In re Guardianship of Rudy.

[Cite as In re Guardianship of Rudy (1992), Ohio St.3d ].

Guardians -- Without a finding of incompetence, the appointment of a limited guardian by a trial court is improper -- R.C. 2111.02, applied.

(No. 91-2112 -- Submitted November 10, 1992 -- Decided December 11, 1992.

Appeal from the Court of Appeals for Trumbull County, Nos. 90-T-4398 and 90-T-4416.

At the time of the trial court's deliberations, Margaret Rudy was a seventy-eight-year-old widow living at her home in Niles, Ohio. After her husband's death in 1977, she managed their property and other assets. She apparently managed the assets well, at least until sometime in 1988.

By 1988 Mrs. Rudy's health had deteriorated. Her diabetes became worse. She may have developed breast cancer, and she became overweight. Her adopted sons, John and David, had stopped assisting with chores. Further, she testified, a maintainance worker, who had been taking care of her rental properties, stopped helping her. She told a friend she wanted someone to take care of her affairs. Mrs. Rudy asked the friend, but this person declined.

In late 1988, Mrs. Rudy asked the priest of Our Lady of Sorrows church to give her communion. During his visit to her house, she asked if anyone in the church could help her. The priest suggested Peter Burns. Burns, together with his friend Delbert Strawder, agreed to assist. The men cleaned her house and began to help with chores. Mrs. Rudy's health apparently began to improve. The two men monitored her diet. Her blood sugar level and blood pressure improved. She lost one hundred fifty pounds, and was taken to a doctor on a regular basis. She also became more reclusive, and reduced her contact with friends.

For many years, Mrs. Rudy had been represented by attorney Douglas Neuman, and had used the services of stockbroker Donald Rodenbaugh. She became suspicious of both in early 1989. Mrs. Rudy testified that she had requested a testamentary trust, but

discovered that her attorney had set up an inter vivos trust naming himself as trustee. Correspondence from the stockbroker led her to believe that hundreds of thousands of dollars had dissapeared from her accounts. In addition, several of her stocks had been transferred to a street account without her permission. She was afraid the lawyer and stockbroker might throw her out of her house. Because of her mistrust, Mrs. Rudy transferred assets (including her real estate, automobiles, cash and stocks) to Delbert Strawder and Peter Burns. She also made a new will leaving almost everything to Burns and Strawder.

David Rudy, by his attorney, Douglas Neuman, applied for appointment of a guardian in February 1989. In September 1989, Mrs. Rudy's nephew, Lloyd Tompkins, applied to be appointed as her guardian. Upon the applications of Rudy and Tompkins, the probate court appointed John Daily, and later Robert Vesmas, as limited guardian of Mrs. Rudy's estate. The court of appeals affirmed this decision. Shortly before oral argument in this court, Mrs. Rudy died.

Chester, Hoffman, Willcox & Saxbe, John J. Chester, Richard B. Metcalf and James J. Chester, for appellant Margaret S. Rudy.

Guarnieri & Secrest and Michael D. Rossi,for appellee Robert Vesmas.

Ambrosy & Fredericka and James A. Fredericka, for appellee Lloyd Tompkins.

Westenfield & Neuman and Douglas J. Neuman, for appellee David W. Rudy.

Herbert R. Brown, J. The issue is whether the appointment of a guardian for Mrs. Rudy complied with Ohio law. We find that it did not. Further, despite Mrs. Rudy's death, we choose not to dismiss the case, because parties on both sides agree that the resolution in this case could affect a potential will contest.

The statute governing guardianships is R.C. 2111.02. R.C. 2111.02(B)(1) states in part: "If the probate court finds it to be in the best interest of an incompetent or minor, it may appoint pursuant to divisions (A) and (C) of this section, on its own motion or on application by an interested party, a limited guardian with specific limited powers." (Emphasis added.) R.C. 2111.02(C)(3) states: "If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the burden of proving incompetency shall be by clear and convincing evidence." Mrs. Rudy was not a minor. Therefore, before a guardian was appointed, her incompetency had to be proven by clear and convincing evidence.

The probate court held the required hearing and heard the testimony of numerous witnesses. The court made a long list of findings, including the following: that "Mrs. Rudy is receiving medical treatment for a number of infirmities, and will require on-going medical care in the future," that "Mrs. Rudy is receiving and requires the assistance of other persons in order to live in her own home and obtain medical care, and will require such assistance in the future," that "Mrs. Rudy was misinformed about the need to expend and transfer her assets, and relied on that misinformation to her disadvantage

in disposing of her assets," and that "[t]he conveyance of Mrs. Rudy's assets was not the proper management of her property, and was not in her best interest." The court then appointed Mrs. Rudy's attorney, John Daily, as limited guardian of her estate. Appellees Tompkins and Vesmas contend the above findings equate to a finding of incompetency and were sufficient to comply with the statutory mandate.

The probate court did not make a finding that Mrs. Rudy was incompetent. The finding that Mrs. Rudy had medical problems and required assistance to live is not sufficient, nor are the rather vague findings that she was "misinformed" about the need to transfer assets and that the transfer was "not in her best interest."

In a second judgment substituting Robert Vesmas as the limited guardian, the court referred to Mrs. Rudy's "incapacity." This term is not defined in the statutes pertaining to guardianship, and its mention in a later judgment cannot substitute for a specific finding of incompetence.

After a lengthy review of the record, the court of appeals stated: "When the instant record is examined and considered along with the judgment entries, it is clear that the trial court's determination of incapacity addressed appellant's competency. Thus, the trial court made a finding of mental impairment, or incompetency, sanctioning the imposition of a limited guardianship." A court of appeals may review findings of fact for an abuse of discretion by the trial court. But it cannot make a finding of fact that should have been made by the trial court, nor extract such a finding from the trial court's opinion where no finding was made.

Without a finding of incompetence, the appointment of a limited guardian by the trial court was improper. Were Mrs. Rudy still alive, the probate court would be directed to rescind the letter of guardianship, and the guardian directed to return assets to Mrs. Rudy's control. However, Mrs. Rudy's death makes this impossible.

Further, we are not in a position to examine all actions taken by the guardian with a view to either voiding or confirming them. The law does not require us to do so. The order by a probate court appointing a guardian cannot be collaterally impeached. Shroyer v. Richmond (1866), 16 Ohio St. 455, paragraph seven of the syllabus; Union Savings Bank & Trust v. Western Union (1908) 79 Ohio St 89, 86 N.E. 478, paragraph two of the syllabus; cf. R.C. 2113.23 (pertaining to executors and administrators). Actions taken by a guardian, therefore, are under color of law, and may be upheld even where the guardian's authority is sucessfully challenged. Since Mrs. Rudy is deceased, and since the parties have a forum available to test her competency with respect to the wills proposed for probate, we decline to undo any of the actions taken by the guardian while acting under color of law. The assets become a part of Mrs. Rudy's estate the same as if she had owned them free of the guardianship at the time of her death.

However, neither the finding of incompetency by the court of appeals nor the failure of the probate court to find incompetency is to be used in a will contest where the competency of Mrs. Rudy may be an issue. That issue must be

resolved de novo on the law and the evidence--some of which may, of course, be evidence which was previously submitted to the probate court.

Judgment reversed.

Moyer, C.J., Sweeney, Holmes, Douglas, Wright and Resnick, JJ., concur.