

[Cite as *In re Guardianship of Walther*, 2004-Ohio-3396.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

IN RE: GUARDIANSHIP OF :

F. ALBERTA WALTHER INCOMPETENT: C.A. CASE NO. 20095

: T.C. CASE NO. 335780

: (Civil Appeal from
Common Pleas Court)

.

O P I N I O N

Rendered on the 25th day of June, 2004.

.

William R. Coen, 2323 West Shantz Avenue, Kettering, Ohio 45409
Attorney for Appellant

David R. Schmidt, 1200 E Dorothy Lane, Dayton, Ohio 45419, Atty.
Reg. No. 0012588
Attorney for Appellee

.

GRADY, J.

{¶1} This is an appeal from an order of the Probate Court removing a guardian of a Ward's estate and awarding additional compensation to the guardian of the Ward's person for her services.

{¶2} The Ward, F. Alberta Walther, is eighty-nine years of age and infirm. In July of 2001, the Probate Court appointed Attorney William R. Coen guardian of Mrs. Walther's estate and appointed Tracie Candela, Mrs. Walther's granddaughter, guardian

of her person.

{¶3} Tracie Candela took Mrs. Walther into her home to care for her. Ms. Candela and Mr. Coen agreed that Tracie Candela would be paid one thousand dollars per month for her services. After approximately four months, Ms. Candela realized that her grandmother required more care than Ms. Candela could provide. Mrs. Walther was then returned to her own home under the care of her son, Jerry Walther.

{¶4} Disputes developed concerning Jerry Walther's care of his mother and several motions were filed by Tracie Candela in that connection. This appeal concerns two that the Probate Court granted: a request for additional compensation for the care she had provided Mrs. Walther and a motion to remove William R. Coen as guardian of Mrs. Walther's estate.

{¶5} The motions were referred to a magistrate of the Probate Court who, after a hearing, awarded Tracie Candela an additional \$4,000 for her services and ordered that Mr. Coen be removed as guardian of Mrs. Walther's estate. The trial court adopted the magistrate's decision. Mr. Coen filed objections, which were overruled. Mr. Coen appeals.

FIRST ASSIGNMENT OF ERROR

{¶6} "THE TRIAL COURT ERRED IN AWARDING COMPENSATION IN ADDITION TO AMOUNT CONTRACTED FOR AND IN ADDITION TO AMOUNT SOUGHT."

{¶7} William Coen paid Tracie Candela approximately \$4,000 pursuant to their agreement concerning her care of Mrs. Walther.

Candela sought an additional amount from the Probate Court. The magistrate found that Ms. Candela is entitled to an additional \$4,000 for her services, noting "that at the time that Tracie Candela cared for Mrs. Walther she had 24-hour-per-day responsibility. Mr. Coen was paying her for her responsibility of the care of F. Alberta Walther, the preparation of meals, cleaning up after F. Alberta Walther's incontinence, laundry of F. Alberta Walther, seeing to her daily needs, at \$1.39 per hour. In addition thereto, Tracie Candela had additional expenses of food, housing and utilities as a result of caring for the ward."

{¶8} Appellant Coen does not explain how the trial court erred when it adopted the magistrate's decision. He suggests that the additional amount ordered is excessive and/or barred by his prior agreement with Ms. Candela.

{¶9} The Probate Court is charged by law to appoint guardians for the person, or the estate, or both, of minors and incompetent persons. R.C. 2111.02(A). Compensation of guardians is set by local rule, except that additional compensation may be allowed for extraordinary services and reimbursement upon proper application. Sup. Ct. R. 73. Appellant does not contend that these requirements were not satisfied.

{¶10} The Probate Court acted pursuant to the discretion conferred on it when it allowed Tracie R. Candela additional compensation as guardian of the person of F. Alberta Walther. No abuse of discretion is demonstrated.

{¶11} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶12} "THE TRIAL COURT ERRED IN AWARDING COMPENSATION TO INCLUDE ATTORNEY FEES WITHOUT PROPER SUPPORTING EVIDENCE."

{¶13} Tracie Candela testified that she had paid her attorney \$1,500 for his services in prosecuting her applications to the Probate Court for additional compensation and to remove Mr. Coen as guardian of the estate. (T. 10). Appellant Coen complains that because Ms. Candela failed to prove that her attorney's hourly rate and services were reasonable, the trial court erred in awarding Tracie Candela \$1,500 as and for attorney fees.

