STATE OF MICHIGAN

COURT OF APPEALS

In re Guardianship of JEK.

LYNN L. MARINE-ADAMS, as Temporary Guardian of JEK, a legally incapacitated person,

Appellee,

and

SUSAN KATHY COSHATT,

Petitioner-Appellee,

v

PAUL GARDNER,

Respondent-Appellant.

UNPUBLISHED
May 18, 2023

No. 364111
Wayne Probate Court
LC No. 2022-877442-GS

In re Conservatorship of JEK.

LYNN L. MARINE-ADAMS, as Special Conservator of JEK, a legally incapacitated person,

Appellee,

and

SUSAN KATHY COSHATT,

Petitioner-Appellee,

v

No. 364112
Wayne Probate Court
LC No. 2022-877543-CA

PAUL GARDNER,

Respondent-Appellant.

Before: PATEL, P.J., and CAVANAGH and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals[1] involving the requests of petitioner to appoint her as conservator and guardian of JEK, a legally incapacitated person, in Docket No. 364111, respondent appeals by leave granted[2] the trial court's order appointing Lynn L. Marine-Adams as the temporary guardian of JEK. In Docket No. 364112, respondent appeals by leave granted[3] the trial court's order appointing Marine-Adams as the special conservator of JEK. We now vacate those orders and remand for further proceedings consistent with The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

JEK, who was born in 1932, suffers from dementia and Alzheimer's disease. Apparently while still of sound mind in January 2021, JEK appointed respondent as his attorney-in-fact and patient advocate. During this time, JEK and respondent lived together. About nine months later, respondent moved JEK into Oakmont Senior Living Residence. Evidence was presented showing JEK regularly eloped from his apartment at Oakmont, and sometimes fell and injured himself. Respondent was sometimes difficult to contact when Oakmont struggled to care for JEK. Respondent went on a lengthy vacation out of the country in 2022. While respondent was abroad, Oakmont contacted petitioner to pick up JEK so he could be removed from the facility. JEK stayed with petitioner for a few days before moving into Plymouth Inn Assisted Living, where he received hospice care and 24-hour supervision.

Believing JEK was not being cared for appropriately, petitioner filed petitions to appoint her as JEK's guardian and conservator. Petitioner provided limited evidence with her petitions. Respondent filed a written response to each petition, primarily relying on JEK's decision to appoint respondent as JEK's attorney-in-fact and patient advocate. Petitioner filed a brief and a list of exhibits, which included additional evidence. During the hearing regarding the petitions, the trial

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[1] *In re Guardianship of JEK*, unpublished order of the Court of Appeals, entered December 22, 2022 (Docket No. 364111); *In re Conservatorship of JEK*, unpublished order of the Court of Appeals, entered December 22, 2022 (Docket No. 364112).

[2] *In re Guardianship of JEK*, unpublished order of the Court of Appeals, entered December 22, 2022 (Docket No. 364111) (MURRAY J., would have denied leave to appeal).

[3] *In re Conservatorship of JEK*, unpublished order of the Court of Appeals, entered December 22, 2022 (Docket No. 364112) (MURRAY J., would have denied leave to appeal).

court refused to consider any evidence and essentially held a settlement conference. When the parties would not settle, the trial court directed them to go to mediation. In the meantime, though, the trial court suspended respondent's authority to act for JEK and appointed Marine-Adams, an independent third-party, as JEK's temporary guardian and special conservator. These appeals followed.

II. DISCUSSION

A. STANDARDS OF REVIEW

"The probate court's decisions are generally reviewed for an abuse of discretion." *In re Estate of Huntington*, 339 Mich App 8, 17; 981 NW2d 72 (2021). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted). However, "[a] court necessarily abuses its discretion when it makes an error of law." *In re Guardianship of Gordon*, 337 Mich App 316, 318; 975 NW2d 114 (2021). "We review de novo issues of statutory interpretation, which are questions of law." *In re Conservatorship of Murray*, 336 Mich App 234, 240; 970 NW2d 372 (2021). "This Court reviews the probate court's findings of fact for clear error." *Huntington*, 339 Mich App at 17 (quotation marks and citation omitted). "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." *Murray*, 336 Mich App at 239-240 (quotation marks and citation omitted).

B. TEMPORARY GUARDIANSHIP

Respondent argues that the trial court abused its discretion by appointing a temporary guardian under the circumstances, and encourages us to instruct the trial court to dismiss the petition for guardianship on remand. We agree in part and disagree in part.

1. LEGAL AUTHORITY TO ESTABLISH TEMPORARY GUARDIANSHIP

The trial court abused its discretion when it appointed a temporary guardian for JEK without legal authority to do so.

