[Cite as *In re Kovacic*, 2011-Ohio-5862.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF	:	**PER CURIAM OPINION**
KATHERINE KOVACIC.	:	**CASE NO. 2011-L-002**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 07 GU 0196.

Judgment: Affirmed.

Nancy A. Kovacic, pro se, 34682 Iris Lane, Eastlake, OH 44095 (Appellant).

James E. Kovac, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113-1701 (For Appellee, Ronald C. Swencki).

PER CURIAM.

{¶1} Appellant, Nancy A. Kovacic, pro se, appeals the judgment of the Lake County Court of Common Pleas, Probate Division, granting the application of appellee, Ronald C. Swencki, for attorney fees for services rendered to appellant as guardian of her minor child, Katherine Kovacic. Appellant argues the court's judgment is against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} On October 30, 2007, appellant filed an application to be appointed as guardian of Katherine, then age 14. She also filed an application to be appointed as guardian of her minor son, Daniel Kovacic, then age 16. The purpose of the

guardianships was to settle a personal injury claim filed on behalf of the children in federal court. The trial court subsequently appointed appellant as the children's guardian. On December 26, 2007, appellant filed an application to partially settle the children's claims against two of the defendants. The trial court granted that application. The lawsuit against the other defendants remained pending. Although the guardianship of the children proceeded as two separate cases, appellant only appealed the trial court's judgment entered in Katherine's case. Thus, our analysis is confined to that case.

{¶3} On January 25, 2008, Attorney Richard Jacob entered his appearance as counsel for appellant as Katherine's guardian.

{¶4} After the trial court granted appellant's application to partially settle the children's claims, appellant and Mr. Jacob were not vigilant in filing the required documentation. In March and April 2008, the trial court issued past due notices, notifying them they were late in filing the distribution reports and inventories regarding the settlement proceeds.

{¶5} After the distribution reports were eventually filed in both guardianships, on December 4, 2008, the court entered an order finding appellant's distribution reports were not correct in that they did not match the court's judgment entries approving settlement of the minors' claims. The court found the suit expenses and net settlement amounts did not match the judgment entries. Further, the court found the distribution reports did not contain the required vouchers. The court ordered appellant and Attorney Jacob to file corrected reports of distribution supported by vouchers.

{¶6} On January 20, 2009, appellant filed a second partial application to settle the children's claims against another defendant in the federal action. The court also granted this application. However, once again, appellant and her attorney, Mr. Jacob, failed to file proper reports of distribution with respect to these settlement proceeds. The court sent them multiple past due notices with respect to these reports. Due to their failure to file the reports, the court entered orders on March 11, 2009; July 29, 2009; and October 6, 2009, requiring them to file proper reports of distribution, but they repeatedly failed to do so. Appellant's failure to comply with the court's orders resulted in the court entering an order to show cause why she should not be held in contempt of court.

{¶7} Meanwhile, in or about June 2009, Attorney Jacob became seriously ill. On July 29, 2009, the trial court entered an order finding that appellant had failed to file reports of distribution with respect to the second partial settlement and also finding that she was overdue in paying outstanding court costs. However, due to the illness of Attorney Jacob, the court gave appellant until August 24, 2009, to file proper reports of distribution with respect to the second partial settlement and to pay court costs in full. Shortly after the court entered its July 29, 2009 order, Attorney Jacob passed away.

{¶8} Attorney Jacob's brother, John Jacob, told appellant that appellee, an experienced probate attorney and a close friend of the Jacob family, had agreed to take over Attorney Jacob's cases. John recommended that she meet with him. Appellee met with appellant on August 24, 2009, and they discussed the terms of appellee's representation of appellant in the two pending guardianship cases.

{¶9} Following this meeting, appellee mailed a retention letter to appellant on August 25, 2009. In his letter appellee stated that he would need a retainer of $500 for each guardianship case and that he would charge appellant an hourly rate of $150/hour. Shortly thereafter, on September 5, 2009, appellant sent appellee a check for $500.

{¶10} Appellee proceeded to provide legal services to appellant for about eight months. Then, on May 11, 2010, he filed an application for payment of attorney fees for services rendered on behalf of Katherine's guardianship. Attached to his application was an itemized statement of services rendered between August 24, 2009, and March 11, 2010. The statement indicated the balance due was $2,772.50. On May 10, 2010, appellee served a copy of the application and itemized statement on appellant.

{¶11} On August 18, 2010, the magistrate held a hearing on appellee's application. Appellee testified that, prior to entering his appearance as appellant's attorney, the guardianships were in disarray. He said the court had issued numerous citations to appellant and her attorneys due to their failure to file reports of distribution and other required information. He said the cases had a history of problems, including many pro se motions filed by appellant, which, he said, he was finally able to resolve.

{¶12} Appellee testified that he has been licensed to practice law in Ohio since 1969, and that he has continuously practiced law since his admission to the bar. He is a sole practitioner, but occasionally associates with other attorneys on certain cases.

{¶13} Appellee testified that he prepared and mailed his retention letter to appellant on August 25, 2009, which confirmed the terms of his representation they had discussed on August 24, 2009. In his letter appellee stated that he would need a retainer of $500 for each child and that, due to appellant's close relationship with the

Jacob family, he would charge her an hourly rate of $150/hour, which, he said, is less than his standard hourly rate. He also stated appellant would be responsible for any case expenses and court costs. Appellee asked appellant to sign the bottom of the letter, indicating her acceptance of the terms outlined therein, and to return it to him.

{¶14} Appellee testified that he has not been able to find the original letter with appellant's signature so he does not know whether she signed and returned it to him. However, he said that appellant sent him a retainer check, dated September 5, 2009, for $500, from which he concluded that appellant retained him to represent her according to the terms of his retention letter. He accepted appellant's payment as a retainer for both guardianship cases. In the course of his representation of appellant, he met with her many times to discuss the progress of the guardianships. At no time during any of these meetings did appellant ever question the rate he quoted to her.

{¶15} Appellee testified that the quoted rate, i.e., $150/hour, is the minimum reasonable and customary rate that attorneys in the area would charge for such services.

{¶16} Appellee testified that, upon completing his itemized statement in Katherine's guardianship, he mailed it to her. He said, however, that when his secretary typed the statement, by mistake, she billed appellant at $130/hour, instead of $150, as they had agreed. He also said that, although the statement itemized 25.75 hours of services he performed, his secretary inadvertently did not bill appellant for 2.5 hours of those services. Consequently, instead of billing appellant for the 25.75 hours of work he performed, his secretary charged appellant for 23.25 hours. These errors resulted in a bill of $3,022.50, although, if appellant had been correctly billed, the bill would have

been $3,862.50. Appellee did not ask that the bill be corrected. After deducting one-half of the retainer, i.e., $250, from the balance owed for work performed for Katherine's guardianship, he billed appellant $2,772.50 for work performed on that guardianship, which was based on the hourly rate of $130. Presumably, the other $250 from appellant's retainer was applied to the amount owed for his work performed on behalf of Daniel. After appellee sent this bill to appellant, she never contacted him to discuss it.

{¶17} In contrast, while appellant conceded she retained appellee, she testified he agreed to represent her in both guardianship cases for a flat fee of $500. She said that because he accepted her check, that was evidence he was fully paid. She testified she never received the August 25, 2009 retention letter; however, she did not dispute that the letter was sent to her at her residence address or that, shortly thereafter, she sent appellee $500. She offered no documentary evidence that appellee agreed to perform all work required for $500. She did not indicate on the check or in a letter that her $500 check was meant to serve as payment in full. If appellee had agreed to a flat fee of $250 for his work on behalf of Katherine, as appellant argues, in light of the fact that appellee provided 25.75 hours of services to appellant on Katherine's guardianship, that would mean he agreed to provide legal services at an hourly rate of $9.70/hour, which is about two dollars above the federal minimum wage.

{¶18} Appellee testified the case presented a myriad of problems he had to address. He said he had difficulty filing an accounting because appellant had moved funds from one bank account to another and then back again without the required prior approval of the court. Due to these unauthorized transfers, he was required to meet with several bank employees in efforts to properly account for the settlement funds.

Appellee testified that his experience in probate helped him to resolve these complicated issues and to prepare the second partial account, which he filed on March 1, 2010.

{¶19} In an attempt to rebut appellee's testimony, appellant testified that every problem appellee described in handling her case "was a ruse to cause this to be confusing." She said, "This was simple, as simple as could be. It was done. All he had to do was type it up."

{¶20} Following the hearing, on September 3, 2010, the magistrate entered her decision, finding appellant's testimony that she believed her $500 check was payment in full for both guardianship cases was unrealistic. The magistrate found that, because there were two partial settlements approved, appellee had problems preparing the verifications of receipt and deposit. She also found that appellee had problems in obtaining documentation from appellant's prior counsel and in communicating with the various persons involved. Consequently, the magistrate found appellee encountered increased difficulty in preparing the second partial account and an application for authority to expend funds.

{¶21} On review of appellee's itemized fee bill, the magistrate found the bill to be "fair, proper and reasonable and in the best interest of the ward." She thus recommended the court approve appellee's request for attorney fees in the amount of $2,250.

{¶22} Appellant filed an objection to the magistrate's decision, arguing, without any reference to the record, that appellee "purposely and with malice protract[ed] this case, as favor to another [unnamed] entity that has caused us harm." Appellant argued

the magistrate was not "involved in the hiring or firing of [appellee], but now wants to interpret his intentions." Appellant also stated in her objection, "This is treading on the face of extreme bias and extreme neglect." Appellant's objection was a scathing, personal attack on appellee, accusing him of criminal and unethical conduct without any evidence in support. She alleged that appellee's motion for attorney fees was a "despicable attempt to extort money from [Katherine]." Appellant also alleged that she had proved the trial court was guilty of "judicial bias *** beyond a reasonable doubt" because the court had denied her request for a continuance.

{¶23} The trial court held an evidentiary hearing on November 23, 2010, on appellant's objection. Following the hearing, the court entered judgment on December 1, 2010, denying appellant's objection and adopting the magistrate's decision. Appellant appeals the trial court's judgment, asserting two assignments of error. For her first assigned error, appellant alleges:

{¶24} "The trial court erred in finding for attorney fees against the manifest weight of the evidence rule."

{¶25} As a preliminary matter, we note that, while appellant filed a transcript of the magistrate's hearing on appellee's application for attorney fees, appellant did not file a transcript of the subsequent hearing held by the trial court on her objection. In her appellate brief, appellant concedes that the trial court held a hearing on her objection at which she and appellee testified. However, without a transcript of this final hearing before the trial court, we have no idea what testimony or other evidence was presented at that hearing.

{¶26} An appellate court in determining the existence of error is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, paragraph three of the syllabus. An appellant is required to provide a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. This is so because an appellant has the burden of demonstrating error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163. This principle is embodied in App.R. 9(B), which states in relevant part:

{¶27} "*** If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion."

{¶28} "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp*, supra; accord *Warren v. Clay*, 11th Dist. No. 2003-T-0134, 2004-Ohio-4386, at ¶7.

{¶29} Because the trial court held an evidentiary hearing on appellant's objection and she challenges the manifest weight of the evidence, a transcript of the trial court's hearing was necessary for a review of this assigned error. Because appellant failed to file a transcript of that hearing, we must presume regularity of the proceedings below and affirm. *Knapp*, supra. For this reason alone, her argument lacks merit. In any event, appellant's arguments in support of this assigned error are not well taken.

{¶30} "'*** [I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. ***

{¶31} "'If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the *** judgment, most favorable to sustaining the *** judgment.'" *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, fn. 3, quoting 5 Ohio Jurisprudence 3d (1978) 191-192, Appellate Review, Section 603.

{¶32} "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. The interplay between the presumption of correctness and the ability of an appellate court to reverse a trial court decision based on the manifest weight of the evidence was succinctly set forth in the holding of this court in *C.E. Morris Co. v. Foley Construction Co*. (1978), 54 Ohio St.2d 279:

{¶33} "'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.'" *Seasons Coal Co., Inc*., supra.

