

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1163

September Term, 2016

IN THE MATTER OF MARTIN A. STEPPER
FOR THE APPOINTMENT OF A
GUARDIAN OF THE PERSON AND
PROPERTY

Eyler, Deborah S.,
Reed,
Friedman,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 30, 2017

This appeal arises from a Petition for the Appointment of a Guardian of the Person and Property of Martin A. Stepper (“the Petition”), filed by Genesis HealthCare (“Genesis”) in the Circuit Court for Montgomery County. Ultimately, the court granted the Petition over the objection of Mr. Stepper’s twin sister, Phyllis Stepper, the appellant, and appointed Robert McCarthy, Esq., as guardian of the property and the director of the Area Agency on Aging, a division of the Montgomery County Department of Health and Human Services (“the County”), as guardian of the person.¹ Ms. Stepper noted an appeal, and during the pendency of the appeal, Mr. Stepper died.

Ms. Stepper presents three questions on appeal.² For the following reasons, we shall dismiss the appeal as moot.

LEGAL BACKGROUND

Guardianship proceedings for disabled persons are governed by Md. Code (2001, 2011 Repl. Vol.), Title 13 of the Estates and Trusts Article (“ET”) and by Title 10 of the

¹ By Order of this Court dated January 18, 2017, the County was substituted as the appellee in place of Genesis.

² The questions as posed by Ms. Stepper are:

- I. Whether the court erred in finding a want of good cause and denying an Interested Person’s motion for a mental examination of her brother, alleged by the nursing home to be cognitively impaired and clearly and convincingly in need of a guardianship?
- II. Whether the court erred in its findings that the Respondent waived a jury trial right and that his presence at trial was waived?
- III. Whether the court erred in its conclusion that Respondent was, by clear and convincing evidence, mentally incapacitated and in need of no lesser alternative than guardianship of his person and property?

Rules. As pertinent, ET section 13-101(f) defines a “disabled person” to be an adult who has been “judged by a court to be unable to manage his property for reasons listed in §13-201(c)(1)” or a person judged to be “unable to provide for his daily needs sufficiently to protect his health or safety for the reasons listed in §13-705(b).” *See also* Md. Rule 10-103(b)(1)&(2). ET sections 13-201(c)(1) and 13-705(b) each include “mental disability [or] disease” as a reason a person may be adjudged to be disabled.

The circuit court is empowered to appoint a guardian of the property and of the person of a disabled person. ET §§ 13-201 & 13-705. In either instance, the petition for guardianship must attach certificates of competency completed either by two physicians who have examined the allegedly disabled person; or by one physician *and* one psychologist or social worker. ET § 13-705(c); Md. Rules 10-202(a)(1) & 10-301(d). At least one of the certifying health care professionals shall have examined the allegedly disabled person within 21 days prior to the filing of the petition. Md. Rule 10-202(a)(1).

Unless the allegedly disabled person has hired private counsel, the court shall appoint an attorney to represent his or her interests. ET § 13-705(d)(1); Md. Rule 10-106(2). “The person alleged to be disabled is entitled to be present at the hearing unless he has knowingly and voluntarily waived the right to be present or cannot be present because of physical or mental incapacity.” *Id.* at (e).

Notice must be given to all “interested persons,” including any heirs of the allegedly disabled person, *see* Md. Rule 10-103(f), and to the allegedly disabled person. *See* Md. Rule 10-204. Unless waived by the allegedly disabled person or his or her

attorney, the court shall set the matter in for a jury trial. Md. Rule 10-205(b). A guardian of the person may be appointed for a disabled person upon proof by clear and convincing evidence that the person “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person[.]” ET § 13-705(b).

ET section 13-707 establishes certain priorities for the appointment of a guardian of the person. As pertinent, “[a]dult persons who would be the disabled person’s heirs if the disabled person were dead” take priority over the “director of the area agency on aging.” ET § 13-707(a). “For good cause, the court may pass over a person with priority and appoint a person with a lower priority.” *Id.* at (c).