"The Estates and Protected Individuals Code [(EPIC)], MCL 700.1101 *et seq*., governs the laws concerning the affairs of protected individuals and legally incapacitated individuals." *Gordon*, 337 Mich App at 318. In analyzing questions under EPIC, we must engage in statutory interpretation, the law regarding which was explained in *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 544; 942 NW2d 696 (2019):

> This issue requires us to engage in statutory interpretation. "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written." [*Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007)] (citation omitted). "We must examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Ally Fin, Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (quotation marks and citation omitted). "In doing so, we consider the entire

> text, in view of its structure and of the physical and logical relation of its many parts." *Id*. (quotation marks and citation omitted). Proper statutory interpretation requires: (1) reading the statute as a whole, (2) reading its words and phrases in the context of the entire legislative scheme, (3) while considering both the plain meaning of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions in harmony with the entire statutory scheme. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Deruiter v Byron Twp*, 325 Mich App 275, 283; 926 NW2d 268 (2018) (citation omitted)[, rev'd on other grounds 505 Mich 130 (2020)]. "[W]e must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (quotation marks and citation omitted).

Initially, the parties dispute under which EPIC subsection the trial court exercised its authority when appointing Marine-Adams as JEK's temporary guardian. Generally, under MCL 700.5306(1):

> The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and 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.

Before establishing a guardianship under MCL 700.5306(1), a trial court must satisfy strict notice requirements, codified at MCL 700.5311(1) and (2):

> (1) In a proceeding for the appointment or removal of an incapacitated individual's guardian, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing must be given to each of the following:
>
> > (a) The ward or the individual alleged to be incapacitated and that individual's spouse, parents, and adult children.
> >
> > (b) A person who is serving as the guardian or conservator or who has the individual's care and custody.
> >
> > (c) If known, a person named as attorney in fact under a durable power of attorney.
> >
> > (d) If no other person is notified under subdivision (a), (b), or (c), at least 1 of the individual's closest adult relatives, if any can be found.
>
> (2) Notice must be served personally on the alleged incapacitated individual. Notice to all other persons must be given as prescribed by court rule. Waiver of notice by the individual alleged to be incapacitated is not effective unless the

> individual attends the hearing or a waiver of notice is confirmed in an interview with the visitor.

Notably, as referenced in MCL 700.5311(1), the same notice requirements do not exist for "the appointment of a temporary guardian." This is because a temporary guardianship is only legally permissible under a specific set of circumstances, which EPIC codified as follows:

> If an individual does not have a guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, the court shall provide notice to the individual alleged to be incapacitated and shall hold a hearing. Upon a showing that the individual is an incapacitated individual, the court may exercise the power of a guardian, or appoint a temporary guardian with only the powers and for the period of time as ordered by the court. A hearing with notice as provided in [MCL 700.5311] shall be held within 28 days after the court has acted under this subsection. [MCL 700.5312(1).]

Reading the plain language of the statute, as we must, *Nyman*, 329 Mich App at 544, there are four substantive requirements for the appointment of a temporary guardian: (1) the individual must be proven to be incapacitated, (2) the individual must not have a guardian appointed already, (3) an emergency must exist, and (4) there must not be any other person who "appears to have authority to act in the circumstances . . . ." MCL 700.5312(1). As for procedural requirements, MCL 700.5312(1) states that notice must be given to the alleged incapacitated individual before the temporary guardianship is established. If the trial court acts under the statute and creates a temporary guardianship, then the trial court is required to have a hearing compliant with the notice requirements of MCL 700.5311 within 28 days of the temporary guardianship order. MCL 700.5312(1).

Respondent asserts that the trial court acted under MCL 700.5312(1) when it appointed Marine-Adams as the temporary guardian of JEK. Seemingly understanding the trial court did not comply with MCL 700.5312(1), petitioner instead argues the trial court actually relied on MCL 700.5306 to establish the guardianship. Petitioner's argument focuses on her petition, which did not seek a temporary guardianship, and the trial court's order, which she describes as a "form order," and encourages us to ignore it. The record supports only one possible conclusion—the trial court entered the order appointing Marine-Adams as JEK's *temporary* guardian under MCL 700.5312(1).

Petitioner's arguments to the contrary rely on factual inaccuracies and misstatements of the law. First, there is no legitimate dispute petitioner did not request a temporary guardianship in her original petition. Indeed, the petition specifically states: "I REQUEST that the court determine [JEK] is an incapacitated individual and appoint [petitioner as] . . . full guardian with all powers provided by statute." At the hearing regarding the petition, though, petitioner made an alternative request that she be appointed as JEK's temporary guardian, as a sort of trial period, which would allow the trial court to see if JEK fared better when living with petitioner instead of at Plymouth Inn. Even so, regardless of petitioner's written or oral requests of the trial court, respondent is not appealing what petitioner asked the trial court to do, respondent is challenging what the trial court *actually did*.

