

[Cite as *In re Myers*, 2017-Ohio-603.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

BRENDA MYERS

ADULT INCOMPETENT

JUDGES:

Hon. William B. Hofman, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2016 AP 05 0028

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Probate Division, Case No. 2015
GD 16600

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 9, 2017

APPEARANCES:

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Wise, J.

{¶1} Appellant David Myers, Sr. appeals the April 14, 2016, Judgment Entry entered by the Tuscarawas County Court of Common Pleas, Probate Division, appointing Brenda Myers' daughter, Bridgett Thompson, as guardian.

STATEMENT OF THE FACTS AND CASE

{¶2} This case involves the appointment of a guardian of the person and the estate of Brenda Myers. The relevant facts are as follows:

{¶3} Brenda and David Myers have been married for over thirty years. Brenda and David had no children together. Brenda had two children from her first marriage: Gary and Bridgett Stanley. David had a son from his first marriage: David Myers, Jr.

{¶4} David and Brenda jointly owned a company, Myers Machining, for the entirety of their marriage. David is president of the company. Brenda served as an officer and worked actively at the company for 25 years until 2006 when she was diagnosed with cancer. At the time of Brenda's illness, David was 51 percent owner of the corporation and Brenda was 49 percent owner. (T. at 79). The company also employed all three of the couple's children, Gary, Bridgett and David, Jr. Myers Machining was a successful company and, as a result, the entire family prospered.

{¶5} In 2003, before her cancer diagnosis, David and Brenda signed Living Wills, Durable Powers of Attorney for Health Care, and general Durable Powers of Attorney. In her general Power of Attorney, Brenda nominated David as guardian of her person. Her daughter Brenda was nominated as her first alternate attorney-in-fact.

{¶6} In 2006, Brenda was diagnosed with Leukemia. She underwent chemotherapy treatment, which was successful in treating her cancer but left her with

frontal lobe dementia, a brain injury. As a result, Brenda requires constant supervision. She is ambulatory but has severe memory impairment.

{¶7} In 2010, using the 2003 Power of Attorney, David transferred Brenda's shares of the company, totaling 49%, to himself. The Magistrate found that there was no evidence that Brenda participated in this transfer or was consulted or was even made aware of it. (See Jan. 21, 2016, Magistrate's Decision, ¶9). No payment or consideration was made to Brenda for these shares. *Id.*

{¶8} David then transferred 744 of the 750 shares to himself (approx. 99%) as Trustee of the David L. Myers Revocable Trust, conveying the remaining 1% to his son David, Jr. (See Jan. 21, 2016, Magistrate's Decision, ¶9). As sole beneficiary of his own inter vivos trust, David alone is to receive any income or principal of trust property that David the Trustee considered advisable for David the Beneficiary's comfortable maintenance, health and welfare. Under the terms of David's trust, Brenda is eligible for support from the trust only upon David's death when the company is required to purchase the shares. This remains subject to David's power, as trustor, to modify his trust. (See Jan. 21, 2016, Magistrate's Decision, ¶9).

{¶9} The trust simultaneously executed a Buy/Sell Agreement with the Company obligating the company to buy all 744 of the Trusts' shares for \$1,000,000 upon David's death. *Id.* The trust provided for the equal division of the business and trust assets among the couple's three children upon the passing of both Brenda and David. (T. at 80).

{¶10} David also had Brenda sign off on the transfer of the business real estate to a holding company in 2010. (T. at 298).

{¶11} Brenda's health has deteriorated since 2012, and eventually Brenda discontinued working. (See Magistrate's Decision dated January 21, 2016). A caregiver was hired to stay with Brenda on the weekdays while David and/or Bridgett were at work. (T. at 267). Once Brenda's health deteriorated to a point where the caregivers were not enough, a plan was put in place for Brenda to stay at The Inn at Northwood Village¹ on the weekends, at her own house on weekdays with a home-aid, and with Bridgett or Gary during the weekday evenings because David was travelling. (T. at 271).

{¶12} In 2014, David decided to relocate to Florida. He also spent that summer travelling the West Coast in a motor home with his girlfriend, who happens to be his wife's aunt. (T. at 110, 290, 292). The aunt owns the Florida residence where David now resides. *Id.*

{¶13} In 2015, David announced that he was going to sell the marital residence and insisted that Brenda was to live full-time in the nursing home. (T. at 312).

{¶14} Brenda's children objected to his plan and on April 27, 2015, Brenda's daughter Bridgett filed an application to be appointed as her mother's guardian. She sought guardianship of both her mother's person and estate. Brenda Myers has been living with her daughter Bridgett since the application to be appointed guardian was filed.

{¶15} Shortly after the filing of the guardianship, David returned from Florida and fired both of his stepchildren, Brenda and Gary. (T. at 76, 92). David also unilaterally sold the marital residence, utilizing the 2003 power of attorney. (T. at 73).

{¶16} On May 28, 2015, the day before the scheduled hearing, David filed his own competing motion to be named as guardian only of his wife's person. In support, David

¹ The Inn at Northwood Village ("Northwood") is an assisted living facility located in Dover, Ohio.

presented the 2003 document where Brenda nominated him as the guardian of her person. The document was silent as to the appointment of a guardian of her estate.

{¶17} A hearing was held on May 29, 2015, at which time the trial court determined that a continuance was necessary to obtain counsel for the Ward.

{¶18} On June 1, 2015, David filed a change-of-address notice with the trial court, listing his adult son's residence in Bolivar as a physical residence while seeking to continue to receive service at a post office box.

{¶19} Evidentiary hearings were held on July 16 and September 2, 2015.

{¶20} The trial court heard the following testimony:

{¶21} Bridgett testified that she has been a full-time caregiver for her mother since the commencement of this case. (T. at 128-29, 137). Her brother Gary found another job, but she has stayed home to take care of Brenda. Bridgett testified that she was concerned that her mother would be allowed to "waste away" if left in a nursing home. (T. at 152-53, 193). She was kept safe but not active. (T. at 158). Evidence at trial showed that Mrs. Myers had improved her physical health a great deal during the pendency of the case. (T. at 130).

{¶22} David Myers has no residential address in Ohio. He moved to Florida in late 2013 and returns to Ohio as business requires. At the time of the trial, he was staying in a motor home he had driven to Ohio for the hearing. Since his move to Florida, he has only visited infrequently. By his own estimation, he had seen Brenda six times in the year before the trial. (T. at 117). According to Bridgett, David did not talk to her mother on any of those occasions, and they simply had passing meetings. (T. at 143). Since July, 2015, David's financial contribution to Brenda's care has been to pay for Brenda's prescription

medications and provide weekly grocery store gift cards in the amount \$150. (See Jan. 21, 2016, Magistrates Decision, ¶34).

¶23 Brenda Myers indicated that she was comfortable living with her daughter. (T. at 21, 212). She identified the Appellant as her "ex-husband." (T. at 12, 215.) Mrs. Myers' sister, who is employed by Appellant and was called by him at trial, testified that Mrs. Myers is best left in the care of Appellant. (T. at 237).

¶24 Brenda's only income is Social Security of about \$1,000 per month, and husband David is the payee for the Social Security Administration. David has retained control of her bank account, which had approximately \$11,000 in it at the time of the hearing. (See Jan. 21, 2016, Magistrates Decision, ¶8).

¶25 In July, 2015, between the July and September trial dates, David, as the trustor/settlor, amended the David L. Myers Revocable Trust as follows: During David's life, he still controls all of the assets and upon his death the remaining shares are still to be sold to a buyer required to purchase them, stated to be for \$1 million. The cash from the sale of the stock will be placed in the control of successor trustee David Myers, Jr. (David's son) with instructions to provide support for Brenda as he deems advisable. From a marital trust and a Trust B, the successor trustee, presumably David Jr., is given sole discretion to pay amounts to meet Brenda's needs (or not) while considering the availability of public benefits and Brenda's standard of living at David's death. David Jr. is the sole successor beneficiary of trust assets after Brenda's death. (See Jan. 21, 2016, Magistrates Decision, ¶11).

¶26 These amended trust documents (a) minimize the amount of support obligated to Brenda upon David's death; (b) disinherit Brenda and Gary, as successor

beneficiaries of the trust; and (c) place David's girlfriend and his son David Jr. as successor trustees upon his death to provide for Brenda. (T. at 114).

{¶27} After the conclusion of the trial, each party submitted proposed findings.

{¶28} On January 21, 2016, the trial court's magistrate found that a guardianship was appropriate, and that Bridgett should be appointed as guardian both of the Ward's person and estate. The magistrate specifically stated reasons that good cause existed to not appoint David despite his previous nomination in a 2003 power of attorney. Interim orders were entered for the protection of the Ward.

{¶29} David filed a timely objection to the decision. By Judgment Entry filed April 14, 2016, the objections were overruled by the trial court.

{¶30} It is from this judgment entry Appellant now appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶31} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT APPOINTING APPELLANT GUARDIAN WAS NOT IN THE BEST INTERESTS OF HIS WIFE BRENDA MYER.

{¶32} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT APPOINTED BRIDGET [sic] THOMPSON (DAUGHTER OF BRENDA MYERS) AS GUARDIAN."

I., II.

{¶33} We shall address Appellant's Two Assignments of Error together as they are interrelated.

{¶34} In his First Assignment of Error, Appellant argues that the trial court erred in finding that appointing Appellant as guardian was not in the best interest of his wife. In

his Second Assignment of Error, Appellant argues that the trial court erred when it appointed Bridget Thompson as guardian. We disagree.

{¶35} R.C. §2111.02(A) provides that “[w]hen 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[.]”

{¶36} When considering an application for appointment of a guardian, a probate court must (1) first determine that a guardian is required, and (2) also determine who shall be appointed guardian. *In re Guardianship of Simmons*, 6th Dist. Wood No. WD–02–039, 2003–Ohio–5416, ¶17.

{¶37} On appeal, the parties in this case are not disputing the trial court’s finding that Brenda Myers requires a guardian.

{¶38} 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.

{¶39} Appellant first contends that the trial court abused its discretion in appointing Appellee guardian because the ward, Brenda Myers, nominated him as guardian of her person in a Durable Power of Attorney in 2003.

{¶40} Revised Code §2111.121 **Nomination as guardian of person or estate; procedure**, provides:

(A) A person may nominate in a writing, as described in this division, another person to be the guardian of the nominator's person, estate, or both or the guardian of the person, the estate, or both, of one or more of the nominator's minor or incompetent adult children, whether born at the time of the execution of the writing or afterward, subject to notice and a hearing pursuant to section 2111.02 of the Revised Code. The nomination is for

consideration by a court if proceedings for the appointment of a guardian of the person, the estate, or both, for the person making the nomination or if proceedings for the appointment of a guardian as the guardian of the person, the estate, or both of one or more of the nominator's minor or incompetent adult children are commenced at a later time. The person may authorize, in a writing of that nature, the person nominated as guardian to nominate a successor guardian for consideration by a court. The person also may direct, in a writing of that nature, that bond be waived for a person nominated as guardian in it or nominated as a successor guardian in accordance with an authorization in it.

{¶41} R.C. §2111.121(B) instructs the probate court that “[e]xcept for good cause shown or disqualification, the court shall make its appointment in accordance with the person's most recent nomination.”

{¶42} Here, as set forth above, Brenda Myers nominated Appellant to serve as the guardian of her person in her Durable Power of Attorney, executed in 2003. However, that said, even in the presence of a valid power of attorney, a trial court was still not bound by it. A person nominated in a properly executed power of attorney must also be examined by the court. The court must determine “if the person nominated is competent, suitable, and willing to accept the appointment.” R.C. §2111.121(B). Thus, it was within the probate court's discretion to reject Appellant as the guardian even though he had been properly nominated in a power of attorney. *In re Guardianship of Hafner* (Nov. 24, 1993), 9th Dist. No. 16073.

{¶43} “In making a determination as to who should serve as a guardian, the probate court's primary responsibility is to ensure that the person appointed will act in the best interests of the ward.” *In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E.2d 1310 (12th Dist.1992); R.C. §2111.50(C); *In re Guardianship of Hilt*, 6th Dist.

Sandusky No. S-14-010, 2015-Ohio-3186, ¶20, quoting *In re Guardianship of Thomas*, 148 Ohio App.3d 11, 2002-Ohio-1037, 771 N.E.2d 882, ¶96 (10th Dist.).

{¶44} “ ‘Best interests’ means the permanent welfare of the ward in his relation to society in view of all the circumstances.” *In re Briggs*, 9th Dist. Summit No. 18117, 1997 WL 416331, (July 9, 1997).

Standard of Review

{¶45} A probate court's decision to appoint a guardian is generally within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *In re Guardianship of Borland*, 5th Dist. Stark No.2002CA00410, 2003-Ohio-6870, ¶8; *In re Guardianship of Miller*, 187 Ohio App.3d 445, 2010-Ohio-2159, 932 N.E.2d 420 (3rd Dist.); *In re Guardianship of Waller*, 192 Ohio App.3d 663, 2011-Ohio-313, 950 N.E.2d 1207(1st Dist.), ¶ 16; *In re Guardianship of Anderson*, 2nd Dist. Montgomery No. 25367, 2013-Ohio-2012, ¶ 15.

{¶46} An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). “A reviewing court will not reverse a judgment appointing a guardian as an abuse of discretion if it is supported by competent, credible evidence.” *In re Guardianship of Waller*, 1st Dist. Hamilton No. C-100131, 2011-Ohio-313, ¶16

{¶47} Ohio does not have a statutory preference for the appointment of guardians. *In re Guardianship of P.D.*, 4th Dist. Washington No. 08CA5, 2009-Ohio-3113, ¶23. Although courts generally select the next of kin, those with familial ties, or someone acceptable to such persons on the theory that they will be the ones most concerned with

the ward's welfare, they are not required to do so. *Id.* A probate court may appoint a stranger as guardian if it is in the best interest of the ward. *Id.*

{¶48} “At all times, the probate court is the superior guardian of wards who are subject to 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.” R.C. §2111.50(A)(1). Because the probate court is the superior guardian, “the appointed guardian is simply an officer of the court subject to the court's control, direction, and supervision,” and has, therefore, “no personal interest in his or her appointment or removal.” *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010–Ohio–2471, ¶ 53.

{¶49} Here, the magistrate heard testimony over the course of two days. The magistrate wrote, and the trial court approved and adopted, a twenty-page Decision.

{¶50} With regard to its finding of good cause/disqualification pursuant to R.C. 211.121(B) that Appellant David Myers was not suitable to be appointed guardian, the court found:

64) The "good cause shown" in this case for disregarding David's nomination as guardian of the person are: 1) he lives in Florida with a new romantic interest and intends to discharge his marital duties solely by delegation and pocketbook (not that he simply happens to live in Florida); 2) he has not participated, as has Bridgett, in his wife's medical care, medicinal relief, and companionship; 3) the level of his spousal contributions have not been appropriate since the time Brenda and Bridgett jointly decided where Brenda would live, given David's income levels and the fact that much of his income is derived from marital assets; 4) David travels a lot and cell phone consultation from Florida or the western United States can't be a good way of monitoring someone who is in need of being monitored; 5) David's interests in preserving marital wealth solely for himself and his designees are potentially in conflict with Brenda's needs. David can't be trusted to share marital wealth with Brenda now that he has written her off as unable to share the dream of retirement

{¶51} With regard to Appellant's arguments that placing his wife in the care of professionally trained staff at the Inn at Northwood nursing facility is preferable to her living with Bridgett, the trial court found that while such is a top-flight assisted care facility which has lots of amenities, these amenities are wasted on Mrs. Myers due to her reduced interests and attentions span. (See Jan. 21, 2016, Magistrate's Decision at ¶18). Instead, "she vegetated in her room." *Id.*

{¶52} While the trial court did not expressly find financial misconduct in this case, it did express its very serious concerns:

With the full complement of all marital income and assets at his exclusive control, David tried to pigeon-hole his wife's care to this assisted-care facility model. This preserves the lion's share of income and assets for himself. He no longer preserves it for "them", as the 2015 trust amendments amply display. One cannot help but believe that David carries on with this marriage because marriage on his terms is so much cheaper than divorce. But he made it quite plain at the hearing that while it's a shame Brenda can't enjoy his retirement with him, he intends to persevere in that enjoyment. He candidly acknowledged that he and Brenda have "no relationship" — and that spending more time with her would not, he feels, foster a better relationship" (See Jan. 21, 2016, Magistrate's Decision at ¶41).

{¶53} The trial court also found that Appellant "does not see the complete imbalance of asset ownership he has unilaterally created — his assets vs. Brenda's — as being problematic." (See Jan. 21, 2016, Magistrate's Decision at ¶26).

{¶54} In support of its determination that Appellee Bridgett Thompson should be appointed guardian of the person and the estate of Brenda Myers, the record in this case shows that Appellee Thompson, the ward's daughter, is a committed caregiver to her mother. Bridgett takes her mother on daily walks, spends time with her in the living room and kitchen of her home. (See Jan. 21, 2016, Magistrate's Decision at ¶35) Since living with her daughter, Brenda has become more active, has lost some weight which she

needed to loses, and is happier there than in the nursing home. (See Jan. 21, 2016, Magistrate's Decision at ¶38). Additionally, to the extent that she can express her own wishes, Mrs. Myers expressed that she wanted to live with Bridgett. Brenda expressed in Court that if she needed a guardian, she wanted Bridgett to be her guardian, and that she liked living with Bridgett. (See Jan. 21, 2016, Magistrate's Decision at ¶24).

{¶55} The trial court found, in view of Appellee's extraordinary commitment to her mother, essentially putting her own life on hold to care for her mother, that Appellee's motivation is not financial but is based on genuine care and concern for what is best for her mother. Moreover, the fact that Appellant no longer resides in Ohio and spends the majority of his time traveling are a concern. Even before the rift with his step-children, Appellant only had a very limited relationship with his wife, seeing her only infrequently.

{¶56} While the parties herein disagree over the best way to care for Mrs. Myers, based on the evidence in this case and the testimony of all involved, we cannot say that the trial court abused its discretion in finding that Appellee Thompson was the more appropriate applicant to be Mrs. Myers' guardian.

{¶57} Appellant's Assignments of Error are overruled.

{¶58} For the foregoing reasons, the judgment of the Court of Common Pleas, Probate Division, Tuscarawas County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0119