ORIGINAL

FILED
11/19/2024
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 24-0494

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 24-0494

OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioner,

v.

ORDER

HON. DAN WILSON, Montana Eleventh Judicial District Court Judge,

Respondent.

Office of the State Public Defender (OPD) has petitioned this Court for a writ of mandamus to direct Hon. Dan Wilson, Montana Eleventh Judicial District Court Judge to appoint OPD as counsel to represent T.B., who is subject to a guardianship and conservatorship proceeding before Judge Wilson in Flathead County Cause No. DG-24-048(D).

OPD has provided an affidavit in accordance with § 27-26-201, MCA. OPD further alleges, and provides exhibits in support of its allegations, as follows:

On May 23, 2024, Thomas Jon Belzer, via his counsel Emily von Jentzen, filed a Petition for Guardianship and Conservatorship of T.B. in Flathead County District Court. The matter was filed as Cause No. DG-24-35(C) and assigned to Hon. Heidi J. Ulbricht. Pursuant to §§ 47-1-104(4)(b)(vii), 72-5-315, and 72-5-408, MCA, the court appointed OPD to represent T.B. on May 29, 2024, because T.B. did not have counsel of her choosing. OPD assigned Dianne Rice as T.B.'s counsel in that case.

On June 6, 2024, T.B. filed an Answer to Petition and Jury Trial Demand.

On June 10, 2024, Belzer moved the court to remove court-appointed OPD counsel and appoint private counsel to represent T.B. He argued, among other things, the increased legal fees of a jury trial would deplete the funds available for T.B.'s care. He suggested

four attorneys, including Christina Larsen, the court could appoint in lieu of OPD. T.B., via Rice, opposed the motion to remove OPD counsel and appoint private counsel.

Judge Ulbricht held a hearing on the motion to remove OPD on June 27, 2024. Rice argued § 72-5-408(2), MCA, provides the court shall appoint OPD unless the person to be protected has counsel of their own choice. In this case, T.B. did not have prior counsel and did not make a determination on who she wanted as her attorney. Belzer moved to dismiss. Rice requested time to prepare for a hearing on the motion to dismiss. The court denied the request and dismissed the matter without prejudice.

We note that T.B., through OPD, did not appeal the district court's decision to dismiss the first petition without prejudice in cause DG-24-35(C). *See Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶ 18, 346 Mont. 414, 197 P.3d 913 (allowing appeals of dismissals without prejudice when special circumstances are present). As such, much of what OPD argues here is not properly before us.

On June 28, 2024, Brandon Burton filed a new Petition for Guardianship and Conservatorship, with von Jentzen as counsel. This case was designated as Cause No. DG-24-048(D) and assigned to Judge Wilson. The Petition alleged T.B. had indicated she would prefer Burton serve in the role of guardian and conservator. The Petition asked the District Court to appoint a private attorney to represent T.B., asserting "Christina Larsen, Esq., is a proper person to serve as attorney for [T.B.] and she has consented to act."

On July 2, 2024, Judge Wilson issued an Order Appointing Attorney, which provided:

> The Petition of Brandon Burton for the appointment of Guardian and Conservator of an incapacitated person having come before the Court, and it appearing that the incapacitated person is not represented by legal counsel of her own choice, Christina Larsen, Esq., is hereby appointed to represent [T.B.] in the proceedings before the Court with all powers and duties of a Guardian ad Litem.

On July 30, 2024, OPD moved for leave to intervene in DG-24-048(D) pursuant to M. R. Civ. P. 24(b)(2). OPD argued the court should allow intervention because T.B. had a right to have appointed OPD counsel to protect her rights. OPD argued that, because the

District Court had bestowed the powers and duties of a guardian ad litem (GAL) upon Larsen, T.B.'s right to due process was violated since she did not have "an actual attorney to represent her [desired] interests," but rather a GAL who was statutorily bound to represent T.B.'s best interests regardless of T.B.'s wishes. OPD argued T.B. was entitled to have an attorney appointed to represent her interests, at public expense.

On July 31, 2024, the District Court denied OPD's motion for leave to intervene in DG-24-048(D). It concluded OPD did not prove it should be allowed to intervene under the criteria set forth in M. R. Civ. P. 24(b)(2). The court further concluded Larsen was an "appropriate official" to represent T.B. under § 72-5-315(2), MCA, and issued an Order *Nunc Pro Tunc* appointing Larson as attorney

On August 20, 2024, OPD petitioned this Court for writ of mandamus. At our invitation, and pursuant to M. R. App. P. 14(7), we invited responses from Judge Wilson and from petitioner Brandon Burton. Both responded in opposition to OPD's petition.[1]

M. R. App. P. 14(2) provides that original proceedings commenced in this Court to obtain writs, including writs of mandate or mandamus, shall be commenced and conducted in the manner prescribed by the applicable statutes. Section 27-26-102, MCA, provides in relevant part that this Court may issue a writ of mandamus to compel any lower tribunal to perform an act that the law specially enjoins *as a duty* resulting from an office, and that the writ must be issued in all cases in which there is no plain, speedy, and adequate remedy in the ordinary course of law.

OPD argues this Court should compel the District Court to appoint it to represent T.B. OPD argues Judge Wilson's duty to appoint OPD as T.B.'s attorney is not discretionary but is statutorily mandated by § 72-5-408(2), MCA, in regard to the conservatorship proceeding.

[1] We further note that OPD subsequently filed a document captioned "Notice that Alleged Facts are in Dispute" and exhibits in support of the motion. OPD did not seek leave of Court to file what is, essentially, a reply brief. M. R. App. P. 14(7)(a) ("No reply memorandum shall be filed to the summary response, except on order of the supreme court."). We therefore did not consider this filing in disposing of this matter.

However, the real issue before us is whether § 72-5-408(2), MCA, grants OPD the right to intervene, essentially as a party, in a conservatorship proceeding if it disagrees with a district court decision appointing counsel. It does not.

Regarding intervention, M. R. Civ. P. 24(b)(2) provides that the court has *discretion* to permit a state governmental officer or agency (including OPD) to intervene under certain circumstances. A grant of intervention is not mandatory and is thus not appropriate for a writ of mandamus. Mandamus exists "to compel the performance of an act that the law specially enjoins *as a duty* . . . ." Section 27-26-102(1), MCA (emphasis added). For a court to grant a writ of mandate, the clear legal duty must involve a ministerial act. In determining whether an act is ministerial or discretionary we have said, "'[w]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.'" *Smith v. Cnty. of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834, (quoting *State v. Cooney*, 102 Mont. 521, 529, 59 P.2d 48, 53 (1936)).

The District Court has the *discretion* to allow OPD to intervene under the provisions of Rule 24(b)(2). As such, a district court decision to not allow intervention under Rule 24(b)(2) cannot be subject to a writ of mandate.

OPD raises further arguments as to whether the District Court erred in granting Larsen the powers and duties of a GAL, which would conflict with Larsen's duties as T.B.'s attorney since a GAL represents an individual's best interests while a person's attorney represents their client's desired interests. However, writs of mandate are limited to ministerial acts—duties to "be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Smith*, ¶ 28. Thus, we make no ruling on this issue.

IT IS THEREFORE ORDERED that the petition for writ of mandamus is DENIED and DISMISSED.

The Clerk is directed to immediately provide a copy of this Writ to all counsel of record, to the Flathead County Clerk of Court, and to the Hon. Dan Wilson, presiding Judge.

DATED this 19 day of ~~October~~ November, 2024.

Chief Justice

Justices

FILED

NOV 19 2024

Bowen Greenwood
Clerk of Supreme Court
State of Montana