In the Missouri Court of Appeals
Western District

LEE ALLEN FISHER,	)	
Appellant,	)	
v.	)	**WD84058**
	)	
NINA M. SLINGER,	)	
Respondent,	)	**FILED: October 26, 2021**
and	)	
KEITH A. MAYER,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE MARK A. STYLES, JR., JUDGE

BEFORE DIVISION THREE: LISA WHITE HARDWICK, PRESIDING JUDGE, GARY D. WITT AND EDWARD R. ARDINI, JR., JUDGES

Lee Fisher appeals from the circuit court's judgment denying his motion to be appointed guardian and conservator of his sister, Nina Slinger, and granting Keith Mayer's competing motion for appointment. Fisher contends that the circuit court misapplied the factors for the order of appointment priority in Section 475.050.[1] For reasons explained herein, we affirm.

[1] Unless otherwise indicated, statutory citations refer to the Revised Statutes of Missouri 2016, as updated through the 2020 Cumulative Supplement.

FACTUAL AND PROCEDURAL HISTORY

Slinger is 87 years old. Fisher is Slinger's brother, and Mayer is her nephew by marriage. Mayer and his wife have a close relationship with Slinger. Mayer has been assisting Slinger with her medical, financial, and personal wellbeing since roughly 2010, when her husband died. In 2012, Slinger added Mayer to her bank accounts so he could better assist her financially if necessary. In 2015, Slinger granted Mayer a durable power of attorney for all general purposes, and Mayer contends a second power of attorney was also granted for medical decisions. The document pertaining to medical decisions was lost, however, so Slinger and Mayer executed a new document in 2018. From 2015 to 2018, Mayer assisted Slinger with personal, financial, and healthcare issues, which included selling her home and moving her to an independent living apartment.

In 2018, Slinger was diagnosed with dementia. In August 2019, members of Slinger's family took her to Fisher's house to stay with him. Contrary to Mayer's expectations that the visit would last a week, Fisher kept Slinger at his home for roughly a year until after the trial. Mayer had limited contact with Slinger during that time. Fisher filed a petition for appointment of guardian and conservator on August 16, 2019, and an amended petition on March 23, 2020. Mayer filed a competing petition for appointment on August 26, 2019.

At the bench trial, the court considered testimony and medical evidence of Slinger's cognitive decline, and the parties stipulated to Slinger's incapacity and need for a guardian and conservator. Slinger also testified at trial that she wanted

Fisher to be her guardian, but, among other indications of mental decline, she did not remember her relationship to Mayer, did not remember requesting that her daughter be appointed a few months prior, did not know Fisher's address or where she had lived at the independent living apartment, and greatly underestimated how long she had been staying with Fisher and why.

After trial, the circuit court entered its judgment ordering that Fisher's motion to be appointed guardian and conservator be denied and that Mayer's competing motion be granted. Fisher filed a motion for new trial, which was denied. Fisher appeals.

STANDARD OF REVIEW

We will affirm the circuit court's judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "Substantial evidence is evidence which, if true, is probative of the issues and from which [the trier of fact] can decide the case." *Hays v. Price*, 313. S.W.3d 645, 650 (Mo. banc 2010). "A claim that the judgment erroneously declares or applies the law . . . involves review of the propriety of the trial court's construction and application of the law." *Pierce v Mo-Kan Sheet Metal Workers Welfare Fund*, 616 S.W.3d 409, 413 (Mo. App. 2020). "Against-the-weight-of-the-evidence review is very deferential. A judgment is only reversed in rare cases, when the reviewing court has a firm belief that the

decree or judgment is wrong." *Matter of A.L.R.*, 511 S.W.3d 408, 414 (Mo. banc 2017).

