

**In re Guardianship & Conservatorship of Coleman  
(Opinion Not Designated for Permanent Publication)  
(October 11, 2011)  
Nebraska Court of Appeals**

Daughter, one of three children of Monroe Coleman, filed a Petition seeking the appointment of a Guardian and Conservator for her Father who had been a valedictorian of his high school class, a full colonel in the military, and a deputy police chief. At the time of trial, he was 91 years of age. He was evaluated by a forensic psychiatrist who concluded that Monroe had minimal cognitive disorder but not as severe as dementia. However, said psychiatrist noted long term memory deficits and mild cognitive dysfunction which would worsen over time. A geriatrician also performed an evaluation which indicated cognitive decline and problems with executive functioning. Monroe testified that if a guardian was appointed, he preferred one of his younger sisters or his nephew to serve. Looby, a clinical gerontologist, was appointed temporary guardian and conservator. Monroe did not want to have any relationship with Looby and never met with him. After trial, Looby was appointed permanent guardian and conservator and Monroe appealed, asserting the County Court erred in (1) finding him incapacitated and finding the appointment of a guardianship was necessary or desirable, (2) in finding full guardianship as opposed to limited guardianship was necessary, (3) in finding him unable to manage his property effectively and that his property would be wasted or dissipated unless proper management was provided, and (4) in appointing Looby, a person without priority, to serve as guardian and conservator.

Standard of Review: The Appellate Court reviews the proceedings for error appearing on the record made in the County Court. The Appellate Court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious nor unreasonable.

ISSUE: Guardianship: A guardian may be appointed if the court is satisfied by clear and convincing evidence that he/she is incapacitated and the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision. *Neb. Rev. Stat. §30-2620.*

The Court found there was sufficient evidence that Monroe was incapacitated. Medical testimony of the two professionals established that fact. It was determined that Monroe's cognitive dysfunction would worsen over time. He had a history of not addressing medical issues and refusing assistance in his home.

ISSUE: Full vs. Limited Guardianship: *Neb. Rev. Stat. §30-2620* sets forth that "if the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the Court finds by clear and convincing evidence that a full guardianship is necessary."

Due to Monroe's cognitive and physical limitations, the Court found sufficient competent evidence that a full guardianship was necessary.

ISSUE: Conservatorship: The standard for appointment of a conservator is found in Neb. Rev. Stat. §30-2630(2):

Appointment of a conservator . . . may be made in relation to the estate and property affairs of a person if the court is satisfied by clear and convincing evidence that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as . . . mental deficiency, physical illness or disability . . . and (ii) the person has property which will be wasted or dissipated unless proper management is provided . . .

The Court concluded that Monroe's physical and mental health barriers affected his ability to effectively manage his property and a conservatorship was necessary. There was evidence that bills were unpaid prior to the appointment of a temporary guardian and conservator. Even though no bank statements nor financial records were introduced at time of trial, there were questions about large withdrawals from Monroe's accounts.

ISSUE: Appointment of Looby as Guardian and Conservator: The Court found that the appointment of Looby as both conservator and guardian was in the best interests of Monroe because he was the nominee of the wife, as well as one of the daughters and the son, even though Looby was a person without priority.

Monroe contends that the County Court did not consider his wishes for appointing his younger sisters or nephew and that the County Court appointed a person without priority. The statutes provide the priority for guardian (*Neb. Rev. Stat. §30-2627(a) and (b)*) as follows:

- (1) A person nominated most recently by one of the following methods:
  - (i) A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;
  - (ii) A person acting under a power of attorney or durable power of attorney; or
  - (iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;
- (2) The spouse of the incapacitated person;
- (3) An adult child of the incapacitated person;
- (4) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (5) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;
- (6) A person nominated by the person who is caring for him or her or paying benefits to him or her.

§30-2627(b).

Section 30-2627(c) further explains the process of appointing a guardian:

When appointing a guardian, the court shall take into consideration the expressed wishes of the allegedly incapacitated person. The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority. With respect to persons having equal priority, the court shall select the person it deems best qualified to serve.

