[Cite as *In re guardianship of B. I. C.*, 2009-Ohio-4800.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN THE GUARDIANSHIP OF: B. I. C.	C. A. No. 09CA0002 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. G-66149-03

DECISION AND JOURNAL ENTRY

Dated: September 14, 2009

CARR, Judge.

{¶1} Appellants, H.B. and M.B. ("the Bs" or "Guardians"), appeal the judgment of the Wayne County Court of Common Pleas, Probate Division. This Court affirms, in part, and vacates, in part.

I.

{¶2} On December 31, 2003, the Bs filed an application for appointment as guardians for the minor, B.I.C., alleging that the child's parents were unsuitable to have custody and tuition of the minor. N.C. ("Mother") waived notice and consented to the guardianship of her child. C.C. ("Father") neither waived notice nor consented to the guardianship of his child. On January 26, 2004, after a hearing, the probate court appointed the Bs as guardians of the minor. Letters of Guardianship issued the same day, conferring guardianship powers on Guardians for an indefinite period of time.

{¶3} Mother and Father were divorced on August 9, 2004. On March 19, 2007, a magistrate in the Wayne County Court of Common Pleas, Domestic Relations Division, issued a decision recommending that Father's motion for custody of B.I.C. be dismissed for lack of jurisdiction in light of the probate court's jurisdiction over the guardianship of the child. The domestic relations court magistrate recommended that Father file a motion to terminate the guardianship in the probate court, if he wished to pursue custody.

{¶4} On April 20, 2007, Father filed a motion in the probate court to terminate the guardianship. On May 15, 2007, Father filed a motion to establish a parenting time schedule, effectively requesting that the probate court issue an order of visitation for Father and the child ward. Guardians moved to dismiss Father's motion to terminate the guardianship or, in the alternative, for an award of attorney fees and costs expended in response to Father's "frivolous" motion. On July 10, 2007, the probate court issued a judgment entry in which it noted that Father withdrew his motion to terminate the guardianship. The probate court further issued a briefing schedule for the parties to brief the issue of the probate court's jurisdiction to consider the issue of visitation.

{¶5} Guardians and Mother filed memoranda in opposition to the motion for visitation, arguing that the guardianship in effect granted the Bs "permanent legal custody" of the child and that "the matters of visitation, support, and other allocation of parental rights and responsibilities are expressly given to the original, exclusive jurisdiction of *juvenile courts*, and thus are precluded from being considered by any other court system." (Emphasis in original.) Father filed a memorandum in support of the probate court's jurisdiction to address the issue of visitation between a ward and a family member, citing case law in which appellate courts have

recognized the probate court's authority to do so. On August 31, 2007, the probate court found that it had jurisdiction to hear the matter of visitation between Father and the child.

{¶6} Father moved for the appointment of a guardian ad litem, and Guardians opposed such appointment. The probate court appointed a guardian ad litem on the authority of R.C. 2111.23 after finding that Guardians had an adverse interest.

{¶7} On January 8, 2008, after a hearing, the probate court issued a judgment entry, ordering that daytime visitation shall continue as the parties agree and scheduling the matter for further hearing at a later date.

{¶8} On April 4, 2008, Guardians filed a motion for child support from Father. They further sought an order requiring Father to provide medical insurance coverage for the child. On April 25, 2008, Father filed a motion for child support from Mother, as well as an order requiring Mother to share equally in all uninsured medical expenses for the child. On June 6, 2008, the probate court ordered Mother and Father to provide medical insurance for the child and to share in the uninsured medical expenses for the child. The same day, the probate court issued a judgment entry, ordering Mother and the child to pay child support through the Wayne County Children Services Board. On June 10, 2008, the probate court issued a judgment entry, nunc pro tunc, ordering Mother and Father to pay child support for the child through the Wayne County Child Support Enforcement Agency.

{¶9} On October 16, 2008, after a hearing, the probate court issued a judgment entry, ordering unsupervised Wednesday evening and bi-weekly Saturday visitations between Father and the child. In addition, the court ordered a two-day overnight visitation on December 13 and 14, 2008, and scheduled a subsequent review hearing on the issue of visitation. The probate

court held a review hearing in early December, 2008,[1] and issued a judgment entry on December 22, 2008, ordering Christmas visitation for Father and adopting, with one modification, a visitation schedule attached to the entry. The attached visitation schedule consisted of a copy of Loc.R. 11 of the Wayne County Juvenile Court.

