[Cite as *In re Guardianship of Biro*, 2011-Ohio-1834.]

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

In the Matter of: The Guardianship of Michael Biro

Court of Appeals No. OT-10-024

Trial Court No. 20082027

DECISION AND JUDGMENT

Decided: April 15, 2011

* * * * *

George C. Wilber, for appellant.

John Klaehn, for appellee.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from the judgment issued by the Ottawa County Court of Common Pleas, Probate Division, in a guardianship application. Because we conclude that the trial court did not abuse its discretion in appointing appellee, Vickie Biro, as guardian, we affirm.

{¶ 2} Appellant, James Biro, and appellee were divorced in 2006. They have two children, twins Jamie and Michael Biro who were born in 1987. At the age of six, Michael was diagnosed with autism. Following his parents' divorce, he resided with appellee.

{¶ 3} On September 23, 2008, appellant filed an "application for appointment of guardian of alleged incompetent" pursuant to R.C. 2111.03. Appellee asked the court to appoint her Michael's legal guardian. Pursuant to R.C. 2111.04, a court investigator was assigned to this case and filed a report.

{¶ 4} Investigator Gloria J. Shenkel reported that Michael needs to be reminded to eat and that he needs assistance in getting dressed. He is incapable of driving, doing housework and preparing meals. Shenkel reported that Michael gets frustrated very easily and that it is better for him when things are kept simple.

{¶ 5} She noted that his condition is irreversible and she concluded that a guardianship was necessary.

{¶ 6} "[Ward has had] grand mal seizures back-to-back. Mother was granted full custody of proposed ward through divorce. There is no visitation granted with father unless ok'd by mother. * * * Mother gives her full attention to proposed ward. They walk daily, go to church and do activities to stimulate his mind. Proposed ward does not like a lot of people around and works on the computer a lot, i.e., email and games. * * * I feel that proposed ward does need a guardian and that [appellee], mother, would be a suitable guardian.

{¶ 7} On September 28, 2009, appellant filed his own application to be Michael's guardian. Once again, pursuant to R.C. 2111.04, Investigator Schenkel was assigned to write a report. In her report, she stated that appellant believes that Michael has lived a sheltered life too long and has never been taught to do things himself. He also believes that appellee is keeping Michael from functionally socially by keeping him away from other people. In conclusion, she wrote: "[B]oth of Michael's parents have his best interest in mind. * * * I feel that Michael does need a guardian. Considering that Michael has always been with [appellee] and does not have a relationship or interact with his father it would be best for Michael to remain with [Mother]."

{¶ 8} On the same day she filed her report with regard to appellant's application, Schenkel filed an amended report with regard to appellee's application. In the report she relayed to the court that when she told Michael that appellant had applied to be his guardian, he replied "[I] don't want him to be guardian." She also included a copy of a letter she received from Michael's twin sister Jamie asking for her brother to remain with appellee as Michael is more used to and more comfortable with appellee.

{¶ 9} Following a hearing, the court granted appellee's guardianship application. Appellant now appeals setting forth the following assignments of error:

{¶ 10} "I. The probate court erred and abused its discretion in appointing a guardian who will not act in and promote the long term best interests of the ward.

{¶ 11} "II. The probate court erred and abused its discretion in appointing a person as guardian who has a financial conflict in her individual capacity, as

distinguished from her fiduciary capacity, adverse to the long term best interest of the ward.

{¶ 12} "III. The trial court erred as a matter of law and abused its discretion when it failed to grant appellant's motion to dismiss the guardianship application of Vickie Biro.

{¶ 13} "IV. The trial court erred and abused its discretion in failing to obtain an attorney to represent the ward in this proceeding."

{¶ 14} Appellant's first two assignments of error will be considered together. Appellant contends that the court abused its discretion in appointing appellee Michael's guardian.

{¶ 15} A trial court is vested with broad discretion in appointing guardians. The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. *In re Estate of Bednarczuk* (1992), 80 Ohio App.3d 548, 551. An abuse of discretion implies more than an error of law or judgment. Rather, abuse of discretion suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 16} When a court considers a motion for appointment of a guardian, it must make a two-part determination: "(1) it must first determine that a guardian is required; and (2) it must also determine who shall be appointed guardian." *In re Guardianship of*

Friend (Dec. 16, 1993), 8th Dist. No. 64018, citing *In re Medsker* (1990), 66 Ohio App.3d 219. In the absence of a written nomination by the ward of who shall be appointed guardian, the probate court is required to choose a guardian who will promote the best interests of the ward. See *Guardianship of Elliott* (Dec. 16, 1991), 12th Dist. No. CA91-01-002; *Matter of Mahaffey* (Jan. 20, 1987), 12th Dist. No. CA86-10-147.

{¶ 17} The parties in this case do not dispute the fact that Michael requires a guardian. Appellant first contends that the court abused its discretion in appointing appellee guardian because she will not act in and promote the long term best interests of her son. Specifically, appellant maintains that appellee tends to shelter and isolate Michael too much. As a result, appellant maintains, he is not exposed to various opportunities and activities which would help him develop socially. He additionally argues that appellee wants to keep Michael dependant on her so she can continue to receive spousal and child support from appellant.

