IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF:	:	
	:	
G.S.,	:	C.M. # 19906-N-SEM
	:	
a person with an alleged disability.	:	

ORDER DENYING AND DISMISSING PETITION

WHEREAS, on March 10, 2022, Christiana Care Health Services (the "Petitioner") filed a petition for the appointment of a guardian for the person and property of G.S. (the "Petition");[1] attached to the Petition was a physician's affidavit from E.M., M.D., dated February 10, 2022, disclosing that G.S. was diagnosed with a neurocognitive disorder and alcohol use disorder;[2] Dr. E.M. further disclosed the following:

1. A September 23, 2021, MRI showing "multiple chronic lacunar infarcts[;]"
2. A September 24, 2021, psychiatry evaluation noting G.S. "lacked ability to demonstrate adaptable thinking . . . does not have capacity to decline SNF[;]"

[1] Docket Item ("D.I.") 1.
[2] *Id.*

3. A January 25, 2022, neuropsychiatry evaluation noting G.S. "appears to lack capacity to make informed decisions regarding his medical care and disposition[;]" and
4. A January 26, 2022, SLUMS score of 20-22;[3]

WHEREAS, Dr. E.M. opined G.S. was unable to perform any of the following activities independently: activities of daily living, paying his own bills, living alone, taking medication appropriately, giving informed consent for medical procedures, and resisting scams;[4]

WHEREAS, the Petitioner proposed the Office of the Public Guardian as an appropriate fiduciary and the Office of the Public Guardian consented to its appointment;[5]

WHEREAS, Denise D. Nordheimer, Esquire (the "AAL") was appointed as G.S.'s attorney *ad litem*;[6] after her investigation, the AAL filed a report explaining she had "no hesitation in recommending that a guardian be appointed for [G.S.][,]" but that G.S. strenuously objected to the Petition;[7]

WHEREAS, G.S. pursued his objection, and a second attorney *ad litem* was appointed to represent G.S. as if engaged by him;[8]

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] D.I. 3.
[7] D.I. 7.
[8] D.I. 9-10.

WHEREAS, an evidentiary hearing on the Petition and G.S.'s objections was held on June 7, 2022 (the "Hearing");[9]

WHEREAS, at the Hearing, one of G.S.'s doctors and his nurse case manager testified in support of the Petition;[10] G.S. testified in opposition;[11]

WHEREAS, the following was established at the Hearing:[12]

1. Hospitalist D.L., MD, who met G.S. in June 2021 and has seen him approximately thirty (30) times since, confirmed the diagnoses on Dr. E.M.'s affidavit and would add stroke or cerebrovascular accident as an additional diagnosis. He further agrees that G.S. is unable to perform the functions selected by Dr. E.M. and would add additional limitations such as inability to independently make phone calls, shop for groceries, or get prescription medications.

2. Dr. D.L. does not, in his professional medical opinion, believe G.S. can make complex medical decisions such as discharge planning or choosing between treatment options. Per Dr. D.L., G.S. can, however, make simple decisions. Dr. D.L. further believes G.S. cannot manage and properly care for his property. Dr. D.L. believes if G.S. does not have a guardian and is discharged back to his home,

[9] *See* D.I. 12, 16.
[10] *See* D.I. 16. During the Hearing, the AAL offered to call a detective from Elsmere Police to testify as to the condition of G.S.'s home before his latest admission. G.S. objected, through counsel, and I denied the request for failure to timely identify the detective as a witness.
[11] *Id.*
[12] *See id.* I have also relied on a draft version of the transcript of the Hearing in preparing this ruling; a final transcript has not yet been docketed but given the important issues at stake, I decline to delay this ruling.

he is likely to get another infection, fall and injure himself, and end up back in the hospital. Dr. D.L. described a pattern of G.S. leaving the hospital only to be readmitted within a few days or weeks. Rather than return home, Dr. D.L. believes G.S. needs to be placed in a long-term care facility with 24-hour supervision.[13]

3. Dr. D.L. last saw and spoke to G.S. in mid- or late-February 2022, before Dr. D.L. went on paternity leave. Dr. D.L. was still on leave while testifying. Dr. D.L. explained, however, that he believed, based on G.S.'s diagnoses and history, he is likely in the same condition regarding his decision-making capacity. Dr. D.L. also reviewed G.S.'s medical records from February through June 2022 in preparation for his testimony.

4. N.L., a nurse case manager for Christiana Hospital, also testified in support of the Petition. N.L. is responsible for discharge planning for complex cases, including that of G.S. In assisting G.S., N.L. learned that his home is infested with bedbugs and his family is unwilling or unable to pay for an exterminator. N.L. recommended a long-term care placement, but G.S. informed her he wished to return home and care for himself.

[13] Dr. D.L.'s concerns about G.S. intensified after an interaction G.S. had with E.B. PAC. But Dr. D.L. was also aware that G.S. did not have a productive relationship with E.B., which may have led or contributed to the concerning statements G.S. made. Their strained interaction led to the psychiatry consult referenced in Dr. E.M.'s affidavit.

5. N.L. does not believe G.S. can care for himself, she has concerns about his immediate family's reliability as caregivers or supports, and she believes G.S. lacks insight into his limitations and the risks posed by his family.[14] N.L. also testified that G.S. needs his medications administrated to him, to be turned every two (2) hours, and a sling and overhead lift to be moved around and out of his bed. N.L. also testified that G.S. declined Medicaid planning.

6. But G.S. appears to have changed his tune. G.S. testified that he has now learned more about Medicaid and how it can benefit him. And G.S. explained that while he would like to return home, he appreciates he is not able to do so; he acknowledged that he cannot walk and would be endangering himself if he returned home. G.S. believes if he gets physical therapy and can walk again, he can return home and care for himself. Thus, G.S. now wants to be placed into a rehab facility and, if all goes well, return home once he has recovered. But G.S. admitted, under questioning from the AAL, that he has not been able to walk independently for over two years. His medical records also reflect that he is "bedbound".

7. G.S. further testified at length about his family, identifying his wife and children, his children's ages, and how long he has been married and in his current home. G.S. also identified his current sources of income and the location of his bank

[14] N.L. specifically recalled a visit from G.S.'s son where the son attempted to retrieve G.S.'s banking information and then urinated on himself in the nurse's station. G.S. disputed this testimony.

account. But G.S. testified that he was not currently paying his bills and did not know what his current bills are.

8. G.S.'s testimony was not always perfect. He testified, confusingly, that he graduated high school in 1967, worked at Hercules Corporation for 40 years, was offered a buyout in 1964, and has not worked in four (4) or eight (8) years. When the inconsistency was brought to his attention, G.S. clarified he meant he retired in 2000 or 2014. G.S. also testified inconsistently about the physical therapy he received at the hospital—stating at various times that he received no physical therapy and at others that he had a few sessions.

9. Regarding the condition of his home, G.S. explained that it degraded over the last two years with his frequent hospital admissions. G.S. acknowledged that he needed to address the bedbugs before returning home and explained that he has located an exterminator from Pennsylvania that will guarantee full eradication for around $2,500, money he believes he has saved in his bank account.

10. G.S. was adamant that his family loved and supported him. He strenuously objected to insinuations that they harmed, posed a danger to, or exploited him. But, under questioning, he did acknowledge that his wife and children need some help.

11. Altogether G.S. testified that he wants to get better, go home, and take care of his family like he always has. Although he acknowledged his medical history,

alcoholism, and brain damage from strokes, he testified adamantly that he does not need (or want) a guardian.

WHEREAS, the AAL continues to support the Petition based on the medical evidence she was provided during her investigation (much of which was not admitted during the Hearing), G.S.'s infirmities, and his lack of insight into the dangerous situation at his home; the AAL recommends the Petition be granted to avoid further neglect, harm, and danger to G.S.;

WHEREAS, "the effect of the establishment of a guardianship is profound: in adjudicating any proposed ward as a [person with a disability], this Court is imposing the greatest diminution of an individual's autonomy and personal rights that any court may impose, short of a criminal conviction[;]"[15]

WHEREAS, as the party seeking guardianship, the Petitioner bore the burden of proving at the Hearing that G.S. is a person with a disability under 12 *Del. C.* § 3901(a)(2), which is someone who

> [b]y reason of mental or physical incapacity is unable properly to manage or care for their own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;

[15] *In re LMR*, 2008 WL 398999, at *2 (Del. Ch. Jan. 24, 2008).