*Neb. Rev. Stat. §30-2639* (Reissue 2008) outlines a similar process for appointing a conservator. The person must exhibit the ability to exercise the powers to be assigned, and the order of priority is delineated as follows:

- (1) A person nominated most recently by one of the following methods:
  - (i) A person nominated by the protected person in a power of attorney or a durable power of attorney;
  - (ii) A person acting under a power of attorney or durable power of attorney; or
  - (iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the protected person;
- (2) A conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;
- (3) An individual or corporation nominated by the protected person if he or she is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;
- (4) The spouse of the protected person;
- (5) An adult child of the protected person;
- (6) A parent of the protected person or a person nominated by the will of a deceased parent;
- (7) Any relative of the protected person with whom he or she has resided for more than six months prior to the filing of the petition;
- (8) A person nominated by the person who is caring for him or her or paying benefits to him or her.

§30-2639(b).

Further directions are found in §30-2639(c):

When appointing a conservator, the court shall take into consideration the expressed wishes of the person to be protected. A person having priority listed in subdivision (2), (4), (5), (6), or (7) of subsection (b) of this section may nominate **in writing** a person to serve in his or her stead. With respect to persons having equal priority, the court shall select the person it deems best qualified of those willing to serve. The court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having lower priority or no priority.

The Court found that a daughter, who was Monroe's power of attorney, was not present at trial nor did anyone suggest that she serve as the potential guardian or conservator. The Court determined that even though Monroe's sisters and nephew said they would serve as guardian and conservator, there was no real evidence as to why these three persons were suitable to serve in the best interest of Monroe.

As to priority, Monroe argued that Looby was appointed as guardian and conservator without having priority and absent a finding that it was in his best interest. Monroe had failed to nominate anyone and the next level of priority was his spouse who did not have the ability to serve. Next in line are his three children. The one daughter did not attend the trial nor was suggested as suitable to serve and the other two children lived out of state and had strained relationships with Monroe.

The Appellate Court noted that the County Court had appointed Looby due to the nominations of the spouse and two of his children which constituted error as the guardianship statutes do not allow a person with priority to nominate a guardian. However, the conservatorship statutes allow a person with priority to nominate, **in writing**, a conservator to serve in his or her stead (*Neb. Rev. Stat. §30-2639(c)*). However, because the spouse did not qualify as an individual with priority, her nomination of Looby, in writing, did not have an effect on priority (*Neb. Rev. Stat. §30-2639*). The two children did not sign nominations in writing either.

Even though the Appellate Court determined that the County Court's reliance on the nominations of Looby was in error, the error was found to be harmless as there was sufficient evidence in the record to support Looby's appointment as Guardian and Conservator as being in Monroe's best interest. At trial, there was testimony that Looby was professional in his dealings and Monroe appeared to be better cared for. The Appellate Court concurred with the finding of the County Court that this appointment was in the best interest of Monroe and affirmed the findings of the County Court.

**In re Guardianship & Conservatorship of Alma Kehter, An Incapacitated Person**  
**(Opinion Not Designated for Permanent Publication)**  
**(August 3, 2010)**  
**Nebraska Court of Appeals**

The Scotts Bluff County Court appointed one of Alma's sons, Richard, to be her conservator and guardian and the other son, Michael, appealed. Alma was 84 years old and experienced difficulty with her memory as a symptom of dementia or alzheimer's disease. Michael had petitioned the Court to be appointed guardian and conservator. The other two children, Richard and Patricia, agreed that a guardian and conservator should be appointed but requested that Richard be appointed.

Trial was held to determine whether Michael or Richard would be better suited to serve as Alma's guardian and conservator. Alma wanted both sons to serve together, but they were unable to work together so they asked the Court to determine which son should be appointed. Richard admitted receiving \$121,000 from Alma which he held and invested for her as he stated it was not for his personal use but was invested to supplement Alma's income. Richard testified he was willing to give Alma the entire amount back at anytime that she wanted it.

