[Cite as *In re Guardianship of Melhorn*, 2009-Ohio-2424.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

In Re:	:	
	:	Appellate Case No. 22764
THE GUARDIANSHIP OF	:	
CARL THOMAS MELHORN	:	Trial Court Case No. 07-GRD-392
	:	
	:	(Probate Appeal from
	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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BROGAN, J.

{¶1} This case is before the court on the appeal of Rosita Barbee-Melhorn from a probate court order appointing Lawrence J. Greger as guardian of the person and estate of Carl Thomas Melhorn. Barbee-Melhorn also appeals from an order granting

visitation to Linda Vaughn, Donna Banks, and Jeannie Messiana, who are Melhorn's adult daughters.[1]

{¶2} In support of the appeal, Rosita contends that the trial court committed various procedural errors, including failure to meet statutory notice requirements for appointing a guardian; failure to conduct an evidentiary hearing on the guardianship application; failure to consider the investigator's report prior to the appointment; and improper reliance on an outdated statement of expert evaluation. Rosita additionally contends that the trial court erred in failing to find a less restrictive alternative to appointing a guardian, and in finding that Rosita had agreed to establishment of a guardianship when the record indicates otherwise. Finally, Rosita contends that the trial court lacked authority under Ohio law to issue orders of visitation.

{¶3} We conclude that the trial court erred in failing to hold a hearing on the guardianship pursuant to R.C. 2111.02(C). Because this conclusion requires reversal of both judgments being appealed, the remaining assignments of error are moot and will not be addressed. Accordingly, the judgments of the trial court appointing a guardian and granting visitation rights are Reversed, and this cause is Remanded for further proceedings.

I

{¶4} Carl Melhorn is a seventy-seven year old man who apparently suffers from some degree of dementia, although the precise degree of impairment and its effects are unclear. Carl has been married to his wife, Rosita, for twelve years. Carl also has three

[1]For purposes of convenience, we will refer to the parties as Rosita, Carl, Linda, Donna, and Jeannie.

adult daughters, Linda, Donna, and Jeannie, who all live in Oklahoma. In addition, Carl has a grandson, Ronnie Kent Murphee, who lives in Toledo, Ohio.

{¶5} In December 2007, Murphee filed an application in the Montgomery County Probate Court, requesting to be appointed the guardian of Carl's person and estate. Murphee also asked for appointment of a doctor to conduct an expert evaluation of Carl. Shortly after the application was filed, an attorney filed a notice of appearance on Carl's behalf. Likewise, Rosita's counsel entered an appearance on Rosita's behalf.

{¶6} A hearing on Murphee's application was set for mid-February 2008, and Carl was notified of the hearing date. Because Murphee did not submit an expert evaluation with his application, the court ordered Murphee to submit an evaluation within fifteen days of receipt of the court's order, which was filed in late January 2008. No evaluation was ever filed by Murphee.

{¶7} In early February 2008, Robert Cannarozzi filed an investigator's report on the proposed guardianship. The report indicated that Cannarozzi had met with Carl at Carl's residence. According to the report, Carl demonstrated good understanding of the concept of guardianship and was opposed to a guardianship. Carl did state that Rosita was the only person he would want as his guardian. Carl further indicated that he had not seen or heard from his grandson in the past twenty years.

{¶8} The report stated that Carl appeared to be well-cared for and healthy, and that there was no sign of any kind of neglect. Housing and sanitation were excellent, and Rosita saw that all Carl's medical needs were met. Rosita had been a nurse for 51 years prior to retiring. The report recommended that a guardian of the person and estate be appointed, and stated that an expert evaluation would be forthcoming when

Rosita completed her own application for guardianship.

{¶9} Subsequently, Rosita filed her own application for guardianship in mid-March 2008. Rosita attached the expert evaluation of Dr. Javad Tabatabain to her application. The evaluation indicates that Dr. Tabatabain evaluated Carl during one visit in December 2007. The doctor stated that Carl was mentally impaired due to dementia (memory loss), and recommended establishment of a guardianship. The doctor's evaluation also found impairment of Carl's thought process, concentration and comprehension, but not of his speech, motor behavior, affect, or judgment.