The order entered by the trial court establishing the temporary guardianship is abundantly clear that the trial court was acting under MCL 700.5312(1) considering it essentially quotes the statutory language and states: "The individual does not have a guardian, an emergency exists, and no other person appears to have the authority to act in the circumstances. A showing has been made that the individual is incapacitated." The order is titled "Order Regarding Appointment of Temporary Guardian of Incapacitated Individual," and provides that Marine-Adams "is appointed temporary guardian of the adult and shall qualify by filing an acceptance of appointment."

Petitioner urges this Court to ignore the order because it is a "form order" and likely was entered by the trial court by mistake. In support of her claim that the temporary guardianship order was an erroneous form order, petitioner asserts that the order was obviously entered in error because it stated petitioner was appointed as JEK's conservator. Petitioner has misstated the factual record. The temporary guardianship order makes no reference to anyone being appointed as JEK's conservator. Instead, petitioner is speaking about the trial court's order appointing Marine-Adams as the special conservator for JEK, which simply is not germane to this issue. Therefore, petitioner's argument lacks factual support. Further, petitioner does not suggest what order this Court should rely on instead if it accepted her assertions that the temporary guardianship order should be ignored. The other written order entered by the trial court on the same day, which is not a form order, states, "IT IS FURTHER ORDERED that Attorney Lynn Marine-Adams is appointed as temporary guardian" of JEK. The transcript does not help petitioner's position either, considering that the trial court specifically stated it intended to appoint a temporary guardian. Moreover, it is well established in Michigan that "a court speaks through written judgments and orders rather than oral statements . . . ." *Powers v Brown*, 328 Mich App 617, 620 n 1; 939 NW2d 733 (2019) (quotation marks and citation omitted). Here, the trial court's oral pronouncements and two written orders establish only one thing: it was appointing a temporary guardian for JEK under MCL 700.5312(1).[4]

Having determined the trial court acted under MCL 700.5312(1), respondent next argues that the trial court abused its discretion because the legal requirements for establishing a temporary guardianship under the statute were not met. As explained above, there are four substantive requirements for the appointment of a temporary guardian: (1) the individual must be proven to be incapacitated, (2) the individual must not have a guardian appointed already, (3) an emergency must exist, and (4) there must not be any other person who "appears to have authority to act in the circumstances . . . ." *Id.* For purposes of this appeal, the parties do not dispute JEK was an incapacitated individual and that he did not have a guardian already appointed. Instead, they disagree regarding whether there was an emergency and anyone who "appears to have authority

[4] Given this conclusion, the parties' dispute about whether the trial court properly appointed Marine-Adams as guardian for JEK under MCL 700.5306(1) has been rendered moot. Briefly, because the trial court did not act under the authority provided in MCL 700.5306(1), there is no actual dispute about whether the trial court properly or improperly did so. Therefore, because there is no controversy regarding the statute, the arguments are moot, and we decline to consider them. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018); *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018).

to act in the circumstances . . . ." *Id.* The latter element is the one most obviously lacking in this case.

The record is abundantly clear that JEK appointed respondent to be JEK's attorney-in-fact in a durable power of attorney form and his patient advocate in a healthcare power of attorney form. The durable power of attorney document was signed by JEK, notarized, witnessed by two people, and provided broad powers to respondent. In fact, the durable power of attorney specifically stated JEK "authorize[d] [respondent] to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future." The document appointing respondent as JEK's patient advocate for healthcare situations also was broadly worded: "I grant my Patient Advocate full power and authority to make care, custody, and medical treatment decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so." There can be little dispute that these documents provided respondent with apparent "authority to act in the circumstances" presented in this case. MCL 700.5312(1).

Indeed, petitioner does not contend these documents did not provide respondent legal authority to act for JEK when he became incapacitated. Instead, petitioner notes that she asserted and provided evidence showing respondent was not promptly responding to contacts from Oakmont about JEK's care and custody. For this argument, petitioner relies on MCL 700.5306(5), which states:

> If an individual executed a patient advocate designation under [MCL 700.5506] before the time the court determines that he or she became a legally incapacitated individual, a guardian does not have and shall not exercise the power or duty of making medical or mental health treatment decisions that the patient advocate is designated to make. If, however, a petition for guardianship or for modification under [MCL 700.5310] alleges and the court finds that the patient advocate designation was not executed in compliance with [MCL 700.5506], that the patient advocate is not complying with the terms of the designation or with the applicable provisions of [MCL 700.5506 to 700.5515], or that the patient advocate is not acting consistent with the ward's best interests, the court may modify the guardianship's terms to grant those powers to the guardian.

Petitioner focuses on the language as it relates to a guardian being provided the powers of a patient advocate if the advocate is not complying with the document appointing the person as patient advocate, violating the statutory subsections related to patient advocates, or not acting in the best interests of the ward. See MCL 700.5306(5). However, petitioner's reliance on MCL 700.5306, in general, is again misplaced. As discussed above, the trial court did not act under MCL 700.5306 when it appointed Marine-Adams as JEK's temporary guardian. Instead, the trial court clearly acted under MCL 700.5312, which does not contain a provision similar to MCL 700.5306(5).

In fact, the language used in MCL 700.5312(1) is inapposite to applying MCL 700.5306(5) to temporary guardianships. Specifically, MCL 700.5306(5) provides different reasons why a trial court might effectively revoke a patient advocate's authority to act for a ward. Importantly, the inquiry requires an analysis of whether the patient advocate was properly appointed to the position

considering that MCL 700.5506 contains particular rules for such, or whether the patient advocate was adequately fulfilling their duties under the statute, the original document providing authority to the advocate, and the ward's best interests. The wording of MCL 700.5312(1) does not require such in-depth considerations of the patient advocate's duties and powers; instead, it requires only that there must not be any other person who "appears to have authority to act in the circumstances . . . ." Therefore, regardless of whether the trial court might eventually have determined respondent was not fulfilling his duties as JEK's patient advocate, respondent still "appear[ed] to have authority to act" at the time the trial court established the temporary guardianship. See *id*. Considering respondent had apparent authority to act on behalf of JEK, the trial court did not have authority to establish a temporary guardianship under MCL 700.5312. Because "[a] court necessarily abuses its discretion when it makes an error of law," the trial court's appointment of Marine-Adams as the temporary guardian of JEK without authority under EPIC was an abuse of discretion. See *Gordon*, 337 Mich App at 318. The trial court's order establishing a temporary guardianship must be vacated.[5]

2. DISMISSAL

Respondent also argues that this Court should not simply vacate the temporary guardianship and remand, but should further instruct the trial court to dismiss the petition for guardianship. We decline to do so.

Respondent contends that petitioner's claim for a guardianship must fail as a matter of law because the petition does not allege grounds that, even if true, would warrant a guardianship under MCL 700.5306. "Under MCL 700.5303(1), an individual 'in his or her own behalf, or any person interested in the individual's welfare,' may file a petition seeking a finding of incapacity and the appointment of a guardian." *In re Guardianship of Redd*, 321 Mich App 398, 404; 909 NW2d 289 (2017). Further, "[t]he petition must contain specific facts about the individual's condition and specific examples of the individual's recent conduct that demonstrate the need for a guardian's appointment." MCL 700.5303(1). Under EPIC, when a trial court is presented with a petition for guardianship of an incapacitated person, it can "appoint a guardian," "dismiss the proceeding," or "enter another appropriate order." MCL 700.5306(1). To appoint a guardian, the trial court must "find[] by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and 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." *Id*.

MCL 700.5303(1) and MCL 700.5306(1) provide a framework for when a petition is sufficient and would avoid being dismissed. As noted, under MCL 700.5303(1), a petitioner is required to plead specific facts exhibiting the necessity of a guardianship. Meanwhile, MCL 700.5306(1) states the circumstances that must exist to establish a guardianship. Therefore, to

[5] Given this conclusion, we decline to address the various other issues raised by respondent as related to the temporary guardianship. Considering the order must be vacated, those issues, the remedy for which would also be vacation of the temporary guardianship order, have been rendered moot. See *TM*, 501 Mich at 317.

avoid dismissal of a petition for guardianship, EPIC appears to require a party to specifically state in the petition the reasons why the petitioner believes the individual for whom a guardian is sought is an incapacitated person under the relevant statute,[6] and why "the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual . . . ." *Id.*; MCL 700.5303(1).

As noted above, for the purposes of this appeal, respondent does not challenge the claim that JEK was an incapacitated individual. Further, respondent does not disagree that JEK cannot care for himself on his own. Instead, respondent contends that the petition did not contain adequate factual assertions, even if believed, that would establish appointment of a guardian was "necessary as a means of providing continuing care and supervision of the incapacitated individual . . . ." MCL 700.5306(1). Pertinently, respondent notes that he was properly caring for JEK as his attorney-in-fact and patient advocate.

Despite respondent's argument to the contrary, the petition for guardianship contained sufficient factual assertions to withstand his claim for dismissal. The petition submitted to the trial court contains a section where petitioner was prompted to write in "[s]pecific facts about [JEK]'s recent condition that lead [sic] me to believe [JEK] needs a guardian . . . ." Petitioner stated:

> [JEK] wondered [sic] away from his residence and has fallen several times. He has been diagnosed with Alzheimer's and Dementia and is confused and disoriented. [Respondent], [JEK's power of attorney] cannot be reached and has not been contributing to his care. Petitioner has been looking after [JEK] but cannot make care decisions without obtaining Guardianship.

In addition to this statement, petitioner also attached a document titled a "CCO System Careplan," that appears to be from Oakmont, where JEK lived until July 23, 2022. The care plan states, JEK was "experiencing weakness," and although "alert," JEK was "confused" and not "oriented[.]" JEK also was described as an "elopement risk and fall risk." After noting adult protective services (APS) was involved with JEK's case, the plan recommended JEK receive "private duty one on on[e] 24 hours care." According to the plan, JEK was unable to independently perform any of his activities of daily life. JEK suffered frequent mood changes, short-term memory loss, confusion regarding time and place, poor judgment, agitation, suspicion, wandering, poor eating, sundowning, aggression, and depression. Lastly, the plan stated that JEK's "last hospitalization [was] due to fall after elopement incident."

