

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person and Estate of
Leslie A. Mayo.

DONALD P. MURRAY, as Conservator,
etc., et al.,

Petitioners and Respondents,

v.

RONALD A. MAYO,

Objector and Appellant.

D060703

(Super. Ct. No. 37-2008-00152495-PR-
CP-CTL)

APPEAL from orders of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Appeal dismissed.

Ronald A. Mayo is the husband of conservatee Leslie A. Mayo. Leslie's conservators are her children from an earlier marriage, Donald Preston Murray and Lee Brooke Murray Roy (together the Conservators). (Throughout this opinion, we refer to these individuals by their first names as a matter of simplicity and clarity.)

Ronald appeals two minute orders issued by the probate court in this conservatorship proceeding. We conclude that the orders are not appealable and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, the probate court appointed the Conservators to administer Leslie's person and estate. In May 2010, the Conservators filed a petition for exclusive authority to give consent for medical treatment and provide medications for the purpose of treating dementia. In November 2010, Jerilyn S. Jones, Leslie's court appointed attorney filed a report recommending that the application be granted. In May 2011, the probate court granted the Conservators the authority to make medical decisions on Leslie's behalf. (All further dates are in 2011.) This order did not give the Conservators the authority to place Leslie in a care or nursing facility described in subdivision (b) of Probate Code section 2356.5. (Undesignated statutory references are to the Probate Code.)

On June 29, the Conservators removed Leslie from her home where she lived with Ronald and moved her to a skilled nursing facility in La Jolla. Dr. R. K. Gundry evaluated Leslie and concluded that she suffered from dementia. He noted that she was confused, unable to care for her own toileting needs, unable to leave the facility unassisted and exhibited wandering behavior. Four days later, Leslie was admitted to the UCSD Senior Behavioral Health Inpatient Unit (SBH) through the emergency room. Dr. Daniel Sewell diagnosed Leslie with severe dementia and suspected that she was suffering from alcohol withdrawal. After treating her with an alcohol

withdrawal protocol, "her vital signs and behavioral problems dramatically improved," suggesting that she had been experiencing alcohol withdrawal.

Dr. Sewell noted that Leslie is "unable to reliably indicate her preferences regarding many aspects of her life," suggested that she be discharged to Sunrise at La Costa (Sunrise), a residential facility specializing in the care of dementia patients, and gave a number of examples of why he concluded that the care Ronald had been providing Leslie was "inadequate, substandard, inappropriate, and dangerous."

Dr. Sewell concluded that Leslie should "not be returned to the care or supervision of [Ronald]." On July 7, the Conservators served notice that they proposed to move Leslie's residence to a skilled nursing facility, noting that Leslie was hospitalized through the emergency room and that once her condition was stabilized, she would be discharged to a skilled nursing facility, not her home where the condition was created.

Thereafter, Ronald filed a verified ex parte application for an order instructing the Conservators that Leslie should be returned to her personal residence, as this was the least restrictive appropriate residence. The ex parte application did not object to Leslie's initial move based on improper or inadequate notice.

Lee and Jones filed objections, under penalty of perjury, to the ex parte application. Jones noted that over the past few months, she received numerous e-mails from Ronald indicating his "increasing frustration" with being Leslie's primary caregiver as Leslie's behavior had become more erratic. Although the Conservators tried to arrange in-home care for Leslie, Ronald frustrated their efforts. Jones believed that Leslie would like to return home, but concluded that she could not "advocate that

[Leslie] return to the negative environment from which she was removed" and she could not foresee Ronald cooperating with a caregiver.

At the August 5 hearing on the ex parte application, the probate court denied the requested relief without prejudice, ordered the Conservators to file a petition regarding Leslie's placement, and pending further proceedings, authorized that Leslie be placed in a secured perimeter facility once discharged from SBH. The court also ordered that Ronald not visit Leslie pending further order of the court or stipulation by the parties. On August 24, the Conservators filed a postmove notice of change of residence to Sunrise.

