[Cite as *In re Guardianship of Reed*, 2010-Ohio-345.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
Guardianship of Mary Reed,	:	No. 09AP-720 (Prob. No. 526410)
(Virginia Crump,	:	
Appellant).	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on February 2, 2010

Michael D. Juhola, for appellee.

James H. Banks, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Probate Division.

SADLER, J.

{¶1} Appellant, Virginia Crump ("appellant"), appeals from the June 26, 2009 judgment of the Franklin County Court of Common Pleas, Probate Division ("probate court"), in which that court denied appellant's motion to remove appellee, Michael D. Juhola ("appellee"), as the guardian of the person of Mary Reed ("ward"), and to appoint appellant as successor guardian.

{¶2} The following factual and procedural history is taken from the record. At the time of the trial court's judgment the ward was 95 years old. She suffers from Alzheimer's dementia and has resided at the Isabelle Ridgway Care Center ("the Center") in Columbus, Ohio since February 2007. Appellant resides in Marion, Ohio and is the ward's daughter.

{¶3} On December 28, 2007, appellee filed an application to be appointed guardian of the ward's person. When he filed the application, appellee was required, pursuant to R.C. 2111.04(A)(2)(b), to provide notice of the application to "the next of kin of the person for whom appointment is sought *who are known to reside in this state*." (Emphasis added.) Appellee did not notify appellant of his application.

{¶4} On February 1, 2008, the probate court appointed appellee to be the guardian of the ward's person. On September 15, 2008, appellant filed a motion in the probate court to relocate the ward to a facility other than the Center. Following a hearing and the issuance of a magistrate's decision recommending denial, the probate court denied the motion by entry journalized on November 26, 2008.

{¶5} On February 2, 2009, appellant filed a motion seeking to set aside the appointment of appellee as guardian and to appoint appellant as the successor guardian. Following a March 18, 2009 hearing, a magistrate of the probate court found that appellee did not know of appellant as the ward's next of kin residing in this state at the time appellee filed his application for guardianship, and thus had met the applicable notice requirement. The magistrate further found that appellee has consistently attended care conferences regarding the ward since his appointment. The magistrate also found that on five occasions during visits with her mother in 2008, appellant demonstrated

inappropriate and disruptive behaviors. Finally, the magistrate found that, in addition to Alzheimer's dementia, the ward suffers from psychosis, depression, congestive heart failure, hypertension, blood clots, and a risk of falls, and it remains in her best interest to continue residing at the Center. Based upon these factual findings, the magistrate concluded that there was no cause to remove appellee as guardian, appellant would not be a more appropriate person to act as her mother's guardian, and it would be in the ward's best interest for appellee to remain her guardian.

{¶6} Appellant filed objections to the magistrate's decision, which the probate court overruled by judgment entry journalized June 26, 2009. Appellant timely appealed and advances the following assignment of error for our review:

> THE TRIAL COURT'S APPOINTMENT OF GUARDIAN OF AN ALLEGED INCOMPETENT MADE WITHOUT NOTICE TO THE WARD'S NEXT OF KIN AND THE COURT'S RETENTION OF SAID GUARDIAN AND REFUSAL TO PERMIT THE WARD'S NEXT OF KIN TO ACT AS GUARDIAN OF HER MOTHER IS CONTRARY TO LAW AND EQUITY SUCH THAT THE JUDGMENT BELOW MUST BE REVERSED.

{¶7} In the case of *In re Guardianship of Clark*, 10th Dist. No. 09AP-96, 2009-Ohio-3486, we explained:

> The axiomatic principle enveloping guardianship matters is that the Probate Court is the superior guardian of the person and property of an incompetent, while the guardian herself is an officer or agent of court, subject always to the court's control, direction and supervision. R.C. 2109.24 provides the specific statutory authorization for removal of a guardian and provides that the probate court may remove a fiduciary for, among other reasons, neglect of duty, incompetence or because the interest of the trust or estate demands it. In matters relating to guardianships, the probate court is required to act in the best interest of the [ward].

(Citations omitted.) Id. at ¶29.

{¶8} A probate court's decision regarding the removal of a guardian will not be reversed absent an abuse of discretion. Id. at ¶30. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *In re Lauder*, 150 Ohio App.3d 277, 2003-Ohio-406, ¶44.

