In The

Supreme Court of Virginia

RECORD NO. 150587

KENIA L. LOPEZ-ROSARIO,

Appellant,

v.

CHRISTINE HABIB and VIRGINIA SURGERY ASSOCIATES, P.C.,

Appellees.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The Circuit Court erred in granting Defendants' Motion to Dismiss/Plea in Bar, which ruling was based on the fact that the Complaint was filed in the name of Kenia L. Lopez-Rosario, and not by a Guardian on behalf of Kenia L. Lopez-Rosario, even though a guardianship order had been entered for the Plaintiff below prior to the filing of the Complaint. [Argued App. 42-50; Ruling of Court App. 49; Final Order App 52].

II. STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Plaintiff filed a Complaint against Defendants in the Circuit Court of Fairfax County in September, 2012. That case was nonsuited without service of process, in September, 2013. The instant case, with the exact same parties and allegations, was filed within six months of the nonsuit order, also in Fairfax County. [App. 1-4].

After some limited discovery, Defendants filed a Motion to Dismiss/Plea in Bar, arguing that the Guardianship Order from July 2010, relieved Plaintiff of the right to institute any legal proceedings in her own name, and that the Complaints herein should have been filed by the guardians. [App. 11-17]. Plaintiff filed an Opposition, arguing that the guardianship was limited to medical decisions only. [App. 37-40].

After reviewing the written memoranda, and hearing oral argument, the Honorable Judge Tran granted Defendants' Motion on January 23, 2015. [Transcript of Motion's Hearing, App. 42-51; Final Order, App 52]. Plaintiff filed her Notice of Appeal from this ruling on February 13, 2015.

III. STATEMENT OF FACTS

The Plaintiff below, Kenia L. Lopez-Rosario, is now 33 years old and suffers from a condition called panhypopituitarism, which is a severe disorder of the pituitary gland. The effect on her is that she suffers from cerebal palsy and has an extremely small stature. She has osteoporosis (resulting in extremely frail limbs) and has foot and toe deformities. She also has bilateral deafness, and communicates through American Sign Language. [App. 22-24- Psychologist Report].

The Plaintiff is a young lady who has needed in the past, and will likely need in the future, extensive medical care, not related to the case herein. Particularly, she has needed multiple orthopedic surgeries to correct her foot and leg deformities. Largely because of her inability to speak (due to her deafness) and her overall condition, Children's Hospital National Medical Center (NCMC) felt more comfortable if a guardian were appointed to consent to all of the medical treatment. [See App. 24, para. 7].[1]

Plaintiff's parents, Kenia I.R. Lopez and Israel Lopez, applied for a guardianship in the Circuit Court of Loudoun County (the domicile of

[1] Although plaintiff was born on May 8, 1981, she received much of her treatment, specifically including the orthopedic surgeries, at NCMC because of her small stature.

plaintiff and her parents), and after the requisite reports were filed, a guardianship order was entered on July 28, 2010. [See App. 23-29; Final Order].

Subsequent to the entry of the guardianship order, Plaintiff was admitted to Inova Loudoun Hospital on September 22, 2010, and on September 24, 2010, the decision was made to perform gallbladder surgery on plaintiff. During that surgery, Defendant Christine Habib, M.D., a general surgeon who was employed by Defendant Virginia Surgery Associates, P.C., transected the plaintiff's common bile duct, causing significant injury to plaintiff, which resulted in an extended hospitalization at Inova Fairfax Hospital. Plaintiff has alleged that the transection of the bile duct was below the standard of care, and was the proximate cause of plaintiff's injuries and subsequent hospitalization. [See App. 1-4; Complaint]. Defendants have denied those allegations. [See App. 5-8; Responsive Pleading to Complaint].

IV. STANDARD OF REVIEW

The standard of review would be for this Court to review, *de novo*, the Guardianship Order for this Plaintiff [App. 25-29], and determine whether, as a matter of law, particularly Code sections 64.2-2009 and 64.2-2025, this Order was a Limited Guardianship Order for the purposes of medical decision making, and did not relieve the Plaintiff of her other legal rights (such as prosecuting actions in Court), or whether the applicability of this Order and these Code sections required this case to be brought by the Guardians.

V. ARGUMENT

A. THE GUARDIANSHIP ORDER IN THIS CASE WAS LIMITED TO MEDICAL DECISION MAKING ONLY

In their Motion, Defendants relied primarily on the case of *Cook v. Radford Community Hospital, Inc.*, 260 Va. 443, 536 S.E.2d 906 (2000), where this Court upheld the dismissal of a medical malpractice action that was filed in the name of a ward, rather than by the ward's guardians. Plaintiff agrees that if a guardianship order relieves the ward of all legal rights, then *Cook* would control, and the filing in the name of the Plaintiff would be considered a legal nullity, and thus require dismissal. However, Plaintiff contends that the Guardianship Order in the instant case was intended to be a limited guardianship for medical purposes, and thus did not remove the ability of Plaintiff to file this legal action in her own name.

Code section 64.2-2009, titled the "Court order of appointment; limited guardianships and conservatorships," specifically states, in part that "A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable." The statute gives the broad outlines; the specific order in each case governs the rights that the ward maintains and those rights that are

invested in the guardians. The statute clearly allows the ward to retain at least some of their rights, if feasible.

Another part of the same section (§ 64.2-2009) recognizes limited guardianships for specific purposes: "B. The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care for the limited purpose of medical decision making, decisions about place of residency, or other specific decisions regarding his personal affairs." The statute not only recognizes, but seems to encourage, the Courts to allow wards to retain some of their own power to the extent possible.

The guardianship for the Plaintiff fits that perfectly, because the only rights that needed to be taken from the Plaintiff were those involving medical decision making, which had to be done because of the requests of the health care provider, Childrens' Hospital (NCMC).

For example, on page three of the psychological evaluation [App. 24, para. 7] the psychologist states in part in section 7:

> The present petition arose from a requirement of NCMC that someone have legal responsibility for making the decision to permit Kenia's recent orthopedic surgery. That situation was handled satisfactorily via a temporary guardianship, but, going forward, Kenia needs someone who can make any such decisions in the future.

In addition, the Final Guardianship Order [App. 27, para. 7] required NCMC to pay all of the costs and fees associated with the proceeding. It is certainly unusual, to say the least, for a health care provider to fund a guardianship proceeding in its entirety; the goal was clearly to qualify someone (here the parents) with whom the health care provider was comfortable, to consent to the medical procedures, so that the health care provider could move forward with those procedures.

It makes sense that this guardianship was initiated for the purpose of medical decision making. This is consistent with the statute and the order. The statute, as indicated above, recognizes limited guardianships, and particularly references limited guardianships for medical decision making, which is the case herein.

B. THE GUARDIANSHIP ORDER IN THIS CASE DOES NOT SPECIFY THE WARD'S LEGAL DISABILITIES AS THE STATUTE REQUIRES; THUS SHE IS NOT LEGALLY DISABLED FROM PROSECUTING THIS LAWSUIT

Another section of the germane statute requires that the Court issuing a Guardianship order to specifically relieve the ward of his or her legal rights, the clear implication being that if certain legal rights are not specifically relieved, then they are retained by the ward. Section 64.2-2009 states, again, in part "A. The court's order appointing a guardian or conservator shall ... (iv) **specify the legal disabilities**,(emphasis added),

if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2."[2]

The final guardianship Order herein does not contain language often seen in general guardianship orders, relieving the ward of all authority and power to perform legal acts regarding her property and person. It simply does not address the issue of "performing legal acts" - rather it is aimed at medical decision making.

Plaintiff submits that the guardianship proceeding for Kenia Lopez-Rosario allowed her parents to make medical decisions for her, which was the intent of the proceeding, but did not strip her of her legal rights to take action concerning her person and property, such as, for example, filing this lawsuit and voting. For that reason, plaintiff was legally competent to file this case through counsel.

Defendants have argued that the *Cook* case and Code Section 64.2-2025 mandate that the fiduciary prosecute all legal actions on behalf of the ward. Plaintiff believes that this would only be true if the Order in question had specifically relieved the ward of the legal right to manage her property and person. In the absence of language specifying her legal disabilities,

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[2] These sections of the Virginia Constitution and Code deal with, among other things, voting rights of individuals.

that Code section would not apply, and Plaintiff would retain the right to file lawsuits, including the case at bar.

VI. CONCLUSION - RELIEF REQUESTED

Appellant/Plaintiff respectfully requests, for the reasons stated herein, that this Honorable Court reverse the Circuit Court's ruling on the Motion to Dismiss/Plea in Bar, and remand the case to the trial court to continue with the proceedings.

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CERTIFICATION PURSUANT TO RULE 5:26(h)

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CERTIFICATE OF FILING AND SERVICE

I hereby certify, that in compliance with Rule 5:26(h), that, on this 2nd day of November, 2015, an electronic copy of the Brief of Appellant and Appendix were filed, via VACES, and ten paper copies of the Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellant was served, via email, and an electronic copy on CD of the Brief of Appellant and Appendix was served, via UPS Ground Transportation, to Paul T. Walkinshaw, counsel for Appellees, at the address of record listed above.

Jacob A. Kamerow