Not Reported in A.2d, 2010 WL 525629 (Conn.Super.), 49 Conn. L. Rptr. 170

Superior Court of Connecticut,
Judicial District of Hartford.
In re Girts ZUKOVS et al.

No. HHDCV106006598S.
Jan. 11, 2010.

PECK, J.
*1 On December 23, 2009, the Hartford Probate Court, Robert K. Killian, Jr., Judge, after a tape-recorded hearing held at Hartford Hospital, issued a decree finding that it was in the best interest of Girts Zukovs, the conserved, "to remove the CPR directive, discontinue dialysis and remove all medications save those necessary for his comfort. Nutrition, hydration and ventilation should be continued." FN1 Judge Killian stayed this order until Tuesday, December 29, 2009, at 12:00 noon to allow for filing an appeal to the Superior Court.FN2 In the afternoon of December 28, 2009, the appellants, Anita Petersena, Iveta Zukova Petterson and Dace Jansone, the conserved party's sister, mother, and family pastor, respectively, electronically filed an appeal to the Superior Court accompanied by a motion to stay the execution of the decree issued on December 23, 2009.

FN1. The full decree was filed electronically along with the appeal.

FN2. This portion of Judge Lillian's order reads as follows:
To afford the family the opportunity to appeal this order if it so chooses, the Court stays its order until Tuesday, December 29, 2009 at 12:00 noon at which time the Co-Conservators and the hospital are to see that it is affixed to Mr. Zukovs' chart.

Finally, the Court is concerned that CPR, if necessary between now and next Tuesday and attempted by the hospital, could result in serious discomforting injury to the respondent and urges the family to consider advising the Co-Conservator Gregory Norsigian of its consent to the earlier elimination of at least that part of the current directive. If the family does not intend to appeal, it should also so advise the Co-Conservator Gregory Norsigian, so that the Co-Conservator may then place this order on the patient's chart prior to Tuesday, December 29, 2009.

The propriety of the order of December 23, 2009, as identified by the appellants, is the sole subject of the appeal.FN3 The body of the appeal does not indicate whether it was held on or off the record. However, on December 29, 2009, a brief hearing was held by the court with all the interested parties present to address scheduling the motion for stay as well as the procedural aspects of the appeal. At that time, the court determined that the December 23, 2009 hearing was recorded and ordered a transcript to be produced in time for a hearing on Monday, January 4, 2010. The transcript was in fact delivered to the

court on January 4, 2010, prior to the hearing and was marked in court on that date as Court Exhibit 1.

FN3. The document is denominated, “Appeal of Probate Decree of Honorable Robert K. Killian, Jr. to Terminate Life Support Systems of Involuntary Conserved Girts Zukovs Dated December 23, 2009.”

At the December 29, 2009 hearing, with the agreement of all the interested parties, the court ordered that Judge Killian's order be stayed until a hearing could be held on January 4, 2010 or until further order of the court. Since the appeal from Judge Killian's decree was issued by the probate court after a hearing on the record, General Statutes §§ 45a-186a and 45a-186b govern this appeal and define the standard of review. Although in their motion filed December 28, 2009, the appellants reference “Connecticut General Statutes § 45a-185 et seq.,” with no more specific statutory or practice book references recited in the motion, in their memorandum and at the hearing held on January 4, 2010, the plaintiffs argued that the automatic stay provision of Practice Book § 61-11 applies to a pending probate appeal. On January 4, 2010, in addition to stating her oral objection, Katarzyna Kozlowska, co-conservator, and an interested party, presented to the court a written objection to the motion for stay. The co-conservator, Norsigian, and counsel for Zukovs, stated their objections orally. Hartford Hospital took no position. At the hearing, all interested parties appeared either individually or through counsel. FN4

FN4. Although there are several interested parties whom the appellants were required to serve pursuant to General Statutes § 45a-186(b) including the co-conservators, Katarzyna Kozlowska and Gregory Norsigian, Esq., Wanda Wisniowski, attorney for Girts Zukovs, the conserved, and Hartford Hospital, on January 4, 2010, at the time of the hearing on the motion to stay the probate decree, no party other than the Hartford Probate Court had been served with the appeal. However, on January 4, 2010, all interested parties were present in court and agreed to accept service. Although the court ordered counsel for the appellants to file an affidavit of service within forty-eight (48) hours which would have allowed the electronic filing system to accept appearances and other filings of the interested parties, as of the time of the writing of this memorandum of decision, no such affidavit has been filed. This issue is notable because the requirements of electronic filing prevent anyone not named in the return of service from filing anything in connection with the case. Although the court has directed the clerk's office to accept paper appearances at least for the purpose of notice, these appearance do not allow the parties in question to file papers. Therefore, although Katarzyna Kozlowska, presented a written objection in court on January 4th of which the court takes judicial notice, it cannot yet be accepted for electronic filing. The court noted this point for the record and informed her counsel that an electronic filing would still be required.

The decree of the Hartford Probate Court, issued on December 23, 2009, affects the person of Girts Zukovs, a Latvian immigrant and resident of Bristol, Connecticut. The following history is based on the representations of counsel for the plaintiff in open court and in their memorandum in support of the motion to stay the probate decree and other documents submitted in connection with the appeal, including the decree itself. Zukovs,

age 33, was brought to Hartford Hospital and underwent surgery on or about June 30, 2009, for injuries he received when a motor vehicle collided with the motorcycle Zukovs was riding on June 25, 2009. During the course of the surgery, Zukovs apparently aspirated and suffered anoxic brain injury. Zukovs is not known to have executed a living will, appointed a health care agent, or executed a power of attorney. On July 29, 2009, Katarzyna Kozlowska applied to be appointed conservator of the estate and person of Girts Zukovs, an incapable person, in the Berlin Probate Court. The application listed Zukovs as residing in New Britain with Kozlowska. Based upon this application, the Probate Court of Berlin appointed Kozlowska as the conservator of the person and estate of Zukovs on August 18, 2009.

*2 The appellants, Anita Petersena, the mother of Zukovs, a resident of Latvia, Iveta Zukova Petterson, the sister of Zukovs, a resident of Denmark, and Dace Jansone, Pastor of the Latvian Lutheran Church of Manchester/Willimantic, stated that they appeared before the Berlin Probate Court, in person, on October 14, 2009. They alleged that they were denied access to Zukovs, denied access to Zukovs' medical information and were denied notice in the appointment of Kozlowska as conservator. These parties also sought removal of Kozlowska as conservator on that date. On October 29, 2009, the appellants, Jansone and Petersena, moved for a finding of no jurisdiction in the Berlin Probate Court and, subsequently, submitted an application for temporary co-conservatorship with the Hartford Probate Court. On November 6, 2009, Kozlowska filed an objection to the motion of no jurisdiction. On December 2, 2009, Judge Walter Clebowicz found that the Berlin Probate Court was without jurisdiction and vacated the conservatorship and all findings made by that court. Immediately following Judge Clebowicz's finding, both Hartford Hospital and Kozlowska applied to the Hartford Probate Court for appointment of a temporary conservator. Acting upon the application of Hartford Hospital, on December 3, 2009, the Hartford Probate Court appointed Attorney Gregory Norsigian, temporary conservator,FN5 and Attorney Wanda Wisniowski as attorney for Girts Zukovs. Thereafter, on December 7, 2009, the Hartford Probate Court held a hearing and formally appointed both Norsigian and Kozlowska as temporary co-conservators over the objections of the appellants.

FN5. Attorney Norsigian made the point of informing the court that he was chosen by the Hartford Probate Court because his name is on a list indicating that he is available for such appointments. He had no prior acquaintance with any of the interested parties to this case. Judge Killian noted on the record of the December 23, 2009 hearing that he selected Kozlowska as she was the choice of the conserved at a time when he was competent to choose.

The decree issued on December 23, 2009 by the Hartford Probate Court, states that after due notice to all the interested parties, a hearing was held on that date at Hartford Hospital to consider “the advanced medical directives and course of treatment for the conserved person.” FN6 At the hearing, Judge Killian heard testimony from Dr. Lenworth Jacobs, Zukovs' attending physician, regarding Zukovs' condition and prognosis. Jacobs stated that Zukovs is in a “persistent vegetative state.” He testified that Zukovs' higher functions of brain are not working; that his lungs, kidneys and liver have

failed. He is on dialysis. As a result of his liver failure, he cannot adequately heal his wounds and fight infection and that his skin, muscle and bone tissue are breaking down in various locations. His lungs are infected and he has pneumonia. Although he is on five antibiotics, they “are not serving him well.” He is in a “futile situation” which is “irreversible.” (Transcript (“Tr.”), 12/23/09, at 9-13.) Jacobs further stated that there is no medical treatment available that will restore Zukovs to functional capacity and, even with the continuation of the current services, he is likely to die quite soon. It was Jacobs' recommendation that dialysis be discontinued and the order to administer cardiopulmonary resuscitation (CPR) be removed as the pressure imposed by CPR would likely rupture his abdominal hernia. Jacobs also recommended that the blood pressure medications and antibiotics be stopped and that he receive only palliative care to keep him “comfortable so he can pass in peace and not suffer.” (Tr ., 12/23/09, at 23.) Jacobs explained that if it became necessary to perform CPR on Zukovs in his present state, it would likely cause terrible internal damage resulting in a particularly gruesome death. (Tr., 12/23/09, at 18, 19 & 22.)

FN6. The Decree notes that the following individuals were present at the hearing: Monica H. Fowler, social worker at Hartford Hospital, Dr. Lenworth Jacobs, trauma surgeon, Dr. Barbara Jacobs, nurse ethicist, Attorney Gregory Norsigian and Kathryn Kozlowska, temporary co-conservators of the person, Rev. Dace Jansone, Robert Nastri, Jr., attorney for Kathryn Kozlowska, Brian Prucker, attorney for the mother, sister and Reverend Jansone. In addition Wanda Wisniowski, attorney for Girts Zukovs, the conserved person, and Iveta Sukova, sister of the conserved, participated by telephone.

*3 During the hearing, all of the parties in attendance, including Zukovs' co-conservators and counsel for the appellants, were given the opportunity to inquire into Zukovs' condition and to express their opinions as to the course of action that should be taken regarding his medical care. After considering the questioning and statements if all present at the hearing, Judge Killian ordered that Hartford Hospital change Zukovs' code status to indicate that no CPR was to be performed, and that dialysis, blood transfusions and certain medications, including those regulating his blood pressure be discontinued. Further, the decree directed that artificial nutrition, hydration and ventilation, along with any medications intended to provide comfort to Zukovs were to be maintained.

In their motion to stay the decree pending this appeal, the appellants state that “irreparable harm will result to the person of Girts Zukovs, if the motion for stay is not granted.” In their memorandum in support of the motion to stay, the appellants contend that a stay should be granted for the reason that probate appeals fall within the ambit of Practice Book § 61-11, governing appellate procedure.FN7 The court disagrees as the issue of a stay is specifically addressed in General Statutes § 45a-186(f), the statute governing probate appeals. Section 45a-186(f) provides, in relevant part, that “[t]he filing of an appeal under ... [the probate appeal] section shall not, of itself, stay enforcement of the order, denial or decree from which the appeal is taken.” In addition, Section 61-11 is included within the rules of appellate procedure and speaks only to appeals taken from the Superior Court and not appeals to the Superior Court. However, since there is sparse

jurisprudence on the issue of stays of probate decrees and the issue before the court is discretionary in nature, the court looks to the cases interpreting the § 61-11(c) for guidance. See DeChristoforo v. Botte, Superior Court, judicial district of New Haven, Docket No. CV 05 4010768S (January 5, 2006, Devlin, J.) (where there is no statute or practice book rule that automatically stays an [spousal support] order, "any stay is therefore discretionary").

FN7. Practice Book § 61-11(a) provides, in relevant part, that "[e]xcept where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to take an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause."

Specifically, on the issue of whether or not to stay the decree of December 23, 2009, the court is guided by the principles set forth in Griffin Hospital v. Commission on Hospitals, 196 Conn. 451, 493 A.2d 229 (1985). These include (1) the likelihood that the appellant will prevail; (2) the irreparability of the injury to be suffered [by the appellant] from immediate implementation of the [probate court's] order; (3) the effect of a stay upon other parties to the proceeding; and (4) the public interest involved. Id., at 456, 493 A.2d 229. The decision to grant a stay requires a "balancing of the equities," taking into account these four factors. Id. The application for a stay is left to the "general equitable powers" of the court. Park City Hospital v. Commission on Hospitals & Health Care, 210 Conn. 697, 700-01, 556 A.2d 602 (1989). See also In re Sandra Sherlock-White v. Probate Appeal, Superior Court, judicial district of Tolland, Docket No. CV 0-4011501 (July 7, 2009, Bright, J.).

Likelihood that the Appellant Will Prevail on Appeal
*4 In evaluating the likelihood of success on the merits of this appeal, it is important to first consider the standard of review available to the court in an appeal of a probate matter heard on the record.

"In an appeal taken under section 45a-186 from a matter heard on the record in the Court of Probate, the Superior Court shall not substitute its judgment for that of the Court of Probate as to the weight of the evidence on questions of fact. The Superior Court shall affirm the decision of the Court of Probate unless the Superior Court finds that substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes; (2) in excess of the statutory authority of the Court of Probate, (3) made on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the Superior Court finds such prejudice, the Superior Court shall sustain the appeal and, if appropriate, may render a judgment that modifies the Court of Probate's order, denial or decree or remand the case to the Court of Probate for further proceedings." General Statutes § 45a-186b.

At the January 4, 2010 hearing, after reviewing the applicable standard of review pursuant to § 45a-186b, the court asked counsel for the appellants upon which grounds of appeals they claimed likelihood of success within the framework of the statute.FN8 In response, the appellants offered two grounds, abuse of discretion and violation of due process. The appellants claim that the Hartford Probate Court abused its discretion either by ignoring the application of the appellants to act as conservators or by failing to appoint them as conservators. This claim is based solely on the representations of counsel and not supported by any evidence in the record before the court.

FN8. Notably, in their original appeal papers, the appellants recited fourteen (14) reasons for appeal.

As a second ground of on which they claim they will likely prevail, the appellants argue that the notice of the hearing for the Hartford Hospital hearing was unconstitutionally vague because it did not indicate that the hearing would consider end of life decisions. The appellants further claimed they were denied access to medical records and/or received poor information thus depriving them of the opportunity to reach intelligent decisions regarding the conserved which also constitutes a denial of due process. (Tr., 1/4/10, at 59-60.) As with the previous claim, this reason is likewise unsupported by evidence in the record before this court. The notice of the December 23, 2009 hearing was not offered as an exhibit or otherwise presented to the court. This court is therefore unable to make any assessment regarding the adequacy of the notice as a valid appeal issue within the framework of § 45a-186b. Further, a statement by appellants' counsel as contained in the transcript of the December 23, 2009, hearing reflects his understanding that the notice of the hearing that day was to discuss medical options.FN9 As for the denial of access to medical records and information, the appellants offered no testimony, affidavits or other tangible evidence in support of their claims. However, Hartford Hospital offered the testimony of its employee, Monica Fowler, a social worker and its director of social work. In addition, the co-conservator, Norsigian, testified about the availability and accessibility of medical records and information from the time of his initial appointment as temporary co-conservator by the Hartford Probate Court on December 3, 2009. Contrary to the appellants' claim, both witnesses testified the medical records were made available to the appellants and their counsel and that the appellants' input was sought at each step of the proceedings before the Hartford Probate Court. FN10 They also testified that numerous opportunities were offered to the appellants to have their opinions' heard and their concerns addressed. Indeed, an offer was even extended by Hartford Hospital to fly the appellants from Europe to the United States at the hospital's expense in order to allow the appellants to visit with Zukovs and interact once again with the medical staff. (Tr., 1/4/10, at 61-75.) For all these reasons, the court finds that the appellants have failed to present any evidence supporting a claim that they are likely to prevail on any of their stated reasons for appeal. See Griffin Hospital v. Commission on Hospitals, supra, 196 Conn. at 456-57, 493 A.2d 229.

FN9. With respect to the hearing notice, counsel for appellants remarked as follows: “The notice here indicates today is to discuss medical options.” (Tr., 12/23/09 at 44.)

FN10. The transcript of the December 23, 2009 hearing indicates that the records have been accessible to the appellants but they have taken no affirmative steps to review them. (Tr., 12/23/ 09, at 45-48, 56, 58.)

Irreparability of Injury to Appellants

*5 At the hearing on January 4, 2010, appellants' counsel originally spoke in terms of the irreparable harm to Zukovs in the event his life is shortened by the directive of the probate court but subsequently argued that there will be irreparable harm to the appellants if the probate decree of December 23, 2009 is allowed to take effect. The appellants argue that the manner of death is far from a certainty and that the irreparability of death alone should be enough to grant the stay. Although the appellants offered no specific evidence of irreparable harm to themselves, the court notes that the sister, appellant Petterson, participated by telephone at the December 23, 2009 hearing and expressed words that reflect the apparent frustration and sadness of the family at the prospect of losing their loved one. On the other hand, the co-conservators and attorney for Zukovs each expressed their deep concern that the failure to implement the probate court decree will only prolong the suffering and undermine the dignity of Zukovs who is so obviously and hopelessly ill. The transcript revealed that despite Judge Killian's persistent efforts to engage Petterson and Reverend Jansone in the decision-making process, they repeatedly insisted that the family or those appointed by the family should be making the decisions about Zukovs and evaded participating in deciding the appropriate course of treatment for him. (Tr., 12/23/09, at 48-54, 57-58.) At no time did the appellants seek to introduce any medical testimony of their own.

Effect of the Stay on Other Parties

Given the facts of this case, the effect of the stay on other parties is interwoven with the potential of irreparable harm. Other than the appellants, the other parties to this matter are the co-conservators, the conserved, who is able to participate only through his counsel, and Hartford Hospital.FN11 So, in addition to considering any harm to the appellants from not granting a stay, the court is required to consider the harm to others resulting from its decision. At the hearing, the conservators for Zukovs acknowledged the irreparability of harm to Zukovs should the stay be denied, namely his death. The conservators and counsel for the conserved argued, however, that given the physical and mental condition of Zukovs, in the final analysis, greater harm would likely come to him should the stay be granted in light of all the medical evidence outlined so graphically by Jacobs at the December 23, 2009 hearing. As noted in probate decree, CPR “could result in terrible internal damage resulting in a particularly gruesome death.” Under all the circumstances, the balance of equities weighs in favor of allowing a comfortable and dignified passing of the conserved as supported by the co-conservators and Zukovs' own lawyer.

FN11. As indicated earlier in this decision, Hartford Hospital merely seeks direction on how to care for the conserved and takes no position on pending motion for stay.

Public Interest Involved

The final factor to be considered under the Griffin Hospital case is the public interest involved in granting the stay. Neither the appellants nor any other party has articulated how the public interest should factor into the court's decision. The appellants have made general statements to the effect that any end of life decisions on the part of an incapacitated individual who does not have a living will should be undertaken by the family and not by a non-relative conservator. However, the fact is, the court has no basis to find that the family has made a substantial effort to take charge of and participate in Zukovs' medical care through the probate court or otherwise. While the public obviously has an interest in knowing that courts are operated fairly, the appellants have presented no evidentiary basis for the court to conclude that the probate court acted improperly or unfairly.

CONCLUSION

*6 On balance, for all the foregoing reasons, the court finds that the appellants have failed to persuade this court to exercise its discretion in favor of continuing the stay of December 23, 2009 decree of the Hartford Probate Court. Accordingly, the appellants' motion for stay is hereby denied.

Current Date: 04/30/2010
Source: SUPERIOR COURT, CONNECTICUT

CASE INFORMATION

Case Title: PETERSENA, ANITA v. HARTFORD PROBATE COU
Court: SUPERIOR COURT
Case Number: HHD-CV-10-6006598-S
Case Type: CIVIL
Case Subtype: WILLS, ESTATES AND TRUSTS
Key Nature of Suit: PROBATE, TRUSTS & ESTATES (360)
Date Filed: 12/28/2009
Court Location: HARTFORD
Return Date: 01/12/2010
Disposition Date: 01/22/2010
Disposed/Disposition: WITHDRAWAL OF ACTION

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DOCKET PROCEEDINGS

Date: Entry #: Description: Date Docketed: Party:

01/22/2010 185.00 Docket Entry: WITHDRAWAL OF ACTION Judge: BY THE PLAINTIFF Result Date: 01/22/2010 PLAINTIFF
Send Runner to the Court
01/22/2010 104.00 Docket Entry: WITHDRAWAL PLAINTIFF
Send Runner to the Court
01/14/2010 102.00 Docket Entry: OBJECTION TO MOTION
DEFENDANT
Send Runner to the Court

01/11/2010 103.00 Docket Entry: MEMORANDUM OF DECISION
COURT
Send Runner to the Court
01/05/2010 101.00 Docket Entry: MOTION FOR STAY
PLAINTIFF
Send Runner to the Court
12/28/2009 100.30 Docket Entry: SUMMONS & COMPLAINT
PLAINTIFF
Send Runner to the Court