ANALYSIS

Prior to addressing the merits of Fisher's points on appeal, we must address the deficiencies in his briefing. Mayer contends that Fisher's amended brief violates Rule 84.04 in that it fails to provide an adequate statement of facts and raises multifarious points on appeal. We agree. Fisher's statement of facts contains only three sentences and is very similar to the deficient statement of facts in *Moore v. Quirk*, 81 S.W.3d 717, 720 n.1 (Mo. App. 2003):

> Appellants' statement of facts is two paragraphs and one sentence long. It is merely a recitation of the procedural history of the case. Rule 84.04(c) requires the statement of facts to be a fair and concise statement of the facts relevant to the questions presented for determination without argument. The facts should define the scope of the controversy and afford an immediate, accurate, complete and unbiased understanding of the facts of the case. Appellants' recital of the facts is deficient and violates Rule 84.04(c). We do not dismiss Appellants' appeal on this basis, however, because the argument section of Appellants' brief provides this court with an understanding of the issues raised.

(internal citations and quotation marks omitted). Similarly, because the argument portion of Fisher's brief allows us to understand the issues raised, we will not dismiss the appeal on the basis of the deficient statement of facts. *See id*.

In addition to the deficient statement of facts, Fisher's three points on appeal allege "[that the circuit court's decision was] contrary to law, [that the circuit court] erroneously declared or applied the law, [and that its decision] was not supported by substantial evidence and [was] against the weight of evidence."

Each of these arguments is separate and distinct from the other and must be asserted in separate points on appeal. *In re Marriage of Blanchard*, 613 S.W.3d 879, 886 (Mo. App. 2020). Multifarious points on appeal preserve nothing for appellate review and are grounds for dismissal. *Id*. Nevertheless, because of our preference to reach the merits of every appeal, and because we can address Fisher's arguments without acting as his counsel, we will gratuitously address the merits of Fisher's claims. *See Buckley v. Tipton*, 270 S.W.3d 919, 922 (Mo. App. 2008 (noting our longstanding preference to reach the merits of every appeal).

In his first point on appeal, Fisher contends the circuit court erred in finding that Slinger's request to have him appointed as guardian and conservator was not reasonable. In reaching its decision to deny Fisher's motion, the court considered Section 475.050.1, which lists the order in which guardians and conservators must be selected for appointment. In relevant part, Section 475.050.1(1)-(4) reads:

> Before appointing any other eligible person as guardian of an incapacitated person, or conservator of a disabled person, the court shall consider the suitability of appointing any of the following persons, listed in the order of priority, who appear to be willing to serve:
>
> (1) If the incapacitated or disabled person is, at the time of the hearing, able to make and communicate a reasonable choice, any eligible person nominated by the person;
>
> (2) Any eligible person nominated in a durable power of attorney executed by the incapacitated or disabled person, or in an instrument in writing signed by the incapacitated or disabled person and by two witnesses who signed at the incapacitated or disabled person's request, before the inception of the person's incapacity or disability;
>
> (3) The spouse, parents, adult children, adult brothers and sisters and other close adult relatives of the incapacitated or disabled person;

> (4) Any other eligible person or, with respect to the estate only, any eligible organization or corporation, nominated in a duly probated will of such a spouse or relative.

The court found that, based on the evidence of cognitive decline presented, Slinger could not communicate a reasonable choice for who should be appointed as her guardian and conservator. Thus, it found that Fisher did not meet the requirement for priority under Section 475.050.1(1). The court then found that Mayer met the second tier of priority under Section 475.050.1(2) by way of his valid durable power of attorney. The court, therefore, found that Mayer had the highest statutory priority for appointment and appointed him as guardian and conservator.

Fisher generally argues that, because Slinger made, through a written declaration and testimony at trial, her reasonable choice for him to be her guardian, he had the highest appointment priority under Section 490.050.1(1). The parties do not contest that Slinger testified that she wanted Fisher to be her guardian. In making its finding that Slinger was unable to communicate a reasonable decision, however, the circuit court considered evidence that Slinger had repeatedly selected Mayer to assist her, make major decisions for her, and manage her finances prior to the onset of her dementia. The court also considered evidence that Slinger had been taken to Fisher's house under mysterious circumstances for roughly a year leading up to trial. Finally, the court considered substantial evidence of Slinger's increasing dementia, confusion, and memory impairment, which reduced her ability to make a reasonable decision regarding who should be her guardian and conservator.