{¶10} Guardians timely appealed, raising two assignments of error for review. This Court rearranges the assignments of error for ease of discussion.

II.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOCATING PARENTAL RIGHTS AND RESPONSIBILITIES IN AN ESTABLISHED GUARDIANSHIP FOR A MINOR CHILD."

{¶11} Guardians argue that the trial court erred by issuing orders regarding visitation, child support, and the provision of medical insurance for the ward. This Court agrees, in part, and disagrees, in part.

{¶12} The probate court determined that it had jurisdiction to hear the matter of visitation between Father and the child ward. "A trial court's determination that it has subject matter jurisdiction *** is a question of law; accordingly, this Court reviews the trial court's assertion of jurisdiction in this matter de novo." *CommuniCare Health Servs., Inc. v. Murvine*, 9th Dist. No. 23557, 2007-Ohio-4651, at ¶13. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." (Internal citations omitted.) *Rusov v. Ansley*, 9th Dist. No. 23748, 2007-Ohio-7022, at ¶12.

{¶13} Guardians assert that the probate court has no authority to "delve into the aspects of the juvenile court jurisdictional arenas dealing with residual parental rights," delineated by

[1] The judgment entry indicates that the review hearing was held on December 13, 2008,

Guardians, in part, as "visitation, child support, medical insurance coverage, uninsured medical costs responsibility, [and] tax dependency exemptions." Interpreting a guardianship merely as "a placement for purposes of future adoption by the guardian(s)," Guardians assert that they have "complete dominion and responsibility" for the child, free from any restrictions by the probate court.

{¶14} By its definition, a guardianship does not constitute a termination of parental rights. R.C. 2151.011(A)(16) defines "guardian" as "a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111. of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and *subject to the residual parental rights of the child's parents.*" (Emphasis added.) "Residual parental rights, privileges, and responsibilities" are "those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support." R.C. 2151.011(A)(46). Parental rights are necessarily distinct from responsibilities. This definition of "guardian" does not indicate that parents of a ward retain any residual responsibilities.

{¶15} R.C. 2111.01(A) similarly defines "guardian" as "any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor." R.C. 2101.24(A)(1)(e) reserves exclusive jurisdiction to the probate court to appoint guardians. The probate court maintains on-going judicial oversight of the ward and guardian during the pendency of the guardianship. R.C. 2111.50(A)(1) states that the probate court is the "superior guardian of wards who are subject to

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which was a Saturday.

its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships." In fact, the guardian does not possess "complete dominion" over the ward. Rather, the guardian's control is limited to the authority granted by statute, relevant case law, and orders or rules of the probate court. R.C. 2111.50(A)(2)(a). R.C. 2111.13 enumerates the duties of a guardian of a person, including "[t]o obey all the orders and judgments of the probate court touching the guardianship." R.C. 2111.13(A)(4).

{¶16} Appellate courts have recognized the probate court's authority to address the issue of visitation between a ward and a family member. See, e.g., *In re Zahoransky* (1985), 22 Ohio App.3d 75, 76 (relying in part on the "plenary power at law and in equity fully to dispose of any matter properly before the court" and citing R.C. 2101.24 and R.C. 2111.13(D)); *In re Hoke*, 10th Dist. No. 02AP-1398, 2003-Ohio-4704, at ¶6 (recognizing that statutory authority conveys upon the probate court "broad power in all matters touching the guardianship."). In fact, this Court affirmed a probate court's judgment which ordered restricted visitation between a ward and her sister, inherently recognizing the probate court's jurisdiction to address the matter of visitation in the context of a guardianship. *In the Matter of the Guardianship of McElhany* (Jan. 14, 1998), 9th Dist. No. 18423. This conclusion further comports with the probate court's statutory role as the "superior guardian" and serves to acknowledge and preserve a parent's residual rights. Accordingly, this Court concludes that the probate court maintains the authority to address matters of visitation in relation to guardianships. Guardians' second assignment of error is overruled as it relates to the issue of the probate court's jurisdiction to address visitation.

