

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

In Re: THE GUARDIANSHIP OF
RONALD FOSTER,

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:
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No. 107438

[APPEAL BY RONALD FOSTER.]

JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: May 2, 2019**

Civil Appeal from the Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2018GRD234609

Appearances:

Ronald Foster, pro se, *appellant*.

Peter Russell, *for appellee*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} Ronald Foster appeals the appointment of Peter Russell as the guardian of his estate and of his person. We affirm.

{¶ 2} Foster’s sibling filed an application for guardianship over Foster after Foster was admitted to the hospital demonstrating vascular dementia, psychosis, diabetes, and multiple medical issues. The probate court appointed Foster

independent legal counsel under R.C. 2111.02(C)(7). We note that neither Foster nor his legal guardian requested appointed counsel for Foster under R.C. 2111.02(C)(7)(d)(ii) for the purposes of this appeal. Under that subdivision, the ward or alleged incompetent person has the statutory right to appointed counsel upon request if the guardianship decision is appealed. *State ex rel. McQueen v. Court of Common Pleas*, 135 Ohio St.3d 291, 2013-Ohio-65, 986 N.E.2d 925, ¶ 9, citing *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 1998-Ohio-596, 693 N.E.2d 794. If the ward is not indigent, he or she has the right to counsel of his or her own choosing. The lack of counsel, however, does not hinder the disposition of this case.

{¶ 3} In the hearing on the matter of the appointment of the guardian before the magistrate, Foster consented to the court appointing Russell as guardian. Foster is not challenging the effectiveness of his appointed counsel, nor is there any suggestion in the record that any error lies with the appointment of counsel or representation. At the conclusion of the hearing, in part at the request of Foster's counsel, it was also determined that the matter would be revisited in 180 days. Foster did not file objections to the magistrate's decision. Instead, Foster filed a written request with the probate court, ostensibly under R.C. 2111.49(C), asking to evaluate the continued necessity of the guardianship. Under that statutory provision, and if the ward alleges competence, the court is required to conduct a hearing at which time the guardian or applicant for guardianship must prove the ward's continued incompetence by clear and convincing evidence. The court stayed the hearing pending the resolution of this appeal.

{¶ 4} The standard of review in this appeal is far more limited than the continuing review afforded under R.C. 2111.49(C), which places the burden on the guardian or the applicant for the guardianship to prove the continued necessity of the guardianship with clear and convincing evidence. In contrast, appealing the appointment of the guardian shifts the burden to the ward to demonstrate error. Appellate courts defer to the discretion of probate courts regarding guardianship matters. *In re Guardianship of Shear*, 8th Dist. Cuyahoga No. 105330, 2017-Ohio-8169, ¶ 4, citing *In re Guardianship of Poulos*, 8th Dist. Cuyahoga No. 96366, 2011-Ohio-6472, ¶ 16, and *In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E.2d 1310 (12th Dist.1992). However, in light of the fact that Foster did not file objections to the magistrate’s decision personally or through his appointed counsel, we can only review for plain error in this particular case. Civ.R. 53(D)(3)(b)(iv).

{¶ 5} Foster was represented by counsel during the probate court proceedings. At the hearing in which the necessity of the appointment of a guardian was to be determined, Foster consented to the outcome. In this case, we are limited to reviewing for plain error a discretionary act to appoint a guardian that Foster invited through his consent. Even if we recognized the existence of error, the plain error doctrine is not to be invoked except in the “utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice.” (Emphasis sic.) *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 23. In order to “successfully assert that a trial court committed plain error, a defendant must show an error that constitutes an obvious defect in the trial proceedings and

demonstrate that the error affected the outcome of the trial.” *State v. Gordon*, 152 Ohio St.3d 528, 2018-Ohio-259, 98 N.E.3d 251, ¶ 23, citing *Rogers* at ¶ 22. In light of Foster’s consent to the appointment of Russell as guardian, we cannot conclude that the proceedings resulted in a manifest miscarriage of justice. By consenting to the outcome, Foster relieved the applicant for guardianship of the burden to demonstrate the need for such action. We affirm and remand for further proceedings on Foster’s written request to determine the continuation of the guardianship under the relevant statutory scheme, which is to immediately occur with the probate court appointing counsel to represent Foster under R.C. 2111.02(C)(7).

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court, probate division, to carry this judgment into execution.

**A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.**

SEAN C. GALLAGHER, PRESIDING JUDGE

**FRANK D. CELEBREZZE, JR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR**