

Introduction to the Court's Final Order

After closing arguments, the Court said it would return in 15 minutes with its decision. An hour later, Judge Pugh returned and read his ruling, which we've described as the best decision we've ever disagreed with.

The first several pages all support putting Jenny in a guardianship. As he read them, our hearts sank. I kept saying "I'm sorry" to Jenny. In response, she repeated "He's going to send me home."

As usual, Jenny was both smarter and stronger than us. Starting with the word "However" on page 5, the Court gave Jenny her life back. While he put her in a guardianship, it was with the people she wanted to live with, it was only over two facets of her life, and it was strictly limited to one year. After one year, the guardianship terminates and Jenny regains all decision-making authority.

Perhaps most significantly, the Court held that, even while in guardianship, Jenny should use Supported Decision-Making - that when her guardians make decisions for her, they should make the decision Jenny would have made, not what they think is in her "best interests." Once the guardianship terminates, the Court stated that it wants Jenny to use Supported Decision-Making.

Thus, this was the first case ever to Order the use of Supported Decision-Making as an alternative to plenary guardianship for a person with a disability. For Jenny, that means he sent her home and gave her back the power to choose the life she wants to lead.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

JULIA S. ROSS

and RICHARD W. ROSS

Petitioners,

KELLY MORRIS

and JAMES TALBERT

Intervenors,

v.

CASE No.: CWF120000426P-03

MARGARET J. HATCH

Respondent.

ORDER

Pursuant to Notice, this matter came to be heard upon the Petition of Richard W. Ross and Julia S. Ross to appoint a guardian for Margaret J. Hatch, in which Kelly Morris and James Talbert intervened. Parties appeared in person and by counsel, and also present was Clara Swanson, Esq., a discreet and competent attorney at law who served as Guardian ad Litem for Margaret J. Hatch for the duration of these proceedings. The Court is in receipt of the reports of the Guardian *ad Litem*, made pursuant to Virginia Code § 64.2-2003.

Over the course of six days, the Court heard evidence and argument in this matter on May 1, 2013, May 2, 2013, May 3, 2013, July 29, 2013, July 30, 2013, and August 2, 2013. Evidence was also presented at a hearing for a temporary guardian on August 27, 2012.

Upon careful consideration of the evidence and pursuant to the Court's authority under Virginia Code §64.2-2000 and Virginia Code § 64.2-2007, the Court does find by clear and convincing evidence that:

1. It is undisputed that the Respondent is a 29 year old female who was diagnosed with Down Syndrome at birth and may be categorized as intellectually disabled.

2. Two separate experts evaluated Respondent to have an intelligence quotient somewhere between 46 and 57, descriptively classified as "lower extreme" in the first evaluation and "moderately delayed" in the second. Although the results of the first evaluation conducted by Lori Burkett, Psy.D. were called into question by the discovery that the Respondent had taken the pain medication Percocet® prior to the evaluation, the later evaluation conducted under the auspices of C. Rick Ellis, Ed.D. substantially confirmed the intelligence quotient portion of Dr. Burkett's evaluation. It is not disputed that Respondent was not on Percocet® at the time of Dr. Ellis's evaluation.

3. Both evaluations identified short term memory as an area of significant impairment for Respondent. According to Dr. Ellis's evaluation, Respondent demonstrated between a second and third grade level of achievement in reading, writing and math skills.

4. Dr. Burkett evaluated Respondent's adaptive living skills to be in the low functioning range, indicating that she needed to live dependently rather than independently or semi-independently. Dr. Ellis's evaluation concluded that "with appropriate support" Respondent would not meet the statutory definition of incapacitated, and "with support" she could manage her property and financial affairs. Neither evaluation concluded that Respondent could function independently.

5. Lay testimony demonstrated that Respondent had a persistent history of irresponsibility with personal finances stemming from an inability to comprehend fundamental money management principles. Witnesses testified to at least two bicycle accidents, one that left her with severe back injuries that required invasive surgery. She has failed, even after instruction, to take adequate steps to protect her own safety, and has, in the past, placed herself in jeopardy both by under-dosing and overdosing on medication. Witnesses testified to her deficits in personal hygiene skills and her ability to avoid dangerous situations with strangers.

6. Past conduct is a guide to determine whether an individual would do unsafe acts or be at greater risk to himself or herself. This is a case of more than poor judgment regarding safety, risk and inappropriate conduct, but an accumulation of unsafe behavior and inappropriate conduct that indicate an inability to effectively evaluate safety and make decisions.

For the foregoing reasons, based upon clear and convincing evidence provided by the testimony of several experts, and two evaluations conducted more than a year apart, and the testimony of Respondent's friends, family and acquaintances, the Court finds that Respondent is incapacitated within the meaning of Virginia Code § 64.2-2000 in that she is unable to receive and evaluate information effectively or respond to people, events, or environments to such an extent that she lacks the capacity to meet the essential requirements for health, safety, or therapeutic needs without the assistance of a guardian at this time. The Court adopts the argument of counsel for the Petitioners and the Guardian *ad Litem* as part of its reasoning.

Although counsel for Respondent has argued ably that with support, Respondent may one day become able to conduct her own affairs, the Court must make its determination based upon the present situation, not what it may speculatively become in the future.

The person who is the subject of this controversy, and to whom the Court is to give both a voice and a choice in these proceedings, on whether she shall have the right to make decisions, be independent, and have the right to self-reliance and self-determination has not been heard, other than through other witnesses, reports, and documents submitted to the Court. This has been given due consideration in making the Court's decision.

