In re Guardianship and Conservatorship of Gorman

2004 | Cited 0 times | Nebraska Court of Appeals | March 23, 2004

(not designated for permanent publication)

INTRODUCTION

Betsy L. Ashenbach, a niece of Irene M. Gorman, filed a petition in the county court for Lancaster County, seeking appointment as the permanent guardian and conservator for Gorman. Gorman's brother, Roy A. Cummings, filed an answer and petition in intervention, seeking appointment as Gorman's permanent guardian and conservator. Cummings asserted that he had priority for appointment as Gorman's guardian and conservator by virtue of a durable power of attorney executed by Gorman in his favor. The county court found that Gorman was in need of a guardian and conservator, that the durable power of attorney was invalid, and that it was in the best interests of Gorman that Ashenbach be appointed as her permanent guardian and conservator. Cummings appeals. For the reasons stated below, we affirm.

BACKGROUND

Gorman was born March 2, 1920. Gorman resided in North Platte, Nebraska, and worked for the Union Pacific Railroad for 38 years, prior to retiring and moving to Lincoln, Nebraska, in approximately 1996. Gorman has no children and was predeceased by both her first and second husbands. Gorman executed the Irene M. Gorman Revocable Trust (the trust) on November 9, 1999, as an estate-planning tool. The trust was being administered by a corporate trustee, Wells Fargo Bank Nebraska, N.A. (Wells Fargo), at the time of the hearing in this matter and is discussed further below. Ashenbach moved in with Gorman in approximately June 2001, after Ashenbach separated from her husband. In October of that year, Gorman was diagnosed with Alzheimer's dementia, which diagnosis is discussed further below. Ashenbach continued to live with Gorman and to help her with daily living tasks until approximately January 2003, at which time Ashenbach left the house because of conflict with Cummings and Cummings began residing with Gorman.

On January 20, 2003, Gorman executed a durable power of attorney in favor of Cummings. The durable power of attorney document gave Cummings the power to engage in certain acts on Gorman's behalf, including the power to receive debts, payments, and property; to settle accounts; to satisfy security interests and mortgages; to compound, submit to arbitration, or otherwise settle or adjust differences; to prosecute and defend; to manage real estate; to grant leases, receive rents, and otherwise deal with tenants and lease property; to sell or exchange real or personal estate; to deposit moneys, withdraw, invest, and otherwise deal with tangible property; to vote at stockholders

meetings, execute proxies, and otherwise substitute for owner; to execute deeds, bills, notes, and similar instruments; to make gifts; and to "do all other things necessary in connection herewith." The durable power of attorney document also contained a clause that stated: "In the event a guardian or conservator is deemed necessary or convenient for any reason, then I nominate and appoint the attorney [in fact] named herein as guardian or conservator or such other person as the attorney [in fact] shall designate." Another clause states that the durable power of attorney shall not be affected by Gorman's disability or incapacity and that the authority granted shall continue during any period while Gorman is disabled or incapacitated.

On January 27, 2003, Ashenbach filed a petition, seeking appointment as the permanent guardian and conservator for Gorman. Ashenbach alleged that Gorman was not competent to make financial decisions and that Gorman's incapacity impaired her to the extent that she lacked sufficient understanding or capacity to make or communicate responsible decisions with respect to certain areas of her life. Ashenbach alleged that she had priority for appointment as Gorman's guardian and conservator by virtue of being Gorman's niece and because certain other parties had signed waivers and renunciations of their rights to appointment. Ashenbach further requested that a guardian ad litem be appointed for Gorman. Also on January 27, Viola Chambers, who is Gorman's sister, and Linda Moffet, who is another niece of Gorman, filed waivers and renunciations of their rights as potential guardians and conservators and requested that Ashenbach be appointed by the court as guardian and conservator for Gorman. The court appointed a guardian ad litem for Gorman on January 29.

Cummings filed an answer and petition in intervention on February 7, 2003. Cummings alleged that Gorman was competent and had sufficient understanding or capacity to make or communicate responsible decisions concerning the areas of Gorman's life detailed in Ashenbach's petition. Cummings alternatively alleged that in the event the court found Gorman to be an incapacitated person, it would be in Gorman's best interests to have Cummings appointed as her permanent guardian and conservator. On February 13, Ashenbach filed an amended petition, which was essentially identical to her original petition except for the additional allegations that Gorman was not competent to execute the durable power of attorney in Cummings' favor and that the durable power of attorney document was invalid.

The matter was heard by the county court on March 13 and 19, 2003. Evidence was presented concerning Gorman's evaluation for and diagnosis with Alzheimer's dementia. Gorman was evaluated at the memory disorder clinic of BryanLGH Medical Center on October 8, 2001. Several doctors examined Gorman and administered various physical, memory, and mental status tests. Upon reviewing the results of their testing and examinations, the medical team diagnosed probable Alzheimer's dementia and noted two previous small strokes on the CT scan that was performed. The team recommended that Gorman start taking Aricept, a drug useful in improving the memory of Alzheimer's patients like Gorman. The team also recommended that Gorman take vitamin E to strengthen nerve fibers and baby aspirin to decrease the chance of another stroke. The clinical

psychologist who examined Gorman in October 2001 stated in the diagnosis section of his report that "[if] she has not done so[,] Gorman would be well advised to execute a durable power of attorney and a power of attorney for health care. Should her condition decline further, she would become incompetent to execute such documents." The clinical psychologist further stated that "[Gorman's] family would be well advised to make contingency plans for placement in a supervised setting at some point should her condition continue to decline."

Gorman was seen by Dr. James A. Bobenhouse on October 22, 2002. Bobenhouse, a neurologist, was one of the doctors who examined Gorman in 2001. Following his October 2002 examination of Gorman, Bobenhouse wrote an opinion letter based upon the results of his examination of Gorman, his experience in treating patients with dementia, and his training as a neurologist, in which letter he opined that Gorman had mild to moderate dementia and that she was not competent to make financial decisions. Bobenhouse further opined that in light of Gorman's dementia, Gorman would be more likely to maintain some degree of independence if she were to continue to live in familiar surroundings.

Dr. H.L. Balters, a clinical psychologist, examined Gorman in February 2003. Balters interviewed Gorman, reviewed medical records, and conducted psychological testing. Balters noted:

The cognitive associations of . . . Gorman during the course of the evaluation were logical and sequential, for the most part. She did not seem to be particularly guarded or evasive. Her capabilities for psychological insight, as well as utilization of judgment, were assessed as fair to limited. . . . On the day of the intake, the client was oriented as to person, to place, and to time; she initially was not certain whether the year was 2003 or 2004, but eventually stated the correct choice.

With regard to Gorman's performance on the Weschler Adult Intelligence Scale-III test, Balters noted that Gorman was "adequate for certain types of rote short-term memory undertakings. However, for any task which require[d] sustained concentration, plus mental manipulation during such, she fare[d] much more poorly." Balters noted Gorman's poor retrieval of items from long-term memory storage. Balters stated, "This individual may not be able to adequately decipher what she sees visually going on around her. She may miss the obvious, though others may perceive the happenstance quite adequately. In addition . . . Gorman has no real sense of what is customary social behavior." Balters noted that Gorman was not "adept at novel situations/undertakings," having to have test-taking instructions repeated constantly, both at the beginning and during the administration of a subtest. Because Gorman had "a better grasp of rote material," these difficulties were viewed as "organic-like behavior." Balters' diagnostic impressions at the end of the evaluation included adjustment reaction and senile dementia. Balters opined that Gorman was not able to manage her financial circumstances. With regard to the possibility of Gorman's traveling to California with Cummings, Balters opined that such a trip might be manageable because Gorman would be in Cummings' presence, but that "a prolonged residence in a new, unfamiliar living arrangement may lead to cognitive/psychological disorientation on her part."

Gorman's guardian ad litem, Stephanie Hupp, testified concerning her investigation of the case. Hupp concurred with the opinions of Bobenhouse and Balters that Gorman was not able to make or communicate responsible decisions concerning her person. Hupp interviewed Gorman, Cummings, Ashenbach, and other family members during her investigation and indicated that her observations were consistent with the doctors' findings. Hupp recommended the appointment of Ashenbach as guardian and conservator, primarily due to the doctors' recommendations that it would be better for Gorman to continue to live in Lincoln. Hupp's investigation revealed nothing that caused her to be concerned about the care Gorman had been receiving from Ashenbach. Hupp expressed concerns about Cummings' request to be appointed guardian, based on Cummings' age and certain changes initiated by Cummings in Gorman's estate plan. Hupp questioned the validity of the durable power of attorney document and certain alleged will revisions, in light of Bobenhouse's October 2002 recommendation of incapacity. On cross-examination, Hupp acknowledged that when she interviewed Gorman, Gorman indicated that she wanted to go with Cummings to live in California and wanted Cummings to manage her financial affairs.

Several relatives of Gorman testified in support of Ashenbach's being appointed Gorman's permanent guardian and conservator. Chambers, Gorman's sister, was 74 years old at the time of the hearing and resided in Arizona. Chambers testified that her preference would be to have Ashenbach appointed as Gorman's guardian. Chambers testified that Ashenbach had a close relationship with Gorman and that Chambers had no reservations about Ashenbach's ability to care for Gorman. Chambers described Ashenbach as very capable, competent, and protective of Gorman. Nichole Shulde, Gorman's grandniece, testified that she became close to Gorman after Gorman moved to Lincoln in approximately 1996. Shulde began driving Gorman to medical appointments in 1996 or 1997, and Gorman quit driving completely in 1998 or 1999. Shulde indicated that she and other family members were pleased with the arrangement when Ashenbach moved in with Gorman, because there had been previous indicators that Gorman was having some memory problems. Shulde continued to provide transportation for Gorman after Ashenbach moved in with Gorman. Shulde described the relationship between Ashenbach and Gorman as friendly and close. Shulde felt that Ashenbach would be the best person to serve as Gorman's guardian and indicated that Moffet, Shulde's mother, approved of Ashenbach as guardian as well.

Ashenbach, age 58, is employed by the Nebraska State Patrol in its criminal investigation division. Ashenbach testified that prior to the time she moved in with Gorman, there had been some discussion among family members that Gorman needed some assistance with daily living tasks such as cooking. Upon moving in, Ashenbach assumed responsibility for tasks including cooking, grocery shopping, and "general every day running of the house." Ashenbach indicated that as time passed, Gorman's daily activities required more supervision, and that Gorman began to experience more confusion, especially when Gorman was taken out of her everyday environment. Ashenbach did not believe that Gorman was able to live independently any longer. Ashenbach indicated that she had not had to manage Gorman's financial affairs while living with her and that Ashenbach would prefer to have a trustee, such as Wells Fargo, continue to handle Gorman's financial affairs. Ashenbach did

not feel it would be in Gorman's best interests to move to California, because Gorman was not particularly close to Cummings' extended family living in California. Ashenbach testified that in recent months, it had been typical for Gorman to change her mind frequently and to be influenced by the last person who spoke to her. Ashenbach testified that Gorman and Cummings spoke by telephone approximately once a week.

Cummings, a retired mechanical contractor, was 72 years old at the time of the hearing in this matter. Cummings had resided in California since 1956, except for a 1-year period when he resided in Idaho. Cummings began staying with Gorman in Lincoln on approximately January 15, 2003. Cummings is married and has four adult children. Cummings' sources of income include a pension, Social Security, and interest income. Cummings' assets include his home in California, various investments in the stock market, a boat, and several vehicles. Cummings visited Gorman for two separate periods of several weeks each in 2002. Cummings' wife accompanied him during the second visit in 2002.

Cummings testified that during his second trip to Nebraska in 2002, Gorman expressed a desire to move to California with him. Cummings indicated that Gorman would be able to stay in his home until he found a suitable place for her to live and that his wife and daughter had located a senior living facility, approximately 9 minutes from Cummings' home. A brochure for this facility describes it as a "full service independent senior apartment complex." Cummings testified that he believed Gorman was able to live in an "independent living arrangement." As to his own health, Cummings testified that he was in good health, but he indicated that he had a pacemaker and had received "angioplastic" heart surgery in approximately 1984. Also, Cummings takes medication to regulate his blood pressure and cholesterol. Cummings described Gorman's relationship with his wife as "great" with "no problems." Cummings' assessment of the relationship between his wife and Gorman was contradicted by Chambers, who also suggested that Cummings may have additional health problems not mentioned in his testimony.

Gorman was called as a witness by Cummings and, aside from some problems with her hearing aid and some understandable nervousness, responded clearly and accurately to the questions that were posed to her. Gorman testified that most of her friends were in North Platte, where she had lived for approximately 38 years, and that she had not made many new friends in Lincoln. Gorman testified that she wanted Cummings to be appointed as her guardian and conservator and that she wanted to live in California with Cummings.

Concerning Gorman's finances, the record shows that Gorman executed the trust on November 9, 1999, naming herself as trustee. At the date of execution, the trust was unfunded and contained provisions relating to the distribution of the trust estate upon Gorman's death. Beneficiaries named in the trust document included Chambers, Cummings, Ashenbach, Shulde, Moffet, and another niece and nephew of Gorman. Gorman resigned as trustee on March 8, 2002, and on April 12, pursuant to the terms of the trust, Wells Fargo accepted sole trusteeship of the trust. As of the date of the hearing

in this matter, the trust continued to be administered by Wells Fargo and had an approximate value of $370,000.

Harry Seward, a trust administrative officer for Wells Fargo, testified concerning his management of the trust. Seward indicated that the trust was unfunded when Wells Fargo took over as trustee and that subsequently, Wells Fargo began gathering Gorman's assets to fund the trust. Seward testified that Wells Fargo had been unable to search for any further assets to transfer into the trust since August 2002, when Wells Fargo's contact with Gorman was cut off by Gorman and Cummings. Seward indicated that Wells Fargo had not engaged in any selling or reinvesting of the trust assets, pending the determination of the present legal matter. The three quarterly statements for the trust between April and December 2002 show balances of approximately $128,000, $380,000, and $370,000, respectively. Seward indicated that Gorman and Cummings had expressed to him a request for Wells Fargo to resign as trustee in favor of Cummings. Seward indicated, however, that Wells Fargo would have been willing to resign in favor of another corporate trustee, as required by the terms of the trust. Seward testified that in about August 2002, when these communications with Gorman and Cummings occurred, he and other Wells Fargo employees were beginning to have concerns regarding Gorman's competency. Seward indicated that Cummings was angry about Wells Fargo's position with regard to a successor trustee and that communications with Wells Fargo were then essentially cut off by Gorman and Cummings. Seward indicated that he subsequently received a request from Cummings that Seward transfer the assets of the trust to a Charles Schwab account set up by Cummings.

Cummings testified that he was concerned about Wells Fargo's management of Gorman's funds, stating that Wells Fargo lost $126,705 in the market value of Gorman's stock in 1 year. Cummings indicated that he did not need Gorman's money for himself but that he was interested in stopping the "outflow of money" on Gorman's behalf. Cummings testified that he opened a Charles Schwab account for Gorman during his second trip to Nebraska in 2002, that he asked Wells Fargo to move Gorman's funds into these accounts, and that Wells Fargo refused to do so. Cummings indicated that he located certain of Gorman's money that had not been transferred into the trust and had those funds transferred into the Charles Schwab account. The Charles Schwab account is in Gorman's name, and at the end of 2002, the account held approximately $40,000. A second "unfunded" account was also opened at Charles Schwab in Gorman's name. Cummings testified that Charles Schwab gave him "power of attorney" over those two accounts at the time that they were opened. Cummings testified that if he were appointed as Gorman's guardian and conservator, he would move Gorman's money from Wells Fargo to Charles Schwab and that with Gorman's advice, he would undertake the management of Gorman's money and assets.

Evidence was presented concerning certain changes proposed with regard to Gorman's estate plan. Ashenbach testified about a meeting she had with Gorman and Cummings at a restaurant in October 2002, wherein Cummings indicated that Gorman's will needed to be rewritten and Cummings made some notes concerning how he thought various dispositions of Gorman's estate should be changed.

Cummings admitted that these notes reflected his proposed distribution of Gorman's assets as of October 2002, but he testified that certain people were now "off the list" because Gorman had "disinherit[ed] them." Cummings maintained that Gorman remained fully capable and competent to make such decisions concerning the distribution of her estate. Cummings acknowledged, however, that as of January 20, 2003, when Gorman executed the durable power of attorney in his favor, Gorman had some problems with memory and confusion and that Gorman was "[n]ot one hundred percent" capable and competent to manage her own legal affairs at that time.

Copies of a computer-generated letter, dated February 3, 2003, signed by Gorman, and addressed "To Whom It May Concern," were introduced into evidence. The letter stated, "The following people shall be removed and not be put on any future Last Will of Irene Gorman . . . . They are: Bet[s]y Ashenbach[,] Linda Moff[e]t[, and] Viola Chambers." Copies of this letter were received by Moffet and Chambers. Cummings testified that he prepared this letter at Gorman's direction and that Gorman wanted to exclude these individuals from her estate because "they were interfering with her life" and "[s]he wanted them out." Chambers testified that the signature on the letter appeared to be Gorman's signature but that Chambers did not believe Gorman prepared the letter. Ashenbach did not receive a copy of this letter. Ashenbach testified that she did not believe Gorman was mentally capable of preparing such a letter as of February 3, 2003, and that Gorman would not have been able to use the computer to compose such a letter.

The court entered an order on April 3, 2003, finding that the durable power of attorney executed by Gorman in Cummings' favor was invalid, without specifying the court's reason for making this finding. The court further found that Gorman was in need of a permanent guardian and conservator and that it was in Gorman's best interests that Ashenbach be appointed as her permanent guardian and conservator. Also on April 3, the court issued "Letters of Guardian & Conservator" to Ashenbach and Ashenbach filed an acceptance of her appointment. Cummings subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Cummings asserts that it was clear error for the county court (1) to appoint Ashenbach rather than himself as permanent guardian and conservator for Gorman and (2) to find that the durable power of attorney executed by Gorman in favor of Cummings was invalid.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. In re Guardianship & Conservatorship of Donley, 262 Neb. 282, 631 N.W.2d 839 (2001); In re Guardianship & Conservatorship of Hartwig, 11 Neb. App. 526, 656 N.W.2d 268 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor

unreasonable. In re Conservatorship of Anderson, 262 Neb. 51, 628 N.W.2d 233 (2001); In re Guardianship & Conservatorship of Hartwig, supra.

ANALYSIS

Durable Power of Attorney.

We first address Cummings' second assignment of error that it was clear error for the county court to find that the durable power of attorney executed by Gorman in favor of Cummings was invalid. Cummings argues that he had priority over Ashenbach for appointment as Gorman's guardian and conservator by virtue of the durable power of attorney document. With regard to the appointment of guardians, Neb. Rev. Stat. § 30-2627(b) (Cum. Supp. 2002) provides in relevant part:

Persons who are not disqualified under subsection (a) of this section and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:

(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[.]

(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.

The same order of priority applies with respect to the appointment of a conservator pursuant to Neb. Rev. Stat. § 30-2639 (Cum. Supp. 2002). A court is required to take into consideration the expressed wishes of the allegedly incapacitated or protected person when appointing a guardian or conservator. See §§ 30-2627(c) and 30-2639(c). Nonetheless, the court, acting in the best interests of an incapacitated or protected person, may pass over a person having priority and appoint as guardian or conservator a person having lower priority or no priority. See id.

Also useful in examining the issue raised in Cummings' second assignment of error is Neb. Rev. Stat § 30-2667 (Reissue 1995), which provides:

(1) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his or her property except specified exclusions, the attorney in fact shall be accountable to the fiduciary as well as to the principal. The fiduciary shall have the same power to

revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated.

(2) A principal may nominate, by a durable power of attorney, the conservator, guardian of the estate, or guardian of the person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification. . . .

In In re Guardianship & Conservatorship of Hartwig, 11 Neb. App. 526, 656 N.W.2d 268 (2003), this court considered a case wherein the trial court passed over an individual having higher priority for appointment as guardian and conservator by virtue of a durable power of attorney, appointed another individual as guardian and conservator, and terminated the attorney in fact's authority under the durable power of attorney. In reversing the trial court's termination of the durable power of attorney, this court found nothing giving the trial court authority to terminate the power of attorney as part of the appointment of a guardian or conservator and found that such authority was given, pursuant to § 30-2667, to the guardian or conservator. This court noted that a durable power of attorney is not affected by subsequent disability or incapacity of the principal designating such attorney and that the power of attorney document in that case specifically provided that it should not be so affected. See, In re Guardianship & Conservatorship of Hartwig, supra; Neb. Rev. Stat. §§ 30-2665 and 30-2666 (Reissue 1995). We noted, however, that an appropriate court might still have the authority to cancel a power of attorney "upon the grounds of fraud, undue influence, et cetera," as with any other document. 11 Neb. App. at 540, 656 N.W.2d at 279.

We turn to consideration of the validity of the durable power of attorney. With regard to the capacity to contract, 13 Am. Jur. 2d Cancellation of Instruments § 9 (2000) provides in part:

In general, in order to make an enforceable contract the parties must have the capacity to do so. A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect: (1) he or she is unable to understand in a reasonable manner the nature and consequences of the transaction, or (2) he or she is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his or her condition.

This is in accordance with Nebraska law, which provides that in order to set aside an instrument for lack of mental capacity on the part of the person executing such instrument, the burden of proof is upon the party so asserting to establish that the mind of the person executing the instrument was so weak or unbalanced when the instrument was executed that the person could not understand or comprehend the purport and effect of what he or she was doing. Cotton v. Ostroski, 250 Neb. 911, 554 N.W.2d 130 (1996) (case finding ward lacked mental capacity to remove her name from certificate of deposit). See, also, In re Estate of Wagner, 246 Neb. 625, 522 N.W.2d 159 (1994) (stating one possesses testamentary capacity if she understands nature of her act in making will or codicil thereto, knows

extent and character of her property, knows and understands proposed disposition of her property, and knows natural objects of her bounty). It has been further stated:

When cancellation of instrument is sought on the ground of mental incapacity of party, a court must determine whether the party's mental faculties had been impaired to such extent that he or she was unable to properly, intelligently and fairly protect and preserve his or her property rights; a contract may not be set aside on ground of a person's incompetency unless the party lacked sufficient mental capacity to understand it. Courts have stated the test of a person's mental capacity to enter into a contract is whether the person claimed to be incompetent understood the nature of the transaction and the effects of his or her own actions. Emotional disorders, mental weakness, or severe mental depression, alone are not sufficient to show lack of competence to contract. If a party to an agreement has a reasonable perception of the nature or terms of the agreement despite that party's mental weakness, that mental weakness is not a sufficient basis for judicial cancellation of the agreement in the absence of fraud or undue influence.

It is the mental state when the contract is executed that is relevant. A contract may not be voided based on previous incompetence or for alleged incompetence arising after the execution of the contract, though a party's capacity before or after execution of an agreement is relevant in determining competency at the time the contract was executed.

The burden of proving that a party was incompetent or unable to comprehend the nature and effect of the transaction is on the person attacking the validity of the transaction, or asserting the contract is voidable.

13 Am. Jur. 2d Cancellation of Instruments § 10 (2000)

Cummings asserts that there was insufficient evidence presented at trial to sustain a finding that the durable power of attorney was invalid. Cummings argues that the medical evidence shows Gorman was somewhat forgetful and unable to manage her finances by herself but that the evidence offered at trial did not impugn her capacity to contract on January 20, 2003 (the date the durable power of attorney was executed). Our review of the record, however, reveals no clear error in the county court's decision to the contrary. Two doctors, Bobenhouse in October 2002 and Balters in February 2003, both opined that Gorman was not competent to manage her financial affairs. We also note that the clinical psychologist who examined Gorman in October 2001 advised Gorman to execute a durable power of attorney and a power of attorney for health care and indicated that if her condition declined further, Gorman would become incompetent to execute such documents. Balters' February 2003 report did find Gorman's cognitive associations on the date of the evaluation to be "logical and sequential, for the most part," but Balters also questioned Gorman's ability "to adequately decipher what she sees visually going on around her" and noted that Gorman was not "adept at novel situations/undertakings." We also note the testimony in the record that in the recent months prior to trial, Gorman changed her mind frequently and was easily influenced by the last person who spoke to

her. We find no clear error in the county court's implicit determination that Gorman lacked the necessary capacity to execute the durable power of attorney and in the court's explicit determination that the durable power of attorney document was invalid. The court's decision is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. Cummings' assignment of error is without merit.

Appointment of Guardian and Conservator

Cummings asserts that it was clear error for the county court to appoint Ashenbach rather than Cummings as permanent guardian and conservator for Gorman. Our decision above removes Cummings' argument that he has priority for appointment over Ashenbach. However, Cummings asserts that it was in Gorman's best interests that he be appointed as her permanent guardian and conservator. Cummings argues that he is better suited than Ashenbach to serve as Gorman's permanent guardian and conservator. Cummings argues further that he has the necessary resources, that he is concerned about the protection of Gorman's financial assets, and that he has a close relationship with Gorman. Cummings also notes Gorman's expressed wish to have Cummings appointed as her guardian and conservator and to move with Cummings to California.

Clearly, Cummings has certain financial resources at his disposal and a reasonably close relationship with Gorman. Cummings has also exhibited a zealous concern over Gorman's finances, and while we might question his motives given certain proposed changes in Gorman's estate plan, we find that Cummings has taken no action that has served to dissipate Gorman's estate. We also recognize Gorman's expressed wishes, a fact the county court was required to consider. See §§ 30-2627(c) and 30-2639(c). However, under § 30-2639, the best interests of the protected person are the paramount consideration in making an appointment for a conservatorship. In re Conservatorship of Anderson, 262 Neb. 51, 628 N.W.2d 233 (2001). The same can also be said of § 30-2627 with regard to the appointment of a guardian. Ashenbach has obvious experience in caring for Gorman. Ashenbach's appointment was supported by the guardian ad litem and other relatives of Gorman, none of whom supported Cummings' appointment. Gorman's mental condition clearly requires that she live with some supervision and support, and Gorman's doctors have recommended that Gorman will function better in familiar surroundings. Given these factors, we cannot say that the county court erred in concluding that appointing Ashenbach as Gorman's permanent guardian and conservator was in Gorman's best interests. The county court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Cummings' assignment of error is without merit.

CONCLUSION

We conclude that the county court did not err in finding that the durable power of attorney document was invalid and in finding that it would be in Gorman's best interests to appoint Ashenbach as Gorman's permanent guardian and conservator.

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Affirmed.