{¶34} Further, an oral contract for legal services is enforceable where it is supported by competent, credible evidence. *Gilbert v. Larsuel* (Nov. 14, 1994), 5th Dist. No. 1994CA00112, 1994 Ohio App. LEXIS 5271, *3, citing *Cannell v. Rhodes* (1986), 31 Ohio App.3d 183. Since appellee did not produce the original letter signed by

appellant, the parties' representation contract was oral. Appellant concedes in her brief that she entered a "verbal agreement" with appellee for him to provide professional services. Thus, the only issue was the terms of their agreement.

{¶35} First, appellant argues the magistrate prevented her from challenging the hourly rate in appellee's retention letter and his itemized statement. She does not, however, argue how the magistrate prevented her from making such challenge. Nor does she provide any citations to the parts of the record on which she relies. The argument therefore lacks merit. App.R. 16(A)(7).

{¶36} In any event, appellant testified regarding her understanding of the terms of the parties' fee agreement. She testified that the parties agreed that appellee would perform all work in both guardianships for a flat fee of $500. Moreover, although appellant had an opportunity to challenge appellee's itemized statement during her testimony before the magistrate, she did not attempt to challenge any entry in that bill. For these additional reasons, her argument lacks merit.

{¶37} Next, appellant argues the docket for case No. 07 GU 195 (apparently Daniel's guardianship case) shows that appellee did not submit a bill for that case and that "the charges in the bill [for Katherine's guardianship] are from times on which both cases were open." Appellant thus suggests that appellee's bill for Katherine's guardianship included services provided for Daniel. However, because appellant failed to file the docket in Daniel's guardianship in this case, this argument lacks merit. *Schick*, supra. In any event, we note that appellee's itemized statement shows he divided the $500 retainer paid by appellant in half, with $250 being attributed to Katherine's case, and presumably $250 being attributed to Daniel's case. Further,

appellant does not dispute that, according to appellee's itemized statement, whenever he provided the same services for both children at the same time, he billed only one-half of that time to Katherine's case. Consequently, the record is devoid of any evidence that the bill for Katherine's guardianship included any services performed for Daniel.

{¶38} Next, contrary to appellant's argument, the only testimony the magistrate excluded as hearsay was her testimony that certain bank employees allegedly told her that appellee was not an expert in probate law. However, because such testimony was hearsay, it was properly excluded.

{¶39} By adopting the magistrate's decision, the trial court obviously found appellee's testimony regarding the contract terms, as evidenced in his retention letter, to be more credible than appellant's. As the trier of fact, this is the province of the trial court. We therefore hold the trial court's judgment was supported by competent, credible evidence and was not contrary to the manifest weight of the evidence.

{¶40} Appellant's first assignment of error is overruled.

{¶41} For her second assignment of error, appellant contends:

{¶42} "The trial court erred by failing to allow appellant to present all her witnesses."

{¶43} Appellant argues her due process rights were violated because the magistrate did not allow her to present witnesses on her behalf. The argument fails for several reasons. First, because appellant failed to file a transcript of the hearing before the trial court, we must presume regularity of the proceedings and, specifically, that appellant had a full and fair opportunity to call any witnesses she chose at that hearing.

{¶44} Second, appellant does not reference the record in support of her argument. The argument therefore violates App.R. 16(A)(7), and lacks merit for this additional reason.

{¶45} Third, based on our review of the transcript of the magistrate's hearing, the magistrate never denied appellant the opportunity to present any witness to testify on her behalf. To the contrary, when the magistrate asked appellant if she had any witnesses to present, appellant said she did not because appellee did not provide discovery to her. Appellant fails to draw our attention to any authority for the proposition that such reason is an excuse for a party's failure to subpoena or call a witness to testify. In any event, it was undisputed that appellant never propounded any discovery requests to appellee. When asked to explain what discovery appellant was talking about, she testified, "I don't even want to get into it."

{¶46} Appellant's second assignment of error is overruled.

{¶47} For the reasons stated in the opinion of this court, the assignments of error lack merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Probate Division, is affirmed.

TIMOTHY P. CANNON, P.J., CYNTHIA WESTCOTT RICE, J., MARY JANE TRAPP, J., concur.