UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0920

September Term, 2014

JAMES DWYER ET AL.

v.

POTOMAC VALLEY NURSING AND WELLNESS CENTER, ET AL.

Wright,
Hotten,
Arthur,

JJ.

Opinion by Hotten, J.

Filed: January 22, 2015

Appellee, Potomac Valley Nursing and Wellness Center ("Potomac Valley"), filed a Petition in the Circuit Court for Montgomery County, seeking the appointment of a guardian over Gail Reinheimer ("Ms. Reinheimer"). Appellant, James Dwyer, sought appointment as Ms. Reinheimer's guardian. Instead, the court appointed the Director of the Montgomery County Area Agency on Aging as guardian. Appellant appealed, presenting three questions for our review:

> I. Did the [circuit] [c]ourt err when it found that [Ms.] Reinheimer lacks sufficient understanding to make and communicate responsible decisions concerning her person, and that no less restrictive form of intervention is available that is consistent with her [] welfare and safety?
>
> II. Did the [circuit] [c]ourt err when it found that [Ms.] Reinheimer is unable to manage her affairs effectively because of physical and mental disabilities, and that no less restrictive form of intervention is available that is consistent with her welfare and safety?
>
> III. Did the [circuit] [c]ourt err when it admitted into evidence hearsay testimony of the certifying physician and hearsay testimony of a social worker, both witnesses for the [a]ppellee?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Ms. Reinheimer, was born on June 9, 1941. In the 1960's, she became friends with appellant, James Dwyer, and the two maintained a long term relationship. The couple never married and Ms. Reinheimer had no children. In 2008, Ms. Reinheimer executed a power of attorney designating appellant and two other friends, Sue Voss ("Ms. Voss"), and Joan Winston ("Ms. Winston") as co-agents for financial and medical purposes. In September 2013, appellant resigned as power of attorney, after, allegedly, being misled by Ms. Voss and Ms. Winston.

Over the last few years, appellant, Ms. Voss and Ms. Winston, would occasionally visit Ms. Reinheimer to assist with household matters. By 2013, Ms. Reinheimer's health and physical condition had deteriorated. She was afflicted by several medical issues which rendered her wheelchair bound. In August 2013, she was diagnosed with a pituitary tumor resulting in her neck appearing to be twisted and her chin being laid on her chest. That same month, after complaining of breathing problems, Ms. Reinheimer was admitted to Sibley Hospital in Washington D.C. The next month, she was transferred to Potomac Valley for care. Over the next several months, she was treated and evaluated by the medical staff at Potomac Valley. The staff determined that, along with her health problems, Ms. Reinheimer was suffering from psychosis, a delusional disorder, and dementia.

On February 11, 2014, Potomac Valley filed a petition in the circuit court seeking the appointment of a guardian over Ms. Reinheimer's person and property, alleging that she could not make her own decisions. The petition listed appellant, Ms. Voss and Ms. Winston as interested parties. At a hearing on February 20, 2014, the circuit court appointed the Director of the Montgomery County Area Agency on Aging as temporary guardian of Ms. Reinheminer and Bernadette Sweeney ("Ms. Sweeney"), an attorney, as temporary guardian of the property of Ms. Reinheimer.

A hearing on the guardianship petition was held on June 4-5, 2014 during which several witnesses testified. Ms. Reinheimer requested to attend the proceedings and opposed the guardianship. The court also heard testimony from staff members at Potomac Valley, including one of her treating physicians, Mohammed Attia, M.D. ("Dr. Attia") who testified as an expert. Appellant, Ms. Voss and Ms. Winston, who were all represented by

counsel, also testified, along with several other individuals. Appellant testified that as a result of their close relationship, he knew what Ms. Reinheimer wanted and possessed the necessary resources to arrange for whatever care Ms. Reinheimer required to return home. At the trial, two medical certificates were admitted asserting that Ms. Reinheimer suffered from delusions and dementia. After hearing testimony, the circuit court found that Ms. Reinheimer did suffer from dementia which prevented her from making responsible choices regarding her health and finances and appointed the Montgomery County Area Agency on Aging as her guardian.

Appellant noted a timely appeal, challenging the appointment of a guardian. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

Md. Rule 8–131(c) mandates that:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It 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 witnesses.

This Court has explained appellate review of matters tried without a jury in *Conrad v. Gamble*, 183 Md. App. 539, 550-51 (2008).

> We will not set aside the trial court's judgment on the evidence unless it is clearly erroneous and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. "If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." With regard to mixed questions of law and fact, "we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in that

> court's application of the law." As for pure questions of law, "the trial court 'enjoys no deferential appellate review,' and the appellate court 'must apply the law as it discerns it to be.'"

