



In the Missouri Court of Appeals Eastern District

DIVISION ONE

IN THE MATTER OF:
LILY ANN CROCKER

) No. ED109179
)
) Appeal from the Circuit Court
) of the City of St. Louis
) 2022-PR00301
)
) Honorable Rex M. Burlison
)
) Filed: July 20, 2021

Lily Ann Crocker (“Crocker”) appeals the judgment of the Probate Division of the Circuit Court of the City of St. Louis (“the trial court”), entered after two hearings on June 5 and July 21, 2020, finding Crocker to be totally incapacitated, finding Crocker to be totally disabled, and appointing Crocker’s daughter Vickie Lynn Owings (“Crocker’s Daughter” or “Daughter”) as guardian for Crocker.¹ On appeal, Crocker argues the trial court’s judgment is erroneous because, *inter alia*, she was improperly served with Daughter’s petition to appoint a guardian and conservator; and there is insufficient evidence to support the trial court’s findings that Crocker is totally incapacitated and totally disabled.² Although we find Crocker’s argument that she was improperly served with Daughter’s petition has no merit, we reverse the trial court’s judgment

¹ Although the trial court found Crocker to be totally disabled, the trial court found it was not necessary to appoint a conservator for Crocker’s estate because “[t]here [were] no assets belonging to [Crocker] which need[ed] to be administered by the [c]ourt at th[e] time [of the trial court’s judgment].”

² As noted in detail in footnote five of this opinion, Crocker also argues the trial court’s judgment is erroneous for other reasons; however, it is not necessary for this Court to address these issues because we find some merit to Crocker’s sufficiency-of-the-evidence claim and because we are remanding this case for a new hearing.

and remand for a new hearing because we find, (1) it is through no fault or negligence of Crocker that a transcript of the June 5, 2020 hearing was unable to be prepared; (2) it is impossible to conduct meaningful review of Crocker’s sufficiency-of-the-evidence argument on appeal without the ability to review the missing portions of testimony from the June 5 hearing; and (3) Crocker could be prejudiced by the missing testimony.

I. BACKGROUND

On May 28, 2020, Crocker’s Daughter filed a petition requesting the court to appoint her as full guardian of Crocker and as full conservator of Crocker’s estate. The petition alleges Crocker was unable by reason of “bipolar disorder, personality disorder, untreated diabetes[,] high blood pressure, and [an] undiagnosed heart condition” “[t]o receive and evaluate information or to communicate decisions to such an extent that [Crocker] lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness or disease is likely to occur”; “[t]o receive and evaluate information to communicate decisions to such an extent that [Crocker] lacks the ability to manage [] her financial resources”; and “[t]o meet [Crocker’s] essential daily needs of living and/or to manage [her] financial resources without supervision and that there are no less intrusive alternatives to a full . . . guardianship and . . . a full . . . conservatorship available to provide for [Crocker’s] care and financial needs.”

On May 28, 2020, Crocker’s Daughter also filed an emergency motion for appointment of a guardian for Crocker, requesting emergency letters of guardianship be granted to Daughter “in order to make sure [Crocker] receives necessary medical and other care” “given her advanced age and multiple physical and mental health conditions.”

On June 2, 2020, the trial court entered an order appointing an attorney for Crocker. On that same date, the trial court entered an order setting the emergency motion for appointment of a guardian for a hearing on June 5, 2020 at 11:00 a.m.

A return of service and accompanying notice of hearing shows that on June 2, 2020, Crocker was served, in person, at “Barnes-Jewish Hospital, 1 Barnes Jewish Plaza, St. Louis, MO 63110” with a notice of the June 5, 2020 hearing, along with “[a] copy of the petition and a list of prospective witnesses . . . pursuant to [s]ection 475.075[.2] [RSMo. Cum. Supp. 2019³].” The completed return of service document is on letterhead of the Office of Vernon Betts, Sheriff of the City of St. Louis. Above a line on the form that states, “[p]rint name of [s]heriff or [s]erver” is the name “Aric Samm,” and above a line on the form that states, “[s]ignature of [s]heriff or [s]erver” is Aric Samm’s signature.

On June 5, 2020, a hearing was held on the emergency motion for appointment of a guardian. At the hearing, Probate Commissioner Patrick J. Connaghan (“the Probate Commissioner” or “the Commissioner”) appeared, Crocker’s Daughter appeared in person and by attorney, Crocker appeared in person and by attorney, and evidence was heard. All parties appeared by video due to the Covid-19 protocols in place at the time, and the WebEx video platform was used for the hearing. Ultimately, a transcript of the June 5, 2020 hearing was unable to be produced for this appeal because of a computer malfunction; a December 27, 2020 memorandum issued by the Probate Commissioner provides “[the Commissioner’s] voice is the only one that can be heard” on the original recording of the hearing, and “[t]he computer had not recorded any of the testimony from any of the other participants.”

³ Unless otherwise indicated, all further statutory references are to RSMo. Cum. Supp. 2019.

Following the June 5, 2020 hearing, the trial court entered a judgment in favor of Crocker's Daughter and against Crocker on the emergency motion for appointment of a guardian. The trial court's judgment found in relevant part:

The [c]ourt finds that a medical emergency exists which presents a substantial risk that serious physical harm will occur to [Crocker] unless the [c]ourt appoints a suitable and qualified guardian ad litem pending the final disposition of this matter. The [c]ourt hereby appoints [Crocker's Daughter] as [g]uardian ad [l]item with full power and authority as provided in section 475.120 for [g]uardian of the person of [Crocker]. This authority shall remain in full force and effect until the final determination of the [p]etition for [a]ppointment of a [g]uardian and [c]onservator.

The [p]etition for [a]ppointment of a [g]uardian and [c]onservator is hereby set for hearing on Monday, July 6, 2020, at 11:00 [a.m.] in the Probate Division of the St. Louis City Circuit Court.

On July 2, 2020, the trial court entered an order, on its own motion, continuing the July 6 hearing on Daughter's petition to appoint a guardian and conservator. The hearing was subsequently reset for July 21, 2020.

On July 20, 2020, a report authored by Meredith Throop, M.D. and accompanying affidavit (collectively "Dr. Throop's report") was filed in support of Daughter's petition to appoint a guardian and conservator; however, Dr. Throop's report was not introduced or received into evidence at the July 21 hearing.

On July 21, 2020, the trial court held a hearing on Daughter's petition to appoint a guardian and conservator. A transcript of this July 21 hearing was produced for this appeal. Only two witnesses testified at the hearing – Crocker's Daughter and Crocker – and their testimony totals approximately ten pages of the sixteen-page transcript.⁴ No other evidence was introduced or admitted at the hearing.

⁴ The testimony from Crocker's Daughter and Crocker adduced at the July 21 hearing will be summarized in relevant part below in Section II.C.1. of this opinion.

The trial court subsequently entered a judgment finding Crocker to be totally incapacitated, finding Crocker to be totally disabled, and appointing Crocker's Daughter as Crocker's guardian. Additionally, letters of guardianship were issued consistent with the trial court's judgment. The trial court's judgment found in relevant part:

[] [Crocker] is totally incapacitated by reason of [Crocker's] mental and physical condition and as a result is unable to receive and evaluate information or to communicate decisions to such an extent that she lacks the capacity to meet essential requirements for food, clothing, shelter, safety, or other care such that serious physical injury, illness, or disease is likely to occur[;]

[] [Crocker] is totally disabled by reason of [Crocker's] mental and physical condition and as a result is unable to receive and evaluate information or to communicate decisions to such an extent that she lacks the ability to manage her financial resources[;]

...

[] By reason of [Crocker's] total incapacity, it is necessary to appoint guardian of the person. There are no assets belonging to [Crocker] which need to be administered by the [c]ourt at this time. It is therefore not necessary to appoint a conservator of the estate. [Crocker's] identified needs cannot be met by a less restrictive alternative at this time[;]

[] [Crocker's Daughter] is suitable and qualified to serve as guardian of the person [; and]

...

[] [Crocker's Daughter] is appointed guardian of the person with full powers as provided by law.

...

This appeal followed.

II. DISCUSSION

Crocker raises a total of four points on appeal claiming the trial court's judgment finding Crocker to be totally incapacitated, finding Crocker to be totally disabled, and appointing Crocker's Daughter as guardian for Crocker is erroneous; however, we will only consider the following two arguments. In sub-part one of Crocker's first point on appeal, she asserts the trial

court's judgment is erroneous because she was improperly served with Daughter's petition to appoint a guardian and conservator. And in Crocker's second point on appeal, she claims the trial court's judgment is erroneous because there is insufficient evidence to support the trial court's findings that Crocker is totally incapacitated and totally disabled.⁵

A. General Standard of Review

Our Court reviews a trial court's judgment involving a probate matter the same as any court-tried case. *Matter of Mitchell*, 914 S.W.2d 844, 846 (Mo. App. S.D. 1996). Accordingly, we will affirm the trial court's decision unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Id.*; see also *Matter of Barnard*, 484 S.W.3d 833, 837 (Mo. App. E.D. 2016); *In re Banks*, 285 S.W.3d 389, 391 (Mo. App. E.D. 2009).

B. Crocker's Argument that She Was Improperly Served with Daughter's Petition to Appoint a Guardian and Conservator

We first address sub-point one of Crocker's first point on appeal in which Crocker argues she was improperly served with Daughter's petition to appoint a guardian and conservator. For the reasons discussed below, we find this argument has no merit.

During the July 21, 2020 hearing, Crocker testified she was served with the petition to appoint a guardian and conservator and several other documents on June 2, 2020 while at Barnes

⁵ Crocker also argues in sub-part two of Crocker's first point on appeal that the trial court's judgment is erroneous because she did not receive proper notice of the July 21, 2020 hearing; in her third point on appeal that the trial court erred in finding she waived her right to a jury trial; and in her fourth point on appeal that she received ineffective assistance of counsel. It is not necessary for this Court to address these issues because, for the reasons discussed below, we find some merit to Crocker's sufficiency-of-the-evidence claim and because we are remanding this case for a new hearing. Furthermore, to the extent Crocker raises arguments in the argument sections of her brief that have not been set out in her points relied on, these arguments are deemed abandoned, and we decline to give plain-error review to these arguments. See *Brizendine v. Conrad*, 71 S.W.3d 587, 593, 593 n.5 (Mo. banc 2002) (holding "an argument not set out in the point relied on but merely referred to in the argument portion of the brief . . . is considered abandoned" and similarly declining to give plain-error review to such an argument). Accordingly, we deny sub-part two of Crocker's first point on appeal, Crocker's third point on appeal, and Crocker's fourth point on appeal.

Jewish Hospital. In this appeal, Crocker does not dispute she was served with the petition; instead, she contends the manner of service was improper because, *inter alia*, she was not personally served by a sheriff. *See* section 475.075.2 (providing a respondent in a guardianship proceeding “shall be served in person with [inter alia] [a] copy of the petition”); section 472.100.7 RSMo 2016 (indicating that “if personal service is required” under Missouri’s probate code, it “shall be made . . . by the sheriff”).⁶

A return of service and accompanying notice of hearing shows that on June 2, 2020, Crocker was served, in person, at “Barnes-Jewish Hospital, 1 Barnes Jewish Plaza, St. Louis, MO 63110” with a notice of the June 5, 2020 hearing, along with “[a] copy of the petition and a list of prospective witnesses . . . pursuant to [s]ection 475.075[.2].” The completed return of service document is on letterhead issued by the Office of Vernon Betts, Sheriff of the City of St. Louis (“Sheriff letterhead”). Above a line on the form that states, “[p]rint name of [s]heriff or [s]erver” is the name “Aric Samm,” and above a line on the form that states, “[s]ignature of [s]heriff or [s]erver” is Aric Samm’s signature.

Because the return of service document is on Sheriff letterhead and because a court could reasonably find the document was signed by Sheriff Aric Samm, the record does not support Crocker’s argument that she did not receive personal service of the petition by a sheriff. *Cf.*

Flair v. Campbell, 44 S.W.3d 444, 450 (Mo. App. W.D. 2001) (finding a return of service did

