

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

THE GUARDIANSHIP OF IVAN FLOHR

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 2014CA00082

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Probate Division,
Case No. 219330

JUDGMENT:

Affirmed, in part, and Reversed, in part

DATE OF JUDGMENT ENTRY:

December 31, 2014

APPEARANCES:

For Appellee - Faith Lanshe

For Appellant - Jude Flohr

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Hoffman, P.J.

{¶1} Appellant Jude Flohr appeals the April 23, 2014 Judgment Entry entered by the Stark County Court of Common Pleas, Probate Division, which ordered Appellant have no visitation with his father, Ivan Flohr, until Appellant undergoes a psychiatric evaluation. Appellee is Faith Lanshe.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee and Appellant are two of the twelve adult children of Ivan W. Flohr (“the Ward”). Via Judgment Entry filed December 23, 2013, the trial court found the Ward to be incompetent by reason of diminished capacity, and appointed Appellee as a guardian of his person. The trial court appointed Attorney John Prelac as guardian of the Ward’s estate.

{¶3} On February 14, 2014, Appellee filed a Motion to Prohibit Interference with Exercise of Guardian’s Duties. Therein, Appellee alleged some of the Ward’s children were not consistently following the visitation schedule she had established, were taking the Ward’s mail after being instructed not to do so, were purchasing necessities for the Ward when she had already done so, and were taking the Ward to a church “that he does not believe in.” With respect to Appellant, Appellee specifically asserted Appellant refused to give her a key to the Ward’s residence despite requests for such and also interfered with her efforts to provide Alzheimer’s treatment for the Ward. Appellee further claimed Appellant and Mary James, another daughter of the Ward, had contacted Attorney Prelac without Appellee’s permission regarding purchasing a small farm for the Ward. Appellee claimed moving the Ward out of assisted living would compromise his safety.

{¶4} In her motion, Appellee moved the trial court for an order “prohibiting all interested parties from interfering with the exercise of the Guardian’s duties.” February 14, 2014 Motion to Prohibit Interference with Exercise of Guardian’s Duties at 4. The trial court scheduled a hearing on the motion on March 10, 2014. The Assignment Clerk sent notice of the hearing to Attorney Rosemary Rubin, counsel for the Ward; Attorney Randolph Snow, counsel for Appellee; and Attorney John Prelac, guardian of the Ward’s estate.

{¶5} The trial court postponed the March 10, 2014 hearing, and conducted a pretrial instead. Appellant was present at the pretrial. Via Judgment Entry filed March 11, 2014, the trial court issued interim orders. The trial court ordered the scheduled visitation time with the Ward continue with family members reserving times to share meals or take him out. Family members unable to fulfill the schedule were ordered to contact Appellee immediately. The trial court also ordered the Ward be given a list of the phone numbers of all of his children and be given pictures of the family. The trial court found it was in the Ward’s best interest he remained in his current placement at Chapel Hill Retirement Community. The trial court further indicated the Ward may attend Mass at Saints Phillip and James Church, if the Ward so desired. Appellee was to continue to make any and all necessary medical appointments for the Ward and arrange transportation to and from those appointments. Lastly, the trial court ordered all of the Ward’s family members to treat Appellee respectfully.

{¶6} Via Judgment Entry filed March 12, 2014, the trial court appointed Attorney Cheryl Stewart to serve as guardian ad litem for the Ward. The trial court instructed the GAL to evaluate the effectiveness of the current guardian, i.e., Appellee,

and to determine whether the Ward's family members could abide by the trial court's March 11, 2014 orders.

{¶17} The GAL filed her report on April 21, 2014. The GAL recommended Appellee be placed on probation, and if she wished to continue as guardian, engage in formal training. The GAL cautioned Appellee should be removed from the position if she continued to overreact to the Ward's exercising his independence by "violating" her visitation schedule. The GAL noted Appellee should not be responsible for perpetuating the relationships between the Ward and his children, and her siblings should make their own arrangements if they wished to see the Ward. With respect to his current medical needs, the GAL recommended the Ward and Appellee choose a new, neutral physician for the Ward as he no longer trusted his current physician. The GAL found the Ward's current living situation was "overly restrictive". She recommended designing and building him a small home with amenities to serve him both currently and in the future. In the meantime, the GAL suggested the Ward be informed of the amenities available at his current residence. She specified the Ward should attend Church, if he so desired. With respect to Appellant, the GAL recommended he undergo a psychiatric evaluation "at his own expense" which focuses on "his desire to hurt his siblings, create turmoil within the family unit and his desire to perpetuate and further his own agenda as it relates to [the Ward]." Report and Recommendation of Guardian ad Litem at 12.

{¶18} The trial court conducted the previously postponed hearing on Appellee's Motion to Prohibit Interference with Exercise of Guardian's Duties on April 22, 2014. Appellant was present at the hearing. The trial court issued its Judgment Entry on April 23, 2014. The trial court ordered, inter alia, the visitation schedule continue, but

prohibited Appellant from having “visitation or any type of contact with the Ward until the Court receives confirmation that [Appellant] has had a psychiatric evaluation at his own expense” and the evaluating psychiatrist submits confirmation of Appellant’s evaluation “and his willingness to work positively with his siblings in the care of his father, the Ward.” The trial court also ordered Appellant, Mary James, their spouses and children “to cease calling the Ward and having unscheduled visits with the Ward.” The Ward was to initiate any telephone communication with Appellant.

{¶9} It is from this judgment entry, Appellant appeals, assigning as error:

{¶10} "I. THE LOWER COURT COMMITTED ERROR WHEN IT ORDERED THAT APPELLANT COULD NOT VISIT OR HAVE CONTACT WITH THE WARD UNTIL THE APPELLANT UNDERWENT A PSYCHIATRIC EXAMINATION.

{¶11} "II. THE LOWER COURT COMMITTED ERROR WHEN IT ORDERED APPELLANT TO CEASE CALLING THE WARD AND HAVING UNSCHEDULED VISITS WITH THE WARD.

{¶12} "III. THE LOWER COURT COMMENTED [SIC] ERROR WHEN IT ADOPTED THE VISITATION SCHEDULE DEVELOPED BY THE GUARDIAN AND MADE IT THE ORDER OF THE COURT.

{¶13} "IV. THE LOWER COURT’S ORDER PROHIBITING APPELLANT FROM VISITING OR HAVING CONTACT WITH THE WARD DENIES TO THE APPELLANT HIS FUNDAMENTAL RIGHT TO ASSOCIATE WITH HIS FATHER IN VIOLATION OF THE CONSTITUTIONAL RIGHT OF THE APPELLANT.

{¶14} "V. THE LOWER COURT COMMITTED ERROR BY DEPRIVING APPELLANT OF PROCEDURAL DUE PROCESS OF LAW."

IV, V

{¶15} Because we find Appellant's fourth and fifth assignments of error to be dispositive of this Appeal, we shall address said assignments of error together and first. In his fourth assignment of error, Appellant contends the trial court's denying him the opportunity to visit the Ward violated his fundamental right to association with his father. In his fifth assignment of error, Appellant maintains the trial court deprived him of his fundamental right to due process.

{¶16} The legal standard for reviewing an alleged violation of due process is a determination of which test applies, either rational basis or strict scrutiny. A rational basis test applies only if there is no interference with a fundamental right, while a strict scrutiny test applies when either a fundamental right is interfered with or the law itself disadvantages an inherently suspect class. *New Orleans v. Dukes* (1976), 427 U.S. 297, 303, 96 S.Ct. 2513; *Zablocki v. Redhail* (1978), 434 U.S. 374, 386, 98 S.Ct. 673. Under the strict scrutiny test, the law in question must be narrowly tailored to promote a compelling governmental interest in order to be constitutional. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005–Ohio–5334. Under the rational basis test, the law simply must be rationally related to a legitimate governmental interest in order to be constitutional. *Heller v. Doe* (1993), 509 U.S. 312, 320, 113 S.Ct. 2637.

{¶17} We recognize this case does not involve whether a law is constitutional. We further recognize the probate court has plenary authority over the Ward. Nonetheless, we find the extent of the probate court's plenary authority must be scrutinized when used to restrict fundamental constitutional rights.

{¶18} Appellee argues Appellant does not have a fundamental right of association with his father, the Ward, based upon the familial relationship. In support of her position, Appellee relies upon the Ninth District Court of Appeals recent opinion in *In re Basista*, 9th Dist. App. No. 2013–G–3140, 2014-Ohio1349. Therein, a father sought visitation with his daughter, an adult ward. The Ninth District found a ward's parent does not have an absolute right to visitation when the ward is of majority age. *Id.* at para. 24. The ward in *Basista* expressly stated she did not want to visit with her father. *Id.* at para. 25. We find *Basista* to be distinguishable. The evidence in the instant action does not establish the Ward did not want to see Appellant.