{¶9} In support of her assignment of error, appellant argues that the probate court should have removed appellee as guardian because appellee's original appointment was contrary to law. She argues that the original appointment was contrary to law because appellee failed to comply with the notice requirement of R.C. 2111.04(A)(2)(b) by failing to notify appellant of the application.[1]

{¶10} Appellee testified that he did not notify appellant of his guardianship application because he did not know of her existence until April 19, 2008, some four months after he filed the application. Loyce Scott, social services director at the Center, testified that she gave appellee the next-of-kin information that the Center had at the time appellee sought appointment as guardian. According to Scott, this information did not include appellant's name because the Center was not aware of appellant's existence and relationship to the ward until mid-2008, and appellant's sister did not provide appellant's name as a relative of the ward when the ward was admitted. Though appellant testified on direct examination that appellee should have known of her existence because, when

[1] She also makes reference to appellant's failure to notify appellant's sister, Lucy Little. However, the record reveals that appellee did list Lucy Little as the ward's next of kin, and the probate court sent Ms. Little a notice of the hearing on appellee's application for guardianship. Nonetheless, appellant never raised below the argument that Ms. Little did not receive notice, so we would not consider the argument even if we determined that appellant had standing to assert it.

appellee filed the application, appellant *was* listed as a next of kin in the Center's records, on cross-examination she volunteered that her first visit with the ward at the Center may not have been until mid-2008, after appellee had been appointed guardian. Lucy Little testified that she told the Center about appellant at some unspecified time before the ward was admitted.

{¶11} The trial court made a factual finding that appellee complied with the statutory notice requirement because appellee did not know of appellant's existence as a next of kin residing in this state, nor should he have known. The evidence before the court was conflicting as to whether *the Center* knew of appellant's existence at the time appellee filed his application for guardianship. But it was within the trial court's province to judge the credibility of the witnesses and reconcile conflicting testimony. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶82; *In re Guardianship of Florkey*, 4th Dist. No. 07CA22, 2008-Ohio-4994, ¶16.

{¶12} More importantly, however, the evidence was undisputed that *appellee* did not know of appellant's existence until four months after he filed his application for guardianship, despite having checked with the Center, the source most likely, in the circumstances of this case, to possess the needed information. This evidence supports the probate court's finding that appellee did not know of appellant as a next of kin of the ward residing in Ohio. Accordingly, it was well within the trial court's discretion to conclude that appellee had complied with the notice requirement found in R.C. 2111.04(A)(2)(b).

{¶13} Next, appellant argues that the trial court abused its discretion when it determined that it is in the ward's best interest to retain appellee as guardian and that

appellant would not be a more appropriate guardian for her mother. She directs our attention to the trial court's findings that she had attended care conferences regarding her mother in 2008, and she visits her mother for two to three days at a time several times per month. She also points to the trial court's finding that the only times that appellee met with the ward were when he attended care conferences, which are held at the Center on a quarterly basis.

{¶14} Appellant testified that she wishes to be her mother's guardian because she feels she can serve her mother's best interest and she wants to help take care of her mother. As noted above, however, she volunteered that the first time she visited her mother at the Center may have been in mid-2008, over one year after the ward was first admitted to the Center. Moreover, the magistrate found that appellant had been the subject of five separate incident reports involving combative, hostile or inappropriate behavior. These findings are supported by the testimony of Loyce Scott, who testified about the incidents, including two in which the sheriff's office was summoned. Scott testified that appellant acknowledged and apologized for her behavior.

{¶15} Appellant testified as to problems with her mother's care, such as appellant's report that the ward's room contained roaches and that the ward had been raped. However, Center staff testified that neither claim has been substantiated; the Center's nurse practitioner, Tamara Roy, testified that she had never seen roaches in the ward's room (though to allay appellant's concerns, the Center did exterminate each time appellant made such claims), and the incident in which appellant believed her mother had been raped was a trip to a hospital emergency room for what turned out to be a vaginal

yeast infection. There is no evidence in the record of any sexual contact or assault against the ward.

{¶16} The magistrate found that appellee attends all quarterly care conferences regarding the ward and that appellee is discharging his fiduciary duties well. These findings are supported by the testimony of Loyce Scott, who testified that the ward is doing very well at the Center, appellee has attended every care conference to which he has been invited, and each time he attends a care conference he meets with the ward, who responds well to him. As noted earlier, the trial court was within its province to assess the credibility of the witnesses, and the evidence upon which it chose to rely – that the ward is well cared for at the Center and that appellee has discharged his duties to the ward well, including visiting her and attending scheduled care conferences – amply supports the court's conclusions that appellee has performed his fiduciary duties well and that appellant is not a more suitable guardian.

{¶17} Appellant states that the trial court apparently gave credence to appellee's belief that appellant wished to become guardian so that she could relocate her mother, and favored retaining appellee as guardian because he did not intend to move the ward. She argues this was an abuse of discretion because she testified at the hearing that she had no present plans to move her mother and that, in any case, the evidence indicated her mother could adjust to a move if it occurred.

{¶18} The record contains a letter, dated September 4, 2008, to appellee from Dr. George Barnett, Medical Director at the Center. The letter is attached as an exhibit to the 2008 magistrate's decision recommending denial of appellant's motion to relocate her

mother. In the letter, Dr. Barnett relates that the ward suffers from "advanced Alzheimer's Dementia." Dr. Barnett went on to opine:

> Ms. Reed is not able to effectively comprehend what others are saying or doing to her when rendering her care. She often fights and resists them initially. However, because the staff at Isabelle Ridgway Care Center is familiar with her, they know how to respond to her in a way that is familiar to her. Unfortunately, this too, will become more of a challenge as her dementia progresses. The only thing Ms. Reed is familiar with now and gives her some comfort is her (private) room; an environment she has been familiar with since February, 2007 and the staff.
>
> As you know, people with a progressive dementia such as Ms. Reed's do NOT adapt well when their environment or routine is disrupted or changed. The few things they were used to are gone, and everything becomes ["]foreign["] to them. This can lead to an acceleration of the person's cognitive and functional decline.
>
> The value of having staff that *know* Ms. Reed and can recognize subtle changes in her condition or behaviors is vital in keeping Ms. Reed safe and as healthy as her condition(s) allow. I recommend Ms. Reed remain in her current care facility for all the reasons noted above.

(Emphasis sic.)

{¶19} Appellant testified that she disagrees with Dr. Barnett's opinion that her mother should not be relocated. However, she did not offer any contrary medical evidence or expert opinion. Appellant testified that her plans to relocate her mother to Marion, Ohio, were "on hold" at the time of the hearing. (Tr. 7.) She testified that if she were appointed guardian she would not move her mother initially, but would keep the ward at the Center for "a short time maybe." (Tr. 14.) Ultimately, she stated that she was "undecided right now." (Tr. 14.) But appellant filed her motion to remove appellee and to

have her appointed as successor guardian shortly after the probate court denied her motion to have her mother relocated.

{¶20} Tamara Roy testified that the ward has trouble adapting to change and it would be in her best interest to remain at the Center because it is familiar and the staff know her and have a rapport with her. On cross-examination, Ms. Roy acknowledged that the ward adjusted to the change when she moved into the Center, despite her diagnosed Alzheimer's dementia; however, she stated that the difficulty with change becomes worse as the disease progresses. Appellee testified that he planned to keep the ward at the Center because he believes, based upon Dr. Barnett's opinion, and that of Ms. Roy, that it is in the ward's best interest to remain where she is.

{¶21} The evidence demonstrated that appellant disagrees with a medical opinion regarding her mother's best interest without any medical basis for such a disagreement, and has expressed a desire to eventually relocate her mother in contravention of that medical advice. It is also undisputed that two professionals opined that the ward should not be relocated and that appellee plans to follow that advice. The trial court did not abuse its discretion in taking all of this evidence into account in deciding whether to remove appellee as guardian and appoint appellant.

{¶22} Finally, appellant alludes to the presence of a conflict of interest for appellee, stating that "he was not a dis-interested [sic] person at the time of his appointment, but had a longstanding business relationship with Isabelle Ridgeway Nursing Home (where the ward was residing) and was guardian for seven or more patients at one time in the past." (Brief of appellant, 3-4.) This argument, too, fails to persuade us that the trial court abused its discretion.

{¶23} Whether or not the Center has referred other residents to appellee, the trial court was required to evaluate appellee's performance in *this case* based upon the evidence adduced, including taking into account any evidence of potential bias. This it did, pursuant to the dictates of its position as the ward's superior guardian. At the hearing before the magistrate, appellee never advocated for his retention as guardian; instead he gave factual testimony and relied on the court to decide whether it believed his continued service was in the ward's best interest. The court decided that appellee's retention would be in the ward's best interest and, for all of the reasons discussed above, that decision was not an abuse of discretion.

{¶24} Accordingly, appellant's single assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas, Probate Division, is affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

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