{¶14} The trial court adopted the magistrate's decision as the court's own order. The magistrate awarded Tracie Candela an additional \$4,000 for her services as guardian. The decision contains no award of attorney fees. Appellant argues that an award of \$1,500 for that purpose is necessarily a part of the \$4,000 that Tracie Candela was awarded.

{¶15} We are authorized to affirm, reverse, or modify final judgments and orders with respect to the relief granted. Absent an award of attorney fees, as such, there is no relief in that respect for us to review.

{¶16} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶17} "THE TRIAL COURT FAILED TO GRANT A NEW TRIAL AFTER ADMITTING EVIDENCE OF IRRELEVANT MATTERS AND EXHIBIT."

{¶18} As will be more fully discussed under the next assignment of error, Tracie Candela sought to remove Mr. Coen as guardian of F. Alberta Walther's estate for an alleged conflict

of interest arising from his former representation of Jerry Walther in several prior legal matters. The evidence of which Appellant complains concerns one of those matters.

{¶19} The evidence, so near as we can tell, was offered to show the reason why Mr. Coen allegedly favored Jerry Walther against the interests of his ward, Mrs. Walther. That evidence is relevant to prove a conflict of interest. All relevant evidence is admissible, unless otherwise excluded for reasons which are not applicable here. Evid.R. 402. Whether to admit or exclude is committed to the sound discretion of the trial court. We find no abuse of discretion.

{¶20} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶21} "THE TRIAL COURT ERRED IN REMOVING THE GUARDIAN OF THE ESTATE ESPECIALLY WITHOUT INTERVIEWING THE WARD, AFTER JUDGE GOUNARIS HAD INTERVIEWED THE WARD AND OVERRULED APPELLEE'S MOTION TO MOVE THE WARD."

{¶22} Jerry Walther was appointed guardian of the person of his mother, F. Alberta Walther, after she was moved from Tracie Candela's home back to her own home. Jerry Walther stayed there without rent and was paid a monthly stipend by Mr. Coen.

{¶23} Mr. Coen had represented Jerry Walther in several prior matters in which Jerry Walther's pecuniary interests were involved. The magistrate found that one of those matters was a divorce, in which Jerry Walther represented in an affidavit notarized by Mr. Coen that he had no income, while at the time

Mr. Coen was paying Jerry Walther \$1,620 per month for caring for his mother.

{¶24} The magistrate also found that, upon Mr. Coen's advice, Jerry Walther had transferred title to his real property to his mother in order to avoid execution on judgment liens against him, while Mr. Coen subsequently represented to the Probate Court in an inventory that Mrs. Walther had no assets.

{¶25} The magistrate also found that Mr. Coen had applied to the Probate Court for authority to release \$10,000 of Mrs. Walther's funds to Jerry Walther to pay off a lease on a pick up truck, when in fact Jerry Walther was obligated to pay that amount to his former spouse in a divorce in which Mr. Coen had represented him.

{¶26} The magistrate found that these circumstances and certain filings Mr. Coen had made with the courts in connection with them demonstrate a conflict of the interests involved in Mr. Coen's representation of Jerry Walther and his dealings with Jerry Walther on behalf of F. Alberta Walther. Mr. Coen argues on appeal that a conflict is not grounds for removal absent proof that the fiduciary is exercising his authority in a manner adverse to his trust, and that removal is not warranted unless the adverse interest involved is of such a nature that potentially irreparable damage to the trust might issue.

{¶27} The probate court may remove a fiduciary it has appointed "because the interest of the trust demands it." R.C. 2109.24. That section reposes broad discretion on the probate court, and a reviewing court will not reverse a decision to

remove a fiduciary absent a clear showing of an abuse of that discretion. *In re Estate of Jarvis* (1980), 67 Ohio App.2d 94. "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *In re Estate of Russolillo* (1990), 69 Ohio App.3d 448, 450.

{¶28} From the findings which the magistrate made, which are supported by the record, there is ample evidence that because of his representation of Jerry Walther, as well as the payments Mr. Coen made to Jerry Walther from Mrs. Walther's assets, the interests of Mrs. Walther's estate demands Mr. Coen's removal as guardian of her estate. R.C. 2109.24. We find no abuse of discretion.

{¶29} The fourth assignment of error is overruled. The judgment of the Probate Court will be affirmed.

FAIN, P.J. and WOLFF, J., concur

Copies mailed to:

William R. Coen, Esq.
David R. Schmidt, Esq.
Hon. Alice O. McCollum