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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Domestic Partnership of JOSEPH E.
RIBAL and LU TUAN NGUYEN.

LINDA ROGERS, as Conservator, etc.,

Respondent,

v.

LU TUAN NGUYEN,

Appellant.

G049594

(Super. Ct. No. 12D008053)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James L. Waltz and Glenn R. Salter, Judges. Motion to dismiss appeal and request for sanctions. Motion and request denied. Judgment affirmed.

Law Office of Thomas Avdeef and Thomas Avdeef for Appellant.

Law Offices of Cheryl L. Walsh and Cheryl L. Walsh for Respondent.

* * *

Laura Tiano and David Ribal, the children and court appointed guardians ad litem for respondent Joseph E. Ribal, petitioned to nullify their father's domestic partnership with appellant Lu Tuan Nguyen on the ground Ribal was incompetent when the declaration of domestic partnership was signed. After a trial, the court substituted Linda Rogers, respondent's conservator, as the real party in interest and entered a judgment annulling the domestic partnership. The court also denied Nguyen's motion for a new trial. Nguyen brings this appeal challenging the trial court's decision on several grounds. Rogers has filed a motion to dismiss the appeal and requested an award of sanctions. We deny the dismissal motion and sanctions request and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Tiano and David Ribal are Ribal's children. In 1983, after Ribal and his wife divorced, Nguyen moved into Ribal's home.

Tiano testified she began noticing Ribal display signs of dementia in 1999 and that his cognitive impairment became progressively worse over time. Nguyen testified the decline in Ribal's mental condition began in 2011. But on cross-examination, Nguyen admitted he became concerned about Ribal's mental condition as early as 2008. Ribal stopped writing checks in 2009.

On January 16, 2010, Ribal and Nguyen signed a declaration of domestic partnership and filed it with the Secretary of State. A few days later, Nguyen drafted a letter to the California State Teachers Retirement System for Ribal that requested information on how to add Nguyen as a beneficiary for Ribal's pension. Nguyen acknowledged "at that time it might be a little complicated for Dr. Ribal" to draft the letter. He also admitted completing other documents for Ribal during that time.

In April 2012, Tiano and David Ribal were appointed as Ribal's temporary conservators. They periodically renewed the temporary conservatorship through January 2013. (*Conservatorship of the Person and Estate of Joseph E. Ribal* (Super. Ct. Orange County, 2012, No. 30-2012-0557942).) In August, they filed the current proceeding, on Ribal's behalf, to annul the domestic partnership. Nguyen filed a response seeking to dissolve his domestic partnership with Ribal.

Tiano and David Ribal moved to bifurcate their petition from Nguyen's request. Nguyen opposed the request, in part arguing that as Ribal's temporary conservators, Tiano and David Ribal lacked standing to file the annulment petition. At the court's direction, Tiano and David Ribal obtained an order appointing them as Ribal's guardians ad litem. Meanwhile, in the conservatorship proceeding, Rogers was appointed as Ribal's permanent conservator.

A court trial was conducted on the petition to annul the domestic partnership. Just before trial, Nguyen again sought to dismiss the petition, arguing Ribal's children lacked standing to bring the action. He also asserted "Rogers is a necessary and indispensable party . . . and should be before the court in these proceedings." Rogers and her attorney appeared at trial. The court inquired if Rogers believed the annulment proceeding should proceed and whether she should assume prosecution of it. Her attorney stated "there is sufficient information for this matter to be set for the court's decision" and, while "it's possible" Rogers would proceed with the petition if the court vacated the guardians' appointment, she "would have to spend a great deal of additional time going through the entire file" to be brought "up to speed" and "make a determination." The court tentatively denied the motion, concluding the petition was brought by Ribal by and through Tiano and David Ribal as his guardians ad litem.

At trial, the guardians introduced the testimony of Tiano on her personal observations of her father's mental decline and that of two expert witnesses. The first

was Dr. Jody Rawles, a professor of psychiatry and the director of a psychiatric medical service which treats patients suffering from dementia and Alzheimer disease. The second expert was Dr. Bonnie Olsen, a clinical psychologist and professor working in the field of geriatric medicine with experience in assessing and diagnosing the mental capacity of patients. Based on their own examinations of Ribal, their reviews of medical records of the physicians and a neurologist who examined Ribal in March 2010, plus the statements of Ribal's family members, both experts expressed the opinion that Ribal lacked the capacity to understand or consent to a domestic partnership on January 16, 2010.

The guardians also called Dr. Jeff Barke, a physician who served on a school board with Ribal between 2006 and 2010. Based on his personal observations he felt Ribal's cognition was severely impaired by January 2010.

Nguyen testified and also called an accountant who had prepared Ribal's tax returns for many years, plus the notary who witnessed Ribal and Nguyen sign the declaration of domestic partnership and spoke to them before they executed it.

After closing argument, the court returned to the question of who was the real party in interest. It concluded the conservator should be the person representing Ribal's interests and substituted Rogers in place of Tiano and David Ribal. The court then held Ribal lacked the legal capacity to enter into the domestic partnership on January 16, 2010 and annulled the relationship.

DISCUSSION

1. The Real Party in Interest

Nguyen asserts two claims concerning the right to maintain this annulment action. First, he contends Tiano and David Ribal, as their father's temporary conservators, lacked standing to file the petition. According to Nguyen, this threshold

defect defeated the existence of a cause of action, and it could not be retroactively cured. Second, he argues the trial court erred in substituting Rogers as the real party in interest because there was no compliance with the requirements for allowing a party to intervene in an action. (Code Civ. Proc., § 387.)

Both arguments lack merit. It is doubtful Tiano's and David Ribal's status as their father's temporary conservators gave them the authority to file a petition to annul the domestic partnership on his behalf. Probate Code section 2252 provides that other than matters relating to medical treatment, the marshalling of assets and creating financial accounts, or any additional powers expressly granted by a court (Prob. Code, § 2252, subds. (b) & (c)), a "temporary conservator has only those powers and duties . . . that are necessary to provide for the temporary care, maintenance, and support of the ward or conservatee and that are necessary to conserve and protect the property of the ward or conservatee from loss or injury" (Prob. Code, § 2252, subd. (a)). The statute does not mention filing a legal action on the conservatee's behalf.

Nonetheless, other provisions of the law authorized their filing of this action on their father's behalf. Family Code section 2211, allows "a relative or conservator of the party of unsound mind, at any time before the death" to commence "[a] proceeding to obtain a judgment of nullity of marriage." (Fam. Code, § 2211, subd. (c).) While this case concerns a domestic partnership, under Family Code section 297.5, subdivision (a), "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 838 [this statute "effectuates the legislative intent by using the

broadest terms possible to grant to, and impose upon, registered domestic partners the same rights and responsibilities as spouses in specified areas of laws”].)

Family Code section 2211, standing alone, does not authorize the temporary conservators to file the petition to nullify the domestic partnership. In *McClure v. Donovan* (1949) 33 Cal.2d 717, the Supreme Court interpreted the predecessor to Family Code section 2211, explaining “an effective appearance [by a relative] on behalf of the spouse allegedly of ‘unsound mind’ must rest upon the same basis as any other proceeding involving the appearance of ‘an insane or incompetent person’ through a ‘general guardian’ or ‘guardian ad litem’” (*McClure v. Donovan, supra*, 33 Cal.2d at p. 726.) Here, the trial court recognized the defect in Tiano’s and David Ribal’s status and cured it by requiring them to obtain appointment as their father’s guardians ad litem. (Code Civ. Proc., § 373, subd. (c) [“a relative” may be appointed as guardian ad litem for “an . . . incompetent person”]; *Dunphy v. Dunphy* (1911) 161 Cal. 380, 389 [no error in appointing guardian ad litem for incompetent spouse in annulment proceeding where the “order was made on the application of a relative”].)

Nguyen claims Tiano’s and David Ribal’s appointment as Ribal’s guardians did not cure the defect because their lack of standing went to the existence of a cause of action and this defect could not be retroactively corrected. He is wrong. In *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, the Supreme Court held “it was within the discretionary power of the trial court to permit the amendment of the complaint which, in effect, substituted the proper plaintiff in the action” (*id.* at p. 19) so long as no “attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant” (*id.* at p. 20; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1005 [same]).

Tiano and David Ribal, representing Ribal as his guardians ad litem, sought the same relief as they did when filing the petition as his temporary conservators. It was

not necessary for the trial court to dismiss the action and require them to refile it in his name as his guardians ad litem.

Nguyen's complaint about Rogers' substitution as the real party in interest also lacks merit. His pretrial motion in limine argued she was an indispensable party and should be before the court. Rogers appeared at trial and her attorney, conceded there was sufficient evidence to justify a trial on Ribal's capacity to enter into the domestic partnership. Her attorney also questioned witnesses and presented closing argument.

At the time, Code of Civil Procedure section 372, subdivision (a) stated, "When . . . an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the . . . incompetent person, or person for whom a conservator has been appointed, notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate." This statute recognizes the annulment petition could be brought in his name either by Rogers as his conservator or by his children as his guardians ad litem.

Contrary to Nguyen's assertion, the trial court *substituted* Rogers in place of the guardians ad litem. Consequently, his reliance on a statute governing the intervention of a third party does not support a reversal of the judgment. As discussed above, substitution of a party is permissible so long as it does not result in stating an entirely different claim against the opponent. That did not occur in this case. Nguyen claims he suffered prejudice because both the guardians' attorney and Rogers' attorney argued in favor of annulling the domestic partnership, but does not explain how this fact

caused him harm. The trial court did not err in substituting Rogers in place of the guardians before rendering judgment annulling the domestic partnership.

2. *Disqualification of the Trial Judge*

When trial began, the judge disclosed to the parties that he had attended “a couple of” Dr. Olsen’s “lectures” and “a month ago, I had occasion to call Dr. Olsen” and speak with her “in reference” to a matter involving his own family. He expressed the opinion that this contact did not “disqualif[y]” him from presiding at trial, but asked for comment on the matter from the parties. Nguyen’s attorney responded that he would “leave it to the court.” Now, for the first time, Nguyen argues the trial judge should have disqualified himself because of his contact with Dr. Olsen.

We conclude Nguyen has waived this issue for appeal by failing to timely assert it. Code of Civil Procedure section 170.3, subdivision (c)(1) declares: “If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented *at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.* (Italics added.) (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 837 [“even if it is assumed [the trial judge should have been disqualified], . . . plaintiff waived the disqualification by failing to assert it in the manner required by the statute”]; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 384-385 [“once plaintiffs were provided with information sufficient to permit inquiry, they had a duty to exercise reasonable diligence to determine the facts and act upon them; in failing to exercise such diligence, they waived disqualifications that reasonably would have been disclosed”].)

In any event, Nguyen fails to cite to anything in the record supporting a finding that the trial judge was biased. The judge's contact with Dr. Olsen concerned a family matter and he had no knowledge of her involvement in the present case.

3. The Scope of the Expert Witnesses' Testimony

Next, Nguyen argues the trial court erred in allowing Ribal's expert witnesses to testify he lacked the capacity to enter into the domestic partnership on January 16, 2010, because their opinions were based on what he describes as inadmissible hearsay.

The argument is unavailing. Evidence Code section 801, subdivision (b) generally allows an expert to give an opinion "Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." And, the expert "may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (Evid. Code, § 802.) Thus, "Experts may rely upon hearsay in forming an opinion and may state the basis for the opinion." (*Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 933.) The "trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based," and "[o]ur review is for abuse of discretion." (*Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1197.)

Nguyen's argument attacks the entirety of the opinions expressed by both experts based solely on references to the cross-examination testimony of Dr. Olsen on two items of evidence she cited to support of her opinion. This is insufficient to establish the trial court abused its discretion in admitting the testimony of the expert witnesses.

4. Whether the Trial Court Applied the Correct Legal Standard

Nguyen's final argument is that the trial court applied the wrong legal standard in determining whether Ribal was competent to enter into the domestic partnership. The argument is convoluted and difficult to follow. He appears to claim the trial court barred him from presenting evidence about Ribal's mental state before and after January 16, 2010. This assertion is incorrect. Both parties questioned Nguyen at length concerning his relationship with Ribal before they entered into the domestic partnership and subsequent to it. The sole record reference given in support of this claim concerns whether Dr. Olsen knew Nguyen had added Ribal to his credit account.

Further, contrary to Nguyen, the experts did testify to deficits in Ribal's mental capacity as required by Probate Code section 811. To the extent Nguyen attempts to discredit their conclusions, it amounts to an attack on the sufficiency of the evidence to support the judgment. His failure to provide us with an adequate summary of the evidence presented at trial constitutes a waiver of this argument. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

5. The Motion to Dismiss the Appeal and Request for Sanctions

Rogers has filed a motion seeking to dismiss the appeal on the ground Nguyen's "Opening Brief is so lacking in substance that it constitutes an abandonment of his appeal." She also requests sanctions on the ground the appeal is frivolous.

We conclude the opening brief is not so lacking in substance as to support striking it and dismissing the appeal. Further, while we agree the appeal is without merit, it is not frivolous. Thus, Rogers's motion and request are denied.

DISPOSITION

Respondent's motion to dismiss the appeal and request for sanctions are denied. The judgment is affirmed. Respondent shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.