

[Cite as *In re Guardianship of Kushlak*, 2009-Ohio-5219.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91867

**IN RE: GUARDIANSHIP OF
LILLIAN KUSHLAK**

APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the Cuyahoga
County Common Pleas Court, Probate Division
Case No. 2006 GDN 121228

BEFORE: Sweeney, J., Kilbane, P.J., and Stewart, J.

RELEASED: October 1, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Appellant, Lillian Kushlak (“Lillian”) challenges the orders of the Cuyahoga County Probate Court that granted payment of attorney’s fees to her court appointed guardian. For the reasons that follow, we affirm.

{¶ 2} In a related proceeding, the Cuyahoga County Department of Adult Protective Services (“APS”) sought protective services for Lillian, which the Probate Court granted on December 22, 2006. The Probate Court later found Lillian at risk and entered a protective order requiring her to stay at the nursing home facility until guardianship issues were resolved.

{¶ 3} In this case, three individuals filed applications for guardianship: Nelli Johnson (“Johnson”), Sandra Pekarcsik (“Pekarcsik”),¹ and Anthony Kushlak (“Kushlak”).²

{¶ 4} APS had suggested to the Court that a non-family member be appointed as Lillian’s guardian. According to the magistrate’s decision, issued on March 30, 2007, Johnson had applied for guardianship at the request of the Court. An expert evaluation was also submitted to the Court where a physician indicated that guardianship was needed for Lillian as she suffered from dementia, depression and possibly Alzheimer’s disease.³ A

¹Lillian’s niece.

²Lillian’s son.

³Another medical report, prepared on March 13, 2007, indicated that Lillian

hearing was held on the multiple applications and the Magistrate issued his decision on March 30, 2007, granting Johnson's application for guardianship for numerous reasons, including that "the best interests of Lillian Kushlak would be served by the appointment of an independent third party as guardian rather than her son or niece." R. 5, p. 6. The attorney for Lillian filed objections to the Magistrate's decision that were overruled. The Probate Court adopted the Magistrate's Decision by order dated April 27, 2007 and by a separate order on the same date appointed Johnson as Guardian of the person and estate of Lillian. Neither order was appealed.

{¶ 5} Thereafter, Johnson performed her fiduciary duties, including the preparation of various guardianship forms. Johnson also filed a restraining order, which was granted by the Probate Court. On January 8, 2008, Johnson submitted an Application for Attorney Fees for services rendered during the period from December 27, 2006 through December 31, 2007 at the rate of \$80.00 per hour. Johnson submitted an itemized time sheet that detailed the services rendered. On February 11, 2008, Lillian filed a "Motion for Dismissal of Application for Attorney Fee" essentially complaining that

did not suffer from dementia or Alzheimer's disease but exhibited symptoms associated with Parkinson's disease. The physician, however, indicated that Lillian remained "at high risk for continuing cognitive declines which could eventually lead to dementia." R. 5, p. 5.

she should not have been the subject of a guardianship and that she had her own attorney independent of the guardian.

{¶ 6} On February 11, 2008, the Probate Court held a hearing on the Application for Attorney Fees. Johnson and Kushlak were present at the hearing. No transcript was taken. The Magistrate's Decision was issued on April 20, 2008, which found that "[a]s a result of her appointment [as guardian of person and estate of Lillian], Ms. Johnson generated attorney fees totaling \$5,380.00." R. 34. Kushlak objected to the payment of fees for services rendered prior to Johnson's official appointment as guardian on April 27, 2007, which totaled 11.45 hours at a rate of \$80.00 per hour. Kushlak further objected that Johnson should receive commission as guardian and not attorney fees. The magistrate noted, "the case indicates a rather difficult guardianship based on the ward's lack of cooperation with the guardianship and the subsequent restoration to competency. A review of the application for fees indicates that an unusually high amount of time was spent in caring for the ward." R. 34. Citing Rule 1.5 of the Ohio Rules of Professional Conduct, the magistrate further reasoned, "the time expended, the rate charged, the difficulty of the services, and the results obtained are all factors the court must consider in determining the reasonableness of attorney fees." After reviewing the application and the file the magistrate concluded, "that

Ms. Johnson spent significant hours providing care for Lillian Kushlak. However, the hours expended prior to her appointment are reasonable deductions from the application.” Accordingly, the Magistrate’s Decision granted the Application in the amount of \$4,464.00.

{¶ 7} On March 27, 2008, the Probate Court heard and granted Lillian’s application to terminate the guardianship. R. 30.

{¶ 8} On May 13, 2008, Lillian objected to the Magistrate’s Decision of April 29, 2008.

{¶ 9} On May 28, 2008, Johnson filed an Application for Attorney Fees seeking \$484.00 for legal services rendered during the period January 1, 2008 through April 1, 2008. Again, she submitted an itemized time sheet detailing the services rendered.

{¶ 10} On June 27, 2008, the Probate Court overruled Lillian’s objections to the Magistrate’s Decision and adopted the Magistrate’s Decision as the findings and conclusions of the Court. By separate order of the same day, the Probate Court issued an order granting the Application for Attorney Fees in the amount of \$4,464.00. The Probate Court issued a third order granting the Application for Attorney Fees in the amount of \$484.00. Lillian filed a notice of appeal from these three orders. She assigns two errors for our review that we address together for ease of discussion.

{¶ 11} “Assignment of error I.

{¶ 12} “The Cuyahoga County Common Pleas Court - Probate Division erred when it awarded ex-guardian Nelli Johnson attorney fees of 4,464.00 [sic] and 484.00 [sic] from estate of ex-ward Lillian Kushlak because the estate and person were not managed properly - in violation of ORC 2111.14(b) ORC 2111.14(e) 2111.031 [sic].

{¶ 13} “Assignment of error II.

{¶ 14} “The Cuyahoga County Common Pleas Court - Probate Division violated Lillian Kushlak’s right to due process of probate law as guaranteed by the Fourteenth Amendmend [sic] to the United States Constitution Section 1 Paragraph 3, Paragraph 4 when it failed to follow ORC 2111.02c ORC 2111.02c1 ORC 2111.47 notes of decision 7.”

{¶ 15} These assignments of error concern the trial court’s orders that adopted the magistrate’s decisions and orders that granted payment to Johnson.

{¶ 16} We review the trial court’s decision to adopt the magistrate’s decisions and ordering payment to Johnson by applying the abuse of discretion standard. “An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Dancy v. Dancy*, Cuyahoga App. No. 82580, 2004-Ohio-470,

¶11, citing *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (other citations omitted). “In order to find an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.” *Id.*, citing, *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1.

{¶ 17} Civ.R. 53(D)(3)(b) provides in relevant part as follows:

{¶ 18} “(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶ 19} “(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on

which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶ 20} “(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).”

{¶ 21} To the extent Lillian’s second assignment of error challenges the trial court’s decision to open a guardianship and its appointment of Johnson as the guardian, she has waived it. Civ.R. 53(D)(3)(b)(iv). Lillian did not object to the Magistrate’s Decision that granted Johnson’s application for guardianship. Further, the notice of appeal did not include the order that adopted that Magistrate’s Decision. After reviewing the record, we do not find plain error with the trial court’s order concerning the appointment of the guardian. The second assignment of error is overruled.

{¶ 22} Lillian did file objections to the Magistrate’s Decision that awarded attorney fees to Johnson but did not submit any evidence in support and she did not submit an affidavit of evidence as required by the Civil Rule 53. Instead, the objections made unsupported accusations against Johnson.

While the trial court may hear additional evidence before ruling on the objections, it can refuse to do so as set forth by the following provisions:

{¶ 23} “(d) Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. *Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.*” Civ.R. 53(D)(4)(d) (emphasis added).

{¶ 24} Lillian has not argued on appeal or in the trial court below that she was prevented from producing any evidence for consideration by the magistrate. To the contrary, her purported evidence concerns alleged conduct that took place prior to the hearing on Johnson's Application for Attorney Fees. We also note that Kushlak attended the February 11, 2008 hearing and advanced objections to the Application on Lillian's behalf as detailed in the Magistrate's Decision.

{¶ 25} The trial court is not required to hold a hearing on the objections. *Id.*, see also, *Dancy*, *supra*, at ¶9.

{¶ 26} Without a transcript or affidavit of evidence, we are limited to examining the trial court's decision to determine "whether the application of the law to the magistrate's factual findings constitutes an abuse of discretion." *Dancy*, supra. at ¶10, citing, *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272; *Ney v. Ney*, Cuyahoga App. No. 81546, 2003-Ohio-1349.

{¶ 27} There is competent and credible evidence in the record that supports the Magistrate's Decision and the court orders that are the subject of this appeal. The trial court did not abuse its discretion by adopting the Magistrate's Decision and awarding payment to Johnson. This assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Probate Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR