[Cite as *In re Guardianship of P.D.*, 2009-Ohio-3113.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

In The Matter of The Guardianship of: [P.D.].	: : : : : : : :	 Case No. 08CA5 <u>DECISION AND</u> <u>JUDGMENT ENTRY</u> File-stamped date: 5-26-09

<u>APPEARANCES:</u>

Joseph H. Brockwell and Charles A. Cohara, Southeastern Ohio Legal Services, Athens, Ohio, for Appellant, Velma Hoover.

Dennis Sipe, Buell & Sipe, Marietta, Ohio, for minor ward P.D.

Kline, P.J.:

{¶1} Velma Hoover appeals from the decision of the Probate Court of Washington County appointing Jonathan C. Dehmlow as guardian of the person and estate of minor child P.D. (hereinafter "the Child"). On appeal, Hoover contends that the probate court abused its discretion when it granted Dehmlow's application for appointment as guardian. We disagree and find that the court did not abuse its discretion. Hoover next contends that the Child's attorney failed to ascertain and advocate for the Child's wishes and, instead, acted as a guardian ad litem. Because the Child did not have a right to counsel during the guardianship hearing, and as a result, we cannot reverse based on any error related to the performance of the Child's attorney, we disagree. Accordingly, we affirm the judgment of the probate court.

I.

{¶2} The record reveals the following facts pertinent to this appeal. The Child is a minor who suffers from severe autism and other developmental disabilities. In July 2007, Dehmlow, an attorney, filed an application to be appointed guardian of the Child's person and estate. At the time of the application, Hoover, the Child's aunt, had custody of the Child. Another court had placed the Child in Hoover's custody because (1) the Child's father is deceased and (2) the Child's mother has been either unwilling or unable to care for the Child.

{¶3} At the time Dehmlow filed his guardianship application, the Child was residing at Havar Autism Home (hereinafter the "Group Home"), a residential treatment facility for children with autism. Before residing at the Group Home, the Child had lived with Hoover since early 2002. While living with Hoover, the Child received education, training, and in-home monitoring from children's services, the Mental Retardation and Developmental Disabilities board, and a service provider called Havar.

{¶4} On September 27, 2007, the probate court appointed an attorney for the Child. According to the probate court's entry, the attorney was to "represent [the Child's] interests in the matter before the Court regarding the Application for Appointment of Guardian of Minor filed by [Dehmlow]."

{¶5} In November 2007, Hoover also filed an application, requesting the court to appoint her as the Child's guardian. Her application sought a limited guardianship of the Child's person only. The court held a hearing on both applications for guardianship on December 20, 2007.

{¶6} At the hearing, Dehmlow represented himself and presented testimony from several of the Child's service providers. These witnesses testified that the Child has frequently exhibited behavior that is both dangerous to himself and to those around him. These behaviors have included biting; hair pulling; continuing attempts to turn on and touch hot stoves; the ingestion of inedible items, including his own feces; the destruction of property; and acts of physical aggression, often against children with physical disabilities.

{¶7} Dehmlow's witnesses testified that the Child needs a tremendous amount of structure. For example, Dehmlow's expert witness, who has been familiar with the Child's case since 2004, testified as follows: "I guess what [the Child] needs across the board, whether we're in the classroom, in the community, at home, wherever he's at, and it's not just with him, it's for most folks with developmental disabilities, including autism, he needs structure. And structure meaning consistency, predictability, guidance, direction, training. He cannot be left to choosing the majority of his activities without guidance throughout the course of a day." Transcript at 53. The expert witness testified that there was not much structure in the Child's life when the Child lived with Hoover. Instead, the expert witness observed that, while living with Hoover, the Child "would engage in whatever activity he chose at the time." Transcript at 52.

{¶8} The program manager from Havar also testified about the lack of structure in Hoover's home. When asked about Hoover's cooperation in following through on the Child's treatment plan, the program manager testified: "It's just – I think it's too difficult for [Hoover] to understand all the communication

and the behavior plan. I mean, all that needs to be followed and it's a lot. And the diet. It's just a lot." Transcript at 100.

{¶9} Dehmlow's witnesses also testified about the Child's need for constant supervision. For example, the Child's teacher testified that the Child "is eyes on twenty-four/seven. * * * [Y]ou cannot leave him alone for a second because he will – he'll push the envelope if he thinks he can." Transcript at 26. According to Dehmlow's witnesses, constant supervision prevents the Child from harming himself or injuring others.

{¶10} All of Dehmlow's witnesses testified that the Child's behavior has improved significantly since he moved to the Group Home in June 2007.

{¶11} Hoover also testified at the hearing. She testified that the Child had been with her since 2002 and that she thought of the Child as her own son. Hoover further testified that it was her decision to place the Child in the Group Home. However, during the hearing, Hoover would not commit to keeping the Child in the Group Home on a long-term basis.

{¶12} The Child's attorney called no witnesses at the hearing, but he did cross-examine Dehmlow's witnesses and Hoover. During closing arguments, the Child's attorney said, "I had even prepared a short report because I couldn't remember whether I was here as GAL [Guardian Ad Litem] or just attorney, but instead, in looking at this, I believe that under the statutes, that a guardianship is necessary." Transcript at 153. The Child's attorney then proceeded to recommend that the probate court grant Dehmlow's application for guardianship.

{¶13} At the close of the hearing, the probate court found both Hoover and the Child's mother unsuitable to provide the care and structure needed by the Child. The probate court then appointed Dehmlow as guardian of the Child's person and estate.

{¶14} Hoover appeals, asserting the following two assignments of error: I. "THE PROBATE COURT FOUND AGAINST THE WEIGHT OF THE EVIDENCE, AND ABUSED ITS DISCRETION, WHEN IT GRANTED DEHMLOW'S APPLICATION FOR APPOINTMENT AS GUARDIAN OF [THE CHILD]." And, II. "THE COURT ERRED BY FINDING THAT A GUARDIANSHIP WAS NECESSARY, AND THAT THERE WAS NO LESS RESTRICTIVE ALTERNATIVE, WHEN THE ATTORNEY APPOINTED FOR THE CHILD FAILED TO ASCERTAIN AND ADVOCATE FOR THE CHILD'S WISHES AND ACTED INSTEAD AS A GUARDIAN AD LITEM."

II.

{¶15} In her first assignment of error, Hoover contends that the probate court abused its discretion when it granted Dehmlow's application for appointment as guardian of the Child.

{¶16} It is well settled that probate courts have broad discretion when appointing guardians under R.C. 2111.02(A), and their decisions will not be reversed absent a showing of an abuse of that discretion. See *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, 551; *In re Guardianship of Skrobut* (Apr. 30, 1998), Mahoning App. No. 97CA18, unreported; *In re Guardianship of Constable* (Mar. 30, 1998), Clermont App. No. CA97-11-101, unreported; *In re*

Metzenbaum (July 31, 1997), Cuyahoga App. No. 72052, unreported; *In re Guardianship of Worth* (June 20, 1997), Darke App. No. 1430, unreported. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. See *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342, 1998-Ohio-387; *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448, 1996-Ohio-311; *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 64, 1995-Ohio-172.

{¶17} To demonstrate an abuse of discretion, "the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256, 1996-Ohio-159, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222. Moreover, appellate courts are also admonished that, when applying the abuse of discretion standard, they are not to substitute their own judgment for that of the trial court. See *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 732, 1995-Ohio-272; *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

A. Whether a Guardianship is Necessary

{¶18} Under her first assignment of error, Hoover initially argues that it was not necessary for the probate court to appoint a guardian for the Child and that less restrictive alternatives were available.

{¶19} R.C. 2111.02(A) provides: "When found necessary, the probate court on its own motion or on application by any interested party shall appoint, subject to divisions (C) and (D) of this section * * * a guardian of the person, the estate, or both, of a minor or incompetent[.]" Further, in relevant part, R.C. 2111.06 provides: "A guardian of the person of a minor shall be appointed as to a minor having neither father nor mother, or whose parents are unsuitable persons to have the custody and tuition of such minor, or whose interests, in the opinion of the court, will be promoted thereby."

