

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

IN THE MATTER OF : ORPHAN'S COURT DIVISION
ESTELLA MOON, an alleged :
incompetent person : No. 41-98-0574

OPINION and ORDER

In this matter the court is asked to adjudicate Estella Moon an incapacitated person and appoint a limited guardian for her estate, so that a portion of her assets may be spared from the huge nursing home care costs she is incurring each month. Mrs. Moon previously executed a power of attorney appointing George Moon, her husband, and Reverend David Bixler, pastor of her church, as co-attorneys-in-fact. The petitioner, Robert Moon, is the son of George Moon and the stepson of Estella Moon. He contends that a guardian is now necessary because the power of attorney does not permit the type of estate planning that is necessary in this case. He requests this court to appoint him guardian because he has an interest in Mrs. Moon's welfare and is the nominee of George Moon. Reverend Bixler argues that the power of attorney is sufficient to conduct the transactions necessary to preserve Mrs. Moon's estate. If a guardian is found to be necessary, he proposes the appointment of himself.

After hearing, the court finds that it is necessary to appoint a limited guardian for Estella Moon for the purpose of estate planning, and that the guardian should be neither Robert Moon, nor Reverend Bixler, nor both men. Rather, the unique circumstances of this case call for the appointment of a disinterested third party who can dispassionately make decisions in the best interest of Estella Moon.

Factual Background

Estella and George Moon married late in life, when both were in their sixties. Like many such couples, they kept their finances separate. Mrs. Moon had a somewhat strained relationship with Mr. Moon's two children, and she apparently did not desire for them to inherit any of her assets. She therefore executed a will leaving her husband \$500 and a life estate in the house. The bulk of her estate is to be distributed equally between the Child Evangelism Fellowship of Lycoming County and the Emmanuel Baptist Church, the residual beneficiaries. Mrs. Moon also executed a durable power of attorney on 23 December 1992 appointing George Moon and Reverend David Bixler, pastor of Emmanuel Baptist Church, as co-attorneys-in-fact and giving them broad powers to conduct her affairs.

Mrs. Moon is now ninety-one years old. She has been residing in the Rose View Manor Nursing Home for over a year. A stroke has rendered her severely impaired, both physically and mentally. George Moon and Reverend Bixler have been attending to her needs through their powers as attorneys-in-fact.

Mrs. Moon was evaluated by Richard E. Dowell, Jr., a clinical neuropsychologist who testified that she is severely impaired in expressive language skills and language comprehension. She is unable to respond accurately to abstract questions, cannot read or write, and is completely unable to conduct her personal affairs. Communication with her is nearly impossible. The court finds that based on this uncontroverted evidence, Mrs. Moon may be adjudicated incompetent pursuant to 20 Pa.C.S.A. § 5501; § 5518.

Mrs. Moon's expenses for care at Rose View are more than \$4500 per month. Due to this cost her estate has been reduced by \$100,000, dwindling to a present value of

approximately \$330,000. Although she has virtually no chance of recovering to the point of being able to manage her financial resources or physically care for herself, she is in good physical health and could live for many more years.

Robert Moon believes it would be in Mrs. Moon's best interest to engage in estate planning and long-term health care planning to preserve as much of her estate as possible for her husband and the residual beneficiaries in her will. He contends that the existing power of attorney does not permit an individual acting under the power of attorney to develop and carry out such a plan.

I. Necessity for a Guardian

George Moon presented the testimony of Julie Steinbacher, a gerontologist with great expertise in estate planning and asset preservation for individuals requiring long-term health care. She discussed the complicated issues and the relevant laws surrounding the issue of protecting assets from dissipation in nursing home care and detailed the choices available to people who need such care. Although a person is not eligible for Medicaid until he or she has less than \$2400 in assets, the law permits certain transactions to save the entire estate from depletion by nursing home expenses. Ms. Steinbacher outlined the steps Mrs. Moon or her guardian could take to preserve her estate.

First, the assets of both spouses are assessed, allocated, and separated into two estates, following the provisions of 55 Pa. Code 178. This would permit George Moon to immediately receive \$79,000 of Mrs. Moon's estate. If his income falls below a certain amount each month, he is entitled to receive even more of her assets. Next, the remaining

assets are distributed to the residual beneficiaries of Mrs. Moon's will at a rate of \$4500 per month. By executing this plan, as much as \$125,000 could be saved for the residual beneficiaries.

If Mrs. Moon lives for several more years, such a plan would clearly be in the best interest of the beneficiaries, even though George Moon would have taken \$79,000 from the estate. However, if she dies shortly, executing the plan would decrease the amount they would receive, although George Moon could then take his surviving spouse elective share of 1/3 of her estate. Moreover, if the plan is not executed and George Moon enters a nursing home while Mrs. Moon is alive, she will be required to pay for his care and he will be forced to take his elective share if she dies before him.

Although it is impossible to know Mrs. Moon's wishes for her estate, all parties appear to believe she would want her husband's needs to be met and would wish to preserve as much of her estate as possible for the beneficiaries named in her will. The best way to accomplish these goals is to execute some type of asset preservation plan. Both parties agree such a plan would be wise.

The issue, then, is how to execute a plan. Ms. Steinbacher adamantly stated that based on her extensive experience in implementing such plans the existing power of attorney does not grant sufficient power to separate the estates, to make a \$79,000 gift to George Moon, and to distribute the remaining assets to the beneficiaries. She firmly believes the language in the power of attorney must expressly grant the power to engage in long-term health care planning and asset preservation, or express an intent that her agents perform these functions. Ms. Steinbacher also cautioned that even if such transactions were possible

under the power of attorney, it would be foolish to execute the plan unless all interested parties agreed to it, for the residual beneficiaries would almost certainly challenge the transactions afterward. In her opinion, there is no other choice than for the court to appoint a guardian and explicitly grant that individual the power to develop and execute such a plan.

Reverend Bixler argued that the power of attorney currently in effect is sufficient for the agents to do all the things necessary for long-term health care planning and asset preservation. He pointed to the cases of Augustine v. McMahon, 695 A.2d 836 (Pa. Super. 1997) and Taylor v. Vernon, 652 A.2d 912 (Pa. Super. 1995), which hold that a broadly worded power of attorney bestows the power to make gifts, even to one's self. Certainly the power of attorney in this case was broadly worded. However, the cited cases do not convince this court that the power of attorney permits George Moon and Reverend Bixler to engage in the transactions necessary for estate planning and long-term health care planning, for the following reasons.

First, the court finds Ms. Steinbacher's expert testimony to be highly reliable and convincing, and we conclude that the agencies involved would probably not accept the power of attorney as adequate. It matters not what case law says about the matter if the agencies administering the system hunker down into an opposite position and refuse to budge. This court is reluctant to put the attorneys-in-fact through the agonizing process of trying to turn the wheels of entrenched bureaucratic agencies while Mrs. Moon's assets are daily dissipating. Secondly, even if these transactions could be carried out via power of attorney, that path would be fraught with danger of subsequent litigation brought by the residual beneficiaries of the will. Therefore, the court concludes that it is necessary to

appoint a limited guardian for the estate of Mrs. Moon for the purpose of estate planning.

II. Selection of a Guardian

The selection of a person to serve as guardian is within the discretion of the trial court. Estate of Haertsch, 437 Pa. Super. 187, 649 A.2d 719 (1994). However, the law is very clear that whenever possible the court should appoint a person or persons selected by the incapacitated person. 20 Pa.C.S.A. § 5511 states: “When appropriate, the court should give preference to a nominee of the incapacitated person.” 20 Pa.C.S.A. § 5604(c)(2) states:

A principal may nominate, by a durable power of attorney, the guardian of his estate or of her person for consideration by the court if incapacity proceedings for the principal’s estate or person are thereafter commenced. The court shall make its appointment in accordance with the principal’s most recent nomination in a durable power of attorney except for good cause or disqualification.

Case law also underscores the importance of respecting the incapacitated person’s choice. See Wilhelm v. Wilhelm, 657 A.2d 34 (Pa. Super. 1995); In re Sylvester, 409 Pa. Super. 439, 598 A.2d 76 (1991).

The guardianship statute does state, however, that a court may not appoint a person whose interests conflict with those of the incapacitated person. 20 Pa.C.S.A. § 5511. A family relationship to the incapacitated person, in itself, does not constitute an adverse interest.

Mrs. Moon expressed her preference in 1992, when she executed the power of attorney. In that document she stated: “Should I ever be adjudged incompetent by a court, I nominate my attorneys-in-fact or the survivor of them or their nominee to be guardian of

my estate.” Ordinarily, the court would appoint both Reverend Bixler and George Moon’s nominee Robert Moon as co-guardians of her estate. However, we feel this is one of the rare instances where it is in the incapacitated person’s best interest to appoint someone other than the people she chose.

Thus far, Reverend Bixler and George Moon have worked together as co-attorneys-in-fact without any problem, and they may continue to work together on issues other than estate planning. However, it would be highly problematic for the two men to jointly make decisions on the preservation of Mrs. Moon’s estate. Both men have a strong interest in her estate, and their interests conflict. Although both would want to keep as much of Mrs. Moon’s assets from the nursing home as is legally possible, they would certainly take different approaches to the problem. George Moon or his son Robert Moon would naturally strive to acquire for George Moon as many of the assets as possible. Reverend Bixler, as pastor of one of the residuary beneficiaries in her will, would naturally wish to preserve as much of the estate as possible for the beneficiaries, which would entail keeping the assets out of the hands of George Moon.

