Circuit Court for St. Mary's County
Case No. 18-C-14-000469

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2070

September Term, 2016

IN THE MATTER OF
FRED GIBBS JOHNSON

Wright,
Arthur,
Albright, Anne K.
(Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: December 28, 2017

On November 17, 2016, the Circuit Court for St. Mary's County appointed Joshua Brewster, Esquire, as guardian of the property of Fred Gibbs Johnson, and Sandra Smith-Johnson (Fred's[1] wife) and Mr. Brewster as co-guardians of Fred's person, with Mr. Brewster to serve as primary guardian having final decision-making authority. Fred did not appeal this decision.[2] Fred's daughter, Linda Sue Johnson, appealed. She does not question Fred's need for a guardian of person and property, instead claiming that the trial court abused its discretion in failing to appoint her.[3] Sandra cross appealed. She questions Fred's need for a guardian of person and property, claiming that less restrictive alternatives were available. Like Linda, Sandra also claims that the trial court abused its discretion by failing to select her as Fred's only guardian of person and property.[4]

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[1] For clarity, we refer to the parties by their first names.

[2] Though Fred filed a notice of appeal, he filed no brief. Therefore, we must proceed as if he has not appealed the circuit court's decision. *See DeGroft v. Lancaster Silo Co.*, 72 Md. App. 154, 159 (1987).

[3] Linda presents these questions:

1. Whether the lower court erred and/or abused its discretion by disregarding the statutory requirements of guardianships enumerated in Md. Estates and Trusts Code Ann. § 13-707?
2. Whether the lower court erred and/or abused its discretion in its appointment of the guardians?

[4] Sandra presents these questions:

1. Whether the lower court made an improper determination of guardianship contrary to the applicable statute.
2. Whether the lower court erred and/or abused its discretion when the Court determined who would be guardian(s) of Fred Gibbs Johnson
3. In the alternative, whether the lower court erred or abused its discretion by making a finding that it was appropriate to appoint a guardian for Fred Gibbs Johnson.
4. In the alternative, did the lower court err and/or abuse its discretion when it granted guardianship in lieu of a person/agent of the court to oversee Fred Gibbs Johnson and therefore, support Fred Gibbs Johnson with

Finding no error, we affirm the decision of the circuit court.

BACKGROUND

On February 10, 2014, Fred suffered a massive stroke. The resulting brain damage caused several neurological symptoms ranging from aphasia, the inability to understand and formulate language, to dyscalculia, the inability to comprehend mathematics. Fred spent over three months in various hospitals before he was ultimately placed at the Charlotte Hall Veterans Home ("CHVH"), where he was provided 24-hour care.

On March 31, 2014, Linda filed a petition for guardianship, asking that she be appointed guardian of Fred's person and property. Linda claimed that Fred was permanently disabled by the stroke and unable to effectively make decisions about his person and property. At the time, Fred and Sandra were not married but in a long-term romantic relationship. Accordingly, Sandra filed an answer and a petition to intervene, which was granted. Sandra claimed that she should be appointed Fred's guardian because they had purchased a house together, she was made a beneficiary of a number of his accounts, "and her future financial well-being would be significantly impacted by the appointment of Ms. Linda Johnson as guardian." On May 8, 2014, the trial court appointed Mr. Brewster to represent Fred.

On January 7, 2015, Linda filed an amended petition, again seeking to be appointed Fred's guardian and adding several interested parties. With the amended

accommodations instead of supplanting Fred Gibbs Johnson with a Guardian of the Person and Guardian of the Property.

petition, Linda presented a 2003 healthcare power-of-attorney.[5] In it, Fred designated Linda as his guardian in the event that guardianship became necessary. Linda attached physician's certificates from two doctors, Stephanie R. Bruce and Stephen W. Peterson, each stating that Fred's disability is life-long and that he lacks the capacity to understand the nature of guardianship. Sandra filed an answer to the amended petition on June 20, 2016, this time claiming that Fred was not so disabled that he needs a guardian or, alternatively, that she should be his guardian.

On July 22, 2016, Fred executed a "Revocation of Any Power of Attorney," in which he purportedly revoked Linda's 2003 powers of attorney. On July 27, 2016, Fred and Sandra were married at CHVH.

At trial, Linda called Dr. James E. Lewis ("Dr. Lewis"), an expert in "general clinical neuropsychology" and "evaluation of neuropsychologically impaired patients[.]" He twice examined Fred and submitted reports dated September 11, 2015 and August 15, 2016. He testified that he found five distinct neurological disorders, each resulting from the stroke and each irreversible: aphasia, vascular dementia, seizure convulsive disorder, frontal lobe disorder and right hemineglect. Dr. Lewis testified that, though Fred's performance improved on some tests after nine months, he will never return to pre-stroke functionality. He testified that he needs to be in a hospital-based home care unit with a low-level "life care plan[.]"

[5] At trial, Linda also admitted a 2003 durable power-of-attorney.

In regard to Fred's ability to comprehend and communicate, Dr. Lewis testified that Fred reads at a kindergarten to first-grade level and cannot read many letters or words. In regard to Fred's ability to manage money, Dr. Lewis testified that Fred's dyscalculia affects his ability to count or make change. He also testified that Fred is easily influenced and that he "does not have the frontal lobe capacity to" disagree with Sandra about important decisions.

Sandra called Dr. Scott Smith, who was qualified as an expert in psychology. He testified that he examined Fred on August 22, 2016, and determined that Fred can balance a checkbook and do computations but is not able to verbally communicate. He testified that Fred could only read, write and express written words at an early elementary school level, but that Fred's non-verbal test scores had improved 20 points from earlier testing, to a 9.8 grade level.

The trial court looked favorably on both doctors' testimony. It found Dr. Lewis to be capable, "blunt and candid," and, commenting on his testimony, stated that Fred's level of incapacity is "almost a definition of a need for a guardian." While it noted that Dr. Smith's testimony was marked by some incorrect details, including Fred's date of birth, it found the two doctors' reports were "not that far apart."

Sandra and Linda each testified about the other's handling of Fred's assets, among other things. Sandra testified that, as Fred's power of attorney, Linda had spent over $30,000 of Fred's money on legal fees for the guardianship case, and that this had made him miserable. Sandra introduced checks, endorsed by Linda, from Fred's Navy Federal

Credit Union account. On cross-examination, Sandra acknowledged that she had continued to use Fred's car, and a credit card account paid by Fred, after his stroke. In regard to Fred and Sandra's home, Linda testified that Sandra contributed nothing to the mortgage.

At the culmination of the trial, the court found "with no question in [its] mind" that Fred needs a guardian of his person and property. Thus, the court said

> This man needs a guardian of his person and his assets, there's no question in my mind about that. I did a small diagram and, and I first addressed the person. My inclination was, because I know Linda is honest and knows how to handle money, but I came to the conclusion that this money has been spent in her view for her dad's best interests to protect her assets, but the product is that it's made him really unhappy and Linda needs to go back to being his daughter, not his guardian, not the power of attorney, but his daughter.
>
> And I am going to demand that Sandra not get in the way of that, that she not disparage Linda so that father and daughter can have the love they had before and if Sandra will remember that they drove up there together for Fred's best interests when they had to go to Washington Hospital, then that, then that may help.
>
> The daughter cannot be the guardian of the person. The wife has to be involved in that. There's no other way. She has to be involved in Fred's well-being because she has to be able to get medical records, she has to be able to do thing in Fred's best interests. She can't be in charge of it because we aren't – I'm not confident that the evidence shows that she should be the lone star, if you will, of that. So she is going to be a guardian of the person but she's not going to be the primary guardian of the person.
>
> And on property, it is my view that the daughter cannot be guardian of the property.
>
> I'll – as tempted as I was to give her the power of the purse, it has not worked out. Yes, it protected his assets, but it needs to be done in a neutral way that provides for his happiness.

And the wife is not going to be the guardian of the property. Mr. Capristo has pointed out with some ring of truth, the wife has benefitted dramatically from Fred's hard work and investments and purchases and she will continue to benefit from those. I am not going to give her the power of the purse. She has her own money, as she pointed out when she said Fred wanted to put the Subaru in her name, she said no, that's your car. It is his. Those things purchased before the marriage are not marital property.

So there's not going to be any disparagement and that's going to appear in an Order. Neither Linda nor Sandra are going to disparage each other around or near Fred or let him hear such a thing.

They must do what's in his best interest and avoid things that are not in his best interest.

It occurs to me that the, the appropriate person for the guardian of the person and the assets is Mr. Brewster. I'll tell you why. Not only has he done what's in Fred's best interests and represented him capably, but his wife's the medical doctor. She is the County Health Officer. And I don't expect him to be the guardian of the person and the property and for that the wife to be a co-guardian of the person.

And Mr. Brewster is going to prevail when there's a problem or an issue. Everything of major impact on Fred Johnson is going to go through Josh Brewster. He can bill it as normal hourly rate. I am not going to require a bond because I don't believe it's necessary.