The County Court recognized the financial relationship between Alma and Richard but found no credible evidence to show he benefitted in any way from that relationship. The Court determined that Richard had demonstrated a long-term commitment to Alma's needs and appointed him guardian and conservator. The Court determined no bond was necessary. The Nebraska Court of Appeals affirmed the County Court on the two issues, however, recognized plain error of the Court in not ordering a bond. Therefore, the Court of Appeals required bond be set due to the animosity and distrust that existed between Michael and Richard and there was a dispute as to the amount of money Richard owed or was investing for Alma. The Court found that these factors made a bond appropriate in this particular case.

**In re Guardianship & Conservatorship of Ardelle E. Shannon, An Incapacitated Person**  
**(Opinion Not Designated for Permanent Publication)**  
**(February 1, 2011)**  
**Nebraska Court of Appeals**

The Douglas County Court appointed sons, Dennis and Gary, as guardian and conservator, respectively, of their mother, Ardelle, over the objection of brother, Danny. The Court assessed attorney fees in the sum of \$10,000 against Danny to be reimbursed to the estate. Danny appeals the assessment of attorney fees against him. The Court of Appeals finds no abuse of discretion by the County Court and affirms the assessment of attorney fees against Danny.

Initially, Dennis, Gary and Danny, along with another sister, Linda, prior to the filing of the petition for appointment of guardian and conservator for their mother, were all in agreement that Dennis be guardian and Gary conservator. Shortly thereafter, Danny, with different counsel, filed an objection to Dennis' appointment and extensive litigation resulted where discovery was conducted and there was a great deal of legal wrangling. Trial was held and evidence revealed that there was a great deal of acrimony between Ardelle and all of her children over the years. However, Gary was an accountant and had been assisting Ardelle with her finances for several years. Dennis is the only child that had assisted in the care of the mother over the years. Danny had not seen the mother for several years prior to the trial. The record shows that Ardelle had an estate valued at approximately \$2 million. A Guardian Ad Litem, Julie Frank, was appointed who testified and recommended that Dennis and Gary be appointed permanent guardian and conservator for Ardelle. Frank testified that Danny's responses in his required deposition convinced her that his concerns were illegitimate. She concluded that his concerns were "baseless." Following the trial, Dennis and Gary filed an application for reimbursement of their attorney fees from the estate as well as a motion to assess attorney fees against Danny. That motion alleged Danny's actions were often frivolous, made in bad faith, and were utilized for purposes of delay and/or harassment. Danny filed an objection to the assessment of attorney fees against him alleging he was motivated by his concerns for the health and safety of his mother as well as his concerns for Gary's fitness to handle an estate over \$2 million. A hearing was held on the motion to assess fees, at which time billing statements of counsel were received in evidence, along with counsel's affidavit attesting to the fairness and reasonableness of the fee. The Court entered an order appointing Dennis and Gary as guardian and conservator. The Court granted the application for reimbursement of fees by Dennis and Gary in the sum of \$26,771. In a separate order, the Court found that Danny should be assessed attorney fees and shall reimburse the estate \$10,000.

*Neb. Rev. Stat. §25-824(2)* provides generally that a court can order reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith. Further, *Neb. Rev. Stat. §25-824(4)* provides the court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs. The court found that the record clearly supported the finding that the assessment of fees was appropriate under *Neb. Rev. Stat. §25-824(4)*.

The court reasoned that Danny refused to sit for a deposition in Nebraska until the court ordered him to do so. This necessitated serving a subpoena, filing a motion, and holding a hearing which resulted in a continuance of the trial. Danny's counsel asked questions of a personal nature during Dennis' deposition to which Dennis apparently objected and refused to answer. Questions at issue involved Dennis' personal finances, his sexual activities and a domestic abuse charge that was apparently never prosecuted and that was unrelated to Ardelle. The court agreed with Dennis that these questions were irrelevant to his suitability to serve as guardian. The court further noted that Danny testified that Dennis and Gary were unethical and dishonest without providing any evidence to support this assertion. The court found that the discovery abuses, together with Danny's protraction of the proceedings for what the Guardian Ad Litem felt were baseless reasons, caused unnecessary delay and amounted to harassment of Dennis and Gary. Thus, the court upheld the award of attorney's fees for Danny's improper conduct in the sum of \$10,000.

**In re Guardianship & Conservatorship of James Gibreal, An Incapacitated Person**  
**(November 25, 2008)**  
**Nebraska Court of Appeals**

Esther Wingert was appointed temporary guardian and conservator of her brother, James Gibreal. In the same proceedings, Michael Carper was appointed as Guardian Ad Litem. Daniel R. Runge, acting pursuant to a Durable Power of Attorney, withdrew funds from Gibreal's bank account to retain counsel to oppose Wingert's appointment. After Gibreal's death, the Court granted Carper's Motion to require Runge to repay the \$1,500 he had withdrawn. Because, after a ward's death, the conservator's powers are limited to those created by statute and the Court finding no statutory power to act under these circumstances, the order of the County Court of Buffalo County was vacated and the appeal was dismissed.

The Appellate Court concluded that Buffalo County Court did not have jurisdiction to hear Carper's Motion for reimbursement of the funds. Upon the death of the ward, the powers of conservator generally terminate, leaving only a limited scope of available relief permitted to the Court. The circumstances of this case do not fall within the limited scope of available relief, therefore, the Court lacks jurisdiction to hear Carper's Motion requesting Runge be ordered to repay the funds withdrawn to employ counsel to resist the appointment of the guardian and conservator.

**In re Guardianship & Conservatorship of Cordel, 274 Neb. 545, 741 NW2d 675 (2007)**

Harry is the father of Linda, an incapacitated adult, and is also Trustee of a Trust for her benefit. Harry appeals an order of the County Court approving \$80,002.81 in fees and expenses for Linda's guardian and conservator. Harry asserted that the County Court erred in approving an intermediate account without first conducting an evidentiary hearing which he had requested. The guardian and conservator asserted that Harry lacked standing to intervene in the accounting and to prosecute this appeal.

Linda is approximately 53 years old and has multiple sclerosis. Her condition requires her to live in an assisted living facility. Linda appointed Harry as attorney in fact pursuant to a contingent plenary durable power of attorney. Additionally, Harry is the Trustee of a discretionary Trust benefitting Linda and he voluntarily signed a personal guaranty for the payments of the assisted living facility where Linda resides.

Linda's husband petitioned for the appointment of a guardian and conservator for Linda nominating himself. Harry objected and stated that he should be appointed guardian and conservator. The Court agreed upon a neutral party, William, as guardian and conservator. Linda's marriage has since been dissolved.

This is a question of jurisdiction which is a question of law which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. Pursuant to *Neb. Rev. Stat. §30-2209(21)*, an "interested person includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding." Harry asserts that he has standing as a "person interested in the welfare" of Linda as provided for in *§30-2645(a)* which states:

Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator or (5) granting other appropriate relief.

William, the guardian and conservator, argues that the definition of "interested person" is narrowly limited to the categories specifically stated. The court, however, noted that part of *§30-2209(21)* provides that the meaning of interested person would vary from time to time and be determined according to the particular purposes of and matter involved in any proceeding. This gives the narrow definition of "interested person" considerable breadth.

The Appellate Court concluded that the Legislative intent was to broadly define those who have standing to petition the court on behalf of another. Therefore, Harry had standing to intervene in his daughter's guardianship and conservatorship. The allowance of conservator fees is largely a matter of discretion and the reasonable value of services is a question of fact. Therefore, the Court concluded that there was no final adjudication of an intermediate account without an evidentiary hearing. Because no hearing was held, the Court shall hold a hearing regarding William's fees and expenses.