{¶ 18} Appellee testified that she is 22 year old Michael's full-time caregiver. In 2003, he had two grand mal seizures which caused him brain damage. Most significantly, he lost his short term memory. As a consequence, he has trouble learning how to do anything new. In order to keep the risk of another seizure low, she must limit stress in his life. Among the things that cause him stress are children, animals and crowds. She testified that she and Michael walk seven to eight miles, six days a week, in an effort to relieve his stress. When the weather is cold, they walk in a local mall. In the warmer months, they walk outside. On Sundays, the two of them attend church.

{¶ 19} Recently, appellee and Michael took a vacation. They flew to Las Vegas to visit appellee's parents and then they flew to Hawaii to visit Michael's sister and appellee's daughter. Appellee testified that Michael wanted to go to Las Vegas but he did not want to go to Hawaii. Appellee promised him that if he would go to Hawaii with her she would take him to a movie he had wanted to see. He agreed to go and appellee took him to the movie.

{¶ 20} Appellee testified that Michael accompanies her on her weekly errands such as grocery shopping and that while Michael does not care to be around the public, he tolerates it. At home, he spends a lot of time on his computer playing video games. Appellee acknowledged that she does not keep appellant updated on Michael's condition.

{¶ 21} Jill Bothe testified that she is a service and support administrator for the Ottawa County Board of Developmental Disabilities. She testified that she has been Michael's case manager since 2005. In her opinion, she stated that Michael is one of the most severely autistic young men with whom she has ever worked. With regard to appellee, Bothe testified that she is very receptive to ideas or suggestions given by the agency. Bothe testified that appellee has never refused to follow the advice of the agency. According to Bothe, she talks to appellee several times a month whereas she has only spoken to appellant twice in five years, the second time being at court before her testimony. She noted that Michael is employed, through her agency, in a workshop for two hours, two days a week, where he is learning billing procedures. She testified that her agency offers a wellness program for its clients where they can go, with a supervisor,

out to eat, to a movie or bowling and that Michael has steadfastly refused to participate in the program.

{¶ 22} Appellant testified that he works full-time and that he lives with his girlfriend in Ottawa County. As part of his job, he takes day trips to Canton, Ohio every couple of weeks and he travels overseas approximately four times a year. He testified he would be able to rearrange his travel schedule to accommodate his son if he had to, and when he was working his girlfriend would be able to take care of Michael. Appellant, however, testified that he thinks it would be best for his son to continue to live with appellee, but that his son should have a guardian other than appellee.

{¶ 23} Appellant testified that he has contact with Michael approximately four times a year. He explained that he has tried to have more contact but appellee makes excuses for not making Michael more available. He also testified that appellee would not allow Michael to visit appellant at his home because she is afraid Michael will have a seizure.

{¶ 24} Appellant testified that he applied to be Michael's guardian because he believes Michael is "stagnated" in his life and that he does not believe appellee is affording him all of the opportunities that are available to him. Appellant testified he has looked into other autistic programs and doctors and he would like to see Michael evaluated by some other specialists, particularly specialists who can determine what Michael is capable of doing in the future as opposed to just evaluating Michael's current skills. He testified that he would like to see Michael become as self-reliant as is

realistically possible. He acknowledged that appellee has done a good job with Michael but he stated: "[I] think she is out of resources and it is time to bring in an expert from outside to help Mike progress along."

{¶ 25} The record in this case shows that appellee is a committed caregiver to her son. Contrary to appellant's arguments, she does expose him to activities outside the home. As she spends all of her time with her son, she seems to be the person in the best position to determine what kind of activities Michael can and cannot handle. In view of appellee's extraordinary commitment to her son, essentially putting her son's life before hers, we do not agree with appellant that appellee is "only in it for the money." Moreover, appellant's work schedule and his limited relationship with his son are a concern. The parties disagree over the best way to help their son. Based on the evidence in this case and the recommendations from the court investigator, Michael's case manager and Michael's sister, we cannot say that the court abused its discretion in finding that appellee was the more appropriate applicant to be Michael's guardian. Appellant's first two assignments of error are found not well-taken.

{¶ 26} In his third assignment of error, appellant contends that the probate court lacked jurisdiction to hear this case because the Ottawa County Court of Common Pleas, Domestic Relations Division, retained continuing jurisdiction as a result of the parties filing for divorce in 2004. Appellant's third assignment of error is without merit as this court has already addressed this issue in *Biro v. Biro*, 6th Dist. No. OT-10-017, 2010-Ohio-5169. ("Michael's guardianship is within the exclusive jurisdiction of the probate

court. *In re Guardianship of Constable* (June 12, 2000), 12th Dist. No. CA99-05-039." *Biro*, supra, ¶ 13.

{¶ 27} In his fourth assignment of error, appellant contends that the court erred in not appointing Michael legal counsel.

{¶ 28} R.C. 2111.031 provides in pertinent part:

{¶ 29} "In connection with an application for the appointment of a guardian for an alleged incompetent, the court may appoint physicians and other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary."

{¶ 30} The above statute grants the probate court discretionary authority to appoint a prospective ward counsel. We see nothing in the record before us to suggest that the probate court abused its discretion in failing to appoint Michael legal counsel. Appellant's fourth assignment of error is found not well-taken.

{¶ 31} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas, Probate Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____
JUDGE