And the car needs to be addressed, whether it's put on the road for Fred's benefit, even if wife drives it, or sold. We need medical procedures and life care plans in place and, Mr. Brewster, Thanksgiving is your client's favorite holiday. If I could let this occur today, I would do so. I can't. I cannot have him there tonight until there's an assessment.

You know, it's, it's almost like having your grandchildren come over where you take care of the plugs and you take care of electric cords, but he is going to be in that home or a home that he shares with Sandra at the earliest opportunity, and if that home can be safe, I expect that to happen in a matter of days. And I want it to start first thing in the morning.

He should be there by Thanksgiving. In fact, I expect him to be there before that. Him being at Charlotte Hall is not necessary, it's

> not the best use of his money and it makes his miserable and he doesn't have to be fully cognizant to express his regret at that. So this is the end of the hearing.
>
> It is the end of the case and it is the beginning of the hard work for Linda and Sandra and, quite frankly, Fred Gibbs Johnson has worked hard enough his whole life, he shouldn't have to work hard at this any more.
>
> He needs to find his – I thought about a new house, but if we want him to be comfortable, if we want him to be where he is used to being, if this house can be made safe, it should, and will. And I believe there is no lesser way to protect his assets or his person.
>
> I find the need for his assets protection by a preponderance of the evidence and for a guardianship of the person by clear and convincing evidence. And it is the only way I can figure for Linda to be his daughter and for the help reconciling between the two of them. And everybody agrees, Dr. Smith agrees, Dr. Lewis agrees, I suspect Linda knows, with all of her heartburn with her father's wife, he cannot be happy if he is not with Sandra. And so he shall be, as soon as possible.

This timely appeal followed.

STANDARD OF REVIEW

Several standards of review govern our analysis. Generally, when reviewing the decision of a circuit court sitting without a jury, we "review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witness." Md. Rule 8-131(c). We examine the evidence, and reasonable inferences drawn therefrom, in such a way as to support the findings of the trial court. The inquiry is therefore "whether there is any evidence legally sufficient to support those findings." *Mid S. Bldg. Supply of Maryland, Inc. v. Guardian Door & Window, Inc*., 156 Md. App. 445, 455 (2004) (*citing Sea Watch Stores Limited Liability*

Co. et al. v. The Council of Unit Owners of Sea Watch Condominium, 115 Md. App. 5, 31–32 (1997)). "We review any conclusions of law de novo," *In re Elrich S.*, 416 Md. 15, 30 (2010).

Further, trial courts "are presumed to know the law and apply it properly." *State v. Chaney*, 375 Md. 168, 179 (2003) (citation omitted). Trial judges "are not obliged to spell out in words every thought and step of logic," *Beales v. State*, 329 Md. 263, 273 (1993). Accordingly, a trial court "need not articulate each item or piece of evidence she or he has considered in reaching a decision… The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal." *Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 504 (2013) (*quoting Davidson v. Seneca Crossing Section II Homeowner's Ass'n,* 187 Md. App. 601, 628 (2009)).

DISCUSSION

I. Fred's Need for a Guardian of Person and Property

Sandra challenges the appointment of a guardian of person and property for Fred, arguing that (1) the differences between Dr. Lewis' and Dr. Smith's testimony were substantial enough to preclude a finding by clear and convincing evidence that Fred lacked the capacity, understanding, or ability to communicate so as to be able to care for himself; (2) the trial court was clearly erroneous in finding that Fred is unable to manage his property and affairs; (3) guardianship of the property is unnecessary because there are less restrictive alternatives for managing Fred's property; and (4) the appointment of a guardian of person or property for Fred is inconsistent with the "national mandate" of the

Americans with Disabilities Act, which requires placement of a disabled person in a community setting, rather than in an institution. We will take up the last of these arguments first.

To succeed in the appointment of a guardian of the person or property of an adult, the petitioner confronts two different standards of proof, and while the elements are similar, they are not identical. For the appointment of a guardian of the person, Section 13-705(b) of the Estates and Trusts Article provides

> (b) A guardian of the person shall be appointed if the court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.

Md. Code Ann., Est. & Trusts § 13-705(b). Thus, two elements must be established by clear and convincing evidence: (1) that the alleged disabled person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person because of a disability; and (2) that no less restrictive alternative is available.

For the appointment of a guardian of the property, Section 13-201(c) provides

> (c) A guardian shall be appointed if the court determines that:
> (1) The person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, detention by a foreign power, or disappearance; and
> (2) The person has or may be entitled to property or benefits which require proper management.