WHEREAS, mental incapacity under this section

> includes (1) a pattern demonstrating an inability to recognize as relevant to decisions of significance, facts or considerations that one would expect reasonable and competent persons to recognize as relevant to such a decision; (2) a pattern demonstrating an inability to reason with respect to decisions that are relatively simple but personally important, in a way that is internally consistent; or (3) the presence of a mental disease or condition that interferes with the operation of the prospective ward's perceptions or reasoning to such an extent as to raise a substantial likelihood that decisions relating to matters of importance to her have been affected by that mental disease or condition[;][16]

WHEREAS, proof must be made by clear and convincing evidence;[17] the Delaware Supreme Court explained, in *Hudak v. Procek*, "[t]he clear and convincing standard requires evidence that produces in the mind of the trier of fact an abiding conviction that the truth of the factual contentions is highly probable[;]"[18] articulated another way, "[t]o establish proof by clear and convincing evidence means to prove something that is highly probable, reasonably certain, and free from serious doubt[;]"[19] "[m]edical evidence is of significant importance in determining whether or not the statutory grounds [for incapacity] have been proved[;]"[20]

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[16] *In re Gordy*, 658 A.2d 613, 617 (Del. Ch. 1994). *See also In re Snow*, 2006 WL 223598, at *6-*7 (Del. Ch. Jan. 17, 2006) (applying tests from *In re Gordy* and finding lack of capacity).
[17] *See In re JTM*, 2014 WL 7455749, at * 3 (Del. Ch. Dec. 31, 2014) (clarifying that "imposition of a guardianship must be supported by evidence that is clear and convincing, and not merely by a preponderance of the evidence").
[18] *Hudak v. Procek*, 806 A.2d 140, 147 (Del. 2002) (footnotes, alterations, and internal quotation marks omitted) (compiling sources).
[19] *Id.* (citations omitted).
[20] *Brittingham v. Robertson*, 280 A.2d 741, 743 (Del. Ch. 1971).

WHEREAS, adults remain, however, free to make decisions that others may deem unwise or unsafe; this principle was addressed in *In re Conner*, 226 A2d 126 (Del. Ch. 1967); there, Mr. Conner was insistent on selling his real property for far lower than the fair mark value, which his daughter argued demonstrated his incapacity; but the Court, after an evidentiary hearing, found the daughter failed to prove that such "unwise, unrealistic or improvident real estate transactions" were "the consequence of age or mental infirmity[;]"[21] rather, the evidence, including Mr. Conner's testimony, showed his conduct was consistent with his personal philosophy and past conduct, rather than a product of Mr. Conner's memory issues or other incapacities;[22]

IT IS HEREBY ORDERED, this 1st day of July 2022, as follows:

1. The Petition is DENIED and DISMISSED.

2. The Petition and supporting physician's affidavit set forth a reasonably conceivable claim that G.S. had a disability under Delaware law and that he needed a guardian to protect his person and property. But the Petitioner failed to prove current incapacity by the required clear and convincing evidence.

[21] *In re Conner*, 226 A2d at 130, 133-134.
[22] *Id. See also In re Menaquale*, 1981 WL 15303, at *5 (Del. Ch. Feb. 24, 1981) (dismissing a petition for guardianship although recognizing the person with an alleged disability had "academic and business shortcomings" and made a decision that may not have been wise or fair).

3. G.S. has struggled with caring for himself and his family. Testimony regarding the state of G.S.'s person and home immediately before his last hospital admission was difficult to hear. It appears G.S. was unable or unwilling to address serious issues and allowed himself and his family to live in an unsafe and unsanitary way.

4. But the medical testimony at the Hearing was lacking. Dr. D.L. was a credible and likeable witness and appears to be a knowledgeable and skilled physician.[23] But his testimony was stale and limited. At the time he testified, Dr. D.L. had not seen G.S. for about four (4) months. And Dr. D.L. admitted he never performed any cognitive tests on G.S. to gauge his decision-making capacity. Rather, Dr. D.L.'s concerns about G.S.'s capacity arose from second- and thirdhand accounts.[24] Thus, while I respect and appreciate Dr. D.L.'s testimony, it did not resolve all serious doubt as to G.S.'s ability to make decisions for himself.[25]

5. Rather, it appears G.S. has improved since his admission to the hospital. The G.S. that testified at the Hearing was not the G.S. I read about in the Petition or

[23] G.S. agreed, thanking Dr. D.L. for his care and treatment.

[24] For example, Dr. D.L. testified regarding a January 2022 psychiatry consult G.S. had with C.A.T., MD. Petitioner's Exhibit 3. *See also* Petitioner's Exhibit 6 (March 2022 progress notes prepared by Dr. C.A.T.); n.13 *supra*.

[25] Dr. D.L.'s testimony failed to establish the current "presence of a mental disease or condition that interferes with the operation of [G.S.'s] perceptions or reasoning to such an extent as to raise a substantial likelihood that decisions relating to matters of importance to [him] have been affected by that mental disease or condition." *In re Gordy*, 658 A.2d at 617. *See also In re Snow*, 2006 WL 223598, at *7 (finding medical expert testimony inconclusive where "both physicians are family care doctors and the basic mental examinations they administered produced differing results").

supporting physician's affidavit. G.S. demonstrated an understanding of his limitations and the poor condition of his home. He also acknowledged that he needed to first recover and remedy the bedbug infestation before he could safely return home.

6. G.S.'s awareness and acknowledgement was, however, limited in two ways.

a. First, G.S. has an enormous blind spot regarding his family members. I am concerned that G.S.'s immediate family may have, and may again, exploit or manipulate him. But, G.S., as an adult, is free to have relationships with persons who others may see as exploitative, manipulative, or otherwise dangerous. The Petitioner failed to prove that G.S.'s family relationships represent a pattern demonstrating mental incapacity, rather than some form of family love and affection.[26]

[26] On the record before me, G.S.'s blind spot regarding his family does not rise to the level required to prove either of the pattern tests articulated in *In re Gordy*, 658 A.2d at 617 ("(1) a pattern demonstrating an inability to recognize as relevant to decisions of significance, facts or considerations that one would expect reasonable and competent persons to recognize as relevant to such a decision; (2) a pattern demonstrating an inability to reason with respect to decisions that are relatively simple but personally important, in a way that is internally consistent"). This is not to say that family allegiance may never so rise, but conclusive evidence must be introduced to prove that the family devotion is attributable to an inability to (1) recognize what a reasonable and competent person would or (2) reason with respect to that devotion. Although I may not agree with G.S.'s reasoning and allegiance (based on my limited knowledge and understanding), I cannot, on the record before me, say it is wholly irrational or the product of mental incapacity.

b. Second, G.S. appeared unwilling to accept that he might not be able to walk again. This insistence seems contrary to the medical records reflecting that he is bedbound. But I cannot fault G.S. for clinging to hope that he will be able to walk, particularly without conclusive evidence that his hope is fanciful.

7. Proving that G.S. has a mental incapacity under Delaware law was the Petitioner's burden. And it is an intentionally heavy burden, requiring clear and convincing evidence. The Petitioner has failed to prove that it is highly probable, reasonably certain, and free from serious doubt that G.S. currently suffers from a mental incapacity that requires the protection, and serious imposition, of a guardianship. Without such, the Petition must be denied and dismissed.

8. This is a final report under Court of Chancery Rule 143 and exceptions may be filed under Rule 144.

IT IS SO ORDERED.

/s/ Selena E. Molina
Selena E. Molina
Magistrate in Chancery