{¶10} Within a few days after Rosita's application was filed, Murphee filed a motion requesting appointment of a guardian ad litem for Carl. Murphee alleged that Rosita had withheld medication that was prescribed for Carl's dementia, because she did not like some of the known side effects. The trial court appointed a guardian ad litem in April 2008, and the guardian filed a report approximately one week before the scheduled hearing. The guardian interviewed Carl, Rosita, Murphee, and Linda, one of Carl's daughters.

{¶11} According to the report, Carl's wife had been caring for him since they were married in 1995. The guardian indicated that Carl wanted to stay where he was living and have his wife care for him. The guardian described Rosita as a "personable and energetic woman." Rosita was a retired nurse of 51 years, watched her husband's diet carefully and made sure he received both physical and mental exercise daily. Rosita also gave her husband his prescribed medication on a daily basis and kept in close contact with his doctors when she perceived a problem with his medication. Following Carl's latest appointment in April 2008, Exelon had been prescribed in a patch

form, because use of a patch lowered side effects.

{¶12} The guardian's report also indicated that Murphee is an attorney in Toledo who does not have a close relationship with his grandfather. Murphee expressed concern about medication and a power of attorney that had been given to Rosita and her attorney just before Carl's expert evaluation in December 2007. Finally, the report indicated that Linda expressed concern about medication and lack of communication. Linda wanted her father to come to Oklahoma.

{¶13} The guardian recommended that Carl remain in his home in the care of his wife, pending the outcome of the matter. On the same day that the guardian's report was filed, the court's investigator filed another report. The investigator noted that Carl's understanding of the concept of guardianship was good, and that Carl understood that his wife had applied to be his guardian. This met with his approval. Carl stated that his wife had always taken care of him in the past. The investigator noted no impairment of orientation to person, place, and time, and no impairment of speech, affect, or judgment. There was impairment of memory, concentration, and comprehension. However, the investigator stated that the only thing he could find consistent with the doctor's evaluation was a *slight* loss of memory (emphasis added).

{¶14} The investigator again stated that Carl looked well cared for, that housing and sanitation were excellent, and that Carl could provide all of his activities of daily living, such as eating, dressing, and so forth. In addition, the investigator stated that "Ms. Melhorn appears to be a very concerned and caring spouse who provides very well for her husband's needs." April 22, 2008 Court Investigator's Report on Proposed Guardianship, p. 5. The investigator recommended a guardianship of the person and

estate, and stated that Carl was "pretty adamant about having ONLY his wife to be his guardian." Id. at p. 6 (capitalization in original).

{¶15} Previously, on April 14, 2008, the probate court had ordered a hearing to be held on Murphee's application and the competing application of Rosita. The hearing was set for April 28, 2008, and notice was sent to counsel for the parties. This is the same hearing date that was established when Rosita filed her application in March 2008.

{¶16} However, the court failed to make a record of any hearing on April 28, 2008. No witnesses were sworn, and no evidence was submitted. The trial court also did not make a record, in open court, or in chambers, of any agreements or stipulations of the parties, nor did the parties themselves file any written stipulations or agreements. The parties also did not sign an agreed entry.

{¶17} Subsequently, on May 5, 2008, the probate court filed a judgment entry indicating that the parties had agreed and stipulated that Carl was in need of a guardian. The court further concluded that a neutral party should be appointed guardian in view of the acrimony between Rosita and Carl's daughters. The court decided that Lawrence Greger would be a suitable guardian, and appointed Greger as guardian of Carl's person and estate. At that point, Greger had not applied for guardianship; the necessary papers were filed on May 8, 2008, after the probate court's decision.

{¶18} The court later filed an additional entry entitled "Order of Visitation." In this order, the court stated as follows:

{¶19} "This matter came before the Court on April 28, 2008. Attorneys appeared for applicant Rosita Barbee-Melhorn, for applicant R. Kent Murphee, and for prospective ward Carl Melhorn for hearing on the applications for Mr. Melhorn. *Having heard the*

arguments of the prospective parties, the Court found that it was in the best interest of Mr. Melhorn to appoint a neutral guardian, for Mr. Melhorn's person and estate." May 15, 2008 Order of Visitation, p. 1 (emphasis added).