FACTS AND PROCEEDINGS

At the time of the underlying guardianship trial, Mr. Stepper was 71 years old. He was not married and had no children. Ms. Stepper is his twin sister. She lives in Brooklyn, New York.

Genesis filed the Petition on February 2, 2016. At that time, Mr. Stepper was a long-term care resident at Fairland Center (“Fairland”), a nursing and rehabilitation center in Silver Spring that is owned and operated by Genesis. Mr. Stepper was transferred to Fairland in October 2015 following his discharge from Holy Cross Hospital. At the time of his admission, he was suffering from quadriplegia secondary to cervical spinal stenosis and from metabolic encephalopathy secondary to acute renal failure. He was oriented only to person, not to time or place. He was unable to answer basic questions about his finances.

In the Petition, Genesis alleged that Mr. Stepper was a disabled person by reason of “cognitive deficits” that resulted in an “inability to take charge of and manage his property and personal affairs.” Genesis requested that the court appoint guardians of his person and property. Genesis alleged that the “known Interested Persons” were the Social Security Administration; the County; and Ms. Stepper, whose address and phone number were then unknown. Genesis further alleged that Mr. Stepper’s friend, Judy Houseknecht, was not an “Interested Person,” but she would nevertheless be provided with notice of the proceedings.

Attached to the Petition were two certificates completed by physicians attesting that Mr. Stepper lacked the capacity to make or communicate decisions about his property and his medical care. The first certificate was completed by Patricia Gomez, M.D., an internist who was the attending physician at Fairland. She had examined Mr. Stepper on January 5, 2016. She noted that he was diagnosed with cervical spinal stenosis; quadriplegia; cognitive deficits; and a history of depression. She opined that Mr. Stepper was disabled by reason of his cognitive deficits; that his disability was of moderate severity; that the disability was of “indefinite” duration; and that he required institutional care and the appointment of a guardian of his person and property.

The second certificate was completed by Ravi Passi, M.D., an internist who was the medical director for Fairfield. He opined that Mr. Stepper had physical and cognitive disabilities caused by cervical spinal stenosis and metabolic encephalopathy and that the disabilities were moderate in severity and “longterm” in duration. Dr. Passi also opined

that Mr. Stepper required institutional care and the appointment of a guardian of his person and his property.

Simultaneous with the filing of the Petition, Genesis filed an emergency motion for the appointment of a temporary guardian of the property.

On February 16, 2016, the court appointed Nina Helwig, Esq., as counsel for Mr. Stepper and Robert McCarthy, Esq., as the temporary guardian of his property and issued show cause orders to the Interested Persons (and Ms. Houseknecht).

On February 23, 2015, Genesis filed an emergency motion for the appointment of a temporary guardian of the person. Following a hearing that same day at which Mr. Stepper was represented by counsel, the court granted that motion and appointed Sherry Davis, a caseworker for the County's public guardianship division, as the temporary guardian of the person.

The next day, Ms. Helwig filed a response to the Petition on behalf of Mr. Stepper admitting the allegations; alleging that due to his disability, he was unable to communicate to counsel "his wishes regarding the appointment of a guardian," and that in light of counsel's investigation, she believed it was in her client's best interests for the court to appoint guardians of his person and property. Mr. Stepper waived his right to attend all future court hearings and asked the court to grant the Petition.

On March 30, 2016, Ms. Stepper, through counsel, sought an extension of time to respond to the Petition. The next day, the court held a hearing on that motion. At that

hearing, the court granted Ms. Stepper’s motion for an extension of time and set the matter in for a one-day trial on September 21, 2016.

On May 2, 2016, Ms. Stepper filed an opposition to the Petition. She alleged that she was a resident of New York and, since being served with the show cause order, had unsuccessfully “sought to ascertain the accurate, current mental and physical condition of her brother.” She had sought Ms. Davis’s consent for further medical and psychological evaluations of her brother, but had not yet received it. Ms. Stepper further alleged that she had been advised by Genesis that she would not be allowed to visit her brother at “Fairland outside the presence of [Genesis] personnel” because Mr. Stepper had “expressed [to Ms. Davis] the desire not to see [Ms. Stepper].” Ms. Stepper asked the court to deny the Petition; to vacate the orders appointing temporary guardians of Mr. Stepper’s person and property; and, in the alternative, if the court were to grant the Petition, to appoint Ms. Stepper as his guardian.