Md. Code Ann., Est. & Trusts § 13-201(c). Here, two elements must be established by preponderance of the evidence: (1) that the alleged disabled person is unable to manage his property and affairs because of a disability; and (2) that the alleged disabled person is entitled to property or benefits that require managing.

To be sure, one purpose of the Americans with Disabilities Act ("ADA") is " . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]" 42 U.S.C. § 12101(b)(1)(2006). To this end, and with regard to public entities, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Two things prevent us from concluding that the trial court's decision violated the ADA. First, the exercise of judicial process is not in and of itself a "service, program or activity" within the meaning of the ADA. *See Disability Rights New Jersey, Inc. v. Comm'r, New Jersey Dep't of Human Servs*., 796 F.3d 293, 305 (3d Cir. 2015) (holding that procedural safeguards are not "service[s], program[s], or activit[ies]" within the meaning of the ADA, when they are denied to mentally ill prisoners being forced to take medication); *In re Jeanette L*., 2017 IL App (1st) 161944, ¶ 17, 69 N.E.3d 918, 922 (holding that "[p]arental rights termination proceedings are not 'services, programs, or activities' that would subject them to the requirements of the ADA" (citations and quotations omitted)). Here, the object of Sandra's challenge is the judicial process that

yielded the guardianship over Fred. Because this judicial process is not a "service, program or activity," it cannot violate the ADA.

Second, reversal of a trial court's decision is not the type of remedy envisioned by the ADA. *See Green v. N. Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 617–18 (2001) ("reversal of the [trial court's] judgments [was] not an acceptable or available remedy[,]" even if the trial court violated the ADA by excluding a disabled patient from the courtroom during the liability phase of a medical malpractice trial). Here, Sandra's request for reversal is precisely the kind of remedy the ADA does not envision.

With regard to the weight of the evidence (Sandra's first argument), the trial court was well aware of the required clear and convincing standard. Thus, in concluding that Linda had met her burden, the trial court said, "there's no question in my mind about that[,]" and that in appointing a guardian of Fred's person, it was "do[ing] so with great thought."

Moreover, the record is full of evidence showing the extent of Fred's disability. As discussed above, Dr. Lewis noted five independent and irreversible disorders caused by the stroke. The effect of these disabilities on Fred's ability to function is clear. Both doctors testified that Fred has the language abilities of an elementary schooler. Both testified that he has trouble effectuating or implementing his decisions. Both agreed that his cognitive abilities were not what they were before the stroke. Against this record, we cannot conclude that the trial court misapplied the burden of proof.

With regard to whether the trial court was clearly erroneous in finding that Fred is unable to manage his property and affairs (Sandra's second argument), Sandra again points to Dr. Smith's testimony, as well as that of several other witnesses, and argues that it demonstrates that Fred does in fact have the capacity to manage his property and affairs. She posits that Dr. Smith's testimony shows that Fred's problems are simply with communication, rather than with mathematics and complex thought. Similarly, she points to the testimony of several CHVH employees who testified about Fred's independence and ability to take care of himself. Ultimately, however, the trial court was free to "credit all parts, or no part" of these witnesses' testimony. *Loyola Fed. Sav. Bank v. Hill*, 114 Md. App. 289, 306 (1997) (citations omitted). That the trial court saw fit to credit Dr. Lewis over Dr. Smith and the other witnesses on these points is not a basis for reversal.

With regard to less restrictive alternatives for managing Fred's property (Sandra's third argument), Sandra suggests that Section 13-201 must be read to require consideration of these. She concludes that because court approval of specific transactions or the creation of a trust are less restrictive alternatives that could work, the court erred by appointing a guardian. Sandra is incorrect.

Section 13-201 permits, but does not require, courts to consider less restrictive alternatives when appointing a guardian of property. Accordingly, a trial court's failure to consider less restrictive alternatives is not error. *In re Rosenberg*, 211 Md. App. 305, 320-21 (2013). Here, even if the trial court did not consider Sandra's less restrictive alternatives to the extent she wished, same is not a basis for reversal.

II. The Selection of Guardians

Linda and Sandra both contend that by selecting Mr. Brewster to be Fred's primary guardian of the person and guardian of the property without good cause, the trial court improperly diverged from the statutory priorities required by the Estates and Trusts Article. Linda says it was an abuse of discretion not to select her. Sandra says that it was an abuse of discretion not to select her alone. Linda also argues that the trial court erred in appointing Mr. Brewster as Fred's guardian because the parties had no notice and opportunity to be heard on his fitness as a guardian. These arguments fail.