At the September 28 hearing, the court set the matter for "a case management [conference]" and ordered that Leslie remain in her current placement. The court suggested that Ronald be allowed supervised visitation with certain conditions; however, when Ronald's counsel balked, the court stated that it would continue the no visitation order pending the outcome of the hearing on the petition. In January 2012, the court entered a stipulated order regarding Ronald's visitation of Leslie. The order stated that it would remain in effect pending further order of the court. Ronald appeals from the August 5 and September 28 minute orders.

DISCUSSION

The appealability of a judgment or order is jurisdictional. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295 (*Marsh*)). "There are three categories of appealable judgments or orders: (1) final judgments as determined by case law, (2) orders and interlocutory judgments made expressly appealable by statute, and

(3) certain judgments and orders that, although they do not dispose of all issues in the case are considered 'final' for appeal purposes and are exceptions to the one-final-judgment rule." (*Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235.)

The August 5 and September 28 orders are not a final judgment. Accordingly, we turn to whether the orders fall under the collateral order exception to the one-final-judgment rule. Under this exception, "an interim order is appealable if: [¶] 1. The order is collateral to the subject matter of the litigation, [¶] 2. The order is final as to the collateral matter, and [¶] 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant. [Citations.]" (*Marsh, supra*, 43 Cal.App.4th at pp. 297-298.) To the extent Leslie's placement and Ronald's visitation can be considered as matters that are collateral to the issue of whether a conservatorship is required, the orders are not final as to these collateral matters.

At the August 5 hearing, the probate court denied Ronald's ex parte application without prejudice as inappropriate for ex parte relief, authorized Leslie's placement at Sunrise pending a decision on a petition regarding her placement and ordered that Ronald not visit Leslie pending further order of the court or stipulation by the parties. Thus, the trial court clearly contemplated a further hearing on these matters. At the September 28 hearing, the trial court issued no further orders. Rather, it maintained the status quo regarding Leslie's placement and Ronald's visitation, and set the matter for a case management conference to be followed by an evidentiary hearing. Accordingly, we turn to the last category of appealable orders, those orders made expressly appealable by statute.

A party may appeal "[f]rom an order made appealable by the provisions of the Probate Code." (Code Civ. Proc., § 904.1, subd. (a)(10).) Section 1300 sets forth appealable orders in all proceedings under the Probate Code and section 1301 sets forth appealable orders in guardianship and conservatorship proceedings.

Ronald contends the orders are appealable under subdivision (e) of section 1301 which allows an appeal to be taken from the grant or refusal to grant any order "[a]ffecting the [conservatee's] legal capacity of the conservatee pursuant to Chapter 4 (commencing with Section 1870) of Part 3 of Division 4." We disagree.

The portion of the Probate Code referenced in subdivision (e) of section 1301 pertains to the capacity of the conservatee: to bind the estate in financial transactions (§§ 1870-1876); give informed consent to medical treatment (§§ 1880-1890); and marry (§§ 1900-1901). Clearly, this matter does not involve Leslie's capacity regarding financial transactions or to marry. Nor does this matter involve Leslie's capacity to consent to medical treatment as the probate court decided in May 2011 that the Conservators had the "[e]xclusive authority to give consent for and to require the conservatee to receive medical treatment." The fact the Conservators may have changed Leslie's placement while acting under their power to decide Leslie's medical treatment does not advance Ronald's argument that the orders are appealable under subdivision (e) of section 1301.

Ronald's reliance on *Conservatorship of Wendland* (2001) 26 Cal.4th 519 (*Wendland*) is misplaced. In *Wendland*, a wife sought to remove the feeding tube of her severely disabled husband. (*Id.* at pp. 524-526.) After this dispute arose, the wife

petitioned for appointment as her husband's conservator. (*Id.* at p. 526.) In the petition, she asked the court to determine that her husband "lacked the capacity to give informed consent for medical treatment and to confirm her authority 'to withdraw and/or withhold medical treatment and/or life-sustaining treatment, including, but not limited to, withholding nutrition and hydration.'" (*Ibid.*) As subdivision (e) of section 1301 provides, an order pertaining to a conservatee's capacity to consent to medical treatment is appealable. As such, there is no discussion regarding appealability in *Wendland*. Here, however, the August 5 and September 28 orders did not decide a petition regarding a conservatee's capacity to consent to medical treatment; thus, the orders are not appealable under subdivision (e) of section 1301.

Ronald also asserts the orders are appealable under the Code of Civil Procedure as any order granting or denying an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6).) This argument, however, ignores the fact that the probate court did not issue any injunctions at the two hearings. At the August 5 hearing, the Conservators requested ex parte "restraining orders be put in place so that [Leslie could] make a transition to Sunrise" and that Ronald not be allowed to visit for 30 days. However, the trial court never stated that it granted this request; rather, it stated that it needed a petition to be filed.

Moreover, at the September 28 hearing, the probate court specifically noted that it did not grant a restraining order at the August 5 hearing, that it was not granting a restraining order, and that it does not "do restraining orders." When asked about its

authority to dictate Ronald's visitation, the court specified that it was using its inherent power to make orders regarding conservatees.

Finally, we reject Ronald's argument that fairness requires that the orders be appealable. First, the parties' stipulation regarding Ronald's visitation vacated the August 5 visitation order. Thus, the visitation issue is moot pending further order of the court.

Although not argued by the parties, we conclude that the orders at issue in this appeal are not appealable as orders under subdivision (c) of section 1300 because a physician recommended and the probate court authorized Leslie's placement in a secured facility upon her release from SBH. In any event, the Conservators did not require the permission of the probate court to fix Leslie's place of residence within the state (§ 2352, subd. (a)) and although a conservator generally requires a court order to authorize placing a conservatee in a secured perimeter residential care facility for the elderly or a locked and secured nursing facility for people with dementia (§ 2356.5, subd. (b)), this provision does not apply in emergency situations (§ 2356.5, subd. (j)).

At the August 5 hearing, the probate court did not address whether it was faced with an emergency situation. However, at the September 28 hearing, Leslie's counsel argued that Leslie's current placement should not change because "an exigent situation" existed regarding Leslie's care. The probate court agreed, remarking that a "certain degree of exigency" existed at that time. Notably, to the extent this constitutes a factual finding by the probate court, Ronald did not challenge it on appeal.

Other than the implied finding regarding exigency, the probate court made no factual findings at these hearings. The probate court stated at the September 28 hearing that it was "not making any orders today. I'm simply setting [a] case management [conference]. I've made no orders today." At these hearings, the probate court recognized that the contested matter presented an unusual circumstance and tried to guide the matter to where it needed to be procedurally — an evidentiary hearing on Leslie's placement. (§ 1022 [the Probate Code limits the use of affidavits to "uncontested proceeding[s]"; *Estate of Bennett* (2008) 163 Cal.App.4th 1303 [the probate court commits reversible error in denying the request for an evidentiary hearing where there are factual conflicts in the parties' competing declarations].)

Accordingly, although Ronald tenders numerous objections to the admissibility of certain documentary evidence presented at the hearings, we cannot rule on these objections for the first time on appeal. Additionally, as a procedural matter, it is problematic for us to grant Ronald's requested relief, an order returning Leslie to the home she shared with Ronald, when the probate court will decide, or has decided, this very issue.

At oral argument, counsel indicated that a final order has since been issued. We take judicial notice of the superior court file and note that the trial court issued an order on April 13, 2012 that stated a secured perimeter residential care facility was the least restrictive placement for Leslie. This order is appealable (§ 1300, subd. (c)); however, at oral argument, Ronald's counsel stated he would not be appealing the order. Nonetheless, he urged that we address the merits of his arguments to benefit

future litigants. We decline to do so as what constitutes an emergency situation sufficient to place a conservatee in a secured perimeter residential care facility for the elderly is very fact specific.

DISPOSITION

The appeal is dismissed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.