The Court has considered all of the factors set forth in Virginia Code § 64.2-2007, including (i) the limitations of the respondent, as outlined above, including not only her intellectual disability but also her limitations with respect to her adaptive skills; (ii) development of the respondent's maximum self-reliance and independence; (iii) the less restrictive alternatives of an advance directive and durable power of attorney have in fact been put in place and fail to adequately respond to the Respondent's everyday needs and limitations, and the proposed alternative of supportive decision making is, by itself, inadequate at the present time; (iv) in order to protect the respondent from neglect, exploitation, or abuse, in particular from strangers that she may approach without adequate safeguards, and from her own tendency to share private information in public forums; (v) the actions needed to be taken by the guardian are not as expansive as the Petition requests; (vi) both Petitioners and Intervenors have been proposed as guardians, and are suitable, in that they have shown by their actions they can care for the health, safety, welfare, and wellbeing of the Respondent; and (vii) the best interests of the respondent.

The Court commends the temporary guardians, the Petitioners, for their efforts and dedication to date. They have served admirably in their role as temporary guardians, and have shown by their actions through every step of this process that they are caring, supportive, and loving parents. It was the efforts of the Petitioners that brought Respondent's situation to the attention of the Court.

However, the Court is required by statute, Virginia Code § 64.2-2007(D) to give due deference to the preferences of the Respondent, and whatever its origin, based upon the Respondent's animus toward her mother, the Court cannot conclude that it is in Respondent's best interest for Petitioners to continue as her guardians.

WHEREFORE, it is ORDERED, ADJUGED, and DECREED that Kelly Morris and James Talbert be and hereby are appointed as co-guardians for the Respondent. The guardianship is to be a limited guardianship of limited powers and limited duration, with the ultimate goal of transitioning to the supportive decision making model. It is the intent of the Court that the Guardians shall assist Respondent in making and implementing decisions we have heard termed "supported decision making." As stated by an expert witness of the Respondent, Robert Dinerstein, J.D., "[A] guardian's job, actually, even when appointed, is to use what's called 'substituted judgment': that is to make the judgment that the individual would make if he or she were able to express that judgment rather than say the best interest or what the guardian thinks would be right for the guardian." (Robert Dinerstein *De Bene Esse Dep.* at 34)

With those principles in mind, the limited powers and responsibilities of the Guardians for Margaret Jean (Jenny) Hatch are as follows:

1. The guardianship shall expire one (1) year from the date of the entry of this Order.
2. The Guardians shall have the power to make medical and safety decisions on behalf of the Respondent, giving due deference to the wishes of the Respondent.
3. The Guardians shall have an assessment of Respondent's basic needs and services conducted by a professional knowledgeable in the Intellectual Disability Medicaid Waiver services, such as the Community Services Board, and arrange for their practical implementation within a reasonable time from the entry of this Order.

4. For the duration of the guardianship, the Guardians shall continue to assist Medicaid Waiver service providers and guide Respondent in obtaining the maximum benefit appropriate for her needs under the Waiver.

5. The Guardians shall transition Respondent, in accordance with her wishes, from her group home setting to a private residential environment.

6. The Guardians shall assist the Respondent with understanding financial issues and to the extent possible develop money management skills with monitoring and guidance.

7. The Guardians shall support and foster Respondent in rebuilding and strengthening her relationships with her biological family, including Petitioners, her natural father, her grandmother, half and step siblings, and others.

8. The Court strongly recommends that the Guardians continue to provide supportive decision making assistance in anticipation of the termination of the guardianship at the end of one year.

9. The Guardians shall post \$5,000 bond without surety before commencing their duties.

10. The Guardians shall have those duties and liabilities set forth in Virginia Code § 64.2-2019, but only those limited powers specifically enumerated in this Order.

At the end, it is the Court's opinion that the Respondent will be able to assist and work with staff provided by the Medicaid Waiver, who will be providing the supportive decision making skills and increased self-reliance that will allow her to adapt and succeed independently.

The Court concludes that there are no less restrictive alternatives available at this time. The previously executed powers of attorney are hereby declared NULL and VOID, based upon earlier testimony and decisions of this Court.

One hundred percent (100%) of the Guardian *ad Litem*'s fee incurred between the date of the appointment of the Guardian *ad Litem* up to and including the date of the Order permitting the Guardians to intervene in this matter shall be paid by Petitioners. Petitioners shall have the right to seek reimbursement from the estate of the Respondent. The remainder of the fee incurred after the date of intervention up to and including the date of the entry of this Order shall be apportioned equally between the Intervenors and the Petitioners. The Petitioners and the Intervenors may seek reimbursement from the estate of the Respondent. Should funds be insufficient or not readily available, these fees shall be borne by the Petitioners and the Intervenors as outlined above. The Guardian *ad litem* shall provide a breakdown of charges and services no later than seven (7) days from the entry date of this order.

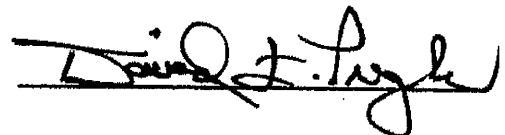
The Guardian *ad Litem*, Clara Swanson, Esq., shall be relieved of her duties in this matter and this matter shall be removed from the Court's docket.

The transcripts of these proceedings shall be made a part of the record in this case.

The Clerk is directed to mail attested copies of this Order to all interested parties and/or counsel.

ENTERED this 22nd day of August 2013

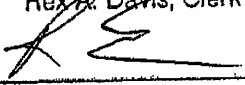
I certify that the document to which this authentication is affixed is a true copy of a record in the Newport News Circuit Court, that I have custody of the record and I am the custodian of that record.



David F. Pugh, Judge

Rex A. Davis, Clerk

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By  D.G.