(internal citations omitted).

DISCUSSION

Appellant advances three allegations of error. First, he alleges that the circuit court erred in finding that Ms. Reinheimer lacked sufficient understanding to make responsible decisions consistent with her welfare and safety. Second, he contends that the court erred in finding that there was no less restrictive form of intervention available. Third, he argues that the circuit court improperly admitted hearsay testimony and relied upon it in finding that Ms. Reinheimer suffered from dementia. Preliminarily, we must dispose of Potomac Valley's contention that appellant lacks standing to appeal. Potomac Valley notes that Ms. Reinheimer has not appealed the trial court's ruling. It concedes that appellant had standing at the trial level because he sought the appointment as guardian, but argues that on appeal he possesses no such claim and thus loses standing. Appellant was able to participate in the proceedings before the trial court because he was an "interested person" as defined by Maryland Code (1974 Repl. Vol. 2011), §13-101(j) of the Estates and Trusts Article [hereinafter Est. & Trusts].

> "Interested person" means the guardian, the heirs of the minor or disabled person, any governmental agency paying benefits to the minor or disabled person, or any person or agency eligible to serve as guardian of the disabled person under § 13-707 of this title. If an interested person is also a minor or a disabled person, interested person also includes a judicially appointed guardian, committee, conservator, or trustee for that person, or, if none, the parent or other person having assumed responsibility for him.

Est. & Trusts §13-707 provides a list of individuals or entities who may be considered for guardianship.

> (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;
> (9) Any other person, agency, or corporation considered appropriate by the court; . . .

In *In Re Lee*, 132 Md. App. 696, 701 (2000), a daughter brought proceedings before the circuit court seeking appointment as guardian for her father. Her brother participated in the proceedings, objecting to the appointment of the sister as guardian and requesting that he be made guardian. *Id.* at 703. Following a trial, the circuit court appointed the sister as guardian and the brother appealed. *Id.* at 708. Before this Court, the sister challenged the brother's standing to contest her appointment as guardian. *Id*. at 709. Concluding that the brother had standing, we explained:

> Initially, we note that appellant, as the son of the subject of a guardianship proceedings, is an "interested person" under Maryland law and has standing to participate, in his own right, in those proceedings. *See* [Est. & Trusts] §13–101(j), *supra*, defining interested person. . . . Equally important, [the father] has no other way to assert his rights but through his son. As he has been adjudged incompetent, he has lost the right to bring suit on his own behalf

> and the attorney appointed by the court to represent him has, to date, functioned principally as an arm of the court and is unlikely to seek approval to appeal the very outcome she sought on his behalf. In short, appellant is not only "as effective a proponent" of [the father]'s rights as [the father] is, he is the only proponent of [the father]'s rights. It therefore follows that, unless appellant is given standing to assert his father's rights, [the father]'s rights "are likely to be 'diluted or adversely affected'" as he will have effectively lost his means and thus his right to appeal. Accordingly, we find that appellant has standing to assert [the father]'s rights in this appeal.

Id. at 710. Likewise, in the instant case, appellant was an interested person for purposes of possible guardianship, under Est. and Trusts §13-707(9). As such, he maintained standing to appeal any decision made during the guardianship proceedings. *See also Law v. John Hanson Sav. & Loan, Inc.*, 42 Md. App. 505, 511 (1979), in which the Court of Appeals explained than an appellant, seeking removal of her brother as a court appointed guardian to their father, "was entitled [as an interested person] to bring matters pertaining to the guardianship estate to the attention of the court . . . [and could] invoke the jurisdiction of the court at any time to resolve questions concerning the estate or its administration."

I. The court's finding that Ms. Reinheimer lacked sufficient understanding

Appellant argues that the court lacked clear and convincing evidence to establish that Ms. Reinheimer was unable to render and communicate responsible decisions regarding her health, welfare and safety. Potomac Valley responds that to the contrary, there was overwhelming evidence before the court establishing that Ms. Reinheimer suffered from dementia.

Est. & Trusts §13-705(b) provides that:

> 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.

A circuit court must determine based on clear and convincing evidence that the subject of the guardianship petition lacks the understanding or capacity to make responsible decisions for his or herself. *See In Re Lee*, 132 Md. App. at 714. In its ruling that Ms. Reinheimer could not make these decisions, the court observed:

> THE COURT: In this case, I've had an opportunity to meet Ms. Reinheimer and view her in court and listen to her testimony as well as the testimony of people who know her, who have known her for a long time, and who have known her for a lesser time. And it's a complicated case, simply because when you hear her speak in court, as some of the people have testified, she's pretty certain about what she wants to say, and she doesn't seem to have any doubt about what she has to say. But there's clearly evidence that shows that she is confused and uncertain and inaccurate about many of the things that she says.
>
> * * *
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> Her mental faculties were significantly reduced when she entered, I think, Potomac Valley at that time. And there was consistent observations of her throughout her stay at Potomac Valley of dementia, that she was confused, that she had hallucinations, that – well, those, I guess, were the two primary things. But she also exhibited issues of anxiety. And so, I believe that the diagnosis of dementia was accurate as it related to her. Although she is certain about the fact that she wants to go home. I can't imagine anyone that wouldn't be certain about that. Who wouldn't want to go home rather than staying in a nursing home?
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> * * *
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> So, it also is clear to me from the evidence that her condition has not improved – at least her mental condition has not improved since she arrived at Potomac Valley. It certainly hasn't improved whatsoever her ability to understand. Her decision making has not improved in that time.

The court based these findings on the evidence and testimony presented. Dr. Attia testified that since September of 2013, he had visited with Ms. Reinheimer on multiple occassions. He recounted times when Ms. Reinheimer would "confabulate", meaning that even when

she was in pain, she would respond to his questions in a manner that was intended to give the impression that her condition was better than it actually was. For example, if she was being treated for back pain, and he asked how she was feeling, she would respond that everything was alright. He explained to the court that confabulation is a sign that a patient is not in touch with reality. On other occasions, he would visit Ms. Reinheimer and she was unable to communicate any intelligible answers to his questions. Dr. Attia testified that although she was very pleasant and they had a good rapport, he concluded that she had a delusional disorder, and that she was not able to properly manage her affairs at that time based on her physical and mental condition. Appellant argues that the court erred in considering Dr. Attia's testimony because it was contradictory or confusing. He points out that Dr. Attia's diagnosis of Ms. Reinheimer changed over the course of his visits with her. He originally diagnosed her with failure to thrive, then with psychosis, thought disorder and inability to function, before arriving at his final diagnosis of dementia. We are not persuaded that this renders Dr. Attia's testimony contradictory or confusing. All of these diagnoses are consistent with Dr. Attia's opinion that Ms. Reinheimer was experiencing physical and mental barriers to her ability to render responsible decisions for herself.

The court also heard testimony from Ms. Winston, who would occasionally visit Ms. Reinheimer and stay with her for several days. She testified that although Ms. Reinheimer was immobile, she had fired her in home caretakers, claiming that they weren't performing their jobs. She also testified that there was a foul odor in the home because Ms. Reinheimer's dog was not being let outside, as a result of her immobility, and so it would urinate and defecate in the home. She also recounted one instance when Ms.

Reinheimer phoned her, stating that she could not breathe and asking Ms. Winston if she should call 911, to which Ms. Winston responded that she should.

Ms. Hart, one of the social workers at Potomac Valley also testified regarding her interactions with Ms. Reinheimer. She testified that sometimes Ms. Reinheimer was uncooperative when the staff attempted to perform mental tests and that she believed Ms. Reinheimer was not properly appreciating the seriousness of her condition. Ms. Reinheimer had indicated to Ms. Hart that she could return home and care for herself with "a little help" but Ms. Hart claimed that Ms. Reinheimer needed much more assistance. Ms. Reinheimer had also asserted that she could walk, when in fact, she was wheelchair bound and could not move without assistance. Ms. Hart also testified to personally observing at least one instance when Ms. Reinheimer appeared to be hallucinating.

The court's findings were based upon the testimony of several individuals, including Ms. Reinheimer's medical doctor, staff at Potomac Valley and her personal friends. We conclude that there was sufficient testimony presented before the circuit court to support its finding that Ms. Reinheimer was not able to make responsible decisions regarding her health and/or welfare.

II. The court's finding that there was no less restrictive form of intervention available.

Next, appellant contends that the court erred in failing to consider a less restrictive alternative, specifically, permitting Ms. Reinheimer to return home to receive care. Appellant is correct that Est. & Trusts §13-705(b) requires the court to consider less restrictive alternatives to guardianship. *See also In re Rosenberg*, 211 Md. App. 305, 320

(2013) ("Admittedly, [§13-705(b)] does require a circuit court to explore less restrictive alternatives to appointment of a guardian of the person."). This record reveals that the court did consider the possibility of Ms. Reinheimer returning home, and found that it was not a viable option.

