[Cite as *In re Guardianship of Larkin*, 2009-Ohio-5014.]

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

IN THE MATTER OF:	:	Case No. 09CA791
	:	
THE GUARDIANSHIP OF LOUISE LARKIN	:	
	:	DECISION AND
ALLEGED INCOMPETENT.	:	JUDGMENT ENTRY
	:	
	:	**Released 9/17/09**

APPEARANCES:

Jonnetta D. Gadson, Chillicothe, Ohio, for appellant.

Paul F. Price, PRICE & ROSENBERGER, Waverly, Ohio, pro se appellee.

Harsha, J.

{¶1} Louise Larkin ("Larkin") appeals the probate court's decision finding her incompetent due to Alzheimer's dementia and bipolar disorder and appointing attorney Paul Price ("Price") guardian of her person and estate. Initially, Larkin argues that the probate court erred by admitting into evidence an expert report prepared by Sean Stiltner, D.O. ("Stiltner") because it constitutes inadmissible hearsay. However, at the guardianship hearing, Larkin told the probate court she had "[n]o objections" to the report's admission. Therefore, Larkin waived the right to raise this issue on appeal.

{¶2} Larkin also contends that the probate court's finding of incompetency was against the manifest weight of the evidence because it is not supported by clear and convincing evidence. However, Stiltner's report concludes that due to mental illness, Larkin is incapable of taking proper care of herself and her property, and the report prepared by Phyllis A. Amlin ("Amlin"), the probate court's investigator, bolsters these conclusions. Because some competent, credible evidence supports the probate court's

finding of incompetency, its decision was not against the manifest weight of the evidence.

{¶3} Finally, Larkin argues that the probate court abused its discretion in finding that a guardianship was necessary. However, Stiltner and Amlin recommended that the court establish a guardianship. Furthermore, the court found that the less restrictive alternatives Larkin suggested, i.e. supervision by friends and family members or the use of advance directives, were insufficient given Larkin's potential for irrational and impulsive behavior and the fact that one of her plans for around the clock supervision had already failed. Because the probate court's decision that a guardianship was necessary was not unreasonable, arbitrary or unconscionable, we affirm its judgment.

I. Facts

{¶4} In October 2008, Price filed an emergency application in the Pike County Common Pleas Court, Probate Division to be appointed as the limited guardian of Larkin's person and estate for 72 hours. Larkin was 81 years old at the time. Price alleged that Larkin was incompetent due to bipolar disorder and Alzheimer's dementia. Stiltner prepared a "Statement of Expert Evaluation," which Price filed with the court.

{¶5} In the report Stiltner states that (1) he evaluated Larkin on three occasions; (2) Larkin suffers from bipolar disorder and Alzheimer's dementia with aggressive tendencies; (3) while examining Larkin, he noticed impairment of her orientation, thought process, affect, memory, concentration and comprehension, and judgment; (4) due to Larkin's short term memory loss and comprehension problems, she could not make appropriate decisions about her personal care; and (5) Larkin recently suffered a fracture and "may have issues with being exploited." Stiltner found

that Larkin was not capable of (1) caring for her activities of daily living or making decisions concerning medical treatments, living arrangements and diet or (2) managing her finances and property. Stiltner also found that Larkin's condition had not been stabilized and was irreversible, and he recommended that the probate court establish a guardianship.

{¶6} The court granted the emergency application and Price's subsequent application for a 30-day extension of the emergency guardianship. Price then filed an application to be appointed as the permanent, non-limited guardian of Larkin's person and estate. Before the initial hearing on this application, Amlin filed a report with the court under R.C. 2111.041. Amlin reported that Larkin had been diagnosed with Alzheimer's dementia, bipolar disorder, Type II diabetes, and various other ailments. She observed impairments in Larkin's orientation, thought process, affect, memory, concentration and comprehension, and judgment. She observed Larkin's affect go from "very docile to rude and angry."

{¶7} Amlin found that Larkin was incapable of performing most daily living activities by herself, such as bathing, preparing meals, cleaning, taking medications, and handling personal finances. She also noted that Adult Protective Services ("APS") informed her of suspected financial exploitation of Larkin, and Amlin felt Larkin would be vulnerable to exploitation if she were not in a supervised care facility. Amlin concluded that a guardianship of Larkin's person and estate was necessary.