{¶17} On the other hand, this Court concludes that the probate court does not have jurisdiction to order parents to pay child support or provide health care coverage for a child who

is a ward subject to a guardianship. R.C. 2101.24(A) enumerates thirty-one subject matters over which the probate court has exclusive jurisdiction, including the jurisdiction "to appoint and remove guardians" and "direct and control their conduct," and "to act for and issue orders regarding wards pursuant to [R.C.] 2111.50." R.C. 2101.24(A)(1)(e) and (s). The matters of the provision of child support and health care coverage are not specified.

{¶18} In addition, R.C. 2101.24(A)(2) recognizes further exclusive jurisdiction of the probate court over particular subject matters if both another section of the Revised Code expressly confers such subject matter jurisdiction upon the probate court, and no section of the code expressly confers such subject matter jurisdiction upon another court or agency. R.C. 2151.23(A)(11) confers exclusive original jurisdiction upon the juvenile court regarding child support matters "not ancillary to an action for divorce, dissolution of marriage, annulment, or legal separation, a criminal or civil action involving an allegation of domestic violence, or an action for support brought under Chapter 3115. of the Revised Code." R.C. 2151.231 directs parents, custodians, child support enforcement agencies, and guardians to file actions for child support orders in juvenile court or "other court with jurisdiction under section 2101.022 or 2301.03 of the Revised Code[.]" R.C. 2101.022 addresses the probate court of Marion County only. R.C. 2301.03 addresses domestic relations courts in various Ohio counties. R.C. 3111.29 addresses complaints for child support in cases where paternity has been acknowledged and directs the mother, other custodian or guardian to pursue the matter pursuant to R.C. 2151.231, as explained above, or by requesting an administrative order from a child support enforcement agency. Accordingly, it appears that the jurisdiction to address matters of child support lies exclusively with the juvenile and domestic relations courts, with the exception that the judge of

the probate division in Marion County shall exercise concurrent jurisdiction with the judge of the domestic relations-juvenile-probate division of that county.

{¶19} Furthermore, R.C. 3119.30(A) addresses responsibility for health care coverage, tying it to actions or proceedings in which child support orders are issued or modified by the court or child support enforcement agency. As the probate court has no authority to address matters involving child support, it is axiomatic that it would have no authority to issue orders apportioning responsibility for a ward's health care coverage.

{¶20} Guardians cite no case law addressing the probate court's jurisdiction to address matters involving child support and health care coverage, and this Court has found none. Father responds to Guardians' second assignment of error only as it relates to visitation, and makes no argument regarding the probate court's jurisdiction to address other issues such as child support and health care coverage. Because we find no authority pursuant to statute or case law evidencing the probate court's jurisdiction to address these matters, this Court concludes that the probate court lacks the jurisdiction to do so. Guardians' second assignment of error is sustained as it relates to the issue of the probate court's jurisdiction to address child support and the apportionment of responsibility for health care coverage of a ward.

{¶21} This Court holds that the probate court maintains jurisdiction to address matters involving visitation between a child ward and the ward's parent, but that the probate court lacks jurisdiction to order parents of a child subject to a guardianship to pay child support or health care coverage costs. Guardians' second assignment of error is overruled, in part, and sustained, in part. To the extent that the probate court addressed child support and health care coverage costs in relation to the child ward, those orders are vacated.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY ISSUING ORDERS REGARDING THE BEST INTERESTS OF THIS WARD IN COMPLETE ABSENCE OF ANY EVIDENTIARY HEARING OR EVIDENCE IN THIS CASE THUS DENYING DUE PROCESS TO THE PARTIES HEREIN."

{¶22} Guardians argue that the probate court erred by issuing orders regarding the best interest of the child ward in the absence of evidence. This Court disagrees.

{¶23} As we have already concluded that the probate court lacked jurisdiction to issue orders regarding child support and health care coverage in regard to the minor ward, this Court addresses the first assignment of error only in regard to the probate court's judgment establishing a visitation order between Father and the child ward.