{¶19} While we with Appellant agree there is no clearly established right of familial association of an adult child and his parent, we, nonetheless, find Appellant has a clearly established right to association with another consenting adult.

{¶20} Having found Appellant has established a fundamental right, we must now determine whether Appellant was afforded his right to due process before that right was denied or restricted.

{¶21} Appellee filed a Motion to Prohibit Interference with Exercise of Guardian's Duties on February 14, 2014. Therein, Appellee alleged some of the Ward's children were not consistently following the visitation schedule she had established, were taking the Ward's mail after being instructed not to do so, were purchasing necessities for the Ward when she had already done so, and were taking the Ward to a church "that he does not believe in." With respect to Appellant, Appellee specifically asserted Appellant refused to give her a key to the Ward's residence despite requests for such and also interfered with her efforts to provide Alzheimer's treatment for the Ward. Appellee

further claimed Appellant and Mary James, another daughter of the Ward, had contacted Attorney Prelac without Appellee's permission regarding purchasing a small farm for the Ward. Appellee explained moving the Ward out of assisted living would compromise his safety.

{¶22} The trial court conducted a hearing on the motion on April 22, 2014. The day before the hearing, the GAL filed her report. Appellant did not receive a copy of the report. At the hearing, "[n]o oaths were administered and no sworn testimony was taken. Witnesses were not called to testify. There was no opportunity to question or examine persons regarding statements or allegations. No one requested to question or cross examine other persons present." Agreed Statement of Proceedings pursuant to App. R. 9(D) at 1. The trial court asked the Ward's children about the guardianship of their father. The trial court permitted counsel for Appellee to comment upon the number of phone calls placed by Appellant and Mary James to the Ward. Counsel for Appellee provided a copy of telephone records to the trial court and counsel for Mary James. Appellant did not receive a copy of these records.

{¶23} Following the hearing, the trial court suspended any and all contact between Appellant and with the Ward until certain conditions were met, i.e., Appellant was to complete a psychological evaluation and the evaluator approved the commencement of visitation. Such ruling was based upon the GAL's recommendations. Additionally, based upon the telephone records provided by counsel for Appellee, the trial court also ordered Appellant not to initiate telephone contact with the Ward.

{¶24} We find Appellant was not provided notice the scope of the April 22, 2014 hearing would include restricting his right to associate with his father. Appellee's motion

sought compliance with her decisions by the Ward's children. The motion did not seek to eliminate Appellant's contact with the Ward or request he undergo a psychological evaluation. Further, Appellant did not receive a copy of the GAL report; therefore, was not prepared to respond to the allegations and recommendations contained in it. Appellant also was unaware his telephone contact with the Ward was being questioned. Appellant was not provided an opportunity to explain was characterized as an "inordinate" number of calls. Prior to placing restrictions on Appellant's right to see or contact the Ward, we find the trial court was required to afford him his due process rights. We find the proceedings below failed to do so. Appellant is entitled to an evidentiary hearing on these issues should Appellee decide to pursue them upon remand.

{¶25} Appellant's fifth assignments of error is sustained.

{¶26} Appellant's fourth assignment of error is premature.

I, II, III

{¶27} In light of our disposition of Appellant's fourth and fifth assignments of error, we find the remaining assignments of error to be premature.

{¶28} The judgment of the Stark County Court of Common Pleas, Probate Division, is affirmed with respect to the order maintaining Appellee's visitation schedule, however, we reverse the portion of the trial court's order which suspends Appellant's contact with the Ward until Appellant undergoes a psychological evaluation.

{¶29} It is so ordered.

By: Hoffman, P.J.

Farmer, J. concurs separately

Delaney, J. concurs

Farmer, J., concurs

{¶30} I concur with the majority's analysis in Assignment of Error V, but would find that the plenary power of the Probate Court trumps the wishes of an individual potential heir/child.

{¶31} The focus of due process and individual rights in a guardianship case is primarily on the ward and his/her wants, needs, and desires.

{¶32} I agree appellant should be afforded an opportunity on remand to be heard on various restrictions of visitation.

{¶33} Once appellant is heard, the primary emphasis remains on the protection of the Ward.