On a separate document from Oakmont, which is titled as "New Resident Form," there are handwritten notes from someone. Petitioner does not identify who wrote the notes, but they specifically express difficulty reaching respondent: "Unable to reach [respondent], out of country." The document shows that petitioner picked JEK up from Oakmont on July 23, 2022. Also attached to the petition were e-mails petitioner sent to herself that contained photographs of business cards

[6] Under MCL 700.1105(a), " '[i]ncapacitated individual' means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions."

from employees of Oakmont. The e-mails were printed out and again contained handwritten notes, the writer of which was not identified. Even so, they indicate "per executive director and assistant director[,] please note Oakmont Livonia has made complaints that [respondent] does not visit nor provide proper for [JEK] [sic]." A handwritten note dated July 22, 2022, states JEK's "safety and well being not secure," and there was an "urgent" request for petitioner to pick up JEK from Oakmont.

As noted above, respondent's primary contention is that a guardianship was not warranted because he was properly ensuring care for JEK as his patient advocate. However, under MCL 700.5306(5), a guardianship is not necessarily precluded when an incapacitated individual has named a patient advocate when of sound mind. Instead, if there is evidence the patient advocate was violating the terms of the healthcare power of attorney document, failing to perform statutory duties, or not acting in the best interests of the ward, the trial court is permitted to appoint a guardian in place of the patient advocate. *Id*. Here, the petition alleged respondent was out of the country and not responding to messages from Oakmont, which was struggling to provide adequate care for JEK. Petitioner specifically identified incidents when JEK eloped from Oakmont and fell. The Oakmont records showed JEK was even hospitalized after one such elopement and fall. When Oakmont tried to contact respondent, JEK's patient advocate, for assistance in ensuring JEK received adequate care, respondent did not promptly return the contact. Eventually, Oakmont was forced to involve APS in the case, and had to contact petitioner to remove JEK from the facility on an urgent basis. The petition also noted JEK had since moved into Plymouth Inn.

From the allegations in the petition just summarized, there were grounds for the trial court to determine a guardian for JEK was "necessary as a means of providing continuing care and supervision of the incapacitated individual . . . ." MCL 700.5306(1). Although respondent was appointed as JEK's patient advocate, the petition contained adequate factual assertions to support that respondent was not fulfilling his duties under the terms of the appointment or the requirements of the statute. More generally, by leaving JEK in Oakmont, which continuously expressed its inability to ensure JEK's health and safety, and being unresponsive to their messages, the trial court could determine respondent was not acting in JEK's best interests. See MCL 700.5306(5). Consequently, if the trial court believed the allegations in the petition after considering all of the evidence, there were adequate grounds to appoint a guardian for JEK, even in light of respondent's appointment as JEK's patient advocate. See MCL 700.5306(1) and (5). Because the petition contained sufficiently specific factual assertions, MCL 700.5303(1), dismissal was not warranted in this case, MCL 700.5306(1). As a result, the trial court did not abuse its discretion by impliedly denying respondent's request for dismissal. See *id*.; *Huntington*, 339 Mich App at 17.

In arguing to the contrary, respondent cites to several pieces of evidence, many of which were never provided to the trial court. We will not consider that evidence in this appeal. See *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 724-725; 909 NW2d 890 (2017) ("[A] party may not expand the record on appeal, and this Court's review is limited to the trial court record.") (Citations omitted). The only evidence cited by respondent that also was provided to the trial court was the report from Jeffrey Fried, who was the guardian ad litem (GAL)

for JEK in the conservatorship case.[7] The report noted that respondent was in regular contact with JEK's care providers now that he lived at Plymouth Inn. Respondent's reliance on this evidence is misplaced. He contends that the trial court should have dismissed on the basis of an inadequate petition. The report of Fried undisputedly was prepared after the petition was filed. Consequently, the adequacy of the petition categorically cannot be determined on the basis of a document prepared after the petition was filed. As just noted, our review is limited to the record before the trial court at the relevant time, and Fried's report was not part of the record when the petition was filed. See *id*. At best, respondent has identified a factual dispute in the record, which the trial court will be tasked with deciding after an evidentiary hearing, should the case not be settled during mediation.

C. SPECIAL CONSERVATORSHIP

Next, respondent argues that the trial court legally erred when it appointed a special conservator for JEK when there was no statutory authority to do so under the circumstances. We agree. The conservatorship appears to have expired on its own terms and, thus, this issue may be moot. However, because it appears that the trial court intended to establish the special conservatorship until the case is decided on the merits or settled, we will address this issue.

The trial court abused its discretion when it appointed Marine-Adams as special conservator for JEK without considering evidence or making factual findings. In Michigan, "the standards governing conservatorship appointments" are codified in EPIC. *In re Conservatorship of Bittner*, 312 Mich App 227, 236-237; 879 NW2d 269 (2015). According to MCL 700.5401(1), "[u]pon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section." The statute also states:

> (3) 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

[7] To counter this argument, petitioner relies on the report in the guardianship case. However, that written report is not in the lower court file, and thus, cannot be considered by us on appeal. See *Meisner Law Group*, 321 Mich App at 724-725 ("[A] party may not expand the record on appeal, and this Court's review is limited to the trial court record.") (Citations omitted).

> individual's support, and that protection is necessary to obtain or provide money. [MCL 700.5401(3).]

EPIC also provides certain requirements for a petition for conservatorship, including who has standing to file one:

> (1) The individual to be protected, a person who is interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian, or a person who would be adversely affected by lack of effective management of the individual's property and business affairs may petition for a conservator's appointment or for another appropriate protective order.
>
> (2) The petition must set forth to the extent known the petitioner's interest; the name, age, residence, and address of the individual to be protected; the name and address of the guardian, if any; the name and address of the nearest relative known to the petitioner; a general statement of the individual's property with an estimate of the value of the property, including compensation, insurance, a pension, or an allowance to which the individual is entitled; and the reason why a conservator's appointment or another protective order is necessary. If a conservator's appointment is requested, the petition shall also set forth the name and address of the person whose appointment is sought and the basis of the claim to priority for appointment. [MCL 700.5404.]

Under MCL 700.5406(7): "After hearing, upon finding that a basis for a conservator's appointment or another protective order is established by clear and convincing evidence, the court shall make the appointment or other appropriate protective order." In analyzing this statutory scheme, this Court noted, "[t]he most demanding standard in civil cases is the clear-and-convincing-evidence standard." *In re Estate of Schroeder*, 335 Mich App 107, 114; 966 NW2d 209 (2020). "Evidence is clear and convincing when it produces a firm belief in the truth of the allegations that a party is attempting to establish." *Id*., citing *In re Brody Conservatorship*, 321 Mich App 332, 337; 909 NW2d 849 (2017). "The standard has also been described as equating to evidence that is as clear, direct, weighty, and convincing as to enable a fact-finder, absent any hesitancy, to come to a definitive conclusion regarding the truth of the precise facts at issue." *Schroeder*, 335 Mich App at 114.

Notably, respondent does not dispute JEK is unable to manage his property and business affairs on his own, as required for appointment of a conservator under MCL 700.5401(3)(a). Respondent does contend, though, that petitioner failed to present clear and convincing evidence JEK had "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." MCL 700.5401(3)(b). Before considering respondent's arguments, we recognize that respondent has made all of his claims on the presumption that the trial court appointed Marine-Adams as conservator for JEK. However, the trial court's order and the letters of conservatorship are clear—Marine-Adams was appointed as JEK's *special* conservator. The distinction is important, in general, because a conservator and a special conservator are not the same thing under EPIC, but

the importance of the distinction is lessened in this case because of the substance of respondent's arguments, which will be discussed in greater depth below.

Under EPIC, a conservator is "a person appointed by a court to manage a protected individual's estate." MCL 700.1103(h).[8] A conservator is provided broad powers to act for an incapacitated person. See MCL 700.5423(2) (listing 29 things "a conservator may do" when "[a]cting reasonably in an effort to accomplish the purpose of the appointment and without court authorization or confirmation," including retaining or disposing of real estate, participating in the protected individual's businesses, and entering into a lease agreement for the protected individual as lessor or lessee). Indeed, the trial court's act of appointing a conservator "vests in the conservator title as trustee to all of the protected individual's property, or to the part of that property specified in the order, held at the time of or acquired after the order, including title to property held for the protected individual by a custodian or attorney-in-fact." MCL 700.5419(1).

The term "special conservator," on the other hand, is used sparingly in EPIC. As discussed above, when a petitioner proves both statutory requirements in MCL 700.5401(3), the trial court can either "appoint a conservator or make another protective order in relation to an individual's estate and affairs . . . ." Under MCL 700.5408(1), one of the other "protective orders" the trial court can consider are "protective arrangements," which can include "payment, delivery, deposit, or retention of money or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, contract for life care, deposit contract, or contract for training and education; or an addition to or establishment of a suitable trust." In establishing such a protective arrangement, the trial court is acting "without appointing a conservator." *Id*. Upon setting up the protective arrangement, the trial "court may appoint a special conservator to assist in the accomplishment of a protective arrangement or other transaction authorized under this section." MCL 700.5408(3). "The special conservator has the authority conferred by the order and serves until discharged by order after reporting to the court on all matters done under the appointment order." *Id*.

The term special conservator is also used in MCL 700.5412, when discussing the qualification of a conservator. When accepting their appointment, a "conservator may exclude from the scope of the conservator's responsibility, for a period not exceeding 91 days, real estate or an ownership interest in a business entity," for various reasons related to hazardous substances. MCL 700.5412(2). Upon doing so, the conservator may request the trial "court to appoint a special conservator with respect to the excluded property . . . ." MCL 700.5412(3). After receiving the request, the trial court may:

> Appoint a special conservator with the duty and authority to collect and manage the excluded property, but only to the extent necessary for proper settlement of the estate, to preserve the property, to account with respect to the property, and to

[8] The term "conservator" is also defined elsewhere in EPIC as including, "but [] not limited to, a limited conservator described in [MCL 700.5419]." MCL 700.5101(c). A "limited conservatorship" is established when the trial court enters "[a]n order specifying that only a part of the protected individual's property vests in the conservator . . . ." MCL 700.5419(1). There is no allegation in this case that Marine-Adams is a limited conservator.

> distribute or otherwise dispose of the property as directed by the general conservator or other court order. [MCL 700.5412(4)(a).]

Elsewhere in EPIC, under MCL 700.5413, a special conservator "is entitled to reasonable compensation from the estate." EPIC permits a trial court to appoint a guardian as a special conservator "[i]f a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property . . . ." MCL 700.5314(b). A guardian of a minor is provided a similar option under MCL 700.5215(a). These latter three sections obviously are not relevant because Marine-Adams is not seeking payment in this appeal and JEK's guardian has not filed any protective proceedings in this case. Moreover, the record contains no indication that a conservator excluded any of JEK's businesses or properties in their acceptance of the appointment as conservator, so MCL 700.5412 also does not apply in this case. Marine-Adams's acceptance did not contain any such exclusions.

Thus, it appears the only possible statute under which Marine-Adams was appointed as JEK's special conservator was MCL 700.5408. Notably, under that statute, the trial court could only appoint a special conservator to oversee a protective arrangement entered in lieu of a conservatorship. MCL 700.5408(3). There is no indication in the record that the trial court meant to establish a protective arrangement for JEK. Indeed, during the hearing, the trial court appeared to equate being a special conservator with being a temporary conservator. First, the trial court stated, "Within 60 days mediation should occur. And again, Lynn Marine-Adams is appointed as the temporary Guardian and temporary Conservator, okay." Shortly afterward, the trial court clarified, "I'll make it a Special Conservator okay and ask that any assets to be turned over to her from now on." The trial court explained its decision to the parties in the following manner: "In the interim, the Court is going to appoint a temporary Guardian, Lynn Marine-Adams and a Special Fiduciary who will serve as the Conservator. At this point, temporary basis and that will be Attorney Lynn Marine-Adams as well."

In light of the record just discussed, it is not abundantly clear the trial court intended to act under MCL 700.5408. However, because there was no other possible authority to appoint a special conservator, we will presume the trial court did so. As noted, the appointment of a special conservator under MCL 700.5408(3) occurs when the trial court decides to create a protective arrangement for an incapacitated person instead of appointing a full conservator. Under MCL 700.5408(1), though, a protective arrangement is only permitted "[i]f it is established in a proper proceeding that a basis exists as described in [MCL 700.5401] for affecting an individual's property and business affairs . . . ." Recall that MCL 700.5401 provides, "[u]pon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section." The same elements described above, which would permit the trial court to appoint a conservator, also are required when the trial court decides to "make another protective order" such as a protective arrangement with appointment of a special conservator:

> (3) 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. [MCL 700.5401(3) (emphasis added).]

Therefore, even though respondent has premised his argument on the incorrect presumption that the trial court appointed Marine-Adams as JEK's conservator instead of his special conservator, respondent's challenges to the elements in MCL 700.5401(3) are still applicable. In other words, the trial court was not permitted to appoint a conservator or make a protective arrangement including appointment of a special conservator without first satisfying the requirements of MCL 700.5401(3).

Pertinently, under MCL 700.5401(3)(b), the trial court could not appoint a special conservator as part of a protective arrangement unless it "determine[d]" JEK had "property that will be wasted or dissipated unless proper management is provided, or money is needed for [JEK]'s support, care, and welfare . . . and that protection is necessary to obtain or provide money." During the hearing on December 1, 2022, the trial court did not "determine" the statutory requirements were met before establishing the special conservatorship. Indeed, the trial court would have been hard-pressed to determine anything, considering it did not allow admission of evidence or weigh any of the evidence attached to the parties' filings. Although the statute only mentions the trial court holding a "hearing," and not an evidentiary hearing, MCL 700.5401(1), the trial court undoubtedly still was required to make "determinations" on the record provided before affecting JEK's businesses and properties, MCL 700.5401(3). Here, the trial court completely failed to do so. In short, the trial court established a special conservatorship and set aside JEK's appointment of respondent as his attorney-in-fact without making *any* factual findings under MCL 700.5401(3). This was a legal error, because the action taken by the trial court was only statutorily permitted if the trial court determined JEK's property would be dissipated or wasted without proper management, or money was needed to pay for JEK's care and such money could not be obtained without action from the trial court. *Id*. Because "[a] court necessarily abuses its discretion when it makes an error of law," the trial court's appointment of Marine-Adams as the special conservator of JEK without authority under EPIC was an abuse of discretion. See *Gordon*, 337 Mich App at 318.

In an attempt to escape this conclusion, petitioner contends the trial court was presented with an adequate record to determine that the statutory requirements for a conservatorship were met. Similarly, respondent counters with arguments regarding the lack of factual support on the record for the trial court's decision. However, because the statute required the trial court to make determinations before establishing the special conservatorship, and the trial court did not do so, it abused its discretion. See MCL 700.5401(3). In making these arguments, the parties have only identified factual disputes that should have been and must be decided by the trial court on the basis

of the evidence. Moreover, each party once again relies on evidence not in the trial court record, and thus, not able to be considered by this Court. See *Meisner Law Group*, 321 Mich App at 724-725 ("[A] party may not expand the record on appeal, and this Court's review is limited to the trial court record.") (Citations omitted).

As for evidence actually on the record, petitioner cites to the copies of checks written to respondent from JEK's account, which she attached to her witness and exhibit list. The checks show respondent was paid $5,000 and $7,000 from JEK in the middle of 2019. The purpose of the compensation from the checks is not clear from their face. Petitioner contends they are in respondent's handwriting, but provides no evidence of such. Moreover, at the time the checks were written, respondent was not yet appointed as JEK's attorney-in-fact, which occurred in January 2021. At that time, two witnesses and a notary stated JEK was still of sound mind. Thus, while respondent being paid $12,000 from JEK is questionable, it is certainly not dispositive, and is just one piece of evidence the trial court will be required to consider during an evidentiary hearing when deciding whether JEK's assets might be being wasted or dissipated. See MCL 700.5401(3).

Respondent, on the other hand, cites to Fried's report and the limited allegations contained in the petition in support of his claim that the petition should have been dismissed. Fried's report indicated respondent paid for the cost of JEK's lodgings not covered by the income from JEK's estate. After speaking with staff at Plymouth Inn, Fried concluded respondent was ensuring JEK was receiving adequate care at the facility. Even so, Fried suggested the trial court should require respondent to conduct an accounting to verify he was not mismanaging JEK's assets and businesses. Therefore, despite the positive review from Fried, he still had concerns about the possibility of waste or dissipation of assets by respondent. As for the petition, it alleged only that JEK suffered from dementia and Alzheimer's disease, which resulted in confusion and being disoriented, and that respondent "has not visited or responded to calls for help and is currently in Greece." Later, the petition vaguely states JEK "has assets that could be wasted pending hearing," and JEK "also needs to pay for care and rent at his current location." Petitioner encouraged the trial court to enter an order requiring JEK's "rent and medical care be paid for form his assetts [sic]."

While the allegations in the petition are sparse and vague, respondent has challenged the trial court's decision to establish a special conservatorship, which occurred on December 1, 2022. Respondent has not provided any authority, nor is there any, requiring the trial court to rely solely on the allegations in the petition when deciding whether to establish a conservatorship or enter a protective order. Therefore, the limited allegations in the petition are not entirely relevant to this issue. From the factual record provided, there was at least a question of fact regarding whether respondent was mismanaging or misusing JEK's funds. Both of the parties, by relying on evidence outside of the record, reveal there is other evidence pertinent to the factual dispute at hand. The trial court, before entering the order appointing Marine-Adams as special conservator, was required to consider the evidence and determine whether the statutory requirements for the order were met as stated in MCL 700.5401(3). The record actually in front of the trial court when it established the special conservatorship does not necessitate a result as a matter of law in favor of either party. See *id.* As a result, by failing to consider any evidence or make any factual determination, the trial court has effectively made it impossible for us to review the decision. In short, as stated above, because the trial court was required to make factual determinations before

establishing a special conservatorship under EPIC, and did not, it abused its discretion, which requires us to vacate the special conservatorship order and remand for further proceedings. See *id*.; *Gordon*, 337 Mich App at 318.[9]

In conclusion, the trial court's orders establishing a temporary guardianship and special conservatorship are vacated, and we remand for further proceedings consistent with EPIC. We do not retain jurisdiction.

/s/ Sima G. Patel
/s/ Mark J. Cavanagh
/s/ James Robert Redford

[9] Respondent also argues that this Court should dismiss the conservatorship petition because petitioner lacked standing to bring the claim. Respondent never raised this argument with the trial court, rendering it unpreserved. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 228; 964 NW2d 809 (2020). A challenge related to standing can be waived by a party's failure to raise it before the trial court. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 528; 695 NW2d 508 (2004). "Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks and citation omitted). Because respondent's standing arguments have been waived, we decline to consider them. See *id*.