[Cite as *In re Guardianship of Langenderfer*, 2004-Ohio-4149.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

In the Matter of: The Guardianship of Darryl Andre Langenderfer	Court of Appeals No. F-03-031 Trial Court No. 032009

DECISION AND JUDGMENT ENTRY

Decided: August 6, 2004

* * * * *

Patricia Horner, for appellant Deborah Langenderfer.

Gary L. Smith, for appellee Darryl Andre Langenderfer .

* * * * *

HANDWORK, P. J.

{¶1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, Probate Division, which denied the application of appellant, Deborah Langenderfer, to be appointed the guardian for the person and estate of her husband, appellee Darryl Andre Langenderfer, a 56 year old man with multiple sclerosis. For the reasons stated herein, this court affirms the judgment of the trial court.

{¶2} The following facts are relevant to this appeal. On August 15, 2003, Mr. Langenderfer's son, Dustin Langenderfer, filed an application for the emergency appointment of a guardian over Mr. Langenderfer's person and estate, claiming he was incompetent due to psychosis and paranoia. Dustin requested that the probate court

appoint him as his father's guardian. A 72 hour emergency guardianship was granted that day. A motion to extend the emergency guardianship was granted and the emergency guardianship was extended until September 15, 2003.

{¶3} On September 17, 2003, appellant filed an application for an appointment as guardian of her husband and his estate. Mr. Langenderfer's request for counsel to represent him was granted. A hearing on the application was held on November 24, 2003. In addition to the testimony of the witnesses, the trial court also had before it reports from two physicians and a court investigator who had examined Mr. Langenderfer and a document labeled "NEXT OF KIN OF PROPOSED WARD" which listed Mr. Langenderfer's children, none of whom are minors.

{¶4} In a certificate of examination and an affidavit in accordance with R.C. 5122.01 and 5122.11[1], both dated February 21, 2003, nine months before the hearing, Dr. David P. Bellian concluded that Mr. Langenderfer was mentally ill and subject to hospitalization by court order. Dr. Bellian reported that Mr. Langenderfer was depressed, has voiced thoughts of suicide and was paranoid. Dr. Bellian made no statements or conclusion regarding Mr. Langenderfer's need for a guardianship.

{¶5} In her report dated September 16, 2003, Dr. Alina Rais, although recommending that the guardianship be continued, also recommended neuropsychological testing to confirm any cognitive impairment. Furthermore, although she opined that "although there is no doubt that the patient is mentally impaired," she also stated that the patient is able to weigh risks and benefits of his treatment and future care."

[1]These statutes concern the judicial hospitalization of the mentally ill.

She concluded her report with the following statement: "Based upon this evaluation and *further testing*, it'll be up to the judge to determine his competence." (Emphasis added.)

{¶6} Dean Dreher, a probate court investigator, submitted his report on September 23, 2003. Although he concluded that a guardianship was necessary, he also stated "mental abilities would be hard to determine with all the anger issues that Mr. Langenderfer is now dealing with in regard to proposed guardianship."

{¶7} At the November hearing, appellant testified that she is a licensed realtor and has been for 15 years; she and Mr. Langenderfer have been married for 34 years; that she has taken care of the finances for most of that time; and that Mr. Langenderfer has multiple sclerosis. On cross-examination, she admitted that Mr. Langenderfer has had direct deposit of his social security for the last five or six years; that she has never had control of his checkbook; that he has signed his own checks to pay his co-pay for Harborside, the nursing home where he resides; that it was her intention to take Mr. Langenderfer home; and that he does not want her as his guardian.

{¶8} Judith Ann Baumle, the director of the Guardianship Initiative of Northwest Ohio, testified that she has been involved in the case for approximately nine months; that appellant was initially opposed to a guardianship; and that appellant did not have an ulterior motive for the guardianship. On cross-examination, Baumle admitted that she never checked with Mr. Langenderfer's current psychologist at Harborside and that she has never spoken to Mr. Langenderfer.

{¶9} Lisa Ann McCready, a social worker and director of social service at Harborside, testified that Mr. Langenderfer was admitted to Harborside on August 15,

2003; that the admitting nurse performed an assessment of his cognition; and that on admission, he displayed short-term memory deficit and, although alert, he was oriented only to himself.[2] McCready also testified that she performed a "mini-mental" assessment on him upon his admission and that he had a moderate intellectual impairment. Since his admission, McCready has observed that Mr. Langenderfer remembers more than he had and his behavior has improved. She also testified that Dr. Daniel Kuna, a psychologist at Harborside, has provided counseling to Mr. Langenderfer every two weeks for a total of four times; that during the initial August 25, 2003 assessment, Dr. Kuna noted that Mr. Langenderfer was alert and oriented to his person, place, time and situation. She also testified that Dr. Kuna's last assessment of Mr. Langenderfer occurred on November 3, 2003, following which Dr. Kuna noted that Mr. Langenderfer was improved and doing well behaviorally. She also testified that Mr. Langenderfer is on anti-psychotic and anti-depressant medications and although there was some difficulty initially in administering the medications, there are no longer any problems. McCready testified that the business manager fills out checks for Mr. Langenderfer to sign for his payment to Harborside because he is unable to write legibly.

{¶10} Mr. Langenderfer testified that he receives $1,100 in social security and $400 in disability; that he signs the checks for payment to the nursing home; and that he makes sure he gets a photocopy for his ledger. He also testified that he does not want his

[2]Orientation is assessed as to person, place, time and situation through a series of questions asked of the individual such as "Who are you?"; "Can you tell where you live?"; "What is the date (or year)?"; and other similar questions.

wife to be appointed as his guardian; that he does not trust her; that he wants to live in the nursing home; and that he does not want to go back to his home.

{¶11} On December 1, 2003, the probate court filed a decision in which he concluded that a guardianship over Mr. Langenderfer and his estate was not necessary because it was not established by clear and convincing evidence that he was incompetent. The probate court stated that Mr. Langenderfer vigorously denies that he is incompetent and does not want his wife appointed. The probate court also noted that although Mr. Langenderfer may suffer from mental illness and clearly suffers from physical disability, he was able to make arrangements for his current care in the nursing home, able to cause checks to be issued for his payment and was currently meeting his needs. Appellant filed a timely notice of appeal and sets forth the following assignment of error:

{¶12} "THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} Appellant's assignment of error challenges the trial court's decision finding Darryl competent and finding no clear and convincing evidence of any incompetence. Appellant argues the trial court erred in denying her requested guardianship over Darryl. This court finds that the trial court did not err.

{¶14} R.C. 2111.02(A) provides:

{¶15} "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 [2111.2 1.1] 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. ***"

{¶16} R.C. 2111.01(D) defines an incompetent person as follows:

{¶17} "'Incompetent' means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family *** ."

{¶18} The purpose of a guardianship is to protect the rights of one unable to manage his or her own affairs. R.C. 2111.01(A) and (D). Pursuant to R.C. 2101.24(A)(1)(e), the probate court has exclusive jurisdiction "to appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts." In matters relating to guardianship, the probate court is required to act in the best interests of the alleged incompetent. *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, 551. When an alleged incompetent objects to the appointment of a guardian, the probate court must be extremely cautious in proceeding. *In re Guardianship of Corless* (1981), 2 Ohio App.3d 92, 94. A probate court's decision regarding an appointment of a guardian will not be reversed absent an abuse of discretion. *Bednarczuk,* 80 Ohio App.3d at 551. In order to find an abuse of discretion, this court must determine the trial court's decision was unreasonable, arbitrary or

unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219.

{¶19} The appointment of a guardian is a non-adversarial proceeding. *In re Guardianship of Schumacher* (1987), 38 Ohio App.3d 37, 39. The purpose of guardianship hearings is to gather information in order to determine the best interests of the prospective ward. *Bednarczuk,* 80 Ohio App.3d at 553.

{¶20} Before a guardian can be appointed, there must be clear and convincing proof that the proposed ward is incompetent. In *In re Guardianship of Rudy* (1992), 65 Ohio St.3d 394, 396, the Supreme Court of Ohio noted that under R.C. 2111.02, findings of medical problems, the need for assistance to live and vague findings that the proposed ward was "misinformed" about the need to transfer assets, did not meet the stringent "best interests" test of the statute.

{¶21} We must now turn to an examination of the record to see if it supports the trial court's decision that there was insufficient evidence of incompetence. That is, pursuant to R.C. 2111.01(D), whether there was evidence of mental or physical illness or disability rendering Mr. Langenderfer unable to care for himself, his property or to provide for his family. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. A judgment will not be reversed by a reviewing court as being against the manifest weight of the evidence if it is supported by some competent, credible evidence going to all the essential elements of the case. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80.

An appellate court must be guided by the presumption that the findings of the trier-of-fact are correct when reviewing a claim that a judgment is against the manifest weight of the evidence. Id. at 80. The court explained:

{¶22} "The underlying 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.

{¶23} Upon our review of the record in this case, this court concludes that the probate court did not abuse its discretion. The court had before it sufficient evidence to conclude that the appointment of a guardian was not in the best interests of Mr. Langenderfer. Although Mr. Langenderfer may suffer from a mental illness, "mental illness and incompetence are not one and the same." *Steele v. Hamilton Cty. Community Mental Health Bd.* (2000), 90 Ohio St.3d 176, 187.[3] Additionally, in *In re Guardianship of Wilson* (1926), 23 Ohio App. 390, 393, the court stated the following in regard to appointing a guardian:

{¶24} "The court, before appointing a guardian for an alleged incompetent, should be fully and completely satisfied that the claimed infirmity or infirmities of the alleged incompetent are of such a nature and character as to prevent such person from fully and

[3]In *Steele*, the Ohio Supreme Court concluded that an involuntary commitment to a hospital due to a mental illness did not raise a presumption that the individual was incompetent, noting that "[t]he mere presence of psychosis, dementia, mental retardation, or some other form of mental illness or disability is insufficient in itself to constitute incompetence. (Citation omitted.)" Id.at 186-87. Although *Steele* involved the forced medication of an involuntarily committed mentally ill individual, we find the Supreme Court's distinction between mental illness and incompetence applicable in a guardianship context also.

completely protecting herself and property interests from those about her who would be inclined to and would take advantage of such person in the way of securing her property or means without giving proper service or value therefor." See, also, *In re Bolander* (1993), 88 Ohio App.3d 498, 504, in which the appellate court noted that "a guardian should only be appointed under the most dire circumstances." In that case as in the case sub judice, the alleged incompetent was mentally capable of handling day-to-day affairs.

{¶25} Accordingly, appellant's single assignment of error is found not well-taken.

{¶26} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Fulton County Court of Common Pleas, Probate Division, is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.
JUDGE