

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 188-3-13 Wrcv

In re Virginia Newman Guardianship

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for hearing on appeal from the Probate Division on May 10, 2013. Appellant, Roger Lamson was present with his attorney, Richard Coutant, Esq. Frank Lamson was present with his attorney, W.E. Whittington, Esq., Mrs. Newman was not present, but was represented by Susan Buckholz, Esq. Mrs. Newman's GAL, Brita Hansen was present. The current guardian, Beth Barrett, was present with her counsel, Stephen Ankuda, Esq. This is an appeal under V.R.C.P. 72 of a guardianship determination made by the Probate Division on March 12, 2013.

An earlier order was issued on May 31, 2012 prior to the close of business. As the parties had been given until the end of the month to make filings, the Court recalled its decision before the close of business on May 31, 2013. Filings were received from both parties prior to midnight on May 31, 2013 and the Court has considered them.

Findings of Fact

The Court's findings of fact made herein are based upon the testimony given at the hearing on May 10, 2013 and upon its review of the transcript and exhibits introduced in the Probate Division as requested here by Roger Lamson. His request for the Court to consider testimony given in the Probate Division and to use that testimony and exhibits as part of this Court's de novo hearing on appeal is consistent with the Court's view of V.R.C.P. 72, which provides that a transcript of the Probate proceedings are part of the record on appeal. This requirement, in the Court's view, enables any party on appeal to offer all or such parts of the transcript as they may wish upon appeal. These findings are made to a standard of clear and convincing evidence.

Virginia Newman is a 97 year old woman, living in South Royalton, who is in declining health. She was born on July 8, 1915. She suffers from hearing and vision difficulties and communicates, when she does, through written means. She has two adult sons, Roger, an attorney who currently is not practicing, and Frank, a nurse practitioner. Roger lives in Sutton, New Hampshire. Frank lives in South Royalton, although in a separate home from his mother. Frank works near his mother's house and stops in to see her frequently. Mrs. Newman purchased her house in South Royalton in 1990 and for several years split her time between there and a

FILED
JUL 1 2013
VERMONT SUPERIOR COURT
WINDSOR UNIT

condominium she owns in Florida. She also owned a summer home in Massachusetts, but that was sold a short time ago.

Roger and Frank have a contentious relationship, each believing the other is taking advantage of their mother. This has led to a great deal of acrimony and protracted litigation which continues in two divisions of the Superior Court. The Court will take judicial notice of the pendency of an appeal in this Court of various determinations made in the Probate Division concerning Virginia Newman's Trust, and the continuation of some aspects of the trust matters in the Probate Division, but the Court is not considering trust issues at this time except to the extent they pertain to the guardianship determination. Mrs. Newman's most recent Trust Agreement was executed on May 2, 2003, when she was nearly 88 years old. It originally provided for Mrs. Newman, her two sons, and Fleet Bank to be co-trustees. Over time the trustees of the trust have changed.

All parties are now in agreement that Mrs. Newman is in need of a guardianship which needs to extend, in some fashion, to all the statutory powers. Roger believes he should be given guardianship over his mother's financial affairs, or at a minimum be a co-guardian concerning financial matters with Beth Barrett, the guardian appointed by the Probate Division. The other parties oppose this request. No one opposes Beth Barrett continuing as guardian concerning the other statutory powers and no one suggests a guardian is not needed for those powers. Barrett is a registered nurse and case manager. She has the necessary education, training, and skills to serve as guardian.

Because the parties are all in agreement that Mrs. Newman is in need of guardianship, the Court will not set forth lengthy findings of fact concerning Mrs. Newman's medical condition. The Court has reviewed the Clinical Evaluation Report prepared by Dr. Lisa Furmansky, which found Mrs. Newman has cognition loss, sensory impairment, and suffers from anxiety and agitation. According to Dr. Furmansky's report, apparently done in January 2013, Mrs. Newman needs total care across a broad spectrum of activities of daily living. She can get meals for herself with assistance, otherwise she requires total care for all activities of everyday living. Dr. Furmansky believes that Mrs. Newman requires 24 hour per day supervision due to risk of falls, and her memory, hearing, and vision impairments. Her condition is age related and will not improve, but she does better with familiar persons present than she does in dealing with strangers. The Court agrees with the parties' stipulation and finds Mrs. Newman requires a total guardianship.

Roger Lamson has been involved in aspects of his mother's financial planning for approximately the past 23 years. Mrs. Newman has a trust which includes most, but not all, of her assets. Until recently, Roger, Frank, and Bank of America were co-trustees of this trust. A probate order, under appeal but not stayed, removed Roger as a trustee, accepted the resignation of Frank as trustee, and replaced Bank of America with Trust Company of Vermont as sole trustee. Bank of America no longer wished to be trustee due to ongoing discord between Roger and Frank. Roger claims that Beth Barrett is overwhelmed with all the obligations she must attend to concerning Mrs. Newman and that his knowledge of her financial affairs will be of considerable aid.

Other than Roger's opinion, no evidence has been submitted that Beth Barrett is unable or incapable of handling the financial affairs of Mrs. Newman. Existing difficulties have been caused by the unclear roles regarding the trust and guardianship issues and the uncertainty arising by the claim of a continuing stay of prior orders of the Probate Division by virtue of the appeal of those decisions.

More accurately, the Trust had been reduced to a level of dysfunction by the bickering between Roger and Frank, which left the Trust perilously close to having no trustee. The situation became such that Roger was depositing some checks payable to the Trust into the representative payee account, which is not part of the Trust, in order to have cash available to meet his mother's current expenses. The guardian was unclear about her authority or the authority of others concerning Mrs. Newman's non-trust affairs.

Because Mrs. Newman's assets are not all in the Trust there is a need on the part of the financial guardian to marshal assets on Mrs. Newman's behalf. Roger contends he is in the best position to do this because of his extensive involvement in his mother's financial affairs. At present the non-trust assets are a representative payee account for direct deposit of Mrs. Newman's Social Security benefits, with a current balance of about \$23,000; a joint checking account with Roger in a Florida bank which has a \$0 balance; and perhaps pieces of property in Royalton and/or Tunbridge. In comparison, however, the Trust assets currently are approximately \$1,200,000. Some \$300,000 on account with Fidelity is apparently being held under some earlier version of the Trust, which needs to be addressed as part of the trust proceedings. The Trust assets appear to be well in excess of the personal assets of Mrs. Newman.

Roger has played an active role in his mother's financial affairs for many years, including considerable involvement while acting as a trustee of his mother's Trust. This included his role in negotiating issues between his mother's Trust and the children of Mrs. Newman's husband, George Newman. Roger claims, and there is no evidence to the contrary, that through his efforts a favorable settlement with the Newman children was reached. Roger is very knowledgeable about his mother's financial holdings.

Frank disagreed with some of the positions taken by Roger as trustee, including the sale of the Massachusetts beach property. Roger alleged that Frank's recalcitrance at selling the Massachusetts property cost the Trust some \$100,000 in sale price and up to \$50,000 in additional expenses.

The level of discord between Roger and Frank is considerable and has worsened over time. This has included disagreements over medical issues and care providers. Roger discharged Mrs. Newman's companion of 28 years over her alleged incompetence. Because the parties agree Beth Barrett should be the medical guardian, the Court will not review the roles each brother has played in caring for their mother or changes in medical care undertaken under the direction of one brother or the other. There are, however, allegations by Roger that Frank administered drugs to his mother improperly, has lied, and has engaged in self-dealing and Trust improprieties. Roger has asked for an accounting concerning the Trust assets. At the guardianship hearing, a bill of sale, purportedly executed in April 2007, was produced. This bill of sale claims to convey the contents of Mrs. Newman's house to Frank. Roger was unaware of this conveyance until the

FILED

JUL 1 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT

time to the hearing in the Civil Division. Roger filed a complaint against Frank with Adult Protective Services which was not resolved at the time of this hearing. Roger claims his mother's personal belongings, including jewelry, are worth \$100,000 or more.

Roger claims that as Mrs. Newman's son, he has a protected liberty interest in being appointed financial guardian for his mother. He claims the family relationship is such that a compelling reason must exist to warrant the appointment of a stranger over his mother's financial affairs.

There is no evidence before the Court that any real property will need to be sold or encumbered to meet Mrs. Newman's obligations.

Both brothers claim the other has involved their mother in issues concerning this litigation. Because communication with their mother is limited to writing notes in large block letters each brother has written notes to her discussing issues between them. Roger recovered notes Frank wrote, one of which indicated that Roger "just wants to inherit as much as possible." Roger also introduced in the Probate Division a note ostensibly signed by his mother asking that he be appointed her guardian. In the hearing in this division, Roger avoided answering the question whether he harbors animosity toward Frank. His actions, however, strongly indicate that he does.

On November 1, 2006, Mrs. Newman executed an advanced directive (Ex. FL2). This directive appointed Frank Lamson as Mrs. Newman's health care agent. In the event Frank was unable to serve, the directive named Frank's wife, Maria Lamson, as the alternate agent. This document is the latest expression of Mrs. Newman's health care wishes, replacing an earlier directive, executed in 1999, which named Frank and Roger as health care surrogates. Roger questions the authenticity of one of Mrs. Newman's signatures on the 2006 directive. No competent evidence was introduced to establish the 2006 advanced directive was not authentic or did not represent Mrs. Newman's health care choices at that time or that she lacked the capacity at that time to execute the directive. There has been a petition filed, docketed in the trust proceeding to review the advanced directive. It does not appear the Probate Division has acted upon this request at present.

There are prior powers of attorney which were executed by Mrs. Newman. These include a 1987 durable power of attorney naming Roger as agent and two later powers of attorney in 1999, naming Frank as agent with Roger as alternate.

Under the Trust Agreement the Trustee is required to pay to the Grantor (Mrs. Newman) portions of the trust estate which the Trustee may determine to be necessary for Mrs. Newman's support, maintenance, welfare or for any other purpose which the Trustee may determine to be in her best interests. In the event a guardian is appointed, the payments shall be made to the guardian or directly to others for the use and benefit of Mrs. Newman. This creates the potential for the guardian and the Trustee to have considerable interaction with each other as Mrs. Newman's health declines.

Both Roger and Frank have submitted information post-hearing which they wish the Court to consider. The Court has not considered the additional information in making these findings, but has considered the proposed findings and conclusions submitted by counsel on matters which were before the Court at the time of the hearing.

Conclusions of Law

The parties here agree that Mrs. Newman is a person in need of guardianship under 14 V.S.A. § 3061. The medical evidence amply supports the conclusion that Mrs. Newman cannot manage any aspects of her personal care or financial affairs without the supervision of a guardian. It has been established by clear and convincing evidence that Mrs. Newman requires guardianship for all statutory powers enumerated in 14 V.S.A. § 3069.

The parties further agree that Beth Barrett should act as guardian for all statutory powers except for financial affairs. The disagreement concerns who should act as Mrs. Newman's financial guardian.

In determining who should be guardian, the court is required under 14 V.S.A. § 3072(b) to consider:

- (1) the nomination of a guardian in an advance directive or in a will;
- (2) any current or past expressed preferences of the respondent;
- (3) the geographic location of the proposed guardian;
- (4) the relationship of the proposed guardian and the respondent;
- (5) the ability of the proposed guardian to carry out the powers and duties of the guardianship;
- (6) the willingness and ability of the proposed guardian to communicate with the respondent and to respect the respondent's choices and preferences;
- (7) potential financial conflicts of interest between the respondent and the proposed guardian, and any conflicts that may arise if the proposed guardian is an employee of a boarding home, residential care home, assisted living residence, nursing home, group home, developmental home, correctional facility, psychiatric unit at a designated hospital, or other similar facility in which the respondent resides or is receiving care; and
- (8) results of any background checks.

In the instant case, the most recent advanced directive, executed in 2006, did not name Roger as Mrs. Newman's agent or alternate agent. The explanation for this may be as simple as the proximity that Frank and his family had to Mrs. Newman as she advanced in age and reduced her time in Florida or elsewhere. Whatever the reason may have been, Mrs. Newman chose not

FILED
JUL 1 2013
VERMONT SUPERIOR COURT
WINDSOR UNIT

to have Roger be either the agent or alternate agent under the 2006 directive. This was a change from an earlier directive. That Roger was not named in the last directive as an agent or alternate agent is some evidence that Mrs. Newman preferred others to handle her health care affairs. At earlier times, Mrs. Newman had provided powers of attorney to both of her sons. Mrs. Newman's guardian obviously will have many decisions to make concerning health care which fall outside the terms of the advanced directive, not the least of which includes who should act as care givers for so long as she is able to remain in her home.

The Trust Agreement provides that Mrs. Newman's sizeable trust estate is to be divided equally between her sons. This is strong evidence that she loves her sons equally.

Despite his considerable involvement in his mother's financial affairs for a period of over a decade from when she executed the 2003 Trust Agreement, Mrs. Newman chose not to make Roger sole trustee of the Trust. This is evidence that whatever involvement Roger had in his mother's finances, Mrs. Newman did not want Roger making sole financial determinations concerning the trust estate. No reason has been advanced why the Court should view the administration of assets falling outside of the Trust Agreement differently.

The Court is cognizant that Roger has much more familiarity with his mother's finances than any person outside of the family would have. He also has more knowledge of them than Frank. Roger's knowledge of her financial affairs has been given great weight by this Court in the consideration of who should act as Mrs. Newman's financial guardian(s).

There is benefit to having a person familiar with Mrs. Newman's assets act as her guardian regarding her financial affairs. However, the evidence does not suggest that her non-trust assets are so substantial or so scattered that such prior knowledge is imperative. There is no credible evidence that Beth Barrett is unable to competently handle the financial affairs of Mrs. Newman outside of the falling outside of the Trust, despite the attention she must give to other aspects of Mrs. Newman's life.

Roger's geographic location in Sutton, N.H. does not present a major obstacle for him to serve as a guardian or co-guardian for financial affairs in this case. More important than location is the uncertainty which might be created by a co-guardianship for financial affairs if the two guardians were unable to agree on a course of action. Given the litigation currently pending the Court does not believe a co-guardianship over financial matters to be a wise approach.

There is evidence before the Court that, unbeknownst to Roger, his mother conveyed personable property, perhaps having considerable value, to Frank in April 2007. This may become an issue of contention between the brothers or between Roger and his mother. The possibility of a conflict of interest between Roger and his mother over this issue certainly exists.

Roger next argues he is entitled to be appointed as the financial guardian of his mother because, as her son, he has a liberty interest in remaining close to her. The legislature requires the Court to take into eight factors in assigning a guardian. *See* 14 V.S.A. § 3072(b). Among

those, the Court considers “the relationship of the proposed guardian and the respondent.” *Id.* § 3072(b)(4). Thus, the statute accounts for Roger’s right to a preference as a family member. The statute does not, however, elevate his status above the other listed factors.

Other jurisdictions permit courts to assign guardians outside of the family when it is in the best interest of the ward. *See, e.g., In re M.K.*, 278 P.3d 876, 883 (AK 2012); *Patterson v. Cook*, 341 S.E.2d 782, 782 (S.C. 1986); *In re Guardianship of Rich*, 520 N.W.2d 63, 66-67 (S.D. 1994). Like Vermont, many states require the courts to give a preference to family members serving as guardians. Nevertheless, a court may assign an outside guardian if it would be in the ward’s best interest. For example, a court may assign an outside guardian where it finds a child’s financial interest conflict with the ward’s interests. *In re Guardianship of Rich*, 520 N.W.2d at 66-67. A court may also assign an outside guardian where the family member lives with a person convicted of abusing the ward. *See In re M.K.*, 278 P.3d at 883. Although these are extreme examples, the cases show the Court need not engage in a liberty interest analysis when assigning a guardian.

More to the point, the Court may appoint an outside guardian when there is significant family acrimony. *See In re Guardianship of Van Sickle*, 2005 ND 69, ¶ 36, 694 N.W.2d 212 (N.D. 2005) (citing *In re Guardianship of Kelly*, 910 P.2d 665, 671 (Ariz. Ct. App. 1996)). For example, the Supreme Court of North Dakota affirmed a trial court’s decision to appoint an outside party instead of the ward’s son because “[t]he record establishes that [the son] is at odds with other family members concerning proper care for the ward.” *Id.* The court then reasoned an outside guardian would serve the best interest of the ward. *Id.* This Court finds the Supreme Court of North Dakota’s reasoning persuasive.

As discussed above, an outside guardian would be in the best interest of Mrs. Newman in this case. The Court considers the relationship between Roger and his mother as one of eight statutory factors. *See* 14 V.S.A. § 3072(b). In the Court’s view, the rancorous and on-going disputes between Roger and his brother make Roger unsuitable to be Mrs. Newman’s guardian. *In re Guardianship of Van Sickle*, 2005 ND 69, ¶ 36. No case law suggests the Court must conduct any deeper analysis concerning Roger’s rights than it already has under the 14 V.S.A. § 3072 factors.

Finally, the Court observes that none of the cases cited by Roger support his contention that he has a liberty interest in being the guardian. Many of the cited cases concern a parent’s right to raise the parent’s child. For example, *In re N.H.* concerned the guardianship of a juvenile in an unstable home. *See* 135 Vt. 230, 231 (1977). Others, such as *Trujillo v. Board of County Commissioners*, generally describe the importance of maintaining families. *See* 768 F.2d 1186, 1188 (10th Cir. 1985). Contrary to Roger’s characterization, *In re Quinlan* mostly considered end of life issues and affirmed a parent’s right to a preference in appointment as a guardian. 355 A.2d 647, 670-71 (N.J. 1976).

The accusations and finger pointing between Mrs. Newman’s sons during the final stages of her life is unfortunate. Under the circumstances, it is best that an independent guardian on financial issues be appointed in an effort to reduce the opportunity for claims of misdealing between brothers.

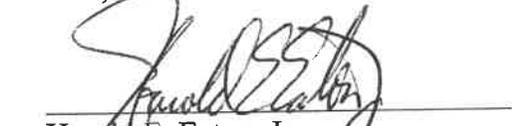
The Court concludes that Beth Barrett should be appointed guardian for the statutory powers enumerated in 14 V.S.A. § 3069(c)(1)(2)(3)(4) and (6). The powers under 14 V.S.A. § 3069(5) are not implicated at this time. There appears to have been no hearing on the petition to review the advanced directive filed for some reason in the trust proceedings, but the Court concludes that given the level of discord existing between Roger and Frank that neither Frank nor his wife, Maria, should serve as agent at this time. Should any interested party request a hearing on that issue, or other issues concerning the advanced directive, a request should be made to this Division within 10 days of this order so that appropriate action may be taken.

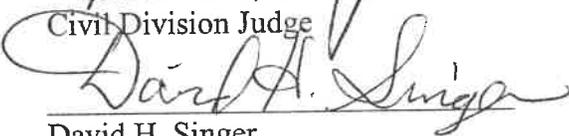
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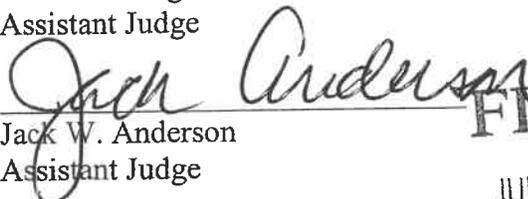
Based upon the foregoing, the Court hereby **ORDERS** as follows:

1. The Court appoints Beth Barrett guardian for Virginia Newman and she is given the powers identified in 14 V.S.A. § 3069(c)(1)(2)(3)(4) and (6).
2. Ms. Barrett shall confer with Frank and Roger Lamson before making any major medical decisions, if conferring is possible under the circumstances, and she shall be guided by Mrs. Newman's instructions as contained in her advanced directive of November 1, 2006.
3. Beth Barrett shall have sole authority over Virginia Newman's supervision.
4. Beth Barrett shall have sole authority to retain and discharge care givers for Virginia Newman. Care givers shall take direction solely from Beth Barrett.
5. Except in case of emergency, Beth Barrett shall have sole authority to obtain medical care for Virginia Newman.
6. Any request to review the 2006 health care directive must be renewed within 10 days of this order or that matter will be deemed moot.
7. Due to potential inconsistencies between prior powers of attorney and this order, all prior powers of attorney are revoked pursuant to 14 V.S.A. § 3507(a)(8).
8. Any bond requirement imposed by the Probate Division continues.

Dated at Woodstock this 25th day of June, 2013.


Harold E. Eaton, Jr.
Civil Division Judge


David H. Singer
Assistant Judge


Jack W. Anderson
Assistant Judge

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JUL 1 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT