robert be allowed to continue in his capacity under the durable power of attorney.

The GAL also spoke at the hearing. She recommended a full guardianship given the extent of Dixie’s needs. She made no comment as to Robert’s suitability, but noted that Qwuan had performed well as temporary guardian, and recommended that he be appointed permanent guardian with a public guardian as a secondary option.

The trial court made findings concerning Dixie's cognitive and physical difficulties and stated that there was clear and convincing evidence that she needed a guardian. He noted that according to the GAL, staff at the assisted living facility believed she needed 24-hour care in a facility. He then appointed Qwan as full guardian, and directed that he allow Robert to visit Dixie for up to one hour per day.

On appeal, Robert first argues that the trial court abused its discretion in appointing Qwan as Dixie's guardian where she unequivocally expressed her preference for Robert on multiple occasions.⁴

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, governs the appointment of guardians for incapacitated individuals (wards). Under the EPIC, an "individual in his or her own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment of a guardian." MCL 700.5303(1). MCL 700.5306(1) permits the court to appoint a guardian for an incapacitated individual if it finds by clear and convincing evidence "that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record."

The EPIC provides that the probate court "may appoint a competent person as guardian of a legally incapacitated individual." MCL 700.5313(1). The statute also provides an order of priority in which the probate court shall appoint individuals to serve as guardian:

(2) In appointing a guardian under this section, the court shall appoint a person, *if suitable and willing to serve*, in the following order of priority:

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.

(b) *A person the individual subject to the petition chooses to serve as guardian.*

(c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.

(d) *A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.* [MCL 700.5313(2) (emphasis added).]

⁴ "[A]ppeals from a probate court decision are on the record, not de novo." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). This Court reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision. *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016).

It is undisputed that Dixie is an incapacitated individual and that the probate court's decision to appoint a guardian to provide for her continuing care and supervision was proper. It is also undisputed that Dixie expressed that she wanted Robert to be her guardian, and that he was willing to serve as same. He had also been previously named as her patient advocate. Therefore, Robert was entitled to be appointed as Dixie's guardian under MCL 700.5313(2)(b) and (2)(d) absent a court finding that he is not "qualified and able to provide for the ward's care, custody, and control." *In re Guardianship of Redd*, 321 Mich App 398, 408; ___ NW2d ___ (2017).

The trial court made several statements in its ruling from the bench indicating its view that Qwuan would be a better guardian than Robert. However, it did not discuss the statutory standard, did not state that Robert was not suitable to serve, and did not make factual findings to support such a conclusion.⁵

Accordingly, we reverse the order appointing Qwuan as permanent guardian and remand to the trial court to use the proper legal standard to determine who to appoint as Dixie's guardian, after making findings of fact regarding Robert's suitability to serve as Dixie's guardian.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No cost as neither party has prevailed in full. MCR 7.219(A).

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause

⁵ We make no comment as to whether Robert is or is not a suitable guardian. That determination is for the trial court on remand.