

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:
THE GUARDIANSHIP OF
GLORIA MAUDE HOLMES

Plaintiff-Appellee

-VS-

SALLY HOLMES

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 14-COA-025

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Probate Division, Case No.
20142006

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

February 12, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JOSHUA A. NEWTON
15 West Fourth Street
Ashland, OH 44805

DAWN KING
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For Neil Hinkle

Guardian for Gloria Holmes

THOMAS R. GILMAN
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Loudonville, OH 44842

DAVID M. HUNTER
244 West Main Street
Loudonville, OH 44842

Farmer, J.

{¶1} On March 21, 2014, appellee, Ashland County Department of Job and Family Services, filed an application for appointment of guardian for Gloria Holmes. At the time, Ms. Holmes was an eighty-three year old woman with various medical and psychological issues.

{¶2} On May 20, 2014, Ms. Holmes's son-in-law, Neil Hinkle, also filed an application for the appointment of guardian, seeking to have himself appointed as Ms. Holmes's guardian.

{¶3} On June 20, 2014, Ms. Holmes's daughter, appellant, Sally Holmes, also filed an application for appointment of guardian, seeking to have herself appointed as guardian.

{¶4} A hearing was held on June 24, 2014. By judgment entry filed August 18, 2014, the trial court granted appellee's application and appointed Attorney David Hunter as guardian of the person and estate of Ms. Holmes.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY APPROVING THE APPLICATION FOR GUARDIANSHIP BECAUSE IT DID NOT COMPLY WITH THE MANDATES SET FORTH IN R.C. 2111.02."

II

{¶7} "THE TRIAL COURT ORDER APPROVING THE APPLICATION FOR GUARDIANSHIP WAS IN ERROR BECAUSE THERE EXISTED LESS RESTRICTIVE ALTERNATIVES."

I

{¶8} Appellant argues the trial court erred in failing to comply with R.C. 2111.02(C)(7) as Ms. Holmes was not present during the hearing and was not represented. We disagree

{¶9} R.C. 2111.02 governs appointment of guardian. Subsection (C)(7) states the following:

(C) 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:

(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:

(a) The right to be represented by independent counsel of the alleged incompetent's choice;

(b) The right to have a friend or family member of the alleged incompetent's choice present;

(c) The right to have evidence of an independent expert evaluation introduced;

(d) If the alleged incompetent is indigent, upon the alleged incompetent's request:

(i) The right to have counsel and an independent expert evaluator appointed at court expense;

(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.

{¶10} We note no objection was made by any party at the hearing regarding R.C. 2111.02(C)(7); therefore, we will review this issue under a plain error standard. Civil plain error is defined in *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus, as "error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." The *Goldfuss* court at 121, explained the following:

The plain error doctrine originated as a criminal law concept. In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the

error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.

{¶11} R.C. 2111.02(C)(7) places the burden on the proposed ward to request the rights enumerated. This presumption is founded on the principle that all persons of age are presumed competent until found incompetent by a court.

{¶12} On May 8, 2014, the trial court appointed Howard W. Glick as Probate Investigator to make service of written notice upon the proposed ward, Ms. Holmes, to advise her of her rights in the case, and to file a written report with the court. On same date, notices to Ms. Holmes of the first two applications and the hearing date were filed. On June 11, 2014, two returns of service were filed indicating Mr. Glick served Ms. Holmes on June 4, 2014, via Anita Lewis, RN. On same date, Mr. Glick filed a report indicating he served Ms. Holmes at Kindred Hospital and certified to the following:

I certify that I have served notice to the alleged incompetent as required by statute and I have communicated to the individual in a language and method best understandable by the individual the individual's right to be present at the hearing, the right to contest any application for the appointment of a guardian for his or her person, estate, or both, and the right to be represented by counsel.

{¶13} In his report, Mr. Glick indicated Ms. Holmes "did not cooperate regarding discussion of rights and concept of guardianship but did say 'I don't want a Guardian,' as one of the only utterances to me."

{¶14} Although appellant's application was filed only four days before the hearing date, the trial court indicated it was proceeding on all three applications. T. at 9, 11. Appellant requested a continuance of the hearing date which was denied. T. at 7-9. All parties, including appellant, agreed Ms. Holmes was incompetent, and all stipulated to two Statements of Expert Evaluation of Ms. Holmes. T. at 14, 15, 19-21. The only contested issue was who was going to be appointed as guardian. T. at 21.

{¶15} The returns of service and Mr. Glick's report establish Ms. Holmes was notified of the guardianship applications and her rights under R.C. 2111.02(C)(7). Ms. Holmes understood Mr. Glick's explanations as she was able to articulate that she did not want a guardian. Ms. Holmes did not make a request for an attorney or to be present during the hearing, thereby waiving her rights under R.C. 2111.02(C)(7). No evidence was presented to the trial court indicating Ms. Holmes did not understand the proceedings or her rights under R.C. 2111.02(C)(7).

{¶16} In addition, as an applicant for guardianship claiming incompetency of the proposed ward, appellant does not have standing to challenge the issue of notice and/or service, as the rights enumerated in R.C. 2111.02(C)(7) belong to Ms. Holmes. *Ohio Pyro, Inc. v. Ohio Department of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27.

{¶17} Assignment of Error I is denied.

II

{¶18} Appellant claims the trial court erred in not appointing her or another family member as the guardian, and there were less restrictive alternatives available i.e., existing powers of attorney, to the trial court in lieu of an independent guardian. We disagree.

{¶19} Although appellant appears to argue that the healthcare power of attorney granted to her by Ms. Holmes and the financial power of attorney granted to her sister Susan Hinkle are sufficient to provide for the care and safety of Ms. Holmes, during the hearing, appellant agreed Ms. Holmes was incompetent and a guardianship was necessary. T. at 19-21, 77-78.

{¶20} Appellant's basic challenge to the appointment of the guardian is that the guardian is not a relative. Appellant wishes to have guardianship over the person relating to healthcare and her sister and brother-in-law have guardianship over the estate relating to financial matters. T. at 50, 64-65, 85. The trial court specifically addressed appellant's suggestion as follows:

***There was some evidence of a less restrictive alternative in this case in that Powers of Attorney are in existence to allow Susan Hinkle to provide financial assistance to her mother and to allow Sally Holmes to provide assistance regarding medical care and treatment. However, the evidence further establishes that the use of those Powers of Attorney have not been sufficient to meet the needs of Gloria Holmes as her needs have not been met. The Court has considered the use of a less restrictive

alternative to guardianship but, based upon the evidence in this case, finds that it is not sufficient to ensure the best interest of Gloria Holmes.

Neil Hinkle, by his education and experience, is qualified to serve as guardian of the person and estate of Gloria Holmes. However, he is part of the family, albeit by marriage. While the Court finds his testimony to be credible that he will stay out of the conflicts, it may become impossible for him to do so, especially if his wife, Susan Hinkle, is accused of misconduct, which has already occurred in the past. In addition, the Guardian in this case may be called upon as Guardian of the person to regulate conduct and/or contact between the children and Gloria Holmes and, of course, Mr. Hinkle's wife is one of those children, putting him in a most difficult position. These children seem to form alliances with one another and against some of the others, which is a fact with which the Guardian will ultimately have to deal.

In addition to her out-of-state residence, Sally Holmes also would have the situation where she would be required to deal with siblings with whom she is often in conflict regarding the care of their mother. The Court has also considered all of the factual findings as related to Sally Holmes and discussed in the evidence above.

Based upon the evidence, the Court finds that it is in the best interest of Gloria Maude Holmes that an independent third person serve as Guardian in this case.

{¶21} We have reviewed the record and agree with the trial court's analysis. There is specific strife between appellant and her brother Jeff. T. at 36-37, 56-57, 91-93, 96-97. Issues exist between the Hinkles and Jeff as well. T. at 36-37, 94-95, 97. Appellant was well aware of Ms. Holmes's condition and was unable to rectify it, forcing appellee to intervene. T. at 35, 53-54, 77-78, 84. It is appellant's position that her mother can be returned to her home for some sort of independent living with appellant managing the siblings' visits. T. at 72-74, 79-80.

{¶22} Although we concur with appellant's position that a guardian who is a relative is preferable vis-à-vis an unknown independent guardian, we cannot find that the evidence supports this avenue in this case.

{¶23} Assignment of Error II is denied.

{¶24} The judgment of the Court of Common Pleas of Ashland County, Ohio, Probate Division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

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