{¶8} At the initial hearing on Price's application for a permanent guardianship, Larkin contested the application. The court rescheduled the guardianship hearing so that Larkin could obtain court-appointed counsel and receive another competency

evaluation. The court also terminated the 30-day emergency guardianship after (1) Larkin, who apparently had been placed in a nursing home, expressed her desire to go home; (2) Larkin assured the court she would receive around the clock care at home from her niece Sandra Hannah ("Hannah") and her neighbor Teresa Jewitt, who were present at the hearing; and (3) APS informed the court it would stay in contact with Larkin. It appears that before the guardianship hearing occurred, APS requested an emergency protective supervision order, which the court granted, because Larkin did not in fact receive around the clock care.

{¶9} The guardianship hearing produced the following evidence. Price offered the testimony of Ramish Shivani, M.D. ("Shivani"), who also prepared a "Statement of Expert Evaluation" which Price filed with the court. Shivani testified that Larkin suffers from dementia, though he could not diagnose it as Alzheimer's dementia at that time, and that she suffers from a mood disorder, most likely bipolar disorder. Shivani testified that Larkin needed assistance with taking her medications and taking care of her finances. He recommended skilled care, but did not feel it was required. Shivani opined that the court should establish a guardianship because he feared that if Larkin arranged for her own care with a family member or neighbor, there was a high likelihood that Larkin would suffer a mood swing and throw her caregiver out. Price introduced the reports prepared by Shivani and Stiltner into evidence without objection by Larkin.

{¶10} Larkin offered the testimony of several witnesses at the hearing. Her niece, Priscilla Ricketts ("Ricketts"), testified that Larkin could cook, clean her own home, and pay her own bills. Hannah testified that Larkin could cook and clean her own home even though Hannah often did those things for her. She also testified that she

normally gave Larkin her medication and helped Larkin with her finances when she needed assistance. Hannah indicated that she had stayed with Larkin in the past and expressed a willingness to continue staying with Larkin during certain times each week. When questioned by the court, Hannah admitted that she had observed Larkin act irrationally and impulsively and that Larkin had "run [her] off a couple of times[.]"

{¶11} In addition, Betty Nance, Larkin's next-door neighbor, testified that Larkin could cook her own meals and pay her own bills. Michael Pennington, Larkin's son-in-law, testified that Hannah did most of Larkin's cooking but that Larkin was able to cook. He also testified that Larkin "mostly" took care of her own finances. In his opinion, she could handle her financial affairs herself but needed someone to stay with her for "physical health reasons." Larkin also introduced into evidence a one-page "Mini-Mental State Exam" form prepared by Kevin R. Schmucker, Ph.D. ("Schmucker"), who did not testify at the hearing. The form states that Larkin's score on the exam suggests that she has no cognitive impairment.

{¶12} Finally, Larkin testified that she felt she was "pretty capable" of taking care of herself. Larkin informed the court that she had hired Hannah and another woman, Betty Salisbury to stay with her around the clock. Larkin also informed the court that she had executed various advance directives, including a power of attorney, approximately four years before the hearing.

{¶13} After the hearing, the court found Larkin "incompetent by reason of bipolar disorder and Alzheimer[']s dementia according to Dr. Sean Stiltner, 119 Victoria Lane, Piketon, Ohio 456611 [sic]." The court determined that a guardianship was necessary. After the court appointed Price as guardian of Larkin's person and estate, Larkin filed

this appeal.

II. Assignments of Error

{¶14} Larkin assigns the following errors for our review:

> **Assignment of Error No. 1** The Trial Court abused its discretion and committed reversible error to the prejudice of Appellant in finding that Louise Larkin is incompetent inasmuch as the Applicant/Appellee did not meet his burden of proof.
>
> **Assignment of Error No. 2** The Trial Court abused its discretion and committed reversible error to the prejudice of Appellant in finding that Louise Larkin is incompetent by reason of bipolar disorder and Alzheimer[']s dementia according to Dr. Sean Stiltner, 119 Victoria Lane, Piketon, Ohio 45661 by admitting hearsay evidence.
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> **Assignment of Error No. 3** The Trial Court abused its discretion and committed reversible error to the prejudice of Appellant in finding that Louise Larkin is incapable of taking proper care of herself and her property without considering the totality of the evidence.
>
> **Assignment of Error No. 4** The Trial Court abused its discretion and committed reversible error to the prejudice of Appellant in finding that a guardianship was necessary inasmuch as the Applicant/Appellee did not meet his burden of proof.

{¶15} Larkin presents only one argument for her first and fourth assignments of error. App.R. 16(A)(7) requires separate arguments for each assignment of error. "While appellate courts may jointly consider two or more assignments of error, the parties do not have the same option in presenting their arguments." *Keffer v. Cent. Mut. Ins. Co.*, Vinton App. No. 06CA652, 2007-Ohio-3984, at ¶8, fn. 2. Thus, we would be within our discretion to simply disregard Larkin's first and fourth assignments of error and summarily affirm the probate court's judgment with regard to them. App.R. 12(A)(2); *Keffer* at ¶8, fn. 2. Nonetheless, we will review all of Larkin's arguments in the interest of justice. However, for ease of analysis, we will address Larkin's assignments of error out of order.

III. Establishment of a Guardianship

{¶16} 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 and to section 2109.21 and division (B) of section 2111.121 of the Revised Code, a guardian of the person, the estate, or both, of a minor or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian. An interested party includes, but is not limited to, a person nominated in a durable power of attorney as described in division (D) of section 1337.09 of the Revised Code or in a writing as described in division (A) of section 2111.121 of the Revised Code.

* * *

{¶17} The first step in the guardianship process is to determine whether the applicant has shown by clear and convincing evidence that the prospective ward is incompetent, e.g., the prospective ward is so mentally impaired as a result of a mental illness or disability that she is incapable of taking proper care of herself or her property. R.C. 2111.02(C)(3); see, also, R.C. 2111.01(D). According to the Supreme Court of Ohio:

> Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

In re Estate of Haynes (1986), 25 Ohio St.3d 101, 104, 495 N.E.2d 23.

{¶18} Even under the clear and convincing standard, our review is deferential. "The standard of review for weight of the evidence issues, even where the burden of proof is 'clear and convincing,' retains its focus upon the existence of 'some competent,

credible evidence.'" *In re Jordan*, Pike App. No. 08CA773, 2008-Ohio-4385, at ¶9, quoting *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. We will not reverse a trial court's decision as being against the manifest weight of the evidence if some competent, credible evidence supports it. Id., citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus; see, also, *Schiebel* at 74. "This standard of review is highly deferential and even 'some' evidence is sufficient to sustain the judgment and prevent a reversal." *Eddy v. Eddy*, Washington App. No. 01CA20, 2002-Ohio-4345, at ¶27. Moreover, we presume the trial court's findings are correct because "the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections and to use those observations in weighing the credibility of the testimony." *Jordan* at ¶9, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, and *Jones v. Jones*, Athens App. 07CA25, 2008-Ohio-2476, at ¶18.

{¶19} If the court finds the prospective ward is incompetent, it still must determine whether to impose the guardianship, i.e. whether it is "necessary." See R.C. 2111.02(A). Appellate courts review that decision under an abuse of discretion standard. *In re Guardianship of P.D.*, Washington App. No. 08CA5, 2009-Ohio-3113, at ¶16. 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. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483, 630 N.E.2d 665, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 73-74, 523 N.E.2d 846. When applying this standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v.*

Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶20} This decision is left to the probate court's discretion for several reasons, including the fact that there may be less drastic alternatives available. See R.C. 2111.02(C)(6); *In re Mihal* (July 14, 1983), Cuyhaoga App. No. 45828, 1983 WL 5551, at *2. For instance, temporary medical treatment, an inter vivos trust, or other provisions may be sufficient for the protection of an incompetent individual.

A. Admission of Dr. Stiltner's Evaluation

{¶21} In her second assignment of error, Larkin contends that the probate court erred by admitting Stiltner's evaluation into evidence because it constitutes inadmissible hearsay. However, "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected at the trial court." *State v. Gordon* (1971), 28 Ohio St.2d 45, 50, 276 N.E.2d 243.

{¶22} At the guardianship hearing, the following exchange occurred between the probate court, Price, and Larkin's attorney:

BY THE COURT: Any further witnesses, any uh, exhibits to offer to the Court?

MR. PRICE: I think you have the expert evaluations already filed with the Court. Um, I had Dr. Shivani, I basically asked him questions directly from that, do you require me to move that into evidence, at all, or?

MR. BEVINS: No objections, your honor.

Because Larkin failed to make a hearsay objection at the hearing, and in fact informed the probate court that she had no objections to the admission of any of Price's expert evaluations, she waived the right to raise this issue on appeal. Accordingly, we overrule Larkin's second assignment of error.

B. Finding of Incompetency

{¶23} In her first, third, and fourth assignments of error, Larkin argues, in part, that the probate court's finding of incompetency was against the manifest weight of the evidence because it is not supported by clear and convincing evidence. She complains that the court improperly equated her need for supervision and her potential for impulsive decision-making with incompetency. Specifically, Larkin contends that (1) Shivani's testimony implies that she "exhibits a certain degree of competence to care for herself and her property" because he only testified that she would "benefit from some supervision" and did not believe she needed skilled care; (2) the probate court should have given less credence to Shivani's testimony than the testimony of Larkin, her family members, and her neighbor because Shivani based much of his opinion on information he did not personally observe; (3) the probate court disregarded Larkin's demeanor at the hearing and her ability to answer questions coherently; and (4) the probate court ignored the results of Schmucker's exam, which suggest that Larkin has no cognitive impairment.

{¶24} However, the underlying premise of Larkin's argument is that the probate court could not rely on Stiltner's report in reaching its decision, so the only expert evidence on the issue of incompetency came from Shivani and Schmucker. Even if we assume that Shivani's testimony and report do not support a finding of incompetency, we have already determined that the probate court could consider Stiltner's report in reaching its decision. Stiltner's report unequivocally concludes that Larkin is incapable of taking proper care of herself or her property due to mental illness. In addition, Amlin's report, which the court was required to consider under R.C. 2111.041(B) before

establishing the guardianship, reinforces these conclusions. Therefore, some competent, credible evidence supports the probate court's finding that Larkin is so mentally impaired as a result of a mental illness that she is incapable of taking proper care of herself or her property. Accordingly, we overrule Larkin's first, third, and fourth assignments of error to the extent that they challenge the probate court's finding of incompetency.

C. Necessity of the Guardianship

{¶25} In her first, third, and fourth assignments of error, Larkin also argues that the probate court abused its discretion in finding that a guardianship was necessary because less restrictive alternatives were available. Specifically, Larkin contends that Shivani's testimony at most establishes that she needed supervision, and Larkin developed and presented a plan for her supervised care to the probate court. Larkin also appears to argue that her advance directives, such as a power of attorney, were a less restrictive alternative to the guardianship.

{¶26} However, Stiltner and Amlin recommended that the court establish a guardianship. Furthermore, the record indicates that the probate court considered the alternatives Larkin proposed, as required by R.C. 2111.02(C)(5), and found them insufficient to protect her person and property. Larkin informed the court that she hired Hannah and Salisbury to stay with her, and she points to selective statements Shivani made at the hearing to argue that she only requires this type of supervision. However, Shivani still recommended a guardianship. He testified that given Larkin's proneness for mood swings, if her care were left to neighbors and family members, it was highly likely that she would throw her caregiver out. In addition, Hannah testified that Larkin

had “run [her] off” in the past. Furthermore, the probate court noted that when it terminated the 30-day emergency guardianship, it did so based on Larkin’s assurance that she would have around the clock care. The court later granted APS’s request for an emergency protective supervision order when it established that Larkin did not in fact receive such care. Therefore, the court felt Larkin had an opportunity to provide for her own care and did so unsuccessfully. The court also noted that given the testimony of Shivani and Hannah regarding Larkin’s irrational and impulsive behavior, it felt Larkin might revoke any advance directions she had in place “without good cause.”

{¶27} Based on this evidence, the probate court did not act unreasonably, arbitrarily, or unconscionably in deciding that a guardianship was necessary for Larkin and that less restrictive alternatives would not sufficiently protect her person and her property. Accordingly, we overrule Larkin’s first, third, and fourth assignments of error to the extent that they argue the probate court abused its discretion in finding a guardianship necessary.

{¶28} Having overruled each of Larkin’s assignments of error, we affirm the probate court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

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

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

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.