> THE COURT: Although she is certain about the fact that she wants to go home. I can't imagine anyone that wouldn't be certain about that. Who wouldn't want to go home rather than staying in a nursing home?
>
> But I also think that, in looking at her situation – and it was pretty revealing at the end of the day hearing about the very specific needs that she has in terms of her physical needs – can't walk, can't go upstairs, can't even transfer herself from a bed to a chair, or a chair to a standing, or chair to a bathroom – . . .

It is evident that the court considered and appreciated Ms. Reinheimer's desire to return home to receive care. However, the court also observed that because of the severity of her condition, she would need 24/7 care and there was no plan in place to accommodate that. Considering this, and the testimony of other witnesses that Ms. Reinheimer had consistently underestimated the seriousness of her condition and the amount of care she needed, the court's finding that returning home would not be the best option for Ms. Reinheimer was not unfounded. Its consideration of the option however was sufficient to meet the statutory requirement of Est. & Trusts §13-705, and accordingly, we find no error.

III. The court's admission of witness testimony

Finally, appellant alleges that the court erred in admitting hearsay statements made by Dr. Attia and Ms. Hart. We begin by noting that a circuit court has discretion when considering the admissibility of evidence and we will not reverse unless the trial court has abused that discretion. *See* Md. Rule 5-104. Hearsay testimony is inadmissible, and thus a

trial court has no discretion to admit it unless it falls under one of the exceptions provided for in Maryland Rule 5-802; *Halloran v. Montgomery Cnty. Dep't of Pub. Works*, 185 Md. App. 171, 196 (2009). Following a review of the trial transcript, we perceive no error in the circuit court's admission of the testimony of either Dr. Attia or Ms. Hart. Appellant contends Ms. Reinheimer's counsel objected several times during Dr. Attia's direct examination to hearsay but the record reveals that the majority of the objections he refers to were not hearsay objections. They were objections to the form of certain questions and motions to strike the answers as a result of improper form. Ms. Reinheimer's counsel did object at least once to Dr. Attia testifying regarding notes in the medical chart that he himself did not write. However, the court overruled the objection, noting that Dr. Attia was testifying as an expert and as such, he was permitted to consider other sources in coming to his conclusions. Maryland Rule 5-702(3)[1] states that a trial court must consider whether there is a sufficient basis to support the expert's testimony. This Court has established that an expert's opinion and testimony can be predicated upon facts from reports of third parties. An expert witness may base his or her opinion on evidence that is ascertained from "facts contained in reports or examinations by third parties." *Keene Corp., Inc. v. Hall*, 96 Md. App. 644, 660 (1993) (emphasis in original). Accordingly,

[1] "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony."

while Dr. Attia did rely upon both his personal observations of Ms. Reinheimer and notes made by other medical staff in her records, he was permitted to do so as an expert witness.

Regarding appellant's allegations of error as to Ms. Hart, we also perceive no error. Each objection made by counsel was considered and ruled upon and we find no basis to reverse. Appellant argues that Ms. Hart was permitted to give her medical opinion even though she was not certified as an expert. However, the transcript does not support this claim. Appellant cites to the following exchange in support:

> [POTOMAC VALLEY'S COUNSEL]: Okay. Have you had any conversations with Ms. Reinheimer that would indicate that she may be having hallucinations?
>
> [MS. REINHEIMER'S COUNSEL]: Objection.
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> THE COURT: Overruled.
>
> [MS. REINHEIMER'S COUNSEL]: This witness has not been qualified as an expert to determine what is a hallucination or what is not a hallucination. That calls for an opinion by a medical expert.
>
> THE COURT: Okay. Why don't you approach?
>
> BEGIN BENCH CONFERENCE
>
> THE COURT: All right. So, I didn't take that question as a diagnostic question but rather a question about physical observation, for example saying hello to someone that wasn't in the room.
>
> [MS. REINHEIMER'S COUNSEL]: Correct.
>
> THE COURT: So, I'm taking it as simply an observations [sic].
>
> [MS. REINHEIMER'S COUNSEL]: Okay. That's what it is then.
>
> [POTOMAC VALLEY'S COUNSEL]: Okay.
>
> END BENCH CONFERENCE

> [POTOMAC VALLEY'S COUNSEL]: You can answer.
>
> MS. HART: Oh, okay. Yes, I have observed her having visual hallucinations. They were around her dog.

Immediately following this exchange, Potomac Valley's counsel asked Ms. Hart if she was aware of any other instances of hallucinations from medical records to which Ms. Reinheimer's counsel objected and the court sustained. The record demonstrates that each objection Ms. Reinheimer's counsel made was properly considered and decided by the trial court. Accordingly, we shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.