Mrs. Moon recognized that the two men would have diverse interests and according to the testimony of Reverend Bixler, that is precisely why she appointed them as co-attorneys-in-fact. She loved her husband and she was strongly loyal to the Child Evangelism Fellowship of Lycoming County and the Emmanuel Baptist Church, and she envisioned each man protecting his rights from the usurpation by the other.

Mrs. Moon could not have foreseen the situation that now presents itself. Under these circumstances, the two attorneys-in-fact could not be expected to work harmoniously

together. They will naturally rise to defend their respective rights against what they view as encroachment by the other. The plan proposed by Ms. Steinbacher will involve various decisions that will need to be made and executed. It is difficult to imagine two people with such adverse interests agreeing on those decisions. At best, the process would be slow and contentious; at worst, the two would be at loggerheads and accomplish nothing while the estate dwindles.

The court notes that neither George Moon nor Reverend Bixler is recommending the appointment of both men. Reverend Bixler agreed that the potential existed for both men to try to benefit themselves, and thus to be in conflict with one another. Reverend Bixler advocates appointing himself alone, because Robert Moon cannot serve and Mrs. Moon did not have a close relationship with his nominee, Robert Moon. The court declines to do this because Mrs. Moon stated explicitly in her power of attorney that either man may appoint a nominee to serve. Thus she must have envisioned Mr. Moon appointing his son, and apparently that was acceptable to her.

This is not to say that either man would try to unconscionably exploit Mrs. Moon's estate and promote his own interests at the expense of the other. There was no evidence that the Reverend Bixler or Robert Moon has a selfish motive. However, it is only natural that each would attempt to maximize his own interest, especially as each man understands that Mrs. Moon apparently intended for them to counterbalance each other in this way.

George Moon, although originally advocating the appointment of himself as guardian, changed his mind in the course of the hearing. His counsel stated that as the hearing proceeded he realized it was necessary to appoint a disinterested third party to

serve as guardian.

The court believes this is the best solution to this difficult problem. A qualified disinterested guardian will be able to develop and implement a plan that protects the rights of all parties to the fullest extent possible and that—more than anything else—is the desire of Estella Moon. The appointment of a third party as guardian will be in her best interest because it is the most effective way to protect the husband she loved and the charities she supported. Therefore, the court makes the following findings of fact and issues the following order:

Findings of Fact

After a hearing held on 22 February 1999, the court makes the following findings of fact:

1. Petitioner Robert L. Moon has shown by clear and convincing evidence that Estella Moon is an incapacitated person, as defined in 20 Pa.C.S.A. § 5501. Her ability to receive and evaluate information effectively has been so significantly impaired by a stroke that she is unable to make and communicate decisions in any way. She is completely unable to manage her own financial resources or to meet essential requirements for her physical health and safety.
2. It is not anticipated that Estella Moon's incapacities will decrease.
3. The power of attorney currently in effect is not the least restrictive alternative available because it does not grant powers to conduct estate planning and long-term health care planning. Since Estella Moon resides in a nursing home, these powers are needed to allocate her assets between herself and George Moon through the

Medicaid law at 55 Pa. Code 178. Therefore, appointment of a limited guardianship of her estate the least restrictive alternative to serve her best interests.

4. All powers granted in the existing power of attorney shall remain in effect, but no power shall be exercised in conflict with the powers granted to the limited guardian.
5. The limited guardianship shall exist for as long as Estella Moon suffers under her current incapacities.

Final Decree

AND NOW, this _____ day of March, 1999, after hearing, it is ordered that:

1. Estella Moon is adjudicated incapacitated.
2. Patricia L. Bowman, Esq. is appointed limited guardian of Estella Moon's estate.
3. Patricia L. Bowman, Esq. shall have the power to:
 - A. Make decisions regarding available income and assets for nursing home care.
 - B. Authorize any contracts or agreement for Public Assistance or other benefits.
 - C. Liquidate, transfer, and allocate assets between spouses per 55 Pa. Code 178, and transfer assets to the residual beneficiaries of Estella Moon's will, according to the best interests of Estella Moon.
 - D. Make any decision required to safeguard her assets including setting up a burial reserve and transferring ownership of life insurance policies and income.
4. Patricia L. Bowman, Esq. shall, within 30 days of the date of this order, submit to this court a plan for the preservation of the assets of Estella Moon's estate. Copies of this plan shall also be sent to Robert Moon and Reverend David Bixler, who shall

both have 20 days in which to submit written comments on the plan.

5. The estate of Estella Moon shall pay for all costs and attorney fees involved with this proceeding.
6. Patricia L. Bowman, Esq. shall be required to post bond with her own surety in the amount of \$500,000 to ensure compliance with this order.
7. Patricia L. Bowman, Esq. shall file all reports necessary to be in compliance with 20 Pa. C.S.A. § 5521, including an initial report and one every 12 months thereafter.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
Lester Greevy, Esq.
Karen Stapp, Esq.
Patricia Bowman, Esq.