{¶20} The court concluded that Carl's best interests would be served by telephone contact and visitation with his daughters. Accordingly, the court permitted each daughter two phone calls per week, and three days of visitation per month in person. Rosita was also ordered to cooperate and facilitate visitation.

{¶21} Rosita now appeals from the adjudication of incompetency and appointment of a guardian, and from the order of visitation.

II

{¶22} In support of her appeal, Rosita has filed nine assignments of error. For purposes of convenience, we will initially address the Second Assignment of Error, as it is dispositive of the case. Rosita's Second Assignment of Error is as follows:

{¶23} "THE COURT FAILED TO CONDUCT A HEARING PURSUANT TO 2111.02 REGARDING THE APPLICATIONS OF MURPHEE, BARBEE-MELHORN, AND GREGER."

{¶24} Under this assignment of error, Rosita contends that the trial court erred in failing to comply with R.C. 2111.02, which contains statutory requirements for hearings in every guardianship proceeding. According to Rosita's brief, no hearing was held on April 28, 2008. Instead, the proceeding was a pre-trial, the interested parties were not present, and no party had the opportunity to present evidence.

{¶25} Before we address the assignment of error, we note that appellees did not file a brief. In this situation, App. R. 18(C) provides that:

{¶26} “If an appellee fails to file the appellee's brief within the time provided by this rule, or within the time as extended, the appellee will not be heard at oral argument except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.”

{¶27} Pursuant to App. R. 18(C), we accept Rosita’s statement of facts as correct. We also note that the record supports these facts, as there is no indication that the parties were present in court on April 28, 2008, or that the court permitted any evidence to be taken. The issue, therefore, is whether the trial court erred in failing to conduct a hearing.

{¶28} R.C. 2111.02(C) states the following requirements for guardianship actions:

{¶29} “Prior to the appointment of a guardian or limited guardian under division (A) or (B)(1) of this section, the court shall conduct a hearing on the matter of the appointment. The hearing shall be conducted in accordance with all of the following:

{¶30} “(1) The proposed guardian or limited guardian shall appear at the hearing and, if appointed, shall swear under oath that the proposed guardian or limited guardian has made and will continue to make diligent efforts to file a true inventory in accordance with section 2111.14 of the Revised Code and find and report all assets belonging to the estate of the ward and that the proposed guardian or limited guardian faithfully and completely will fulfill the other duties of guardian, including the filing of timely and accurate reports and accountings;

{¶31} “(2) If the hearing is conducted by a referee, the procedures set forth in Civil Rule 53 shall be followed;

{¶32} “(3) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence;

{¶33} “(4) Upon request of the applicant, the alleged incompetent for whom the appointment is sought or the alleged incompetent's counsel, or any interested party, a recording or record of the hearing shall be made;

{¶34} “(5) Evidence of a less restrictive alternative to guardianship may be introduced, and when introduced, shall be considered by the court;

{¶35} “(6) The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists;

{¶36} “(7) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has all of the following rights:

{¶37} “(a) The right to be represented by independent counsel of his choice;

{¶38} “(b) The right to have a friend or family member of his choice present;

{¶39} “(c) The right to have evidence of an independent expert evaluation introduced;

{¶40} “(d) If the alleged incompetent is indigent, upon his request:

{¶41} “(i) The right to have counsel and an independent expert evaluator appointed at court expense;

{¶42} “(ii) If the guardianship, limited guardianship, or standby guardianship

decision is appealed, the right to have counsel appointed and necessary transcripts for appeal prepared at court expense."

{¶43} This statute contemplates formal hearings and presentation of evidence on the issues of incompetency and guardianship. In the case of *In re Guardianship of Corless* (1981), 2 Ohio App.3d 92, the Twelfth District Court of Appeals concluded that where an application for appointment of a guardian is contested, there should be, at a minimum, one medical examination of the ward, and that, if the proposed incompetent cannot be present for the hearing, the court should delay the appointment until the court has had an opportunity to observe the alleged incompetent. Id. at 96.

{¶44} Furthermore, when *Corless* was decided, the law did not require a specific burden of proof in guardianship proceedings. Id. at 95. *Corless* advocated for a clear and convincing standard of proof, noting that:

{¶45} " ' * * * Despite the severe incursions of an involuntary guardianship upon individual freedom, courts use non-adversary procedures in adjudicating competency and do not hesitate to impose a guardianship in even doubtful cases. Non-adversary hearings are justified on the ground that only the individual's best interests are at stake: in theory, there is no one before the court who has an interest adverse to that of the potential ward. But, in fact, there will often be interests quite opposite to those of the potential ward. Relatives, creditors and potential heirs may have reasons to wish wardship imposed. The possibility of conflict and the weakness of a non-adversary hearing may best be seen in the treatment of the aged. An elderly individual, having collected considerable funds over a lifetime of savings, may begin to show signs of senility, the inevitable deterioration of old age, as well as a change in consumption

patterns. Relatives interested in receiving inheritances may then be able to secure their expectations of inheritance by obtaining the imposition of involuntary guardianship, curtailing the aged's ability to spend what he has amassed. The effectiveness of guardianship for their purposes of estate conservation is enhanced by procedures which favor family interests and offer little real protection to the individual seeking to avoid the imposition of guardianship upon himself.'

{¶46} " * * *

{¶47} "For these reasons, this court feels that the degree of proof required should be clear and convincing evidence. Once a guardian has been appointed, the ward can no longer direct the disposal of his own property, create legal relations, enter contracts, or transact any other business. While he or she may remain physically unconfined, mentally there is almost total confinement. Thus, the consequences to the proposed ward are so drastic that nothing less than this degree of proof will adequately protect the rights of that person." Id. at 95-96 (citation omitted).

{¶48} Our own district specifically adopted the reasoning in *Corless,* and has held that clear and convincing evidence is required for proof of mental incompetency. *In the Matter of White* (Dec. 23, 1982), Greene App. No. 82 CA 13. The requirement of clear and convincing proof is now codified in R.C. 2111.02(C)(3), and indicates the formality and seriousness with which these proceedings must be approached.

{¶49} The Third District Court of Appeals has stressed that probate courts are given "broad discretion in matters involving the appointment of a guardian." *In re Guardianship of Slone*, Crawford App. No. 3-04-13, 2004-Ohio-6041, at ¶ 7. In *Slone*, the Third District also stated that "R.C. 2111.02(C) sets forth the procedure to be

followed before a guardian may be appointed, including a provision for a hearing. At a guardianship hearing, a finding of incompetency must be established by clear and convincing evidence. R.C. 2111.02(C)(3)." Id. (citation omitted). The Third District further observed that:

{¶50} "The 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." Id. at ¶ 9.

{¶51} The rationale for deferring to trial courts disappears where no hearing has been held, and the court has neither allowed evidence nor observed any witnesses. Notably, the Ninth District Court of Appeals reversed a guardianship decision where a referee did, in fact, hold an evidentiary hearing. However, after the hearing, the trial court *sua sponte* subpoenaed the alleged incompetent's medical records and relied on the records, without providing notice to the alleged incompetent. *In re Guardianship of Schumacher* (1987), 38 Ohio App.3d 37, 39. In reversing the judgment, the Ninth District stated that:

{¶52} "It is clear that the court could have appointed a physician to examine Mrs. Schumacher. R.C. 2111.031. The question before us is whether the court can base its determination of incompetency on medical records subpoenaed sua sponte without any notice to the alleged incompetent ward.

{¶53} "We are mindful of the fact that the appointment of a guardian is not an adversary proceeding. * * * However, it is a proceeding which binds all the world and is not subject to habeas corpus. * * * The imposition of an involuntary guardianship should

be treated as an extremely serious matter as it deprives the proposed ward of his or her rights to any and all but the most meaningless legal or financial decisions. * * * *Basic due process considerations* require that the alleged incompetent have meaningful notice of the taking of additional evidence. * * * While the focus of this proceeding is the best interests of the proposed ward, those interests are not served by the consideration of evidence and the determination of incompetency apparently based on that evidence, without any kind of notice to the proposed ward." Id. (Emphasis added).

{¶54} In the present case, the trial court failed to hold a hearing, and did not provide for the introduction of testimony evidence on the matters at issue, including Carl Melhorn's alleged incompetency, the suitability of Rosita Melhorn as guardian, and what visitation, if any, would be appropriate. The court's indication that it heard "arguments" of counsel on the guardianship is also inconsistent with a finding that the parties were in agreement. Accordingly, the trial court erred in failing to conduct a hearing or to make a record that would justify the lack of an opportunity to present evidence.

{¶55} Our decision does not mean that parties cannot enter into factual and legal stipulations. However, an appropriate record must be made of exactly what occurred, in order to provide a reviewing court with a basis for concluding that the trial court acted properly and within its discretion.

{¶56} In view of the preceding discussion, the Second Assignment of Error is sustained. Because this issue disposes of the appeal and requires reversal of both orders of the trial court, the remaining eight assignments of error are moot.[2]

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[2]The remaining assignments of error are as follows, quoted verbatim:

"THE COURT FAILED TO MEET THE REQUIREMENTS OF OHIO REVISED CODE SECTION 2111.04(A)(2)(a)(i) IN THE APPLICATION OF LAWRENCE J.

III

{¶57} Rosita's Second Assignment of Error having been sustained, and Assignments of Error One, Three, Four, Five, Six, Seven, Eight, and Nine having been overruled as moot, the May 5, 2008, and May 15, 2008 judgments of the trial court are Reversed, and this cause is Remanded for further proceedings.

. . . . . .

FAIN and GRADY, JJ., concur.

GREGER'S [sic] FOR APPOINTMENT."

"THE INVESTIGATOR'S REPORT WAS NOT CONSIDERED BY THE COURT AND WAS NOT COMPLETED WITH RESPECT TO THE APPLICATION OF GREGER PURSUANT TO 2111.041."

"THE COURT ERRED IN NOT APPOINTING ROSITA BARBEE-MELHORN AS THE STANDARD FOR APPOINTMENT IS THAT THE APPLICANT BE A SUITABLE AND COMPETENT PERSON. THE COURT COULD NOT APPOINT GREGER AS THERE WAS NO HEARING HELD AND IT COULD NOT FIND, WITHOUT HEARING, THAT GREGER WAS A SUITABLE AND COMPETENT PERSON."

"THE COURT ERRED IN RELYING ON AN OUTDATED OR STALE STATEMENT OF EXPERT EVALUATION FILED WITH BARBEE-MELHORN'S APPLICATION."

"THE COURT ERRED IN ESTABLISHING A GUARDIANSHIP AND APPOINTING LAWRENCE GREGER AS THERE IS AND WAS A LESS RESTRICTIVE ALTERNATIVE."

"BARBEE-MELHORN DID NOT AGREE THAT THE ESTABLISHMENT OF A GUARDIANSHIP WAS NECESSARY, [SIC] NOT TO THE APPOINT [SIC] OF LAWRENCE GREGER, NOR TO THE APPOINTMENT OF SOME UNNAMED 'NEUTRAL' PARTY."

"THE PROBATE COURT HAS NO AUTHORITY TO ISSUE ORDERS OF VISITATION."

"ASSUMING THAT THE PROBATE COURT HAS THE AUTHORITY TO ISSUE ORDERS OF VISITATION OR OF CUSTODY. THE COURT CAN ONLY DO SO IN THE BEST INTERESTS OF THE WARD AND NOT OF THE MOVING PARTY AND CAN ONLY DO SO AFTER A HEARING REGARDING WHETHER OR NOT VISITATION IS IN THE BEST INTERESTS OF THE WARD."

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