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2018 IL App (5th) 160542-U

NO. 5-16-0542

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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<i>In re</i> GUARDIANSHIP OF ELSE WESENBERG,	)	Appeal from the
a Disabled Adult	)	Circuit Court of
	)	Williamson County.
(The Estate of Else Wesenberg, a Disabled Adult,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16-P-13
	)	
Harold Stein,	)	Honorable
	)	Jeffrey A. Goffinet,
Respondent-Appellant).	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Moore and Overstreet concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in appointing the disabled adult's daughter as the guardian of her person and estate, rather than the disabled adult's son.

¶ 2 BACKGROUND

¶ 3 Else Wesenberg (Else) filed a petition to appoint guardian of estate on February 24, 2016, requesting that Tom Malkovich (Malkovich) be appointed her guardian *ad litem* and Linda Hewlett (Linda), Else's daughter, be appointed the guardian of her estate after the entry of the report of the doctor and the guardian *ad litem*. The petition

indicated that Else was born on March 16, 1925, and it asserted that she was a disabled person within the meaning of the Probate Act of 1975 (Act) in that she was unable to manage her money and assets due to mental deterioration. 755 ILCS 5/11a-2 (West 2014). The petition asserted Else's memory was failing, she was not as sharp as she once was, and she could not manage her financial affairs as she once could.

¶ 4 The petition made the following claims. Else resided alone in a trailer located on property owned by Linda. Else did not have a guardian, was single, and had three children. One week prior to filing the petition, Else had a personal estate worth approximately \$75,000. At the time she filed the petition, Else was unsure how much money she had. On or about January 5, 2016, Harold Stein (Harold), Else's son, took Else to her bank and removed the following from Else's accounts: \$10,000 from Banterra account # xxxx554; \$43,905.79 from MidCountry account # xxx80; and \$5890.68 from MidCountry account # xxx66. According to the bank, Harold put much of that money in an account solely in his name. On February 18, 2016, Else spoke with her attorney, Jay Schafer, and informed him she did not want Harold to have her money and she did not want to designate Harold her power of attorney. At least four people, including attorney Schafer, had asked Harold to return Else's money, but he had failed to do so. Else believed that on February 23, 2016, a man from attorney Schafer's office had come to her house to have her sign papers. The man was not from attorney Schafer's office, and Else did not know what she had signed. The petition stated Else's daughter, Linda, was the proposed guardian of her estate, as Else executed a power of attorney 18 years earlier naming Linda her power of attorney and standby guardian in case she ever needed one.

Else's petition stated, "It is necessary and convenient that guardian of my estate be appointed for the reason that I can't go on like this. Losing my money and signing things when I don't know what they are isn't in my best interest."

¶ 5 Else's motion to appoint guardian *ad litem* was filed on February 24, 2016. The trial court entered an order granting Else's request to appoint Malkovich her guardian *ad litem*. The trial court also entered an order appointing Linda temporary guardian of Else's estate. Linda accepted the appointment and signed the oath of guardian. Letters of office were then filed which appointed Linda temporary guardian of Else's estate through and until April 5, 2016, the date a hearing on the matter was set.

¶ 6 Linda filed a sworn petition for issuance of citation against Harold on March 1, 2016, alleging Harold concealed, converted, or embezzled or had in his possession or control certain funds and financial records belonging to Else's estate. The court entered a citation commanding Harold's appearance in court on March 2, 2016. Harold's attorney, James Hopkins, entered an appearance on his behalf on March 16, 2016.

¶ 7 Following a hearing on March 22, 2016, the court entered an order on March 29, 2016. The order indicated that Harold produced the following testimony at the hearing. On January 5, 2016, Harold took Else to MidCountry Bank where Else endorsed and delivered to Harold certificates of deposit in the amounts of \$43,905.79 and \$5890.68. Harold and Else also closed an account belonging to Else in the amount of \$18,788.46. Thereafter, Harold took Else to South Porte Bank. Else subsequently wrote a check from her checking account in the amount of \$10,000. Harold testified he immediately

deposited \$50,000 of those funds into his personal checking account. Some of the remaining funds were later deposited into a joint account he opened with Else at South Porte Bank. Harold was unsure how much money remained in the joint account. At the hearing, Harold had a cashier's check drawn on South Porte Bank in the amount of \$28,104.47, dated March 7, 2016. Upon an oral motion at the hearing, the court ordered Harold to turn the cashier's check over to Else's estate. The court's March 29, 2016, order directed Harold to immediately cease and desist from any transfer, expenditure, waste, or dissipation of the funds at issue.

¶ 8 The report of guardian *ad litem* was filed by Malkovich on April 1, 2016. Malkovich's report stated that he met with Else at her home on March 23, 2016. During their meeting, Malkovich reported that Else was pleasant and appeared to have a healthy appearance. Else communicated in a general manner but was not able to provide specific information. Else informed Malkovich that she could not remember as well as she used to. Else did not know the day of the week, month, or year but was able to tell time on a clock and stated that she eats when she is hungry. Else told Malkovich she does not take medicine; however, Linda later informed Malkovich that Else requires medication. Else told Malkovich she would consent to any of her children helping her, but it would most likely be Linda or Harold since her other child, Fred, lives out of the area. Else informed Malkovich that Linda had more information regarding her health, but she shopped with Harold. Else informed Malkovich that Linda was a nurse but no longer worked, and Harold did not work. Else was unsure how Harold made his money and referred to him as a "wheeler dealer."

¶ 9 Malkovich's report further stated that he met with Linda after meeting with Else. Linda informed him that she was concerned about her mother's safety when her mother was with Harold. Linda told Malkovich she believed Harold was mentally ill and thought Harold may have medicated Else on at least one or two occasions. Linda told Malkovich she believed Harold administered some form of marijuana medication to Else which caused her to be sleepy and unresponsive. Based on his observations, Malkovich believed Else to be a pleasant person who appeared physically sound. However, Malkovich opined that Else lacked the mental capabilities to manage her personal and business affairs, such as paying utility bills, insurance, and other related expenses. Malkovich stated, "Obviously, [Else] has no recollection of her children ever borrowing, stealing or misappropriating any of her money. Instead, [Else] simply believes that she has a checking account at Banterra Bank with no additional monies." Malkovich recommended that Else have a guardian appointed to help manage and assist her with her personal and business affairs.

¶ 10 Three documents were filed on behalf of Else's estate on April 5, 2016: (1) a motion to compel Harold to turn over the materials removed from Else's possession immediately and provide copies of all banking records within seven days; (2) a petition for accounting and turnover requesting that the court order Harold to deliver Else's funds and property, tax the costs of the proceeding against Harold, and enter judgment in the amount of \$50,480.46 plus fees and costs; and (3) a petition for order of protection seeking an order allowing Harold to only engage in supervised visitation with Else and

prohibiting the exploitation of Else, including the taking or misappropriation of her assets. The court set a hearing on the motion to compel for April 12, 2016.

¶ 11 At the hearing on April 12, 2016, Harold's attorney, James Hopkins, filed a motion to substitute Jonathan Kibler as Harold's counsel. The court entered an order granting the motion for substitution of attorneys. On the same date, Harold, by and through attorney Kibler, filed a certificate of compliance with agreed order to produce; a motion to continue the April 12, 2016, hearing on the petition for guardianship; and a motion to unseal 11A-9 report. On April 12, 2016, the court entered an order rescheduling the hearing to June 3, 2016. On April 18, 2016, the court ordered that Linda remain the temporary guardian of Else's estate through and until June 3, 2016.

¶ 12 Linda filed a petition for appointment of guardian of the person for a disabled adult on April 29, 2016, seeking an order adjudicating Else disabled within the meaning of the Act and appointing Linda as guardian of the person of Else. The petition asserted that a plenary guardianship of Else's person was required because Else was unable to make healthcare decisions for herself or manage her affairs, as has been indicated by her physician, Dr. Keller. The petition noted a physician's report prepared by Dr. Keller had been filed under seal. Attached to the petition was an affidavit of Linda that asserted Else had walked away twice in the last week. Specifically, the affidavit alleged (1) Else walked across a field where she stopped at the first house she came upon; the residents of that house brought her home; and (2) Else walked to an unknown location where she hitchhiked to Johnston City, Illinois; a second vehicle picked Else up, took her to Dairy Queen, and called the police; the police then called Linda, and Linda picked up Else to

take her home. The affidavit asserted it was necessary for the welfare and protection of Else that a temporary guardian of her person be appointed. On April 29, 2016, a notice of rights of respondent was filed along with a notice of hearing set for June 3, 2016. On May 13, 2016, a summons for appointment of guardian for disabled person was filed, which reflected on its reverse side personal service of the summons on Else.

¶ 13 Attorney Kibler filed a motion for leave to withdraw as Harold's counsel on May 5, 2016, to which Harold consented. On June 3, 2016, Harold filed a *pro se* second motion to unseal 11A-9 report and a *pro se* motion to continue hearing on the petitions for guardianship and guardian of the person for a disabled adult. Attorney Schafer, Malkovich, and Harold were present at the June 3, 2016, hearing. At the hearing, attorney Schafer alleged Harold had made certain threats of violence toward many of the people in court, the judge, and Linda. Harold denied these accusations. The court noted Harold had tendered a motion to continue the hearing that day, and continued the hearing to allow an investigation of attorney Schafer's allegations. The court continued the temporary guardianship of Else until June 28, 2016, when a plenary hearing was set to (1) determine whether it was appropriate to put a final guardianship in place and (2) determine whom should be appointed the guardian of Else's estate.

¶ 14 A hearing on several pending matters (the motion to unseal the medical report, the petition for guardian of the estate, the petition for guardian of the person, the petition for an accounting and turnover of the funds, and the motion for an order of protection) was held on June 28, 2016. At the hearing, the court granted Harold's motion to unseal. Thereafter, the court recessed to allow Harold an opportunity to review the medical

records. The court also took judicial notice of Dr. Keller's medical report, which concluded Else has a mild to moderate diagnosis of Alzheimer dementia with difficulty making decisions; has been treated for depression, anxiety, and dementia; scored poorly on dementia testing; and has been advised by the doctor that a guardian be appointed due to difficulty with memory and decision making. The following relevant testimony was adduced at the hearing.

¶ 15 Harold testified he was Else's son and was 64 years old. Harold testified he had never been diagnosed with any medical conditions but had seen a psychiatrist in relation to a prior cannabis conviction. Harold testified he was self-employed, doing odd jobs selling scrap metal. Harold testified he also worked as a heavy equipment operator. Harold stated he had not filed a tax return in either of the prior two years. Harold testified that in November 2015 he took Else to the Senior Citizen Center in Marion to prepare an updated and current power of attorney. Harold testified he was unaware of any prior power of attorney or will executed by Else, including a will which provided that Linda would be appointed guardian of Else's person or estate if necessary. Harold discovered there was a preexisting power of attorney in early 2016.

¶ 16 Harold testified that on January 5, 2016, he took Else to MidCountry Bank where he acquired control of Else's certificates of deposit in the amounts of \$43,905.79 and \$5890.68. Harold testified Else gifted him these funds. Harold further testified Else withdrew funds from a savings account belonging to her in the amount of \$18,788.46, and he helped place the funds in a new checking account he arranged for Else at South Porte Bank. Thereafter, Harold testified Else deposited a \$10,000 check into a joint

checking account belonging to Harold and Else. Harold testified that Else first decided she wanted to give him money about four or five years earlier when Else placed his and his brother's names as beneficiaries of ownership of the certificates of deposit. Harold testified \$50,000 of that money was in his possession. Harold testified the money was not in a bank or institution and he had not spent any of the money, but would not specifically disclose where the money was. Harold would not disclose where the money was "[b]ecause it hasn't been shown that [Else] did not gift that money to me."

¶ 17 Harold testified he and Else went to redeem the certificates of deposit on January 5, 2016, because the certificates of deposit matured on January 3, 2016. Harold testified Else had stated for many years that she would not reinvest the certificates of deposit when they matured because the interest rate was so low and she wanted to see her money used before she died. Harold did not call his brother Fred before redeeming the certificates of deposit. Fred was one of the beneficiaries of the certificates of deposit, payable upon death. Harold testified he put \$50,000 into a joint account belonging to him and Else. Harold did not make any deposits to that account since the initial deposit, and Harold was not aware of any withdrawals made by him since the initial deposit. Harold again testified the \$50,000 was not in a financial institution, and he assumed the money was making zero interest.

¶ 18 Harold testified that he should be appointed Else's guardian. Harold testified he had ordered a lot of vitamins and minerals off the Internet and had administered them to Else but had never administered any type of medication. Harold testified he never had presented to Else any type of medication that included cannabis. Harold then testified

regarding a supervised visitation he had with Else at her residence on Mother's Day. Harold testified he had been drinking beer that afternoon but did not recall making any threats to anyone. Harold testified he was aware Else had wandered from her residence a couple times. Harold believed Else was searching for him. Harold testified he believed Else did not need a guardian but "would be well off with a current, updated power of attorney." Harold testified he should be appointed the guardian of Else if it were necessary to appoint one. Harold acknowledged that Dr. Keller's report diagnosed Else with Alzheimer's dementia.

¶ 19 Jason Stein (Jason), Linda's son and Else's grandson, testified at the hearing. Jason stated he lived next to Linda and Else. Jason testified he participated in the supervised visitation between Harold and Else by allowing them to use his house as a place to meet. Jason recalled a specific visitation occurrence on Mother's Day in which Harold made certain threats. Jason did not believe Harold meant the threats and attributed the threats to Harold's intoxication at the time. Jason testified he saw Else on a daily basis and described her mental health as "different all the time," "up and down," and "[s]ometimes good, sometimes bad."

¶ 20 Robert Stalker (Stalker), an employee in Shawnee Alliance's protective service program, testified at the hearing. Stalker testified he was assigned to Else's case after he received a report alleging financial exploitation. Stalker made two unannounced visits to Else's home, where he spoke with Else, Harold, and Linda. Based on those conversations, Stalker opined it was in Else's best interest to have a "financial guardian, estate guardian." Stalker testified he was aware of Else's recent wanderings and opined Else should be

monitored. Stalker opined that Else benefits living next to Linda and Jason. Based on his conversations with Else, Stalker believed she had a great deal of affection for Harold and agreed it was in Else's best interest to maintain some method of visitation with Harold. Stalker testified that Else referred to Harold as "her rock." After his second visit, Stalker felt it was a good idea for Harold to have a psychological evaluation if he continued to be in Else's life. Stalker's opinion regarding the psychological evaluation was based on the incident where Harold showed up to a supervised visit with Else with alcohol on his breath. Stalker recommended that Harold have visitation with Else but that it be supervised. Referring to Else, Stalker testified "we're dealing with somebody who absolutely, in my opinion and her doctor, has dementia."

¶ 21 Linda testified at the hearing. Linda testified her role with Else included helping her with her bills and fixing things around her house. Linda testified her house was next to Else's house; as Linda described, "we're right on top of each other." Linda testified she became aware that a portion of Else's funds had been removed from Else's accounts after Else came over to her house "crying and telling me that Harold had closed one of her accounts and she wanted her money back, that she didn't feel right about it after she thought about it." Thereafter, Linda called Else's banks and confirmed Else's money had been removed from her accounts.

¶ 22 Linda testified Harold's son, Gerald, told her that Harold had discussed marijuana as a good treatment for Else's dementia. Linda recalled an incident in which Else appeared "totally out of it" after coming home from Harold's house. Linda eventually took Else to Dr. Keller, where a urine drug screen conducted on Else tested positive for

THC. Linda agreed it was in Else's best interest to have a relationship with Harold and testified she was willing to continue to help their relationship as Else's guardian. Regarding the alleged threats Harold made, Linda testified Harold "threatened to cut [Linda's] throat, the judge's throat, and [attorney Schafer's] throat." Linda described Harold and Else's relationship as close. Linda testified she had been taking pain medication for 10 years and has used cannabis as pain medication in the past. Linda did not think Else's positive drug screen could have been the result of her own cannabis use. Linda testified her role in Else's care had increased since the money incident; Linda cooked meals for Else and gave her medicine daily. Linda testified she was still willing to serve as Else's guardian, which Linda described as a promise she made to Else 20 years earlier.

¶ 23 Sabine Stein (Sabine), Harold's daughter, testified at the hearing. Sabine testified she had been engaged in the supervised visitation between Harold and Else. Sabine recalled a specific visitation which took place at a restaurant in Marion. Sabine testified Else was very emotional waiting for Harold to arrive because she had not seen Harold in a long time and missed him. Sabine testified Else "was very happy to see [Harold], like I said, emotional, crying, hugging [Harold], really didn't want to let [Harold] go." Sabine testified Harold and Else's conversations were stressful and concerned court matters. Sabine opined that Harold and Else loved each other very much and Else did not care about the money. Sabine further testified Else made comments about her regretting moving out to the farm and Else wished she lived at the Lake of Egypt. Sabine opined Else needed "daily inspection" and a personal guardian to watch over her.

¶ 24 Harold called Else to the stand. Else testified she was 90 years old and lived "[o]ut in the sticks." Else testified Linda took her to attorney Schafer's office in February where she signed something but did not remember what it was for. After Harold asked whether he had stolen any of Else's money, Else replied, "I hope not." Else stated she did not know of a specific instance in which Harold stole money from her. When asked who she preferred be appointed her guardian, Else testified she would take Harold first and stated Harold was a good cook, which she missed. Else testified she had a close bond with Harold. Else testified that she gifted the certificates of deposit to Harold, which occurred prior to her doctor's report.

¶ 25 The trial judge then examined Else. Else testified the year was 2004 and the month was April. When asked about their ages, Else testified Harold was in his fifties and Linda was in her forties. When asked whether she felt like she needed somebody to help her with banking and bills, Else testified she "[had] that with Linda." Else then testified, "The only help I need is cleaning my house. The rest of it, I don't need nobody." Else did not remember Malkovich, her guardian *ad litem*, visiting her in the spring to ask her questions.

¶ 26 Harold called attorney Schafer to the stand, who testified that he had been an attorney for over 21 years and had worked on "[p]robably more than" 100 guardianship cases. In February 2016, Else and Linda brought attorney Schafer a power of attorney that had been prepared by the Southern Illinois University Legal Clinic and wanted to know whether the original power of attorney that was previously executed was still valid. There was concern about certain documents that had been removed from the house, and

Linda wanted to know what could be done about getting Else's money back. Attorney Schafer questioned Else at length about whether the money at issue was a gift. Attorney Schafer testified Else responded as follows:

"She couldn't tell me how much money she had. She couldn't tell me how much money she had in the last year, where it was, what accounts it was in. I have a standardized test that I give people with regard to telling time, making change, telling me the president, the year, many things similar to the judge. She, unfortunately, did poorly on every aspect of that, but she was entirely conversational, as she was here today."

¶ 27 After his lengthy conversation with Else, attorney Schafer opined Else needed a financial guardian. Else signed a written agreement to have attorney Schafer represent her. Attorney Schafer was aware Harold had been attempting to obtain a new power of attorney for Else. Attorney Schafer testified Else's power of attorney and will both showed Else's guardian was Linda. Else had been a client of attorney Schafer's office for more than 20 years, and Else never asked attorney Schafer to look over any old power of attorney or any new power of attorney. Attorney Schafer testified Else voluntarily came into his office. Attorney Schafer personally believed Harold removed money from Else's account without Else's understanding of why or where the money was going. The court stopped Harold's examination of attorney Schafer after Harold introduced questions regarding whether Else gifted the money. As the trial judge noted, this proceeding "is about whether or not I should grant a plenary guardian. It's not about whether or not there was donative intent."

¶ 28 Finally, Harold called Malkovich to the stand. Malkovich testified that he had been appointed the guardian *ad litem* of Else and had served as a guardian *ad litem* prior to this case on many occasions. When asked who paid his bill, Malkovich testified he forwarded his bill to attorney Schafer's office. Again, the trial judge interrupted Harold's line of questioning and stated the issue before the court was the plenary guardianship. In response, Harold stated he was trying to show Else never requested a guardian *ad litem* and/or any petition for guardianship.

¶ 29 At the close of all evidence, the court concluded Else qualified as a disabled person under the Act and appointed Linda the plenary guardian of Else subject to an oath and bond being resubmitted. 755 ILCS 5/11a-2 (West 2014). The court included a provision that Linda must make quarterly reports to the court. The court found Else demonstrated diminished capacity at the hearing. Specifically, the court observed Else stated the date was April 2004, which it clearly was not. The court concluded Else was not able to fully manage her person or estate due to mental deterioration.

¶ 30 In reaching its decision, the court noted the sole reason for denying Harold the right to be Else's guardian was that Harold had a conflict pending a resolution of whether Else gifted Harold the money at issue. The court noted it would not make a finding regarding donative intent, as that was not the issue before the court. The court stated its decision would change and it would make a difference if Harold returned the money.

¶ 31 A docket entry was made on July 8, 2016, which stated, in relevant part:

"The Court finds based on the testimony that the evidence supports the entry of a plenary guardianship due to [Else's] misstatements due to the month and year, in consideration of the medical report submitted. The Court found [Else] to be otherwise alert and conversational, but the Court is concerned about her overall cognitive function.

\* \* \*

The more troubling issue is who should be appointed. The ward was clear and persuasive that her preference was to have Harold Stein be her guardian. The Court finds [Harold] is qualified under the statute, and specifically finds his prior felony conviction should not disqualify him under the statute. The Court notes Linda Hewlett's argument as to drug use and drinking, but equally notes the testimony as to her drug use and DUI in the past 12 months. Neither is the perfect candidate. However, due to the allegations that certain funds delivered to [Harold] were not a gift, the court believes it would be a conflict for [Harold] to be the guardian of her estate at this time. That issue remains to be resolved; otherwise, [Harold] likely would be named guardian."

In light of the foregoing, the court appointed Linda the plenary guardian of Else's person and estate, which the court noted was due to the pending gift. The court further ordered Harold shall have, at a minimum, the opportunity to see Else every Monday and that visitation shall be unsupervised.

¶ 32 The court entered an order on July 20, 2016, appointing Linda the plenary guardian of the person of Else. The court entered an order two days later appointing

Linda the plenary guardian of the estate of Else. In its orders, the court noted that after reviewing the verified petition and physician's report and being otherwise fully advised in the premises, it concluded: (1) Else lacked sufficient understanding or capacity to make or communicate responsible decisions concerning the care of her person and was particularly vulnerable to manipulation by those who might attempt to take advantage of or abuse her; (2) Else was unable to manage her estate or financial affairs; and (3) a limited guardianship would not provide sufficient protection of Else's estate.

¶ 33 Harold filed a motion to reconsider on August 8, 2016, asserting that on or about August 5, 2016, he turned over to his attorneys a cashier's check in the amount of \$49,796.47, representing the disputed funds that originated from the two certificates of deposit held by Else. Harold asserted this check was deposited into a client trust account in good faith and would remain there until further order of the court. According to Harold, Else professed a strong and clear preference that he be named her guardian and there was no longer a conflict preventing him from being appointed either plenary guardian or limited guardian of Else. Harold requested that he be appointed limited guardian or, alternatively, plenary guardian of the person and estate of Else. A hearing on all pending matters was set for August 23, 2016.

¶ 34 Linda filed a motion to continue and an objection to Harold's motion to reconsider on August 23, 2016. Linda also filed a motion for turnover on August 23, 2016, seeking an order that attorney Glenn Tetzlaff, Harold's third attorney in this matter, turn over to Else's estate the funds received from Harold. Attorney Tetzlaff filed a motion to withdraw as Harold's counsel on October 4, 2016. A hearing on all pending matters was

set for October 19, 2016. At that hearing, the court granted the motion to withdraw, and the hearing on Harold's motion to reconsider was rescheduled for November 15, 2016.

¶ 35 Malkovich filed a supplemental report of guardian *ad litem* on October 24, 2016, to supplement his October 23, 2016, report. In the report, Malkovich stated "[i]t is obvious that [Else] wants to continue to have a relationship with both Harold and Linda." Malkovich recommended that Else continue to see both Harold and Linda on a regular basis but noted his opinion would change if he became aware of any medication, drugs, or vitamins provided by Harold which could adversely affect Else.

¶ 36 On November 2, 2016, Linda filed a memorandum of law in support of her objection to Harold's motion to reconsider; a second motion for turnover, for protective order, and for fees and costs; and a motion to compel—in the alternative. Harold entered an appearance on his own behalf on November 7, 2016, and filed a *pro se* response to Linda's objection to the motion to reconsider on November 14, 2016.

¶ 37 Following a hearing on November 15, 2016, the court entered an order denying Harold's motion to reconsider after concluding Harold made no showing that the money was returned to Else prior to the court's decision. As the court noted, the money was not delivered to Harold's counsel until after the hearing. The court further noted the conflict had not been resolved, as the money had not been returned unconditionally to Else's estate. Rather, the motion indicated the money was subject to further court order.

¶ 38 Harold filed a timely notice of appeal. Specifically, Harold appeals from the trial court's orders appointing Linda the guardian of Else's person and estate and the order denying his motion to reconsider.

¶ 39 ANALYSIS

¶ 40 On appeal, Harold argues the trial court's appointment of Linda as the plenary guardian of the person and estate of Else was an abuse of discretion given the court's findings and the statutory limitations of guardianships. Based on the court's findings, Harold argues: (1) no guardian should have been appointed, or (2) Harold should have been appointed guardian of Else's person, and the issue of Else's estate should have been reserved until a determination of whether Else gifted certain funds to Harold.

¶ 41 Initially, we note Harold raises on appeal numerous issues in support of his argument that were not raised before the trial court. These arguments allege the guardian *ad litem* report and the physician's report were statutorily deficient; attorney Schafer and Malkovich failed to advocate on behalf of Else's wishes; Else was not personally served with the notice of rights as required by statute; and Malkovich, as guardian *ad litem*, failed to elicit Else's position regarding guardianship as required by statute. The record shows these arguments were not raised at the guardianship hearing, nor were they addressed in Harold's motion to reconsider or in Harold's response to Linda's objection to the motion to reconsider. It is well settled that issues not raised before the trial court are deemed waived and may not be raised for the first time on appeal. *Clayton v. Bradford National Bank*, 250 Ill. App. 3d 775, 784 (1993). Accordingly, we need not address these

arguments. Nevertheless, when considering the crux of this appeal, which again is Harold's contention that the trial court abused its discretion in appointing Linda the plenary guardian of the person and estate of Else, we find there was ample evidence to support the trial court's decision to appoint Linda, rather than Harold, the plenary guardian of Else's person and estate.

¶ 42 In relevant part, section 11a-2 of the Act defines a disabled person as "a person 18 years or older who \*\*\* because of mental deterioration or physical incapacity is not fully able to manage his person or estate." 755 ILCS 5/11a-2 (West 2014). Regarding the adjudication of a disability and the power to appoint a guardian, section 11a-3(a) of the Act provides:

"Upon the filing of a petition by a reputable person or by the alleged disabled person himself or on its own motion, the court may adjudge a person to be a disabled person, but only if it has been demonstrated by clear and convincing evidence that the person is a disabled person as defined in Section 11a-2. If the court adjudges a person to be a disabled person, the court may appoint (1) a guardian of his person, if it has been demonstrated by clear and convincing evidence that because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person, or (2) a guardian of his estate, if it has been demonstrated by clear and convincing evidence that because of his disability he is unable to manage his estate or financial affairs, or (3) a guardian of his person and of his estate." 755 ILCS 5/11a-3(a) (West 2014).

¶ 43 A guardianship should be utilized only as is necessary to promote the well-being of the disabled person; to protect the disabled person from neglect, exploitation, or abuse; and to encourage development of the disabled person's self-reliance and independence. 755 ILCS 5/11a-3(b) (West 2014); *In re Estate of McHenry*, 2016 IL App (3d) 140913, ¶ 140. Moreover, a guardianship should be ordered only to the extent necessitated by the individual's actual mental, physical, and adaptive limitations. 755 ILCS 5/11a-3(b) (West 2014); *McHenry*, 2016 IL App (3d) 140913, ¶ 140.

¶ 44 The selection of a guardian is within the discretion of the trial court and will not be overturned absent an abuse of discretion. 755 ILCS 5/11a-12(d) (West 2014); *In re Estate of Doyle*, 362 Ill. App. 3d 293, 303 (2005). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). To be qualified to serve, the proposed guardian must: (1) be capable of providing an active and suitable program of guardianship for the disabled person; (2) be at least 18 years old; (3) be a resident of the United States; (4) be of sound mind; and (5) not be a convicted felon, unless the court finds appointment of the convicted felon to be in the best interest of the disabled person. 755 ILCS 5/11a-5(a) (West 2014); *McHenry*, 2016 IL App (3d) 140913, ¶ 141.

¶ 45 When selecting a guardian, the court must consider the qualifications of the proposed guardian and give due consideration to the preference of the disabled person. 755 ILCS 5/11a-12(d) (West 2014); *McHenry*, 2016 IL App (3d) 140913, ¶ 141. However, the disabled person's personal preference as to who should be his or her

guardian is outweighed by the best interest of the disabled person. *Doyle*, 362 Ill. App. 3d at 303. "[T]he paramount concern in the selection of the guardian is the best interest and well-being of the disabled person." 755 ILCS 5/11a-12(d) (West 2014). The following factors may be considered in making a determination of guardian: (1) the recommendations of persons with kinship or familial ties; (2) the relationship between the disabled person and the party being considered for appointment; (3) the disabled person's conduct prior to being adjudicated disabled which manifests trust or confidence in the proposed guardian; (4) the proposed guardian's prior actions which show concern for the well-being of the disabled person; (5) the ability of the proposed guardian to manage the incompetent's estate; and (6) the extent to which the proposed guardian is committed to discharging responsibilities which might conflict with his or her duties as a guardian. *In re Estate of Johnson*, 303 Ill. App. 3d 696, 705 (1999).

¶ 46 In this case, after thoroughly reviewing the record, we find there was more than sufficient evidence to support the trial court's decision to appoint Linda, rather than Harold, the guardian of Else's person and estate. The record is clear that 18 years prior to these proceedings, well before Else was diagnosed with mild to moderate Alzheimer dementia, Else executed a power of attorney designating Linda her power of attorney and standby guardian. We find no evidence that Else was of unsound mind when she made this designation. The record is further clear that in the petition to appoint guardian of estate signed and filed by Else on February 24, 2016, which gave rise to the instant proceedings, Else requested Linda to be the guardian of her estate. Moreover, the court heard testimony which shows Linda was committed to Else's well-being. Linda lives next

door to Else, sees Else on a daily basis, and assists Else in paying her bills. Linda also helps Else around the house, cooks for Else, and administers Else's daily medication.

¶ 47 Regarding Harold, the court was presented with testimony which caused concern. Specifically, the court noted it was concerned about the money predicament which remained to be resolved. As previously discussed, the record shows Harold took Else to a bank where he removed certain funds from Else's accounts. Harold subsequently placed those funds in his personal account. There was testimony that Harold later placed certain funds in a joint account belonging to Else and Harold. At the time the court ruled on its appointment of Else's guardian, Harold had not returned any of the funds to Else's estate. Due to allegations that these funds were not gifted by Else to Harold, the court found it would be a conflict for Harold to be appointed the guardian of Else's person and estate.

¶ 48 In light of the foregoing, we cannot say the trial court abused its discretion in appointing Linda the plenary guardian of Else's person and estate, rather than Harold. A guardianship is designed to protect a disabled person from "neglect, exploitation, or abuse." 755 ILCS 5/11a-3(b) (West 2014). Here, the trial court was presented with evidence that Harold allegedly financially exploited Else. As the court noted in its orders, Else "is particularly vulnerable to manipulation by those who might attempt to take advantage of or abuse her." Due to those allegations, the court appointed Linda the guardian of Else's person and estate. Although Harold maintains that Else gifted him the funds at issue, that matter remains to be resolved. Considering the allegations of financial exploitation, the trial court was well within the bounds of reasonable discretion in

refusing to appoint Harold as Else's guardian and instead appointing Linda as guardian over Else's person and estate.

¶ 49 The trial court in this case was presented with the difficult task of determining which one of Else's children should serve as Else's guardian. The court's ruling shows the trial court knew the applicable law, weighed the appropriate factors, and weighed the evidence presented in arriving at a decision that served Else's best interest. See *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006) ("A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn."). We further note the court's decision provides minimal change to Else's life and living arrangement, which we find serves Else's best interest. Else resides in the same dwelling in which she resided prior to Linda being appointed her guardian. Linda and Else's grandson, Jason, live next door to Else, and both see Else on a daily basis. Moreover, Linda helps Else around the house and helps pay her bills. Importantly, the court's decision also allows visitation between Else and Harold, which both parties agree to be in Else's best interest. In short, we cannot say the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. Accordingly, the trial court's disposition was not an abuse of discretion.

¶ 50 Much of Harold's argument focuses on Else's testimony at the hearing which expressed her desire to have Harold appointed her guardian if a guardianship was deemed necessary. Harold references the court's finding in its July 8, 2016, docket entry, which stated: "The ward was clear and persuasive that her preference was to have Harold Stein

be her guardian. The Court finds [Harold] is qualified under the statute, and specifically finds his prior felony conviction should not disqualify him under the statute." Based on this finding, Harold contends the court abused its discretion in appointing Linda the plenary guardian of Else's person and estate because "the discretion that should have been applied was to fashion a relief that protects the disabled adult while giving effect to her wishes." We disagree.

¶ 51 Although we acknowledge Else asserted that she preferred to have Harold as her guardian, the trial court is not bound by the disabled person's preference and must only consider it. *In re Schmidt*, 298 Ill. App. 3d 682, 689 (1998). As set forth above, "[o]f paramount concern in the selection of a guardian \*\*\* is the best interest and well-being of the disabled person, regardless of that person's choice." *Johnson*, 303 Ill. App. 3d at 705. Here, aside from the allegations of financial exploitation, which were sufficient to support the trial court's decision to appoint Linda, the court was also presented with evidence that raised concern about Else's overall cognitive function, including the medical report which concluded Else has mild to moderate Alzheimer's dementia. The record shows Else's condition became progressively worse over time, as she began wandering away from home and hitchhiking. At the June 28, 2016, hearing, Else did not know how much money she had. Also at the hearing, Else testified Harold was in his fifties, although he was 64 years old. Perhaps most telling of Else's deteriorating condition is that she believed the month and year to be April 2004. The court also heard testimony from Sabine, Harold's daughter, that during one of their visitations, Harold talked to Else "about what she should say if she was to get to go on stand."

¶ 52 In sum, although Else asserted at the hearing that she preferred Harold as her guardian, the court was presented with considerable evidence lending support to its decision not to appoint Harold guardian. Again, the court's primary concern in appointing Harold was the allegation that Harold financially exploited Else and had not returned the money to Else's estate. Aside from that allegation, which remains to be resolved, the court heard testimony that caused concern regarding Else's overall cognitive function. We reiterate that the paramount concern in the selection of a guardian is the best interest and well-being of the disabled person, regardless of that person's choice. For these reasons, we reject Harold's argument.

¶ 53 Harold further argues, as he did in his motion to reconsider, the fact that he tendered "all of the monies gifted to him" to the estate or to counsel to be held pending further order of the court, upon a determination of the gifting issue, should have negated any of the court's concerns regarding his appointment, particularly as guardian of the person of Else. Regarding his service as guardian of the estate, Harold argues it would have been appropriate to fashion a protection until a determination of the gifting issue had concluded. After careful consideration, we find Harold's argument is misplaced.

¶ 54 In this case, the hearing on guardianship was held on June 28, 2016. The court made a docket entry on July 8, 2016, and entered orders appointing Linda guardian on July 20 and July 22, 2016. The record shows Harold did not turn the funds at issue over to his attorney until after the court entered its orders appointing Linda guardian. In consideration of the foregoing, we find Harold's argument to be somewhat confusing, as he was in possession of the funds at the time the court entered its orders appointing Linda

guardian. As the trial court noted in its order denying Harold's motion to reconsider, in order to present newly discovered evidence in a motion to reconsider, a party must show the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable. *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1141 (2004). Here, Harold has failed to show the money was returned prior to the court's decision. Accordingly, we reject Harold's argument.

¶ 55 Finally, Harold argues that attorney Schafer's dual representation of Else and Linda created the appearance of divided loyalty and direction which resulted in Else's wishes not being advocated. Harold contends attorney Schafer could not represent Else's interests if they conflicted with Linda's interests. Although Linda argues Harold has waived this issue on appeal, appellate review of an attorney's conflict of interest is not waived by the failure to raise the issue in a posttrial motion. *People v. Davilla*, 236 Ill. App. 3d 367, 386 (1992). Accordingly, we will address this issue.

¶ 56 After careful consideration, we again find Harold's argument is misplaced. As previously discussed, the record shows Else executed a power of attorney 18 years ago naming Linda her power of attorney and standby guardian. Regarding the instant proceedings, attorney Schafer entered into a contract with Else. In Else's petition seeking Linda to be appointed the guardian of her estate which was signed by Else on February 24, 2016, Else indicated that she was represented by attorney Schafer. The first document filed with attorney Schafer's signature is Else's motion to appoint guardian *ad litem* filed on February 24, 2016. The motion to compel filed on April 5, 2016, indicates attorney Schafer is an attorney for the estate of Else. At no time throughout the proceedings did

attorney Schafer take action on behalf of any person other than Else, Else's estate, or the guardian of Else's estate. The record shows attorney Schafer accomplished what Else asked of him, which was to have Linda appointed the guardian of her estate. Thereafter, after Else's condition presumably worsened as she started to wander from home and to hitchhike, Linda, who was already serving as the guardian of Else's estate, filed a petition to be appointed guardian of Else's person. Because Else's estate, rather than Linda, is the actual client of attorney Schafer, there is no conflict. For these reasons, we reject Harold's argument.

¶ 57

#### CONCLUSION

¶ 58 For the aforementioned reasons, the judgment of the circuit court of Williamson County is hereby affirmed.

¶ 59 Affirmed.