[Cite as *In re Guardianship of J.B.J.*, 2012-Ohio-1873.]

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

In re Guardianship of
Joseph Bryce Jung

Court of Appeals No. OT-11-020

Trial Court No. 20112001

DECISION AND JUDGMENT

Decided: April 27, 2012

* * * * *

James C. Barney, for appellant.

Vickie B. Ruffing, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Ottawa County Court of Common Pleas, Probate Division, appointing a guardian over the person and estate of appellant Joseph Bryce Jung. We affirm.

A. Facts and Procedural Background

{¶ 2} Appellant has been diagnosed with schizophrenia, paranoid type, and dementia. After pleading not guilty by reason of insanity to a criminal charge in 1991, appellant has continuously resided in several forensic hospitals, most recently the Northwest Ohio Psychiatric Hospital. Recently, appellee, the Mental Health and Recovery Board of Erie and Ottawa Counties, was contacted to assist in developing a plan to conditionally release appellant from his commitment and place him in a nursing home. Appellant, however, objects to being placed in a nursing home. As part of the plan to conditionally release appellant, it was determined that it was necessary to seek appointment of a guardian for him. On January 11, 2011, Linda Van Tine applied for a guardianship over the person of appellant, limited to medical and mental health placement and treatment decisions.[1]

{¶ 3} Submitted with the application was a statement of expert evaluation from Dr. Habeeb Arar, recommending that a guardianship be established. In his evaluation, Dr. Arar identified that appellant was diagnosed with schizophrenia, paranoid type, and dementia. Dr. Arar reported that during his examination, he noticed impairment to appellant's orientation, speech, motor behavior, thought process, memory, and concentration and comprehension. Dr. Arar further commented that appellant was unable to identify his mental illness and did not believe that he was mentally ill or needed to take

[1] At the guardianship hearing, appellee moved to amend the application to include guardianship of the estate. The trial court allowed the amendment over objection. However, that issue is not raised on appeal, and will not be discussed.

medication. However, Dr. Arar noted that appellant did state, "I'm taking medications because they have been ordered for me."

{¶ 4} On January 20, 2011, Van Tine filed an emergency application for limited guardianship of the person. A supplemental report from Dr. Arar was submitted on the same day. In the supplemental report, Dr. Arar stated the nature of the emergency as "The patient is showing a continuous decline in his cognitive function and exhibiting a confusion state. He is unable to give a consent form for starting medication or doing tests." The trial court granted the emergency application and appointed Van Tine as guardian. The emergency guardianship was subsequently extended on a temporary basis until the trial court ruled on the original guardianship application.

{¶ 5} On February 9, 2011, the court investigator submitted her report on the proposed guardianship. The court investigator determined that appellant was incapable of handling personal finances or taking medications. She noted that appellant is showing signs of dementia, but is refusing to take the needed medication. The court investigator's recommendation was that a guardianship was necessary.

{¶ 6} Prior to the hearing on the original guardianship application, a second statement of expert evaluation was filed on March 7, 2011. In this evaluation, Dr. Thomas Osinowo noticed that appellant's speech, motor behavior, thought process, affect, memory, concentration and comprehension, and judgment were impaired. Further, Dr. Osinowo believed that appellant is unable to care for his finances and

medication. Dr. Osinowo concluded that a guardianship should be established for appellant.

{¶ 7} On March 8, 2011, appellant requested that he receive an independent evaluation, and that he be appointed counsel. As a result of the independent evaluation, a third statement of expert evaluation was filed on May 6, 2011. In this evaluation, Dr. Douglas Songer indicated that appellant was diagnosed with schizophrenia, paranoid type, and dementia. As it relates to dementia, Dr. Songer noted that "[appellant] has mild short term memory deficits, but is oriented in all spheres and has a relatively intact long term memory." Dr. Songer also reported that during his examination, he noticed impairment of appellant's speech, thought process, memory, and judgment. Dr. Songer commented that appellant's judgment is impaired due to his mental illness, and that he may act on his delusions or choose to stop treatment if given the opportunity. However, Dr. Songer stated that appellant's "judgment is intact regarding decisions regarding where he would prefer to get his health care treatment. He clearly prefers a group home setting to a nursing home and can provide a cogent, clear explanation for why this is a better choice for him." Dr. Songer recommended that the guardianship be denied.

{¶ 8} The hearing on the guardianship application was held on May 13, 2011. At the hearing, Dr. Martin Williams, the forensic monitor for the Ottawa County Common Pleas Court, testified on behalf of appellee. Dr. Williams confirmed that appellant has been diagnosed with schizophrenia, paranoid type, and dementia. When asked about his concerns regarding appellant's ability to care for himself, Dr. Williams replied, "My

concern is the factors that come into play that he has been in a very restricted institutional setting. He has a very serious mental illness and at this point in time there has been parts where the delusions and the paranoia interfere with his making sound judgment." In addition, the following testimony was elicited:

> Q. Can you give us an example of how his paranoia and delusions interfered with his making sound judgments?
>
> A. It varies on the time, but if in fact he has to sign something or what have you, the paranoia sets in that he feels that he doesn't want to sign it because he doesn't know what it is all about or you are out to get him or somebody is trying to get him to do something.
>
> Q. What about his ability to self administer his medication?
>
> A. That ability does not exist. He has been in an institution. At the beginning, he had to have forced medication, and for the last two years, he has been in fact taking it, but with close monitoring.

{¶ 9} Dr. Williams also testified regarding appellant's dementia specifically. Dr. Williams stated that appellant was not diagnosed with dementia ten years ago. He further testified that over time appellant's dementia will get worse, and as it does appellant will have problems with short-term and long-term memory, which will only exacerbate the mental illness. Dr. Williams did admit on cross-examination, though, that appellant's dementia is being controlled by medication at this point.

{¶ 10} Following the hearing, on May 25, 2011, the trial court issued its judgment entry finding by clear and convincing evidence that appellant "is incompetent by reason of schizophrenia, paranoid type [and] is therefore incapable of taking proper care of himself and his property, and a guardianship is necessary."

B. Assignment of Error

{¶ 11} Appellant has timely appealed, and asserts one assignment of error:

> THE TRIAL COURT ERRED IN GRANTING THE GUARDIANSHIP BECAUSE THE APPLICANT DID NOT PROVE THE NEED FOR A GUARDIANSHIP BY CLEAR AND CONVINCING EVIDENCE.

II. Analysis

{¶ 12} "In matters relating to guardianships, the probate court is required to act in the best interest of the minor or incompetent." *In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E.2d 1310 (12th Dist.1992). While the appointment of a guardian is non-adversarial, when the alleged incompetent objects to the guardianship, the probate court must be extremely cautious in proceeding. *In re Guardianship of Schumacher*, 38 Ohio App.3d 37, 39, 525 N.E.2d 833 (9th Dist.1987), citing *In re Guardianship of Corless*, 2 Ohio App.3d 92, 94, 440 N.E.2d 1203 (12th Dist.1981).

{¶ 13} At the time of the application and hearing, R.C. 2111.02(A) provided,

> When found necessary, the probate court on its own motion or on application by any interested party shall appoint * * * 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.

{¶ 14} R.C. 2111.01(D) defines an "incompetent" as

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 or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.

{¶ 15} Under R.C. 2111.02(C)(3), the applicant has the burden of proving the alleged incompetency by clear and convincing evidence. Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is more than a preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 16} It is well-settled that a probate court's decision regarding the appointment of a guardian will not be reversed absent an abuse of discretion. *In re Guardianship of Hackl*, 6th Dist. No. WD-08-030, 2009-Ohio-666, ¶ 13; *In re Estate of Bednarczuk*, 80

Ohio App.3d at 551, 609 N.E.2d 1310. The term "abuse of discretion" implies that the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} In support of his assignment of error, appellant argues that although he has been diagnosed with dementia, no evidence was presented showing that the dementia precipitates the need for a guardian. However, as noted by appellee, appellant's dementia is just one of the factors that the court considered in finding that appellant is incompetent, and a guardianship is necessary.

{¶ 18} Here, we conclude there is competent, credible evidence sufficient to produce a firm belief or conviction that appellant is incompetent. Submitted as evidence were two expert doctor evaluations and a report from the court investigator that all concluded appellant was incapable of making decisions concerning his medical treatment and finances because of his mental illness. In addition, at the hearing Dr. Williams testified that appellant has no ability to self-administer his medication due to his paranoia and delusions, referencing the fact that appellant had to be forced to take his medication at the beginning, and although he takes it now, he does so under close supervision. Finally, the record contains Dr. Songer's independent psychiatric evaluation in which he states, "My major concern for [appellant] is his past history of noncompliance with treatment, his poor insight into his illness, and his acknowledgment to me that he will not take his medications voluntarily once discharged from the hospital." Based on this evidence, we hold that the probate court did not abuse its discretion in finding by clear

and convincing evidence that appellant is "incapable of taking proper care of himself," and appointing a guardian for the limited purpose of medical and mental health placement and treatment decisions.

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

IV. Conclusion

{¶ 20} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas, Probate Division, is affirmed. Appellant is ordered to pay the costs of this appeal 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE