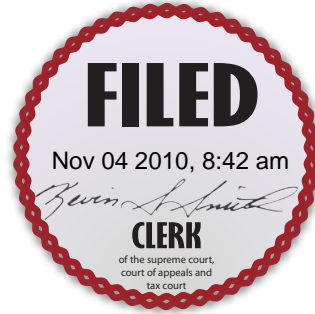


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE GUARDIANSHIP)
OF THE PERSON AND ESTATE OF AZZIE)
JUSTICE, A PROTECTED PERSON,)
)
AZZIE JUSTICE,)
)
Appellant,)
)
vs.)
)
GARNET S. JUSTICE,)
)
Appellee.)

No. 43A03-0912-CV-584

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0606-GU-20

November 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Azzie Justice appeals the trial court's order dated October 13, 2009, related to his guardianship. Azzie raises two issues, which we revise and restate as follows:

- I. Whether the trial court abused its discretion when it ordered that Azzie be institutionalized at Warsaw Meadows Care Center ("Warsaw Meadows") until further court order; and
- II. Whether the trial court abused its discretion in determining that Garnet Justice, Azzie's wife, is a suitable guardian.

We affirm.

The relevant facts follow. Azzie and Garnet were married on November 24, 1982. On June 5, 2006, Garnet filed a petition for emergency appointment of temporary guardianship for the person and the estate of an incapacitated person alleging that Azzie was an incapacitated person, that Azzie had been involuntarily admitted to the hospital on June 1, 2006 for purposes of physical and psychiatric evaluation, and that it would be necessary that Azzie be moved to a supervised nursing home facility for his long term care.¹ The trial court issued an order appointing Garnet as temporary guardian for the person and the estate of Azzie.

On July 12, 2006, Garnet filed a petition for appointment of permanent guardian of person and estate of incapacitated person. On July 28, 2006, the court ordered that Garnet continue to serve as temporary guardian for a period of sixty days and appointed a Guardian Ad Litem (the "GAL") to represent Azzie. On September 19, 2006, the court held a hearing on Garnet's July 12, 2006 petition and entered an order which appointed Garnet as the permanent guardian of the person and estate of Azzie and stated in part that

¹ According to the testimony of Garnet at the April 14, 2009 hearing, Azzie's physician recommended a nursing home facility.

Azzie was “presently admitted to Warsaw Meadows Care Center” and that “due to the effects of dementia, diabetes, high blood pressure, memory loss and depression, together with a limited IQ, a limited education and a propensity towards consuming alcohol, he is unable in part to maintain and care for his personal needs and financial affairs.” Appellee’s Appendix at 18-19.

On October 17, 2006, Garnet filed a verified inventory and a petition to transfer real estate, to sell personal property and for approval of interim accounting requesting that Garnet be authorized to transfer certain property into her name and sell certain property. On November 1, 2006, the court held an evidentiary hearing on Garnet’s October 17, 2006 petition and issued an order approving transfer of real estate and personal property and approving interim accounting.

On March 8, 2007, Garnet filed a notice of guardian’s change of residence.² Garnet filed a petition to approve accounting on October 17, 2008, and the GAL filed an objection to accounting on October 22, 2008.

On April 24, 2008, Azzie by counsel filed a motion for an independent medical examination, and on October 24, 2008, he filed a petition for adjudication of competency and restoration of legal rights, which alleged that Azzie was capable of managing his own affairs and no longer needed Garnet to act as his guardian and attached a report prepared by George Parker, M.D., a forensic psychiatrist and the director of forensic psychiatry at Indiana University School of Medicine. On November 14, 2008, Garnet filed an

² This notice is not included in the record.

objection to the petition for adjudication of competency and objection to admission of Dr. Parker's report.

On April 14, 2009, the trial court held a hearing on Azzie's petition for adjudication of competency and on the guardian's current report at which the court heard testimony from Azzie, Garnet, Dr. Parker, Michele VanRaalte, a nurse at Warsaw Meadows, Linda Kurut, a social service director at Warsaw Meadows, and John Justice, Azzie's nephew. At the close of the hearing, the court took the matter under advisement and requested the parties to submit any proposed findings of fact within six weeks, which the parties submitted in June 2009.

On October 13, 2009, the court issued an order which stated in part:

I. FINDINGS OF FACT

* * * * *

11. At the time of the permanent guardianship hearing on September 19, 2006, and continuing at the time of hearing on the Petition for Adjudication of Competency, Azzie had medical conditions requiring treatment, namely:
 - i) Diabetes, for which he has been prescribed medication;
 - ii) Depression, for which he has been prescribed medication;
 - iii) Cholesterol, for which he has been prescribed medication;
 - iv) Prostate, for which he has been prescribed Flomax;
 - v) COPD, for which he has been prescribed Flovent;
 - vi) Edema in both his legs which results in ulcers on his legs;
 - vii) High blood pressure, for which he has been prescribed medication;
 - viii) Memory, whether or not Dementia, for which he has been prescribed medication; and
 - ix) Allergies, for which Claritin is used.

12. Difficulty existed and presently exists [sic] with Azzie taking his prescribed medication both at the time of the establishment of the permanent guardianship and currently; however, his present caregivers at The Warsaw Meadows Care Center see that he engages in better hygiene practices (bathing) and treatment of ulcers and Edema and that he takes his medications.
13. Four examinations by medical doctors, one of which was a neurologist, and an examination by a psychologist were available to the Court, either in the form [of] direct testimony, in the case of George F. Parker, M.D., who both testified and presented his written report and written reports of Ronald Pancer [sic], M.D. and Michael Williams, M.D., and the report of Dr. Curfman (a neurologist) and Dr. Heiser (a psychologist) which were contained within the report of Dr. Parker, all indicated to some extent implications of dementia, Dr. Pancer [sic] opining impaired memory and episodes of confusion as the result of nine separate examinations by him resulting in his opinion that Azzie Justice needed twenty-four hour, seven day a week supervision. Dr. Williams reported that Azzie was progressing through dementia and had a history of heavy alcohol use and that a guardian was needed for both personal and financial needs. Dr. Curfman related that Azzie suffered a “behavior disturbance of unclear etiology” and on his second evaluation, gave a diagnosis of “possible early dementia.” The psychologist, Dr. Heiser, gave a diagnosis of “Anxiety Disorder NOS.”
14. Azzie currently takes medication for dementia, specifically Namenda and Aricept.
15. Examination reports disclose that Azzie advised the examiner, Dr. Parker, that he, Azzie, might hurt his wife “if I got the chance.” Further, during the same examination, Azzie did not know the day of the week, his short term test by four-word recall required two tests to register all four words and he recalled only one of the four words after a delay of a few minutes-even with hints. Additionally, Azzie advised the examiner that he has Alzheimer’s.

* * * * *

II. CONCLUSIONS OF LAW

The Court now concludes as follows:

1. That Azzie Justice continues to be and is an incapacitated person, as defined in Indiana Code Section 29-3-1-7.5. He is unable to manage his property in whole or in part and unable to provide self-care because of mental deficiency, infirmity and other incapacities. The appointment of a guardian is necessary as a means of providing care and supervision of the physical person and property of Azzie Justice. The present Guardian, Garnet S. Justice, should continue to serve as Guardian of the Person and Estate of Azzie Justice.

* * * * *

III. ORDER

* * * * *

IT IS FURTHER ORDERED that Azzie Justice shall continue to be institutionalized at Warsaw Meadows Care Center, 300 East Prairie Street, Warsaw, Indiana, until further order of this Court.

IT IS FURTHER ORDERED that Garnet S. Justice shall continue to serve as Guardian of the Person and Estate of [Azzie], without bond.

Appellant's Appendix at 8-12. Azzie filed a motion to correct error with respect to the October 13, 2009 order and a brief in support of his motion alleging in part that the court's order that he continue to be institutionalized at Warsaw Meadows was not relief sought by any party and contrary to testimony presented at the April 14, 2009 hearing. The court denied the motion.

Before addressing the issues raised on appeal, we note that all findings and orders of the trial court in guardianship proceedings are within the trial court's discretion. See Ind. Code § 29-3-2-4; In re Guardianship of J.K., 862 N.E.2d 686, 690 (Ind. Ct. App. 2007). This court will reverse a trial court's judgment for an abuse of discretion only if the judgment is against the logic and effect of the facts and circumstances before the

court, together with any reasonable inferences arising therefrom. Chavis v. Patton, 683 N.E.2d 253, 256 (Ind. Ct. App. 1997) (citing In re Guardianship of Wickersham, 594 N.E.2d 498, 501 (Ind. Ct. App. 1992)). When reviewing the trial court’s findings and judgment, we consider only the evidence most favorable to the prevailing party, and we neither reweigh the evidence nor reassess witness credibility. Id.; see also In re Guardianship of J.K., 862 N.E.2d at 690.

We also note that where a trial court enters findings of fact and conclusions of law, first we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. In re Guardianship of Phillips, 926 N.E.2d 1103, 1106-1107 (Ind. Ct. App. 2010) (citing Leever v. Leever, 919 N.E.2d 118, 122 (Ind. Ct. App. 2009)). The specific findings control only as to the issues they cover, and a general judgment standard applies to issues upon which the trial court made no findings. Id. We review questions of law *de novo* and owe no deference to the trial court’s legal conclusions. Id. (citing Shriner v. Sheehan, 773 N.E.2d 833, 841 (Ind. Ct. App. 2002), trans. denied).

I.

The first issue is whether the trial court abused its discretion when it ordered that Azzie be institutionalized at Warsaw Meadows until further court order. Azzie argues that the trial court “committed an error of law and abused its discretion in ordering, *sua sponte*, the indefinite institutionalization of Azzie Justice.” Appellant’s Brief at 15. Azzie argues that the “record contains extensive and uncontradicted evidence that Azzie

can be placed in a less restrictive environment than Warsaw Meadows” and points to the testimony of Dr. Parker, VanRaalte, Kurut, and John Justice. Id. at 17. Azzie further argues that the trial court failed to apply and did not acknowledge the “‘least restrictive environment’ standard, which has been a cornerstone of Indiana caselaw and public policy for nearly four decades.” Id. at 22-23.

Garnet argues that “the trial court clearly considered what would be the least restrictive environment as well as what would be the safest and most appropriate environment for Azzie’s care and placement.” Appellee’s Brief at 10. Garnet further argues that “[l]ogically, a setting may be less restrictive for an individual, but that does not mean that such setting is appropriate, safe or proper for the placement of an elderly, infirm individual such as Azzie who is in need of daily medical nursing care” and that “the trial court’s decision was well within the trial court’s discretion” Id. In support of her arguments, Garnet points to Azzie’s testimony that he was unable to recall the day of the week, the date, the length of his marriage, the name of his doctor or his illnesses, or what foods he should not eat, and to VanRaalte’s testimony regarding her opinion of Azzie’s ability to care for himself and live in an assisted living facility. Garnet also points to the trial court’s findings that Azzie suffered from various ailments and conditions, that Azzie had been evaluated by numerous doctors who have indicated that Azzie suffers from some degree of dementia, and that Azzie was still an incapacitated person. In his reply brief, Azzie argues that Garnet concedes that the “‘least restrictive environment’ legal standard governs this case,” that Garnet “failed to rebut the

uncontradicted evidence that he can be placed in a less restrictive environment,” and that Garnet “failed to address her statutory duties of encouraging self-reliance and community living.” Appellant’s Reply Brief at 3-4, 6.

The record reveals that Azzie was referred to Dr. Parker for a psychiatric evaluation regarding his need for continued guardianship and that, after conducting a clinical interview of Azzie, Dr. Parker prepared a report dated September 22, 2008. In his report, which was presented at the April 14, 2009 hearing, Dr. Parker reviewed and discussed Azzie’s social, medical, psychiatric and other history, current medications and psychiatric status, mental status examination, and medical records. The report indicated that Azzie did not know his current medications except for Lasix, but that medical records in June 2008 show that he was taking “Actos and glyburide, medications for diabetes; Celexa, an antidepressant medication; fenofibrate, a medication for high cholesterol; Flomax, a medication for enlarged prostate; Flovent, a medication for COPD; Lasix and Hyzaar, medications for high blood pressure; Namenda and Aricept, medications for dementia; Claritin, a medication for allergies; and a multivitamin.” Appellant’s Appendix at 44. The report further indicated that Azzie had “edema in both legs and stasis ulcers on his left leg.” Id.

In addition, Dr. Parker’s report reviewed Azzie’s medical records, which indicated that Azzie had been previously found to have limited attention and concentration and “some memory problem.” Id. at 45. The records also indicated that Azzie had a history of “behavioral disturbance of unclear etiology” and had been given diagnoses of

“possible early dementia” and “anxiety disorder NOS.” Id. at 46. The report stated that a number of Azzie’s doctors had given Azzie a diagnosis of a form of dementia. Dr. Parker’s report also indicated that during the clinical interview Azzie did not know the day of the week and that, during a short-term memory test using four-word recall, Azzie “required two trials to register all four words and recalled only one of the words after a delay of a few minutes, even with hints.” Id. at 45.

The record shows that Dr. Parker testified at the hearing on April 14, 2009, that he did not think that placement of Azzie in a nursing home was the “most appropriate.” Transcript at 117. However, when asked if Azzie had any limitations or partial limitations in caring for himself, Dr. Parker testified that he would “be nervous about [Azzie] living independently and completely responsible for his self care and cooking and looking after his medications,” that Azzie “has some memory difficulties,” that it would be good to “keep[] an eye on [Azzie] regarding hygiene and diet and things like that,” and that Azzie is “seventy five, and [has] multiple medical conditions” and is going to “need some help.” Id. at 116. When questioned by the GAL regarding whether an assisted living setting would be better for Azzie, Dr. Parker testified that “[Azzie] may well require the services of an assisted living facility” and that “[w]hether he needs that right now, I’m not the best person to judge that.” Id. at 124.

The record also shows that VanRaalte, a nurse at Warsaw Meadows, testified at the hearing that she or the staff at Warsaw Meadows tested Azzie’s blood sugar and that she thought that Azzie could probably not do the testing himself because it requires one

“to do things in a certain order and [she did not] know if [Azzie would] be able to remember how to do it.” Id. at 27. VanRaalte testified that Azzie “takes at least eight” medications and that most of the medications are taken daily and some are taken twice per day. Id. at 28. VanRaalte testified that she thought Azzie “would need guidance [to] make sure he’s taken his medicine daily.” Id. VanRaalte testified that, on “at least three different times,” she worked with Azzie when he “had periods of time where he stopped taking his Lasix” and would “refuse to take it,” and then Azzie would “fill[] up with fluid” and it would be “hard to breathe and his legs [would] get swollen.” Id. at 28-29. VanRaalte also testified that Azzie had trouble remembering whether he had taken his medications.

VanRaalte further testified that the dietary staff at Warsaw Meadows prepares the meals, that Azzie is on a restricted diet due to his conditions including the edema, and that Azzie is “[n]ot really” able to “make food choices for himself in accordance with [his] restricted diet.” Id. at 30. VanRaalte testified that Azzie has requested to keep “large amounts of cough syrup in his room.” Id. at 31. VanRaalte testified that Azzie can dress himself, but that “[b]athing is a different issue,” that the staff “sometimes have a hard time getting [Azzie] in the tub,” and that Azzie “[s]ometimes [] refuses to bathe.” Id. at 32. VanRaalte testified that Azzie is not able to care for his own wounds and skin care and that the staff “have to check [Azzie’s] legs because he’s had problems with cellulites in the past . . . and [there were] times when [the staff] had to do wound care on his legs.” Id. at 32-33. VanRaalte also testified that Azzie is forgetful.

When questioned regarding Azzie's ability to provide for his own care, VanRaalte testified that Azzie could not do so without "around the clock supervision, twenty-four hours a day." Id. at 34. When asked specifically about Azzie's ability to live in an assisted living facility, VanRaalte testified that "[t]here's a lot of independence when you're in assisted living, and you usually have to be able to be responsible . . . to remember to take your own medicines, so that probably wouldn't be a good option in my opinion." Id.

In addition, Garnet testified at the hearing that she did not believe Azzie was competent, that she talked to Azzie "[e]very day just about," that she had "a cell phone set for [Azzie]" so that he could reach her anytime, and that she talks to the staff at Warsaw Meadows "[a]lmost every day." Id. at 66, 69. Garnet testified that Azzie gets "[v]ery confused" at night. Id. at 69. Garnet testified that Azzie was not capable of cooking for himself and that Azzie does not bathe regularly. Garnet testified that when Azzie resided with her, he was very resistant to her guidance on taking medications and refused at times to take medications or see a doctor. Garnet also testified that Azzie "needs somebody to help him twenty four hours a day." Id. at 78.

Also at the hearing, Azzie testified that he did not know the date of the hearing, did not recall the date of his marriage, and did not remember the last time he saw a doctor. When asked if he had any health issues or illnesses, Azzie initially answered "[n]o," but then stated that he was a diabetic and that he had "black lung too." Id. at 9.

Azzie did not know the conditions for which he took medications. Azzie testified: “I can eat whatever I choose to eat as far as I know.” Id. at 11.

Evidence was presented at the April 14, 2009 hearing which indicated that Azzie has a number of conditions which require regular care and supervision and that continued placement at Warsaw Meadows is appropriate under the circumstances. Based upon our review of the record and considering only the evidence most favorable to the court’s order, we conclude that the evidence supports the court’s findings of fact and that the court’s findings support the judgment. Accordingly, we cannot say that the court abused its discretion when it ordered Azzie to continue to be institutionalized at Warsaw Meadows until further court order. We affirm the order of the court on this issue.

II.

The next issue is whether the court abused its discretion in determining that Garnet is a suitable guardian. In its October 13, 2009 order, the court found that Garnet “continues to be a qualified person and most suitable and willing to serve as Guardian of [Azzie], as she is his spouse and her continued appointment is in the best interest of [Azzie] and the property of [Azzie]” and that “under Indiana Code § 29-3-5-5, [Garnet] is entitled to appointment by virtue of being the spouse of [Azzie] and no compelling evidence [was] presented that it would be in the best interest of [Azzie] to pass over her priority position and appoint one having a lower priority or no priority under I.C. § 29-3-5-5.” Appellant’s Appendix at 11-12. The court concluded that “[t]he present Guardian, Garnet . . . , should continue to serve as Guardian of the Person and Estate of Azzie

Justice” and that Garnet “has fully complied with her duties and responsibilities as Guardian . . .” and ordered that Garnet “continue to serve as Guardian of the Person and Estate of [Azzie], without bond.” Id. at 12.

Azzie argues that the trial court erred in determining that Garnet was suitable to serve as guardian. Azzie argues that the trial court “never articulated its legal standard but appeared to operate as if removal under this provision required a showing of absolute unfitness.” Appellant’s Brief at 24. Azzie argues that the court’s order failed to “sufficiently address and consider Garnet’s financial interest in Azzie’s commitment” because “Garnet receives funds through the spousal impoverishment provisions of Medicaid simply due to Azzie’s institutionalization” and because “Garnet’s financial incentive to keep her husband detained in a nursing home . . . directly conflicts with her legal obligation to encourage his autonomy.” Id. at 26-27. Azzie further argues that the court erred when it overlooked Garnet’s general capacity to serve as guardian due to her domicile in North Carolina and when it failed to mention or make a determination regarding Garnet’s character and integrity. Azzie also argues that conflicting testimony suggests a strained relationship between Garnet and John Justice.

Garnet argues that under Indiana statute her removal as guardian because she has ceased to be domiciled in Indiana is not mandatory and is subject to the discretion of the trial court and that there were no objections filed with the trial court when she filed her notice of change of residence in March 2007. Garnet argues that the court heard evidence at the April 13, 2009 hearing regarding the guardianship income and assets. Garnet

argues that the portion of Azzie’s income which is allocated to Garnet “is founded in the federal Spousal Impoverishment laws” which were adopted by Indiana. Appellee’s Brief at 15. Garnet further argues that “[t]hough she is no longer a resident of the State of Indiana, Garnet has met the statutory requirements to continue to serve as guardian of the person and estate of Azzie” Id. In his reply brief, Azzie argues that Garnet failed to address his arguments which “represent the core of his contention that she is not a suitable guardian” related to the conflict of interest created by the federal funds Garnet receives as a result of Azzie’s institutionalization and the practical implications of her domicile 800 miles away from Azzie. Appellant’s Reply Brief at 9.

Ind. Code § 29-3-12-4 provides that a trial court may remove a guardian who has proven unsuitable of discharging her responsibilities or has failed to perform a duty imposed by law or court order. This court has stated that “[t]he statute governing the proceedings for the removal of a guardian vests broad discretion in the trial court, and the appellate court will not interfere unless an abuse of discretion clearly appears.” Carr v. Carr, 685 N.E.2d 92, 97 (Ind. Ct. App. 1997) (citation omitted); see also Schwartz v. Schwartz, 773 N.E.2d 348, 352-353 (Ind. Ct. App. 2002).

Here, the record reveals that Garnet filed a notice of guardian’s change of residence on March 8, 2007, and the CCS contained in the record does not show that Azzie filed an objection. Garnet testified at the April 14, 2009 hearing that Azzie received income of approximately \$1,070 per month from social security and \$262 per month from a pension, that the income was deposited into a guardianship checking

account, that fifty two dollars per month was allocated to Azzie for spending,³ fifty-seven dollars per month was allocated to a pre-paid burial plan on behalf of Azzie, \$162.50 per month was allocated to purchase a supplemental insurance policy for Azzie, and the remaining amount was usually withdrawn by Garnet to pay her household expenses such as her house payment, insurance, and utilities. Garnet also testified that she purchased clothes for Azzie out of the funds. A Medicaid notice to Garnet from the Indiana Family and Social Services Administration dated August 7, 2006, attached to Garnet's October 17, 2006 petition to transfer real estate and sell personal property and for approval of interim accounting, indicates that up to \$1,213.19 may be properly allocated each month to Garnet from Azzie's income. Further, Garnet testified that she called Azzie "[e]very day just about," and VanRaalte testified that Garnet called Warsaw Meadows or Azzie "at least once a week" and "[s]ometimes twice." Transcript at 39, 66.

Under the facts and circumstances of this case and based upon the evidence and testimony presented at the April 14, 2009 hearing, we are unable to conclude that the court abused its discretion in appointing Garnet as the guardian of the person and estate of Azzie. See In re Guardianship of Atkins, 868 N.E.2d 878, 884 (Ind. Ct. App. 2007) (holding that based upon the evidence presented the trial court did not abuse its discretion when it found that it was in the protected person's best interest to appoint the person's parents as co-guardians of his person), reh'g denied, trans. denied; see also In re Guardianship of Brewer, 922 N.E.2d 82, 89 (Ind. Ct. App. 2010) (concluding that the

³ Garnet testified that sixty-two dollars a month had been paid to Azzie for spending because she paid "ten dollars extra for [Azzie's] cable," but that she had "quit doing that." Transcript at 62.

appellants failed to demonstrate that the trial court abused its discretion when it appointed a third party guardian over an estate). We affirm the order of the court on this issue.

For the foregoing reasons, we affirm the ruling of the trial court.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.