{¶24} The probate court must exercise its powers relating to a ward subject to guardianship in consideration of the best interest of the ward, ward's dependents, and members of the ward's household. R.C. 2111.50(C). This Court reviews a trial court's decision made in the best interest of a person for an abuse of discretion. See, e.g., *In re Roberts*, 7th Dist. No. 08-CA-854, 2009-Ohio-1012, at ¶11 and 13 (stating that an appellate court reviews a probate court's decision regarding a child's change of name, made in consideration of the child's best interest, for an abuse of discretion); *In re Guardianship of Marsh*, 178 Ohio App.3d 723, 2008-Ohio-5375, at ¶49 (stating that a probate court's decision to remove a guardian who is obligated to act in the best interest of the ward is reviewed for an abuse of discretion); *In re Jeffrey A.*, 6th Dist. No. L-08-1006, 2008-Ohio-5135, at ¶13 (stating that a probate court's decision to grant or deny an adoption petition, made in consideration of the best interest of the child, is reviewed for an abuse of discretion). This Court, too, has implicitly reviewed a probate court's order limiting visitation between a ward and a family member for an abuse of discretion. See *Guardianship of McElhany*, supra. An abuse of discretion is more than an error of judgment; it means that the

trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶25} In this case, Guardians filed a praecipe with the court reporter for preparation of the hearings held on May 29, 2007; July 10, 2007; January 8, 2008; May 6, 2008; July 28, 2008; October 1, 2008; and December 13, 2008. The official court reporter subsequently filed a document captioned "Transcript Request," in which she asserted that she was unable to prepare such transcripts because no recording was made of any of the hearings. The probate court judge filed a "Statement of the Record," in which he asserted that no recordings were made of the enumerated hearings; rather, he asserted that counsel had met in chambers on those occasions in regard to the relevant matters.

{¶26} Guardians' docketing statement indicates that "[t]he record will include the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries, and a full or partial transcript of proceedings prepared for this appeal by an official court reporter, who I served with a praecipe that I also filed with this court." There are no transcripts of any hearings in the record before this Court.

{¶27} Guardians, as the appellants, are responsible for providing this Court with a record of the facts, testimony, and evidentiary matters necessary to support the assignments of error. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314. Specifically, it is an appellant's duty to transmit the transcript of proceedings. App.R. 10(A); Loc.R. 5(A). "When portions of the transcript which are necessary to resolve assignments of error are not included in

the record on appeal, the reviewing court has 'no choice but to presume the validity of the [trial] court's proceedings, and affirm.'" *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶28} Moreover, upon notice from the official court reporter that no recordings were made so that no transcripts could be prepared, Guardians could have filed a motion for leave to file an amended docketing statement to indicate that the record would include "a statement of the evidence or proceedings pursuant to App.R. 9(C) or an agreed statement of the case pursuant to App.R. 9(D)." The Ohio Supreme Court has held that "[t]he procedures outlined in App.R. 9 are designed precisely for this type of situation, where a transcript is unavailable." *In re B.E.*, 102 Ohio St.3d 388, 2004-Ohio-3361, at ¶14. Guardians failed to utilize this means of ensuring a complete record, and the record contains no such statements.

{¶29} "This Court has repeatedly held that it is the duty of the appellant to ensure that the record on appeal is complete." *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11, citing *Ruf v. Ruf*, 9th Dist. No. 23813, 2008-Ohio-663, at ¶6, quoting Loc.R. 5(A). Guardians failed to ensure that a record of the facts was contained in the record on appeal. Specifically, there is nothing in the record to allow this Court to determine that the probate court in fact failed to hear any evidence prior to issuing its judgments regarding visitation. Because such information is necessary for a determination of the first assignment of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. See *Knapp*, 61 Ohio St.2d at 199. Guardians' first assignment of error is overruled.

III.

{¶30} Guardians' first assignment of error is overruled. The second assignment of error is sustained, in part, and overruled, in part. The judgments of the Wayne County Court of Common Pleas, Probate Division, are vacated as they relate to issues regarding child support and health care costs. The judgment relating to visitation between Father and the child ward is affirmed.

Judgment affirmed, in part,
and vacated, in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶31} I concur in the judgment. With respect to the first assignment of error, I agree that we are unable to review the merits of the trial court's decision given that there is no record of any proceedings and the Appellants did not avail themselves of App.R. 9(D). With respect to the second assignment of error, I agree that the probate court had authority to order visitation. However, in reaching that conclusion, I do not adhere to the legal analysis set forth in the majority opinion as I find it unnecessary to rely on R.C. 2151.011(A)(16) and (A)(46) which pertain to the juvenile court.

APPEARANCES:

RENEE J. JACKWOOD, Attorney at Law, for Appellants.

NORMAN R. "BING" MILLER, JR., Attorney at Law, for Appellee.

NINA COVER, pro se, Appellee.

KARIN WIEST, Guardian Ad Litem.