{¶20} Here, the probate court found that it was necessary to appoint a guardian for the Child and that guardianship was the "least restrictive alternative." Transcript at 159. Initially, we note that Hoover also filed an application for the court to appoint her the Child's guardian. Thus, Hoover's argument that a guardianship was not necessary seems somewhat illogical. Regardless, we find that the following evidence supports the probate court's determination that a guardianship was necessary: (1) the Child was only eleven years old at the time of the hearing; (2) the Child is severely autistic and suffers from other developmental disabilities; (3) the Child's father is deceased; and (4) although it is not entirely clear why, the Child's mother has been either unable or unwilling to care for the Child since January 2002. Based on this evidence and the requirements of R.C. 2111.06, we do not find that the probate court acted unreasonably, arbitrarily, or unconscionably in deciding that a guardianship was necessary for the Child.

{¶21} Therefore, we find that the probate court did not abuse its discretion when it determined that a guardianship was necessary.

B. The Appointment of Dehmlow

{¶22} Under her first assignment of error, Hoover next argues that the probate court abused its discretion by appointing Dehmlow as the Child's guardian.

{¶23} We are mindful that "Ohio does not have a statutory preference for the appointment of guardians. Courts generally select the next of kin or someone acceptable to the next of kin on the theory that they will be the persons most concerned with the ward's welfare. The Revised Code, however, does not require them to do so, and the probate court may appoint a *stranger* as guardian if the appointment is in the ward's best interests[.]" 53 O Jur.3d, Guardian and Ward, § 30 Priority of Relatives; effect of parent's religion (emphasis added).

{¶24} Here, the probate court appointed Dehmlow as the Child's guardian instead of Hoover. The probate court based this decision, in part, on its determination that a "detached, neutral person" was needed to make the "tough decisions" related to the Child's care. Transcript at 160.

{¶25} In this regard, Dehmlow's expert witness testified about the difficulty Hoover had in acting on advice related to the Child.

{¶26} "Q: Now, when you visited in Ms. Hoover's home, you indicated that you offered advice?

{¶27} A: Yes.

{¶28} Q: Concerning control, consistency, structure, and either direction or redirection?

{¶29} A: Yes.

{¶30} Q: When you testified, I heard you say or I thought I heard you say, that each time you were there, [the Child] seemed to engage in the same behaviors, what I'll call wandering?

{¶31} A: That was pretty consistent, yes, over time.

{¶32} Q: And did you notice that Ms. Hoover seemed to have difficulty in getting him redirected or acting on your advice?

{¶33} A: She did, yes.

{¶34} Q: And again, I'm not saying anything bad or good about it, but sometimes your advice sounds to me like it's counterintuitive for someone who loves a child –

{¶35} A: It is hard.

Q: -- that you have to detach your love for the child from what is best for this child because of his needs?

{¶36} A: Yes." Transcript at 73-74.

{¶37} The evidence shows that, although Hoover very much loves the Child, she either could not or would not make many of the hard decisions necessary for the Child. Indeed, Hoover's testimony demonstrates that she may not adequately comprehend the enormous challenges created by the Child's special needs. For example, Hoover testified:

{¶38} "A: Like when [the expert witness] said [the Child] needed direction. Well, like when he said I couldn't get him directed or get him under control. Well, I just knew that [the Child] would do what he was supposed to do later you know, and at that time you know, a child will – like maybe stamp their feet or throw a toy or sass you, well, I always believe that if you walk away from it, that they will realize that they've done wrong." Transcript at 135.

{¶39} Later, she testified:

{¶40} "A: But it seems to me like [the Child] is – I think sometimes he's being watched too closely – he's followed from room to room. It seems to me like he has no privacy or no, like, does he have a chance to make his own decisions[.] * * * [I]t's like – it's overbearing. I mean, it's like he's being – he's followed from room to room. It's like he don't have no freedom whatever." Transcript at 136-137.

{¶41} She further testified:

{¶42} "A: I can't – I don't want [the Child] treated like a – like he's going to be in harm's way. I mean, I don't want [the Child] treated like he's going to do something that he might not do, you know." Transcript at 137.

{¶43} From the evidence, it was reasonable for the probate court to conclude that Hoover had problems detaching her love for the Child from what is best for the Child. Hoover provided very little structure or supervision while the Child stayed with her. And during that time, the Child engaged in much more anti-social and, often times, dangerous behavior. It is very clear that Hoover loves the Child. That love may contribute to her desire to let the Child have "freedom"

and "privacy" and to "make his own decisions." However, freedom and privacy are not necessarily beneficial for someone with the special needs of this Child. On the contrary, the evidence shows that supervision and structure are necessary to prevent the Child from harming himself and others around him. And similarly, the evidence is overwhelming that the Child is incapable of making his own decisions.

{¶44} It is undisputed that the Child's behavior has improved greatly since the Child moved to the more structured environment of the Group Home. The following witnesses testified to that fact: the Child's teacher, the expert witness who has been familiar with the Child's case since 2004, and the program manager from Havar. And although she attributed the Child's improvement to a variety of factors, even Hoover agreed that the Child's behavior has improved since moving to the Group Home. However, Hoover wavered on whether she would keep the Child in the Group Home on a long-term basis. As Hoover testified:

{¶45} "Q: Okay. And have you discussed June being an end date for his stay in the home?

{¶46} A: I've thought about – well, I'm being pulled in two directions. Down at the home, it's fine for him, the services he's getting is fine. But I also know that [the Child] is lonely. And I also know that I don't live close enough to go see him every day like I want to. But I try to see him twice a week down there, and then he comes out to my place twice a week. And I've been – in the meantime, I've been thinking about trying to find a place to live in Marietta where I could go

see him more often, or have him in my home, with Havar continuing on helping me.

{¶47} * * *

{¶48} Q: Okay. If June comes, and – is there a possibility in June that you'll decide that he needs to stay in the house longer?

{¶49} A: I would go along with that.

{¶50} Q: And why would you go along with that? Under what circumstances?

{¶51} A: Well, because everyone I've talked to says he needs longer – he needs more training and all this and that, but yet, I can say for myself that [the Child] has probably had all that he needs done there. I mean, that he needs. I mean, that he don't really need… He's got the training at school –

{¶52} Q: In June, is there any possibility that you'll consider keeping him on longer? Yes or no.

{¶53} A: I would consider keeping him on longer." Transcript at 125-127.

{¶54} This testimony is especially relevant because, based on the evidence, the structured environment of the Group Home has contributed to a decrease in the Child's dangerous and anti-social behavior. Removing the Child from the Group Home could very well reverse the significant progress made by the Child. Based on Hoover's testimony, it was reasonable for the probate court to conclude that a detached, neutral person could best make the decisions related to the Child's stay in the Group Home.

{¶55} Therefore, for the above stated reasons, we conclude that the probate court did not abuse its discretion by appointing Dehmlow as the Child's guardian. See, generally, *Matter of Guardianship of Tryon* (Aug. 16, 1991), Trumbulll App. No. 90-T-4381, unreported (concluding that "the probate court's determination that an objective third party should serve as guardian was not an abuse of discretion"). We may not necessarily agree with the decision, but we also may not substitute our judgment for that of the probate court.

{¶56} Accordingly, we overrule Hoover's first assignment of error.

III.

{¶57} In her second assignment of error, Hoover contends that the Child's attorney failed to act as an attorney and did not zealously advocate on behalf of the Child. Instead, Hoover argues that the Child's attorney acted as a guardian ad litem.

{¶58} "The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law." *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232.

{¶59} Here, Hoover essentially argues that the Child received ineffective assistance of counsel. We have found no statutory authority or case law to support an argument that a minor has a right to be represented in a guardianship proceeding. Based upon a plain reading of R.C. 2111.02, only an alleged

incompetent, as opposed to a minor, has the right to counsel. R.C. 2111.02(C)(7)(a) provides: "If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has * * * [t]he right to be represented by independent counsel of his choice." However, R.C. 2111.02 contains no such provision for minors. "Where there is no right to counsel, there can be no reversal based upon allegations of ineffective assistance of counsel." *In re Florkey*, Highland App. No. 07CA22, 2008-Ohio-4994, at ¶20, citing *Perkins v. Breeding* (June 29, 1995), Franklin App. No. 94APE11-1605, unreported. Therefore, we cannot reverse this case based on any error resulting from ineffective assistance of the Child's counsel, if it occurred, because the Child had no right to representation.

{¶60} Accordingly, we overrule Hoover's second assignment of error and affirm the judgment of the probate court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court, Probate Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court,

BY: _____
Presiding Judge Roger L. Kline

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.