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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-21-308

IN THE MATTER OF THE GUARDIANSHIP OF SAMUEL RICHARD GILL MARSHA DODSON GILL APPELLANT V. DARRYL SULLIVAN APPELLEE	**Opinion Delivered** May 25, 2022 APPEAL FROM THE STONE COUNTY CIRCUIT COURT [NO. 69PR-21-10] HONORABLE DONALD T. MCSPADDEN, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

Marsha Dodson Gill (Dodson) appeals the circuit court order awarding guardianship of her husband, Samuel Gill, to Darryl Sullivan. She argues that the circuit court erred in that decision and in awarding her only four hours of visitation a week with her husband. We affirm the circuit court's order.

On 22 February 2021, Sullivan petitioned the circuit court to appoint him as Gill's emergency guardian. Sullivan is married to Lisa Sullivan, who is Gill's niece. On February 26, Sullivan amended his petition to ask that he be appointed temporary guardian for Gill. The amended petition listed Dodson as one of Gill's close relatives and explained that a marriage license for Dodson and Gill had been filed on the same day that Sullivan had filed for the emergency guardianship. On March 3, the circuit court appointed Sullivan as Gill's temporary guardian and scheduled a hearing for March 25.

On March 15, Dodson moved to intervene and explained that she and Gill had been in a relationship for more than thirty years and had recently married. She claimed that she was the person most familiar with Gill's physical and financial affairs; thus, she was the person most suitable to serve as Gill's guardian. The petition also stated that Gill preferred that she be appointed guardian. A joinder indicating Gill's preference of Dodson as his guardian and signed by Gill was filed with the motion to intervene.

Sullivan responded to the motion to intervene and denied that Dodson was most qualified to act as guardian, noting that she had married Gill only after the guardianship petition was filed. Sullivan also claimed that Dodson had been interfering in the husbandry management of Gill's farm and had thwarted his (Sullivan's) attempt to obtain Gill's medical records from the Department of Veterans Affairs (VA).

At the hearing on March 25, Dr. James Zini testified that he had recently evaluated Gill and found him "to be very markedly . . . hampered by his [d]ementia." Dr. Zini also reviewed Gill's VA records and said the records substantiated his finding of dementia and that the onset began around five years ago. Dr. Zini opined that Gill should not be driving, that he could safely stay at his home with supervision, and that he was not capable of taking care of his farm or his finances. He also stated that due to Gill's mental incapacity, he probably did not understand the effect of his marriage to Dodson and could not make sound financial decisions.

Sullivan testified that as temporary guardian, he had been gathering information on Gill's income and expenses related to his farming business. He noted that Dodson's name had been added to Gill's bank account as of April 2020, and at the end of 2020, there were

overdraft charges that he did not usually incur. He agreed that he and his two brothers-in-law, Julian Gill and Steve Gill, had been helping Gill take care of his farm since before the guardianship petition was filed. On cross-examination, he acknowledged that Gill and Dodson had been together approximately thirty years and that Dodson had helped take care of Gill's cattle in the past.

Gill testified that he has a farm with cattle and that Dodson helps him with the cattle. He also said that he currently lives with Dodson and that he would like for Dodson to take care of him as he gets older. He stated that they had been married "three or four years ago."

Dodson testified that she had known Gill almost all her life. Around 1986, they started seeing each other as a couple. When she retired from the post office at age forty-five, Gill was still working full time, so she began helping him take care of his cattle. She also attended all of his doctor appointments with him and had noticed Gill's mental decline. Dodson acknowledged that she and Gill had gotten married in February 2021, on advice of their attorney, because Gill's niece and nephew had started "making threats that they were going to take guardianship and they were going to take the farm and all the assets that we owned." On questioning by the court, Dodson said that none of her income goes into her joint account with Gill and that the payable-on-death beneficiary on her separate account is her son, Jerred Dodson.

Jerred testified that Gill had been in his life for thirty-four years, since he was eight years old. He said that his mom and Gill had always taken care of each other and that Gill is considered a member of the family. He denied that his mom was taking advantage of Gill.

At the close of testimony, the court found that Gill was incapacitated and in need of a guardian. The court expressed concern that Dodson and Gill had not gotten married until after Gill's dementia had developed. The court found that Gill's preference of a guardian was not effective due to his incompetence. The court appointed Sullivan as Gill's guardian, reasoning that "[h]e's closely related by blood and marriage—he's most closely related by blood and marriage other than this marriage that occurred after the [d]ementia, after the guardianship was filed for."

The court's written order was filed on 30 March 2021. On 13 April 2021, Dodson petitioned for an emergency hearing, claiming that Sullivan had denied her the right to communicate, visit, and interact with her husband and had interfered with Gill's legal and constitutional rights. In response, Sullivan denied that Dodson was Gill's legal wife and explained that he had filed for an annulment of the marriage on April 6. He also denied that he had interfered with Gill's legal or constitutional rights. On April 26, Dodson filed a notice of appeal from the court's March 30 order.

On June 24, the circuit court held a hearing on Dodson's petition. Dr. Mary Compton, a geriatric neuropsychologist, opined that Gill has mild dementia but that he retains the ability to make certain decisions for himself, specifically regarding his social environment. Gill had clearly communicated to her that he wants to be with Dodson. Sullivan told Dr. Compton that he limited Gill's interaction with Dodson out of concern for Gill's mental health; he did not want Gill to become agitated and worsen his mental status. Dr. Compton said that not being with the person he cares most about, Dodson, likely causes Gill agitation and that agitation does not exacerbate dementia. She stated that

Gill has the capacity to decide who he wants to be with on a daily basis and that in her opinion, it would be in Gill's best interest to have Dodson as his primary caregiver. On cross-examination, Dr. Compton agreed that she had spent one hour talking to Gill and that he had communicated that he wants to stay on his farm. She also agreed that people with dementia are vulnerable to undue influence. Upon questioning by the court, Dr. Compton suggested that Gill be allowed to spend the day at Dodson's house and return to the farm at night or that Dodson visit the farm daily to spend time with Gill.

Gill testified that he would like to spend time with Dodson, that he trusts her to take care of him, and that she had never mistreated him. He said he would like to live with Dodson. On cross-examination, he stated that he did not know what month and day it was. He also testified that he is happy at his farm and that Sullivan had arranged for an aide to visit daily and assist with lunch and medications.

Dr. John Irvin testified that he had been one of Gill's treating physicians since 2010. He said Dodson had accompanied Gill to doctor's visits "several times" and that she had always been attentive and supportive. He opined that it would not be harmful for Gill to spend time with Dodson.

Dodson testified that she had not been able to visit with Gill since the last hearing. She said she had called Sullivan and other family members numerous times, and she had been able to talk to Gill on the phone. She had seen Gill in person outside Dr. Zini's office a couple of times but said that it had been "very difficult." She expressed her desire for her and Gill to see each other every day.

Sullivan testified that he had not allowed visitation between Gill and Dodson because it would "put [Gill] in a state of agitation." Sullivan explained, for example, that after seeing Dodson outside Dr. Zini's office, Gill had refused to eat breakfast or take his morning medications. Sullivan said that he was not opposed to visitation as long as Dodson was "cordial" and did not make inflammatory comments to Gill, such as the family is "more concerned with the farm, we're after the farm."

From the bench, the circuit court ruled as follows:

> What the Court is going to look at is the overall health of Mr. Gill, the physical health of Mr. Gill. It appears that he has thrived since the last hearing as far as his physical. The main concern right here would be the—what psychological, mental harm may come to him or how he's doing that way. I would like to have in-person visits begin, but no one has really given me an option. . . . But what the Court is going to do at this particular point, and we may have to just see how it works out, but I'm going to give Ms. Dodson the right to visit with Mr. Gill at the farm, and that will be for dinner or lunch every Monday and Thursday for a two-hour window. That can either be eleven to one or five to seven at the farm, p.m. And let's see how that works out and go from there.

The circuit court issued a written order on 7 July 2021, and Dodson filed a timely notice of appeal from that order. The appeals from the guardianship order and the visitation order have been consolidated before this court.

Our appellate courts review guardianship proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Martin v. Decker*, 96 Ark. App. 45, 237 S.W.3d 502 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Guardianship of Kennedy*, 2020 Ark. App. 311, 603 S.W.3d 551. However, subject to statutory restrictions, the selection of a guardian is a

matter largely committed to the sound discretion of the appointing court. *Martin*, *supra*. This standard of review accords greater deference to the circuit court than the clearly erroneous standard. The appellate courts will not reverse a case involving an application of guardianship in the absence of a manifest abuse of discretion. *Id*. When reviewing the proceedings, we give due regard to the opportunity and superior position of the circuit court to determine the credibility of the witnesses. *Spurling v. Est. of Reed*, 2018 Ark. App. 185, 544 S.W.3d 119.

For her first point, Dodson argues that the circuit court erred in appointing Sullivan, and not herself, as guardian. Arkansas Code Annotated section 28-65-204(b) (Repl. 2012) provides that the circuit court shall appoint as guardian of an incapacitated person the one most suitable who is willing to serve, having due regard to the following:

> (1) Any request contained in a will or other written instrument executed by the parent or by the legal custodian of a minor child for the appointment of a person as guardian of the minor child;
>
> (2) Any request for the appointment of a person as his or her guardian made by a minor fourteen (14) years of age or over;
>
> (3) Any request for the appointment of a person made by the spouse of an incapacitated person;
>
> (4) The relationship by blood or marriage to the person for whom guardianship is sought.

The statute does not make an ironclad order of priority, rather it leaves to the circuit court's sound discretion the appointment of a guardian who would forward the best interest of the ward; and this action will not be overturned except in a case of manifest abuse of discretion. *Martin*, *supra*.

Dodson argues that the law "strongly prefers" spouses and the ward's preference to act as guardian and that the statute establishes a presumption that favors next of kin over a stranger. A portion of her argument questions the evidence supporting the court's finding of incapacity, and she also asserts that there was no evidence that his incapacity required separation from her. Instead of "confinement" on his own farm, Dodson contends that the better option was to continue his daily routine with her and appoint her as his guardian. In sum, she argues that "the records [sic] holds no sufficient evidence to overcome Arkansas' strong preference in favor of Marsha's requests to serve and Sam's nomination of her as his guardian."

In response, Sullivan denies that the circuit court was bound by any presumption under the guardianship statute. Instead, he cites case law explaining that

> the court is not necessarily bound to appoint next of kin or close relatives or the nominees of such blood relatives, for the court, keeping in mind the principle of law that the best interests of the incompetent are paramount, may, in the exercise of the discretion confided in it with respect to the appointment of guardians, appoint a stranger where to do so would be for the best interests of the incompetent in view of such factors as the adverse interests of the relatives and the incompetent, lack of business ability of the relative, and various other matters to be further noted.

Martin, 96 Ark. App. at 55, 237 S.W.3d at 508 (quoting *McCartney v. Merchants & Planters Bank*, 227 Ark. 80, 83, 296 S.W.2d 407, 409 (1956)). As to the circuit court's decision, Sullivan identifies several of the court's findings that demonstrate its concern that Dodson might have taken advantage of Gill's condition, including Dr. Zini's testimony that Gill probably did not understand his marriage to Marsha at the time it was entered, the timing of the marriage, and testimony from Sam's family members reflecting a "strong inference" that Marsha was seeking to alienate Sam from his family. Sullivan asserts that after assessing

the witnesses' credibility and considering all the evidence, the circuit court decided to appoint him, not Dodson, as Gill's guardian, and that this decision was squarely within the circuit court's discretion and responsibility.

We agree with Sullivan. Section 28-65-204(b) does not designate preferences but instead requires the court to give "due regard" to certain factors. The court's ruling indicated that it considered Gill's preference of guardian and Dodson's status as his wife, but ultimately the court found that Sullivan should be appointed guardian. We hold that the circuit court did not abuse its discretion in appointing Sullivan as Gill's guardian.

For her second point, Dodson contends that the circuit court erred in awarding her only four hours a week in visitation with Gill. Dodson argues that under the statute in effect at the time of the hearing, Ark. Code Ann. § 28-65-110, she had the right to petition for visitation and that the statute established a presumption in favor of her visitation.[1] Arkansas Code Annotated section 28-65-110 provided in pertinent part:

> (a)(1) If a relative has reason to believe coupled with facts to substantiate his or her belief that the guardian of a ward or another person is unreasonably interfering with or denying visitation between the relative and the ward, the relative may file a petition for reasonable visitation with the ward in a court with jurisdiction over proceedings under this chapter that concern the ward.
>
> . . . .
>
> (b)(1) If a ward objects to visitation with the petitioner, the petitioner shall prove by a preponderance of the evidence that the ward was unduly influenced by the guardian or another person.
>
> (2) If the ward consents to visitation with the petitioner, does not object

[1]Dodson explains that the visitation order was entered on 7 July 2021; that § 28-65-110 was repealed effective 28 July 2021; and that there is no statement in H.B. 1648, which repealed and replaced § 28-65-110, that it was intended to be retroactive.

> to visitation with the petitioner, or is unable to express his or her consent or objection to visitation with the petitioner, the guardian or other person shall prove one (1) or more of the following conditions by a preponderance of the evidence in order to overcome the presumption that visitation between the petitioner and the ward is in the best interest of the ward:
>
> (A) The petitioner physically abused, exploited, neglected, sexually abused, or otherwise maltreated the ward or another adult; or
>
> (B) Visitation between the petitioner and the ward would be harmful to the mental health or physical well-being of the ward.

Accordingly, Sullivan could have rebutted the presumption in favor of visitation between herself and Gill by showing that she (A) physically abused, exploited, neglected, sexually abused, or maltreated Gill or another adult, or (B) that visitation would be harmful to Gill's mental health or physical well-being. Dodson contends that Sullivan unreasonably withheld visitation and that there is no evidence in the record of any abuse or that visitation would be harmful to Gill's mental health or well-being. Finally, she asserts that four hours a week is simply not reasonable considering that they had previously spent every day together.

Sullivan responds by explaining that he need not rebut any presumption because he did not oppose reasonable visitation. He contends that the circuit court, after weighing the evidence and accounting for the circumstances, decided the appropriate visitation time is four hours a week, at least for the time being.

We hold that the circuit court did not clearly err in setting visitation at four hours a week. The court explained the reasoning behind its ruling and left the door open to increasing visitation if the visits are successful.

Affirmed.

VIRDEN and VAUGHT, JJ., agree.

Blair & Stroud, by: *Robert D. Stroud* and *Barrett S. Moore*, for appellant.

Law Office of Shannon Briese, PLLC, by: *Shannon Briese*, for appellee.