

[Cite as *Bakhtiar v. Saghafi*, 2016-Ohio-8052.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104204

FOUROUGH BAKHTIAR

PLAINTIFF-APPELLEE

vs.

MEHDI SAGHAFI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-13-346931

BEFORE: Stewart, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 8, 2016

ATTORNEY FOR APPELLANT

David G. Weilbacher
12711 Gordon Street
North Royalton, OH 44133

ATTORNEYS FOR APPELLEE

Joyce E. Barrett
James P. Reddy
Law Offices of Joyce E. Barrett
55 Public Square, Suite 1260
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶1} After nearly 56 years of marriage, plaintiff Fourough Bakhtiar and defendant Mehdi Saghafi were divorced by a decree issued by the Cuyahoga County Court of Common Pleas, Domestic Relations Division. At issue was Bakhtiar’s competency to request a divorce — at the time of trial, the 81 year-old Bakhtiar had been adjudged incompetent by the Lorain County Court of Common Pleas, Probate Division, made a ward of the court, and her affairs were being directed by a court-appointed guardian. Rejecting Saghafi’s assertion that Bakhtiar was incompetent to request a divorce, the domestic relations division judge relied on a stipulation made by the parties in 2013 that Bakhtiar had “clearly and cogently” stated to the probate court that she desired to be divorced and also relied on testimony from her legal guardian to establish that Bakhtiar desired a divorce. Saghafi argues on appeal that the court erred by relying on a two-year old stipulation without first ascertaining whether Bakhtiar still desired a divorce at the time of trial and by failing to require her to testify in support of the divorce.

{¶2} Our ability to review Saghafi’s assignments of error relating to Bakhtiar’s mental capacity to request a divorce is limited because we have no transcript of the trial. The praecipe filed with Saghafi’s notice of appeal requested that the clerk of the domestic relations division prepare a complete transcript under App.R. 9(B). No transcript, however, was filed. We issued a sua sponte order noting that Saghafi had not only failed to file the transcript, but that he had not sought any extension of time in which to complete filing the record. We therefore ordered that “this appeal shall proceed on the App.R. 9(A) trial court record without any additional transcripts.”

{¶3} “The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record.” *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980), citing *State v. Skaggs*, 53 Ohio St.2d 162, 372 N.E.2d 1355 (1978). In the absence of a complete and adequate record, a reviewing court must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court’s decision. *Wells v. Spirit Fabricating, Ltd.*, 113 Ohio App.3d 282, 288-289, 680 N.E.2d 1046 (8th Dist.1996).

{¶4} For purposes of the assignments of error filed in this appeal, the record from the trial consists only of the court’s divorce decree and Stipulation 13. Stipulation 13 states:

13. Zachary B. Simonoff, Attorney at Law, is the duly appointed and acting Guardian of the Person and Estate of Fourough Bakhtiar. Mr. Simonoff has been directed by the Lorain County Probate Court, by order filed on February 9, 2015, to proceed with this divorce action. The Lorain County Probate Court made the following findings:

“Fourough Bakhtiar has consistently stated that she wishes to proceed with the divorce. In 2013, Ms. Bakhtiar clearly and cogently stated to the Court her wishes to be divorced. The Guardian Ad Litem, Court Investigator and the Director of the Volunteer Guardianship program all interviewed Ms. Bakhtiar and found her capable of expressing her wishes to proceed with a divorce. Although the Court has declared her to be incompetent as a matter of law, the Court finds her to be very bright, articulate and determined. Throughout most of the proceedings in this case, Ms. Bakhtiar has been represented by counsel, who has also maintained that it is Ms. Bakhtiar’s independent and express desire to obtain a divorce from her husband, Mehdi Saghafi.”

{¶5} This limited record is inadequate to support Saghafi’s fourth assignment of error that the court erred by allowing Bakhtiar’s guardian to give hearsay testimony regarding her intentions and desire for a divorce — without a record of the guardian’s testimony, this assignment of error is unreviewable. For the same reason, the record is inadequate to support Saghafi’s eighth assignment of error and his argument that the court erred by finding that Bakhtiar’s separation and departure from the marital home was voluntary.

{¶6} The remaining assignments of error collectively raise issues of law that require no reference to specific items in the record. Those issues are whether the court had the duty to independently determine whether Bakhtiar was sufficiently competent to consent to the divorce, whether the court erred by failing to conduct an independent examination of Bakhtiar’s competency notwithstanding the stipulation that continued to express a desire to obtain a divorce, and whether the court erred by granting a divorce without requiring Bakhtiar to testify to her wishes.

{¶7} Before addressing these issues, we first consider Saghafi’s argument that the court erred by finding that the rulings of the probate court, as summarized in Stipulation 13, were persuasive on the issue of whether Bakhtiar had the mental capacity to request a divorce. Stipulation 13 was nothing more than an agreement on the substance of the probate court’s rulings — it was not Saghafi’s agreement with the correctness of the probate court’s rulings. This conclusion is compelled by language stating that “the Lorain County Probate Court made the following findings * * *.” We therefore agree with Saghafi that he did not stipulate that the probate court did not err by finding that Bakhtiar desired to pursue the divorce after being declared incompetent.

{¶8} Even without Saghafi’s agreement on the correctness of the probate court’s rulings, the domestic relations court could find the probate court’s findings relative to Bakhtiar’s continuing desire to seek a divorce worthy of deference. Although there is no trial transcript, we can take notice of our “own records in a previous case involving the same cause and the same parties.” *Ohio v. McGhee*, 8th Dist. Cuyahoga No. 42896, 1981 Ohio App. LEXIS 13438, *12 (Aug. 27, 1981), fn. 1; *State ex rel. Vrooman v. Kauffman*, 22 Ohio App. 282, 285, 153 N.E. 897 (8th Dist.1926).

{¶9} We addressed the underlying facts of the probate court proceedings in *State ex rel. Saghafi v. Celebrezze*, 8th Dist. Cuyahoga No. 102746, 2015-Ohio-1159. In *State ex rel. Saghafi*, Saghafi sought a writ to prohibit the domestic relations division judge from proceeding to trial in this case on grounds that the domestic relations division lacked jurisdiction to proceed with the divorce because there was no “complaining party to the divorce action willing and able to proceed” with the action. *Id.* at ¶ 4. Addressing this question, we stated the underlying facts as follows:

On May 3, 2013, Husband filed an application in Lorain C.P. Probate No. 2013GI00040, to be appointed guardian of his wife, Fourough Bakhtiar (“Wife”). The application to be appointed guardian was premised on the claim that Wife was incompetent. On May 6, 2013, Wife filed a complaint for divorce in the Cuyahoga County Court of Common Pleas, Domestic Relations Division._

On October 23, 2014, the Lorain County Probate Court appointed attorney Zachary Simonoff as guardian of the estate of Wife. On December 3, 2014, the Lorain County Probate Court issued a judgment authorizing Wife's guardian "to proceed in the Cuyahoga County Domestic Relations case through to final divorce." The Lorain County Probate Court opined "[t]hat the Cuyahoga County Court of Common Pleas, Domestic Relations Division, has issued support orders that have been ignored by [Husband], and that the Court will not enforce its orders unless the case proceeds."

On January 2, 2015, Husband filed an appeal in the Ninth Appellate District, of the order issued by the Lorain County Probate Court, which allowed the guardian to prosecute the divorce action. The appeal remains pending in the Ninth District.

Id. at ¶ 2-4.

{¶10} In addition to this case history, the record in this case contains a guardian ad litem's report issued in June 2013 and appended to Saghafi's motion to dismiss the divorce complaint. The probate court appointed the guardian ad litem to investigate whether Bakhtiar required a guardian for her person and her estate. The report stated:

The consensus among the parties, as well as the medical professionals examining her, is that Mrs. Bakhtiar suffers from significant cognitive deficiencies which affect attention, memory, language and executive functioning, most likely due to dementia and Alzheimer's disease. Both professionals agree that Mrs. Bakhtiar is unable to make appropriate decisions regarding her welfare and finances due to the severity of her condition. Furthermore [a clinical neuropsychologist] stated [Bakhtiar's] mental condition makes her vulnerable to exploitation.

{¶11} Saghafi argues that the findings relating to Bakhtiar’s incompetency were at odds with statements by both the probate court and the guardian ad litem that indicated that Bakhtiar may well have had the mental capacity to testify at trial and directly state her intention to pursue a divorce. Stipulation 13 shows that as late as February 2015, the probate court characterized Bakhtiar as “very bright, articulate, and determined,” and that the guardian ad litem described Bakhtiar as “extremely articulate and intelligent” and “able to express herself well.” He maintains that these statements indicated that Bakhtiar should have testified at trial regarding her desire to maintain the divorce.

{¶12} To further support his argument, Saghafi cites *Boyd v. Edwards*, 4 Ohio App.3d 142, 446 N.E.2d 1151 (8th Dist.1982), for the proposition that the court erred by failing to question Bakhtiar to determine whether she still desired to pursue the divorce action after being declared incompetent. *Boyd* held that where a guardian files for divorce on behalf of an incompetent ward, and the suit is opposed by the ward’s spouse on the basis that the ward does not want a divorce, the court may not grant a divorce without first determining whether the ward, despite his incompetence, is capable of expressing his intentions.

{¶13} There is no indication in this case that Bakhtiar did not want a divorce, even after being declared incompetent. “The appointment of a guardian for a mentally incompetent person will not abate a divorce action instituted prior to the incompetency.” *State ex rel. Broer v. Alexander*, 175 Ohio St. 24, 190 N.E.2d 923 (1963), paragraph one of the syllabus. Additionally, the guardian had the power “to sue or defend” on Bakhtiar’s behalf, *see* Civ.R. 17(A), and had been substituted as a party plaintiff in the case. The guardian’s continued prosecution of the divorce case appeared consistent with Bakhtiar’s own wishes: the probate court found in February 2015, that Bakhtiar “has consistently stated that she wishes to proceed with the divorce.”

{¶14} Saghafi asserts that Bakhtiar has been unduly influenced by a family member to pursue a divorce. However, he has offered nothing in support of that assertion. Additionally, that assertion appeared to be dispelled at trial by Bakhtiar’s guardian, who testified and gave what the domestic relations court described in the divorce decree as “credible and sufficient” evidence to “legally establish [Bakhtiar’s] desire to seek a divorce.” So unlike *Boyd*, where there was a question of whether a spouse continued to desire a divorce, the evidence showed Bakhtiar continued to want a divorce.

{¶15} Judgment affirmed.

It is ordered that appellee recover of appellant 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 domestic relations 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR