**[Cite as *In re Guardianship of Lavers*, 2012-Ohio-1668.]**

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

In re Guardianship of Heather Lavers

Court of Appeals No. L-11-1044

Trial Court No. 2008 GDN 2107

**DECISION AND JUDGMENT**

Decided: April 13, 2012

* * * * *

Joel J. Kirkpatrick and Michael A. McCoin, for appellant/cross-appellee.

Douglas A. Wilkins, for appellee/cross-appellant.

* * * * *

**SINGER, P.J.**

**{¶ 1}** Appellant/cross-appellee Robert L. Lavers ("appellant"), husband and guardian of Heather Lavers, appeals the order of the Lucas County Court of Common Pleas, Probate Division, denying his motion to move his ward from Ohio to Florida.

Appellee/cross-appellant Heidi L. Kaczala ("appellee"), Heather Lavers' sister, appeals certain evidentiary rulings that occurred during the hearing on the motion. Because we conclude that the trial court's decision was not an abuse of discretion, we affirm.

**{¶ 2}** Although Heather Lavers was originally from Toledo, she and appellant lived in Gibsonton, Florida with their three children. On September 9, 2008, at age 38, Heather suffered a stroke and became comatose. Heather was initially treated at a hospital in the Tampa Bay area, but after a week it appeared that medical efforts to reverse the coma had failed. Heather's sister, Heidi, is a nurse and the sisters' mother, Patricia, is a veteran medical advisor with a vascular garment manufacturer. Both have ties to the Toledo medical community.

**{¶ 3}** There is a dispute between the parties about the process by which the decision was made, but Heather's Toledo family and her Florida family decided to move Heather to Toledo. On September 15, 2008, Heather, accompanied by appellee, was flown to Toledo where Heather was hospitalized. Appellant and the couple's children also relocated to be near Heather.

**{¶ 4}** After a month of unsuccessful attempts to reverse Heather's coma, she was transferred to a Perrysburg, Ohio skilled nursing facility. She remains there in a persistent vegetative state.

**{¶ 5}** On September 29, 2008, appellee applied to the trial court to be named the guardian of her sister's person. A month later, appellant entered an appearance with a memorandum in opposition to appellee's application. This was followed by appellant's

own application for guardianship. The dispute was resolved with a November 25, 2008 consent entry wherein appellee withdrew her application for guardianship and appellant promised, inter alia, not to remove Heather from Ohio without consent of the court.

**{¶ 6}** In January 2009, appellant and the three children returned to Florida. On July 13, 2009, appellee wrote to the court, complaining that appellant could not properly perform his duties as guardian from Florida. Appellee asked that she be appointed in his stead. The court responded by appointing a guardian ad litem to investigate appellee's concerns.

**{¶ 7}** On October 22, 2009, the guardian ad litem reported that, while there was considerable tension between Heather's Toledo family and her Florida family, the care she was receiving was excellent and appellant was in contact with the nursing home as many as three times a day. The guardian ad litem concluded that he could find no basis to remove appellant as Heather's guardian. The court accepted the guardian ad litem's report and retained appellant as guardian.

**{¶ 8}** On January 12, 2010, appellant moved the court to permit Heather's relocation to Florida. Appellant stated that it had never been his intent to permanently relocate his wife to Ohio and that he believed she would wish to be located near her home and her children in Florida. Such would be in her best interest, appellant asserted. Appellee filed objections to appellant's motion and renewed her request to remove appellant as guardian. The court set the motions for a hearing.

**{¶ 9}** Prior to the hearing on the motions, the court requested that the guardian ad litem investigate moving Heather to a Florida facility. The guardian ad litem reported that, although he sympathized with her Florida family's desire to have her close to them, he was concerned with whether Heather was medically capable of being moved that distance, about the manner in which transportation would be accomplished and whether a Florida nursing home could be identified that would be as "as attentive, conscientious and caring as the facility in Perrysburg." In pre-trial conferences, the court advised the parties that these were its areas of concern as well.

**{¶ 10}** The court heard testimony on the motion over three days of hearings. On the first day appellant called Heather's primary care physician who testified that she remains unconscious, but is medically stable. She is fed through a tube and does not require a ventilator. Heather is being treated for kidney stones and has had recurrent bouts with pneumonia. According to the primary care physician, there is no medical reason to move Heather, and no reason not to move her unless she is being treated for a present illness. If she is moved, the doctor preferred an air ambulance to minimize travel time.