Three days later, Ms. Stepper filed her “Motion for Mental and Physical Examination” of Mr. Stepper. In an attached memorandum, she argued that evaluation of Mr. Stepper by a psychologist was warranted to ensure that he was in need of a guardian and to protect his liberty interests under the federal and state constitutions.

Genesis and Mr. Stepper opposed the motion. Mr. Stepper, through counsel, argued that there was “no need for any further mental or physical examinations” of him and that the court should proceed to consider the merits of the Petition.

On July 7, 2016, the court held a hearing on the motion for a mental and physical examination and denied it. The court reasoned that in light of the fact that two physicians had evaluated Mr. Stepper and found him to be cognitively impaired and that his counsel opposed a third evaluation of her client, Ms. Stepper had not shown good cause as required by Rule 2-423.

On September 21, 2016, a bench trial went forward on the merits of the Petition. Present at the hearing were a representative of Genesis and its counsel; Mr. McCarthy; the County's attorney; Ms. Davis; Ms. Helwig (who waived Mr. Stepper's presence); and counsel for Ms. Stepper. Ms. Stepper did not attend the trial.

In its case, Genesis called Drs. Gomez and Passi, both of whom were accepted as experts in internal medicine; Ms. Davis, who was accepted as an expert in social work and public guardianship; Kerry Grafton, a social worker employed at Fairland; Albeya Hall, the business director at Fairland; and Mr. McCarthy. Dr. Gomez testified that she worked for Dr. Passi's medical practice, seeing patients in a clinical setting, and also was the attending physician at Fairland at all relevant times. In that capacity, Dr. Gomez had taken Mr. Stepper's medical history and performed a physical exam when he was admitted to Fairland and had examined him at least once a month thereafter.

In January 2016, Dr. Gomez performed a capacity examination at the request of Genesis. At that time, Mr. Stepper was oriented "to only his name but not to place, person, self." He had "multiple medical comorbidities" and was a "total care patient." Dr. Gomez explained that Mr. Stepper was a quadriplegic as a consequence of cervical

spinal stenosis; had metabolic encephalopathy secondary to renal failure; and had a history of severe depression, with suicidal ideation. He was admitted to Fairland with “confusion, disorientation, [and] cognitive dysfunction.” He also was suffering from multiple bed sores, requiring treatment at the wound care center.

Since his admission to Fairland, Mr. Stepper’s cognitive function had declined. When Dr. Gomez met with Mr. Stepper the week prior to the guardianship trial, he was not oriented to place or time, believing that the year was 2063. He only spoke a few words and could not “finish a sentence.” His “attention [was] not good” and his “orientation [was] going down.” Dr. Gomez opined that Mr. Stepper’s condition was of “indefinite[.]” duration and, in light of his cognitive decline, he was unable to make or communicate decisions about his property or to manage his own health.

Dr. Passi had examined Mr. Stepper twice: once in January 2016 when he conducted a capacity evaluation at the request of Genesis and again about six weeks prior to the guardianship trial. He opined that Mr. Stepper suffered from quadriplegia or quadriparesis, meaning “weakness in all four extremities,” and from “a cognitive deficit . . . [that] . . . result[ed] [from] the metabolic encephalopathy.” Dr. Passi explained that metabolic encephalopathy can be a “chronic” condition even after the underlying mechanism—in Mr. Stepper’s case, acute renal failure—is treated. The cognitive deficits typical of metabolic encephalopathy also can coexist with dementia.

At the time of the January 2016 capacity evaluation, Dr. Passi was of the opinion that Mr. Stepper was incapable of making or communicating responsible decisions.

When Dr. Passi saw Mr. Stepper again about three months later, he “seemed to be weaker physically and . . . even more confused.” In light of Mr. Stepper’s “progressive[] decline[]” and his “underlying complex medical conditions,” Dr. Passi opined that it was unlikely he would “have any improvement in his cognition or physical condition.”

Ms. Davis testified that she was a caseworker for the County’s Adult Protective Services (“APS”) and public guardianship divisions. In the fall of 2015, APS investigated a tip that Mr. Stepper was a vulnerable adult. He was living alone in a townhouse in Silver Spring. He had no furniture except a bed and was unable to take out his trash or take care of his daily needs. The APS offered him services, which he refused. Prior to the case being closed, however, Mr. Stepper fell and injured himself and was admitted to Holy Cross Hospital. As mentioned, he was transferred to Fairland upon his discharge from Holy Cross.

Ms. Davis further testified that after Ms. Stepper visited Mr. Stepper for the first time, Fairland staff contacted her (Ms. Davis) to advise her that the visit caused Mr. Stepper to become extremely upset. Ms. Davis met with Mr. Stepper the following day to talk to him about it. Mr. Stepper grew visibly agitated when she brought up the subject of Ms. Stepper. He “start[ed] to move a lot . . . [a]nd . . . really g[ot] upset.” He yelled that he didn’t “want to see her” and it took him a long time to calm down. As a result, Ms. Davis had instructed Fairland not to permit Ms. Stepper to visit Mr. Stepper unless she contacted Ms. Davis first. Ms. Stepper had not contacted Ms. Davis since that time to arrange a visit.

Ms. Davis explained that in her capacity as Mr. Stepper’s temporary guardian, she sought his input about decisions. She asked him questions about his needs and wishes on “different days” and in “different ways” to determine if she was getting a “random response or a consistent response.” Mr. Stepper was able to communicate to her if he was in pain; if he was hungry; and if “he wants to see his sister.”

Ms. Davis opined that she would have grave concerns if Ms. Stepper were to be appointed as Mr. Stepper’s guardian because she would not be able to interact with him without his becoming very agitated and upset. This would not be in Mr. Stepper’s best interest, in Ms. Davis’s opinion.

Ms. Grafton testified that she met with Mr. Stepper and his friend, Ms. Houseknecht, soon after he was admitted to Fairland. During that meeting, she learned that Mr. Stepper had a sister in New York, but he told her (Ms. Grafton) that he did not want “[his sister] to be contacted.” Ms. Stepper came to visit Mr. Stepper in April 2016, and he “got very upset and started yelling.” As a result, the staff asked Ms. Stepper to leave. She returned about a month later and Mr. Stepper again became very upset. He told Ms. Grafton that he did not trust his sister and that he had not spoken to her in years.

Ms. Hall testified that she had conducted an admissions referral for Mr. Stepper to determine if he qualified for Medicaid or if he had other sources of payment. He was not cooperative during that assessment and could not answer questions about his bank accounts or his insurance.

Mr. McCarthy testified about his investigation into Mr. Stepper's finances. He initially believed that Mr. Stepper's only assets were his townhouse, which was valued at around \$250,000,³ and a bank account with a balance of \$44,000. He subsequently discovered two brokerage accounts with balances of \$250,000 and \$900,000, respectively. Consequently, Mr. McCarthy had paid off Mr. Stepper's medical bills. Were he to be appointed guardian of Mr. Stepper's property, Mr. McCarthy intended to sell Mr. Stepper's house and to invest the proceeds and the brokerage account monies in government backed securities.

As noted, Ms. Stepper did not attend the trial. The attorney did not call any live witnesses, but read into the record excerpts from the deposition testimony of Ms. Grafton and Ms. Hall.

At the conclusion of the trial, the court ruled from the bench as follows. The court found that Mr. Stepper lacked capacity to make responsible decisions regarding his health and healthcare by reason of his cognitive deficits and therefore was disabled as that term is defined in the ET Article. It took note of the testimony that Mr. Stepper was oriented as to person only; that he had difficulty communicating clearly; that he was confused about his finances and was unable to provide even basic information about his assets to Fairland staff; and that he required a one-on-one nursing aide to ensure that he ate and permitted the staff to move him. The court credited the testimony of Drs. Gomez and

³ The townhouse was encumbered by a deed of trust with a principal balance of \$85,073.91.

Passi that Mr. Stepper’s cognitive function was declining and Ms. Davis’s testimony that Mr. Stepper was “typically confused about rather basic issues.” Finally, the court emphasized the evidence that Mr. Stepper “came into the system” after an APS investigation revealed that he was living alone and unable to care for himself.

The court found, based on Mr. McCarthy’s testimony, that Mr. Stepper had significant assets that required management and that he did not have the capacity to do so. Ms. Stepper had requested that she be appointed as her brother’s guardian, but because she had not testified at the hearing, the court had no evidence about “[h]er abilities, her knowledge, her skills, her interests, her capabilities, her functioning.” For that reason, the court decided to appoint Mr. McCarthy to continue as the guardian of Mr. Stepper’s property and the County, the statutory guardian of last resort, to continue as the guardian of his person.

On September 22, 2016, the court entered an order to that effect. The County was authorized to “consent to medical, dental, or other professional care, medication, counseling, treatment or services for [Mr. Stepper],” but court authorization was required before the County could consent to “any medical procedure that involves a substantial risk to the life of [Mr. Stepper]; and the withholding or withdrawal of any medical procedure that involves a substantial risk to the life of [Mr. Stepper].” Within ten days, Ms. Stepper moved to alter or amend the guardianship order. By order entered on November 23, 2016, the court granted in part and denied in part the motion to alter or amend. The court amended its prior guardianship order *nunc pro tunc* to delete language

stating that Mr. Stepper had been “present [at the trial] and waived a jury trial,” replacing it with language stating that Mr. Stepper’s counsel had waived the right to a jury trial.

This timely appeal followed. On June 13, 2017, Ms. Stepper filed a Notice of Death with this Court advising that Mr. Stepper had died on or about June 7, 2017. Ms. Stepper further advised that she intended to proceed with the instant appeal.

DISCUSSION

“A question is moot if, at the time it is before the [C]ourt, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.” *Attorney Gen. v. A.A. Cnty. School Bus*, 286 Md. 324, 327 (1979). While this Court has discretion to consider a moot issue, we exercise that discretion “only in rare instances which demonstrate the most compelling of circumstances.” *Reyes v. Prince George’s Cnty.*, 281 Md. 279, 297 (1977).⁴ “Therefore, generally when a case becomes moot, we order that the appeal or the case be dismissed

⁴ In *Lloyd v. Board of Supervisors of Elections*, 206 Md. 36, 43 (1954), the Court of Appeals enunciated the circumstances that could justify an exercise of that discretion:

[O]nly where the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest, will there be justified a departure from the general rule and practice of not deciding academic questions [I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely to prevent a decision then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.

without expressing our views on the merits of the controversy.” *Mercy Hospital Inc. v. Jackson*, 306 Md. 556, 562 (1986).

In the case at bar, Ms. Stepper asserts that the circuit court erred by denying her pre-trial motion for a medical examination; by holding a bench trial without first determining whether Mr. Stepper had waived his right to a jury trial; and by finding Mr. Stepper to be a disabled person and appointing guardians of his person and property. She seeks reversal of the final judgment and remand for further proceedings. Mr. Stepper’s death plainly moots these issues as there is no longer any effective remedy this Court could grant. *See, e.g., In re Riddlemoser*, 317 Md. 496, 502 (1989) (appeal in a guardianship case moot where the ward died during the pendency of the appeal). This appeal does not present recurring issues of public concern and the issues are not of the type that are capable of repetition but are likely to evade review. There being no justification for a departure from the general rule that this Court shall not decide purely academic questions, we decline to exercise our discretion to address the merits and shall dismiss the appeal as moot.

APPEAL DISMISSED. COSTS TO BE PAID BY THE APPELLANT.