

[Cite as *In re Guardianship of Kalan*, 2014-Ohio-4159.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:)	
)	CASE NO. 13 MA 46
THE GUARDIANSHIP OF)	
FRANK M. KALAN.)	OPINION
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CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Probate Division, Case No. 12 GI 17.
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JUDGMENT:	Affirmed.
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APPEARANCES:	
For Appellee:	Attorney James E. Roberts Attorney Scott R. DeBonis 100 E. Federal Street, Suite 600 Youngstown, OH 44503

For Appellant:	Attorney John Juhasz 7081 West Blvd., Suite 4 Youngstown, OH 44512
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 18, 2014

[Cite as *In re Guardianship of Kalan*, 2014-Ohio-4159.]
DeGenaro, P.J.

{¶1} Appellant, Frank M. Kalan, appeals from a judgment of the Mahoning County Court of Common Pleas, Probate Division, appointing Appellee, Compass Family & Community Services, as guardian of his person and estate. Upon review, both of Kalan's assignments of error are meritless. First, the probate court has broad discretion in considering whether to appoint a guardian, and clear and convincing evidence was presented to support the appointment. Second, Kalan did not present less restrictive alternatives for the probate court to consider, thus, the trial court did not err in failing to consider same. Accordingly, the judgment of the probate court is affirmed.

Facts and Procedure

{¶2} On January 23, 2012, Compass filed the following: a motion for authority to file an application for appointment of guardian without the submission of a statement of expert evaluation; affidavit of Karla Edwards from Compass; an application for appointment of guardian of alleged incompetent due to the psychotic disorder of paranoia; the probate court form entitled 'Next of Kin of Proposed Ward' with "unknown" listed; and the medical examination report of Dr. Anil Nalluri.

{¶3} The probate court found that it was not possible to obtain a statement of expert evaluation due to the reasoning set forth in the affidavit of Karla Edwards. The medical examination report from Dr. Nalluri was determined to be evidence of Kalan's alleged incompetence and consequently the application was accepted for filing.

{¶4} On January 31, 2012, Michael Richards, the Probate Court investigator, personally served Kalan with notice of the application and hearing. Richards' report indicated that a guardianship of the person and estate was necessary due to Kalan's inability to take proper care of himself and his property; specifically, Kalan had poor hygiene, neglected himself and lacked insight, admitting that he rents storage facilities to keep more "stuff."

{¶5} On February 23, 2012, Compass motioned the court to appoint a physician to examine Kalan. The court originally appointed a physician to conduct an independent examination and file a statement of expert evaluation; however that physician expressed reservations as he believed that this type of work was outside his normal area of

expertise. Compass again moved for a physician to examine Kalan and the court denied the motion stating "counsel can attempt on their own to procure an independent evaluation."

{¶6} On February 24, 2012, the probate court held a hearing on Compass's application to be appointed Kalan's guardian. Based upon the testimony and evidence presented, the probate court made extensive findings of fact, which Kalan has not challenged on appeal. All exhibits were admitted. At the close of the testimony, Kalan moved to dismiss the application, arguing that R.C. 2111.04 requires next of kin to be notified, which was not done. The probate court acknowledged the deficiency and continued the matter to allow service of notice on Kalan's children.

{¶7} The proceedings resumed on March 19, 2013, wherein the probate court made further findings of fact, which Kalan has not challenged on appeal. Based upon the evidence from both hearings, the probate court found that clear and convincing evidence was presented that Kalan suffers from "mental impairment or disability and is incapable of properly caring for himself and his property."

Plenary Guardianship

{¶8} In his first of two assignments of error, Kalan asserts:

{¶9} "The probate court erred in finding that a guardianship was necessary and in imposing a plenary guardianship."

{¶10} "The purpose of a guardianship is to protect the rights of one unable to manage his or her own affairs." *State v. Langenderfer*, 6th Dist. No. F-03-031, 2004-Ohio-4149, ¶18. The probate court is required to act in the best interest of the incompetent individual, but it is well settled that a probate court has broad discretion in appointing guardians. *In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E.2d 1310 (12th Dist.1992). When the proposed ward objects to the guardianship being imposed, the trial court must be extremely cautious in proceeding. *In re Guardianship of Corless*, 2 Ohio App.3d 92, 94, 440 N.E.2d 1203 (12th Dist.1981).

{¶11} Decisions regarding the appointment of guardians will not be reversed absent an abuse of discretion. *Bednarczuk* at 551. "Abuse of discretion means an error

in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶21.

{¶12} "Under R.C. 2111.02(A), the probate court shall appoint a guardian for an incompetent when found necessary." *In re Guardianship of v Goins*, 7th Dist. No. 02-CA-163, 2003-Ohio-931, ¶16. Pursuant to the applicable version of R.C. 2111.01(D) "'Incompetent' means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state."

{¶13} Kalan challenges the probate court's determination that he suffers from a mental impairment or disability and is incapable of properly caring for himself and his property.

{¶14} Regarding Kalan's ability to properly care for himself, Dr. Nalluri's report indicated that Kalan appeared "disheveled and unkempt." Richards, the probate court investigator, reported that Kalan had poor hygiene. However, Detective Brian McGivern of the Canfield Police Department testified that Kalan was well kept during his interaction and caseworker Barbara Yelverton indicated Kalan was dressed appropriately for the weather. John Hallas, a sanitarian from the Mahoning County Sanitary District Board of Health, stated Kalan seemed healthy which was affirmed by Kalan, however, Kalan also testified that he had not seen a doctor in three years.

{¶15} Mentally, Nalluri indicated that Kalan had zero insight and degree of judgment and diagnosed him as a full-blown psychotic. This was reiterated by Richards who noted Kalan was impaired in his thought process, concentration, comprehension, and judgment. Kalan spent three days at St. Elizabeth's Hospital on a mental health issue after being "pink-slipped" by the Canfield Police Department.

{¶16} Overwhelming testimony and evidence was taken regarding the unsafe and deplorable condition of Kalan's property. In November of 2011, Detective McGivern

executed a residential search warrant of the property. The officers wore protective gear due to the horrible condition of the home. McGivern described the premises as completely packed "full of junk" and not passible necessitating him to walk sideways to get from one room to another throughout the entire house. There was no working toilet and the bathtub was full of newspapers and junk. A space heater was placed on a pile of rubbish in Kalan's bedroom. McGivern classified the house as extremely dangerous with wires hanging from the ceiling which necessitated McGivern having the electricity shut off due to the potential fire hazard.

{¶17} McGivern located one dead cat in the refrigerator and one in the freezer, as well as bugs coming up from the floorboards in the kitchen. There were several dogs tied up in the back yard, with one appearing malnourished, thin and shaking. Another dog was tangled in a leash and could not move. McGivern took several photos of the home and property depicting these conditions which were admitted into evidence.

{¶18} Further, McGivern testified that the city has towed four to five vehicles from Kalan's property and that the exterior remained in poor condition. Photographs admitted into evidence depicted a detached garage full of junk, four vehicles, which appeared inoperable and all of which were full of junk, windows and exterior doors to the premises were fully or partially blocked, a staircase with junk stacked across one-half of each step, and interior rooms of the house full of junk from floor to ceiling.

{¶19} John Hallas, a sanitarian with the Mahoning County Sanitary Board of Health, testified that Kalan's home was the worst case of hoarding he had ever seen. There were health and safety issues such as insects in the kitchen, no running water, disconnected electricity, exposed electrical wires, piles of items stacked high and throughout the house making it near impossible to traverse, and two dead cats in the refrigerator and freezer. Hallas sent multiple letters to Kalan noting the violations of the District Homes Code instructing him to clean the premises, repair the damage, and restore water service to the home. Kalan did not abate the safety and health issues.

{¶20} Kalan disregarded these concerns and indicated that he did not have enough hours in the day to clean/donate the items in the house. When questioned, Kalan

had difficulty recalling the last time he donated items and to whom. Further, the filing of these proceedings have not deterred Kalan from collecting additional items, or compelled him to clean the property. Testimony was presented that many months after the first hearing and during the pendency of this case, Hallas and the dog warden went to the property to investigate an animal complaint, returning a few days later on January 18, 2013 with a search warrant, and discovering that the safety and health issues still remained, and that the premises was in the same condition as in the summer of 2012, the last time Hallas has been inside the house.

{¶21} Kalan is unaware and unable to manage his finances. In the first hearing Kalan testified that he receives approximately \$2000 a month from his pension and social security. In the second hearing he testified that he receives \$1,150.00 per month in pension benefits and \$1,500.00 from Social Security for a total of roughly \$2650.00. His mortgage payments total almost \$1400 dollars per month, and he has other debts totaling almost \$25,000 to three creditors that were all delinquent.

{¶22} He indicated that he rents five units to store more items at an approximate cost of \$800 a month but is behind on some payments. He testified that he has lost about eight or nine units in recent years due to inability to pay. He spends approximately \$300 to \$350 per month on pet food and veterinary care and gives his son money for food and cigarettes. Based upon his own testimony, over half of his income is spent on storage facilities and animals not leaving enough for his mortgage payments or utilities, resulting in the disconnection of necessary utilities. The probate court investigator indicated within his report that Kalan cannot handle his personal finances.

{¶23} Counsel for Kalan argues that Kalan is smart, in good physical health, not chronically abusing substances, and suffered from no learning disabilities. As such, he contends that Kalan could not be found incompetent and his testimony was credible. However, the record not only demonstrates multiple safety risks in Kalan's home created by him, but also that Kalan has no appreciation for the gravity of the situation, as he has continued the hoarding behavior during the pendency of this case, did not abate the safety issues within the home, and struggled to manage his finances.

{¶24} The probate court did not abuse its discretion in granting the guardianship over Kalan. Based upon the condition of the house, the safety issues presented therein, the medical findings from Dr. Nalluri, the probate court investigator's report and Kalan's own testimony, there is competent, credible evidence of Kalan's mental impairment or disability, rendering him incapable of taking proper care of himself and his property. Accordingly, Kalan's first assignment of error is meritless.

Less Restrictive Guardianship

{¶25} In his second of two assignments of error, Kalan asserts:

{¶26} "The Probate Court Erred and Abused its Discretion When It Failed to Impose a Less Restrictive Guardianship over the Person and Estate."

{¶27} R.C. 2111.02(C)(5) and (6) require a probate court to consider evidence of a less restrictive alternative if such evidence is introduced. The probate court may deny a guardianship if it finds a less restrictive alternative exists. The statute permits a probate court to exercise its discretion in establishing a guardianship where there is a less restrictive alternative. See *In re Guardianship of Bolin*, 2d Dist. No. 96-CA-30, 1997 WL 189343 (Apr. 18, 1997). This court has previously interpreted the interplay between the two subparts of the statute: "Under a plain reading of the statute, where no evidence on less restrictive alternatives is introduced, there is no duty of the court to consider such alternatives." *In re Guardianship of Goins*, 7th Dist. No. 02-CA-163, 2003-Ohio-931, ¶22.

{¶28} No evidence was introduced in the present case of a less restrictive alternative. Consequently the probate court did not err in failing to consider it. The evidence submitted at the hearing indicated that Kalan had refused offers of assistance because he did not believe he needed any assistance. He did not allow workers and officials to enter his home. Although Kalan has two children, his daughter, who lived approximately three hours away, had not been in the home in years due to a cat allergy and his son is a ward of a guardianship and unable to take care of Kalan.

{¶29} Further, a review of the record indicates that counsel was pursuing the trial strategy that Kalan was fully competent and needed no assistance. This all or nothing approach left no middle ground to argue that a less restrictive alternative was an option.

It is well established that trial strategy will not be second-guessed on appeal and that arguments not raised at the trial court level cannot be raised for the first time on appeal. See *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965, 977. See *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 436 N.E.2d 1001 (1982). Accordingly, Kalan's second assignment of error is meritless

{¶30} In sum, both of Kalan's assignments of error are meritless. The trial court has broad discretion in considering whether to appoint a guardian and clear and convincing evidence was presented to support the appointment. Further, Kalan did not present less restrictive alternatives for the probate court to consider. As such the trial court did not err in failing to consider same. Accordingly, the judgment of the probate court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.