In contesting the court's finding, Fisher argues that, despite medical and legal determinations of incapacity, Slinger "was still able to testify, make and communicate" her preference. The majority of Fisher's arguments focus on fact and law relating to why he was a reasonable choice for guardian and conservator. Thus, Fisher essentially argues that because Slinger could communicate a preference, and because that preference turned out to be reasonable, he should have been appointed over Mayer.

Specifically, Fisher insists, "there is nothing in the record indicating that [he] was not a suitable choice for guardian and conservator or that he was somehow disqualified." This argument misinterprets the standard by which a circuit court must determine Section 475.050.1(1)'s applicability. Mere communication of any preference, which might, by chance, be reasonable, is not sufficient; rather, "the protectee [must be] determined to have the capacity to choose [her] conservator." *Matter of Waldron*, 910 S.W.2d 837, 840 (Mo. App. 1995); *see also In re Estate of Romberg*, 942 S.W.2d 417, 420 (Mo. App. 1997) (considering protectee's capability to make a reasonable choice of guardian due to her dementia).

Fisher's only argument that Slinger had adequate capacity to make a reasonable decision was that "[Slinger's doctor's] latest examinations and assessment before Trial indicates that Mrs. Slinger could make a reasonable choice." Fisher cites generally to Slinger's medical records, but those records do not specifically indicate her ability to make substantial reasonable decisions. In contrast, the most recent medical assessment, along with prior assessments,

appears equally harmful to Fisher's argument because it notes Slinger's memory loss and her inability to care for her health and financial well-being. The circuit court specifically relied on these same medical records, as well as additional testimony, to make its finding that Slinger was "not able to communicate a reasonable choice." Thus, Fisher's argument is unpersuasive.

Without a far greater showing of fact or law to the contrary, Fisher has failed to meet his burden to show that the circuit court's decision was against the weight of the evidence, unsupported by substantial competent evidence, or that the court erroneously declared or applied the law. Point I is denied.

In his second point, Fisher contends that Mayer's durable power of attorney, which was originally entered into in 2015, did not grant Mayer priority under Section 475.050.1. Fisher also insists that, because Mayer's power of attorney was "springing" and did not take effect until Slinger was incapacitated, it did not go into effect until ostensibly after she made her written and testimonial request that Fisher be her guardian and conservator. Therefore, he argues that he has priority over Mayer. Fisher bases these arguments on the premise that Slinger could communicate a reasonable choice of guardian and conservator. Given the circuit court's finding to the contrary, and our affirmation of that decision, these arguments have no merit.

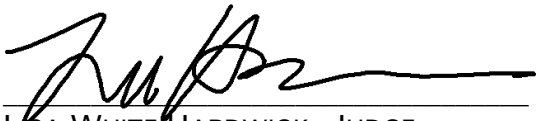
In addition, the plain language of Section 475.050.1(2) requires only that the power of attorney be "executed by the incapacitated or disabled person, or in an instrument in writing signed by the incapacitated or disabled person and by two

witnesses who signed at the incapacitated or disabled person's request." § 475.050.1(2). The "springing" nature of Mayer's power of attorney has no effect on Section 475.050.1(2)'s applicability. Mayer meets the requirements of Section 475.050.1(2) by way of his durable power of attorney granted by Slinger. Fisher does not meet the requirements of Section 475.050.1(1) or (2), so the court did not err in appointing Mayer guardian and conservator. Point II is denied.

In his third point, Fisher argues that he, as Slinger's brother, has priority over Mayer, Slinger's nephew by marriage, under Section 475.050.1(3). This argument ignores that Mayer meets the requirement for a higher priority under Section 475.050.1(2) through his durable power of attorney executed by Slinger. Moreover, when considering appointment under Section 475.050.1(3), courts need not compare the degree of family relationship. *In re Banks*, 285 S.W.3d 389, 392 (Mo. App. 2009) (rejecting a similar argument by finding "the statute's language does not in fact create sub-preferences within the preferential classes set forth in each subparagraph"). Point III is denied.

CONCLUSION

The judgment is affirmed.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.