⁶ The aforementioned citations to section 475.075.2 and section 472.100 RSMo 2016 are merely to give context to Crocker’s argument on appeal, and nothing in this opinion should be read to support the proposition that personal service in a guardianship proceeding *must* be made by a sheriff. In fact, case law indicates personal service in a guardianship proceeding may also be properly obtained by a special process server. *See Flair v. Campbell*, 44 S.W.3d 444, 450-51 (Mo. App. W.D. 2001) (explaining that service of process in a guardianship proceeding may also be properly obtained by a special process server pursuant to language in Missouri Supreme Court Rule 54); *see generally* Missouri Supreme Court Rule 54 (2020); *see also Coburn v. Kramer & Frank, P.C.*, No. ED108948, 2021 WL 865264, at *11 (Mo. App. E.D. March 9, 2021) (application for transfer filed in the Missouri Supreme Court on April 27, 2021) (explaining “*Flair* simply stand[s] for the proposition that neither a circuit court nor a circuit clerk can ‘appoint’ a process server whom the plaintiff had never nominated or requested to be appointed in the first place”).

not indicate a person was acting as a sheriff at the time she purportedly served an underlying respondent in a guardianship proceeding where, unlike here, a return of service document was on “Civil Courier Service letterhead” and “the certificate of service was signed by . . . a ‘Representative for Civil Courier Service’”) Accordingly, Crocker’s argument that she was improperly served with Daughter’s petition to appoint a guardian and conservator has no merit. Sub-point one of Crocker’s first point on appeal is denied.

C. Crocker’s Argument that There Is Insufficient Evidence to Support the Trial Court’s Findings that Crocker is Totally Incapacitated and Totally Disabled

We now turn to Crocker’s second point on appeal, which asserts there is insufficient evidence to support the trial court’s findings that Crocker is totally incapacitated and totally disabled.

1. The Limited Record in this Case

In this case, the record before this Court is very limited. The trial court held two hearings on June 5, 2020 and July 21, 2020.

At the June 5 hearing, all parties appeared by video due to the Covid-19 protocols in place at the time, and the WebEx video platform was used for the hearing. Ultimately, a transcript of the June 5, 2020 hearing was unable to be produced for this appeal because of a computer malfunction; a December 27, 2020 memorandum issued by the Probate Commissioner provides “[the Commissioner’s] voice is the only one that can be heard” on the original recording of the hearing, and “[t]he computer had not recorded any of the testimony from any of the other participants.”

A transcript of this July 21 hearing was produced for this appeal. Only two witnesses testified at the hearing – Crocker’s Daughter and Crocker – and their testimony totals

approximately ten pages of the sixteen-page transcript. No other evidence was introduced or admitted at the hearing.⁷

Crocker's Daughter's July 21 testimony constitutes approximately three pages of the transcript. Daughter told the court that she testified at the June 5 hearing and all of the testimony she provided then was still accurate and true. Daughter's attorney then stated, "I'm going to incorporate [your testimony] from [the June 5 hearing]. We're not going to go over what we did last time." Crocker's Daughter then gave very brief testimony regarding Crocker's continued refusal to take prescribed medications for diabetes and physical conditions relating to her heart and kidneys and Crocker's refusal to undergo heart surgery. Crocker's Daughter also testified she believed a guardianship was necessary for Crocker, Daughter was willing to serve as Crocker's guardian, and Daughter was asking the court to be appointed guardian for Crocker and conservator for Crocker's estate.

Crocker's July 21 testimony constitutes approximately seven pages of the transcript and essentially was a statement telling the court she had been able to manage and control her diabetes and physical conditions relating to her heart and kidneys before she had lost control over her medical decisions. Crocker also testified she does not want her Daughter making decisions on her behalf.

⁷ We note Crocker's Daughter – the respondent in this appeal – argues our Court should consider Dr. Throop's report in determining Crocker's sufficiency-of-the-evidence argument on appeal. As previously stated, on July 20, 2020, Dr. Throop's report was filed in support of Daughter's petition to appoint a guardian and conservator; however, Dr. Throop's report was not introduced or admitted into evidence at the July 21 hearing. Under these circumstances, our Court will not consider Dr. Throop's report on appeal. See *Jamerson v. Boone*, 554 S.W.3d 899, 904 (Mo. App. E.D. 2018) ("The mere filing of a document does not put it before the court as evidence, and the document cannot be considered by the court in making its judgment unless and until it is offered and admitted into evidence.") (citation and internal quotations omitted); *In re I.B.*, 48 S.W.3d 91, 103 (Mo. App. W.D. 2001) ("[T]he mere filing of a document does not place it before the court for purposes of its consideration at [a] . . . hearing We will not consider documents on appeal that were not offered into evidence at the . . . hearing.").

2. Relevant Law and Analysis

As applicable here, Missouri Supreme Court Rule 81.12(a) (effective from January 1, 2018 to the present) provides that “[t]he record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented . . . to the appellate court for decision.” “However, the appropriate remedy when the record on appeal is inadequate through no fault of the parties is to reverse and remand the case to the trial court.” *Empire Bank v. McRobert*, 247 S.W.3d 160, 161 (Mo. App. S.D. 2008) (citations and internal quotation omitted); *see also In Interest of J.M.H.*, 518 S.W.3d 256, 258 (Mo. App. S.D. 2017) (similarly finding).

Accordingly, when it is through no fault or negligence of the appellant that a transcript was unable to be prepared, our Court finds it is impossible to conduct meaningful review of the appellant’s argument on appeal without the ability to review the missing portions of testimony, and we find the appellant’s right to appeal could be prejudiced by the missing testimony, we must reverse the trial court’s decision and remand for a new trial or hearing. *See id.*; *State v. Barber*, 391 S.W.3d 2, 5-7 (Mo. App. W.D. 2012) (reversing the trial court’s judgment and remanding for a new trial where there were missing portions of a transcript through no fault of the appellant and the appellate court found it was impossible to conduct a meaningful review of the appellant’s claimed trial errors without the ability to review the missing portions of testimony); *In re A.J.M.*, 158 S.W.3d 866, 867 (Mo. App. S.D. 2005) (reversing the trial court’s judgment and remanding for a new trial where it was through no fault or negligence of the appellant that a transcript was unable to be fully prepared and the appellant’s right to appeal could have been prejudiced by the missing testimony).

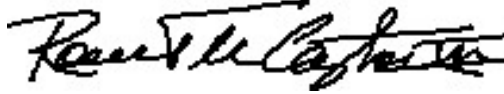
In this case, it is through no fault or negligence of Crocker that a transcript of the June 5, 2021 hearing cannot be prepared; instead, the transcript of the June 5 hearing was unable to be produced for this appeal because of a computer malfunction during the Covid-19 pandemic. While we acknowledge the challenges in technology faced by trial courts and parties during the pandemic, it is necessary for parties to be afforded due process and a sufficient record of the underlying proceedings. This is especially true where, as in this case, the underlying proceeding is one involving “guardianship [, which] necessarily entails a deprivation of the fundamental liberty interest to go unimpeded about one’s ordinary affairs.” *In re Myles*, 273 S.W.3d 83, 85 (Mo. App. E.D. 2008) (quoting *In re Link*, 713 S.W.2d 487, 493 (Mo. banc 1986)).

Moreover, Crocker’s Daughter’s testimony at the July 21, 2020 hearing, which was scant, specifically referred back to and incorporated her June 5, 2020 hearing testimony, suggesting the trial court’s findings relating to Crocker’s alleged incapacity and disability were based at least in part on Crocker’s testimony from the June 5 hearing. Under these circumstances, we find it is impossible to conduct meaningful review of Crocker’s sufficiency-of-the-evidence argument on appeal without the ability to review the missing portions of testimony from the June 5 hearing, and we find Crocker could be prejudiced by the missing testimony.

In sum, we must reverse the trial court’s judgment in this case and remand for a new hearing because we find, (1) it is through no fault or negligence of Crocker that a transcript of the June 5 hearing was unable to be prepared; (2) it is impossible to conduct meaningful review of Crocker’s sufficiency-of-the-evidence argument on appeal without the ability to review the missing portions of testimony from the June 5 hearing; and (3) Crocker could be prejudiced by the missing testimony. *See In Interest of J.M.H.*, 518 S.W.3d at 258; *Barber*, 391 S.W.3d at 5-7; *Empire Bank*, 247 S.W.3d at 161; *In re A.J.M.*, 158 S.W.3d at 867. Point two is granted.

III. CONCLUSION

The trial court's judgment finding Crocker to be totally incapacitated, finding Crocker to be totally disabled, and appointing Crocker's Daughter as guardian for Crocker is reversed, and the case is remanded for a new hearing.

A handwritten signature in black ink, appearing to read "Robert M. Clayton III", written over a horizontal line.

ROBERT M. CLAYTON III, Judge

Colleen Dolan, P.J., and
Kelly C. Broniec, J., concur.