Once the trial court concluded that guardianship is necessary, nothing in the Estates and Trusts Article limited its selection of guardians to Linda or Sandra. In fact, when the court assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves, the court is the guardian, and the individual who is given that title is merely an agent or arm of the court.

Kircherer, 285 Md. at 118. Sections 13-207(a)[6] and 13-707(a)[7] of the Estates and Trusts Article prioritize potential guardians, but the trial court may pass over one with higher

[6] Section 13-207(a) prioritizes potential guardians of the property as follows:
(a) Persons are entitled to appointment as guardian for a minor or disabled person according to the following priorities:
(1) A conservator, committee, guardian of property, or other like fiduciary appointed by any appropriate court of any foreign jurisdiction in which the minor or disabled person resides;
(2) A person or corporation nominated by the minor or disabled person if the designation was signed by the minor or disabled person after his 16th birthday, and, in the opinion of the court, he had sufficient mental capacity to make an intelligent choice at the time he executed the designation;
(3) His spouse;
(4) His parents;
(5) A person or corporation nominated by the will of a deceased parent;
(6) His children;
(7) The persons who would be his heirs if he were dead;
(8) A person or corporation nominated by a person who, or institution, organization, or public agency which, is caring for him;
(9) A person or corporation nominated by a governmental agency which is paying benefits to him; and
(10) Any other person considered appropriate by the court.

[7] Section 13-707(a) prioritizes potential guardians of the person as follows:
(a) Persons are entitled to appointment as guardian of the person according to the following priorities:
(1) A person, agency, or corporation nominated by the disabled person if the disabled person was 16 years old or older when the disabled person signed the designation and, in the opinion of the court, the disabled person had sufficient mental capacity to make an intelligent choice at the time the disabled person executed the designation;
(2) A health care agent appointed by the disabled person in accordance with Title 5, Subtitle 6 of the Health--General Article;
(3) The disabled person's spouse;
(4) The disabled person's parents;
(5) A person, agency, or corporation nominated by the will of a deceased parent;
(6) The disabled person's children;
(7) Adult persons who would be the disabled person's heirs if the disabled person were dead;
(8) A person, agency, or corporation nominated by a person caring for the disabled person;

priority in favor of one with lower priority "for good cause." Md. Code Ann., Est. & Trusts §§ 13-207(c) and 13-707(c)(1). Moreover, "[i]f a guardian of the estate has been appointed, the court may select him to be guardian of the person, regardless of priority." Md. Code Ann., Est. & Trusts § 13-707(c)(2). Ultimately, the trial court has wide latitude in selecting a guardian, and the "statutory preference in the appointment of a guardian, although seemingly mandatory and absolute, is always subject to the overriding concern of the best interest of the ward." *Mack*, 329 Md. at 203 (citation omitted).

Here, the trial court detailed its reasons for passing over Linda. Thus, it explained that Linda had acted in part to "protect her assets," that Fred was "really unhappy" as a result, and that Linda needed to return to being Fred's daughter. It concluded that Linda's having the "power of the purse" in the past had "not worked out" and that the protection of his assets "need[ed] to be done in a neutral way that provides for his happiness." With regard to guardian of the person, the trial court noted that while Sandra and Linda had both disparaged the other in front of Fred, it passed over Linda because Sandra is Fred's wife and "had to be involved." Under these circumstances, the court's

(9) Any other person, agency, or corporation considered appropriate by the court; and (10) For adults less than 65 years old, the director of the local department of social services or, for adults 65 years old or older, the Secretary of Aging or the director of the area agency on aging, except in those cases where the department of social services has been appointed guardian of the person prior to age 65. Upon appointment as guardian, directors of local departments of social services, directors of area agencies on aging, and the Secretary of Aging may delegate responsibilities of guardianship to staff persons whose names and positions have been registered with the court.

conclusion that Linda was not best suited to act in Fred's best interest was not clearly erroneous.

With regard to Sandra, it was the timing of her marriage to Fred, Sandra's use for her benefit of Fred's assets prior to the marriage, and the need to manage Fred's premarital property that prompted the trial court to pass Sandra over. Thus, of the time before their marriage, the trial court found that Sandra had "benefitted dramatically from Fred's hard work and investments and purchases and she will continue to benefit from those. I am not going to give her the power of the purse. . . Those things purchased before the marriage are not marital property." Again, under these circumstances, we cannot conclude that the trial court's conclusion was clearly erroneous.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID EQUALLY BY APPELLANT AND CROSS APPELLANT.