**{¶ 11}** Appellant next called nurses caring for Heather at the Perrysburg nursing home and the home's administrator. These witnesses testified as to Heather's condition and efforts to identify a facility in Florida that would be capable of providing comparable treatment for her.

**{¶ 12}** Appellant testified to his contacts with several Florida nursing facilities and with two air ambulance services. According to appellant, no nursing home was willing to accept Heather until the court had approved her transfer. Similarly, the air ambulance could finalize transportation only on current medical information provided near the time of proposed transfer.

**{¶ 13}** On behalf of appellee, Heather's mother testified that Heather received excellent care at the Perrysburg facility and that she, her daughter and the rest of the family visit regularly. These visitors provide services "over and above what a nursing home is limited to do because of staffing," according to Heather's mother. "We rotate her, talk, we read, we do hygiene care, we get her up in a chair."

**{¶ 14}** Appellee testified, confirming her mother's account of the quality of Heather's care and the regular visitation by the Ohio family. Appellee testified that she regularly assists with her sister's hygiene, helping in bathing her, rotating her, providing "trach care" and oral care. Appellee testified that she believed moving Heather would not be in Heather's best interest because she is getting extraordinary care where she is and her physicians and caregivers here are known variables.

**{¶ 15}** Appellee also presented the testimony of the guardian ad litem who reiterated his assessment from prior written reports that Heather is receiving excellent care in her present facility. With respect to transporting Heather, the guardian ad litem testified that air was preferable to other options because it was quicker. "On the other hand, transporting her for any length of time has its risks."

**{¶ 16}** On cross-examination, the guardian ad litem confirmed his assessment that there was no reason to remove appellant as Heather's guardian. The guardian ad litem also testified that he believed it was in Heather's best interest "to stay in the status quo * * * because the facility in which she is located has had two years of interaction with her, they know her every need, they know – she's almost become adopted by them."

**{¶ 17}** Following closing arguments, the court ruled from the bench, concluding that it was not in Heather Lavers' best interest to be moved to Florida. In doing so, the court noted that Heather is in an excellent facility and receives excellent care from the staff and her physicians. Balancing this against the risk of transporting her and the inherent "learning curve" at a new facility, the court found appellant's motion not well-taken.

**{¶ 18}** From this judgment, appellant now brings this appeal, setting forth five assignments of error:

> A. The trial court's judgment was against the manifest weight of the evidence and was otherwise and [sic] abuse of discretion.
>
> B. The trial court's judgment regarding its order stipulating the issues for trial constituted prejudicial error and was otherwise inconsistent with substantial justice.
>
> C. The trial court's failure to rule on various motions of appellant over the course of this proceeding constituted prejudicial error.

D. The trial court's failure to consider equally competing legal principles, such as spousal rights, the right to travel and constitutional due process, constituted prejudicial and/or structural (constitutional) error inconsistent with substantial justice.

E. In that the probate court is a court of limited jurisdiction that may only act when it has specific statutory authority, the trial court, as a matter of law, improperly exercised jurisdiction by issuing letters of guardianship when it did not have jurisdiction, which constitutes prejudicial error inconsistent with substantial justice and is voidable.

**{¶ 19}** Appellee has interposed two cross-assignments of error:

I. The court erred in admitting Robert's Exhibits ## [sic] 2 and 3 into evidence for any purpose.

II. The court erred in failing to permit Heidi to offer additional testimony or evidence from Hany Jacob, M.D.

## I. Jurisdiction

**{¶ 20}** Threshold to judicial consideration of any matter is jurisdiction. In his fifth assignment of error appellant asserts that the trial court exceeded its jurisdiction because appellant and Heather were Florida residents and Heather is currently located in Wood County.

"Jurisdiction" means "the courts' [sic] statutory or constitutional power to adjudicate the case." The term encompasses jurisdiction over the

> subject matter and over the person. Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." (Citations omitted.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11.

**{¶ 21}** In contrast to subject-matter jurisdiction, personal jurisdiction may be waived if not objected to on a party's first appearance. *State ex rel. Athens Cty. Dept. of Job and Family Servs. v. Martin*, 4th Dist. No. 07CA11, 2008-Ohio-1849, ¶ 14. Similarly, venue, the geographical area in which a court may hear and determine a case, *Black's Law Dictionary* 1557 (6th Ed.1990), is a procedural requirement that may be waived if not raised at the same time as an objection for want of personal jurisdiction. *Flesher v. U-Haul Co. of Ohio*, 10th Dist. No. 5APE11-1420, 1996 WL 362034 (June 28, 1996), Civ.R. 12(H)(1).

**{¶ 22}** A probate court in Ohio patently has exclusive subject-matter jurisdiction over guardianship actions. R.C. 2101.24(A)(1)(e). Consequently, the trial court possessed subject-matter jurisdiction over this matter. Appellant raised neither an objection for want of personal jurisdiction nor for improper venue within the circumstances described in Civ.R. 12(G). Such defenses are, therefore, waived. Accordingly, appellant's fifth assignment of error is not well-taken.

## II. "Stipulations"

**{¶ 23}** In his second assignment of error, appellant complains that the trial court erred to his prejudice by not confining itself to the issues the court "stipulated" it would consider.

**{¶ 24}** A "stipulation" is a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." *Black's Law Dictionary*, *supra*, at 1415.

**{¶ 25}** In a pretrial conference, the court advised counsel for the parties that it was interested in receiving evidence on whether Heather was medically capable of being transferred, the plan for transfer and the suitability of the facility to which it was proposed she be transferred. There is nothing in the record to support appellant's assertion that the court or anyone else stipulated that the court's decision making would be limited to these areas of concern. Absent any such stipulation, we cannot sustain as error the trial court's failure to limit its consideration in that respect. Accordingly, appellant's second assignment of error is not well-taken.

## III. Motions

**{¶ 26}** In his third assignment of error, appellant maintains that he was prejudiced because the trial court ignored numerous motions over the two-year course of the litigation.

**{¶ 27}** Appellant's argument on this assignment, in total, consists of one paragraph:

> Over the course of this proceeding, Appellant filed several motions with a variety of issues raised, however, the lower court never officially considered all the issues and arguments raised. The court failed to address them either in writing or during hearings. Had the court officially acted on these the entire proceedings would have changed. Such a failure constitutes prejudicial error.

**{¶ 28}** We have carefully examined the court's docket and fail to find any substantive motions interposed by appellant that were not ruled upon. Absent more specificity with respect to the motions and issues appellant claims went unconsidered and some reference as to where in the record these documents reside, we must presume the regularity of the proceedings. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). Accordingly, appellant's third assignment of error is not well-taken.

## IV. Spousal Rights

**{¶ 29}** In his fourth assignment of error, appellant complains that the trial court failed to give due consideration to his spousal rights and an individual's right to travel between the states without governmental interference.

**{¶ 30}** Appellant is vague as to the part of the record that shows these arguments were before the trial court. Indeed, the only citation to the record in appellant's brief concerning these issues is to a response to jurisdictional memorandum filed with this court after the notice of appeal. It is a basic rule of appellate practice that ordinarily

matters not brought to the attention of the trial court, by objection or otherwise, are waived and may not be raised on appeal. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Moreover, as appellee points out, appellant voluntarily agreed to the creation of a guardianship and expressly consented to the trial court's authority to determine whether Heather should be moved out of state. Absent some fraud or coercion in the creation of that agreed judgment, which is not alleged, appellant may not now assert purported rights he has ceded. Because of all these things, appellant's fourth assignment of error is not well-taken.

## V. Abuse of Discretion

**{¶ 31}** In his remaining assignment of error, appellant asserts that the trial court's determination that it was not in Heather's best interest to be moved to Florida was against the manifest weight of the evidence and/or an abuse of discretion.

**{¶ 32}** The power of the probate court is superior to that of guardians appointed by the court. All guardians subject to the jurisdiction of the court must obey the orders of the court concerning their wards. R.C. 2111.50(A)(1). Except for the disposition of gifts from a ward's estate, the power of the court relative to one declared a ward is to be exercised in the best interests of the ward. R.C. 2111.50(C)(1), *In re Guardianship of Constable*, 12th Dist. No. CA99-05-039, 2000 WL 745297 (June 12, 2000). A probate court's decision regarding matters involving guardianships will not be reversed on appeal unless the probate court's decision amounts to an abuse of discretion. *See In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E.2d 1310 (1992). An "abuse of

discretion" is more than an error of law or judgment, it implies that the trial court acted unreasonably, arbitrarily or unconscionably. *Id. See also Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 33}** As regards factual determinations of the court antecedent to the exercise of discretion, such determinations will not be disturbed if supported by some competent, credible evidence. *C.E. Morris v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. On review, the findings of a trier of fact are presumptively correct. *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273 (1984). Moreover, in a trial to the bench, the court is presumed to have considered only admissible evidence, unless the record indicates otherwise. *State Farm Mut. Auto Ins. Co. v. Travelers Prop. Caus.*, 5th Dist. No. CT2001-0065, 2002-Ohio-3687, ¶ 70.

**{¶ 34}** Appellant enumerates a battery of reasons he believes the trial court lost its way in weighing the evidence and reaching its conclusion. The court improperly ignored the expert medical testimony of Heather's primary care physician that she could travel. The court inappropriately ascribed medical expertise to the guardian ad litem who recommended against relocation. It was improper for the court to premise its decision on a finding that none of the Florida nursing homes currently cared for a coma patient. The court improperly justified its decision on its erroneous conclusion that there was no basis to find that Heather would want to relocate if able to speak. The court unreasonably concluded that it was safer to leave Heather where she is than to move her. The court applied a "logically absurd" standard of what constitutes a ward's best interest.

**{¶ 35}** Many of appellant's arguments are premised on the notion that the court somehow "stipulated" to narrowing the scope of the inquiry to relocation logistics with the exclusion of everything else. As we have previously noted, we find no such stipulation. This is only proper, because the court is statutorily bound to exercise its authority based on that which is in the best interests of the person subject to guardianship. Indeed, that is what the court recites as its guiding standard in its judgment entry.

**{¶ 36}** Appellant also mischaracterizes the court's recitation of the evidence and arguments presented as the court's findings of fact. Nonetheless, it is clear that the court accepted many of these arguments and ruled accordingly. In our view, this was proper.

**{¶ 37}** The witnesses at the hearing, including appellant, agreed that Heather is receiving excellent care in her Perrysburg placement. The guardian ad litem reported that the staff of the facility has nearly "adopted" her and is extraordinarily attentive to her needs. Supporting this conclusion is appellee's testimony that, notwithstanding Heather's other medical concerns, during her two years at the Perrysburg facility she has suffered no pressure sores. Appellee's testimony is unrefuted that Heather is frequently visited and aided by appellee, her mother and other relatives. There is no evidence that Heather is aware of her surroundings so, while her relocation may be of benefit to her husband and children in terms of convenience, the benefit for Heather from relocation is less clear.

**{¶ 38}** The process of relocation contains some risk. This is an underlying theme from much of the testimony upon which even appellee relies. The primary care physician, while testifying that it was medically possible to move Heather, testified that it

was not medically necessary and advised to use an air ambulance to reduce travel time. The air ambulance firms contacted insist on medical clearance by their own physicians before undertaking transportation.

**{¶ 39}** Relocation to another nursing home, to some extent, involves a wager that the new facility will provide care comparable to that provided in Heather's present situation. Even if that proves to be the case, appellee's argument that a new facility inherently involves some degree of a learning curve is of some merit.

**{¶ 40}** The trial court weighed these considerations and concluded that it was in Heather's best interest to remain at her present placement. On review, we cannot say that this decision constitutes an abuse of discretion. Accordingly, appellant's first assignment of error is not well-taken.

## VI. Cross-Appeal

**{¶ 41}** Appellee has filed a cross-appeal, complaining that certain evidentiary rulings of the trial court were erroneous. Since we have affirmed the trial court's decision without reference to these matters, both of appellee's assignments of error on cross-appeal are moot.

**{¶ 42}** On consideration, the judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. It is ordered that appellant pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____

Thomas J. Osowik, J. _____
CONCUR.
JUDGE

_____
JUDGE