[Cite as *In re Guardianship of Gelsinger*, 2019-Ohio-4584.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE GUARDIANSHIP OF DOUGLAS A. GELSINGER, JR.	:	
	:	No. 108479
[Appeal by Douglas A. Gelsinger]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: November 7, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2018GRD234472

Appearances:

Stafford Law Co., L.P.A., Joseph G. Stafford, and Nicole A. Cruz, *appellant*.

Paulette A. Gelsinger, *pro se*.

ANITA LASTER MAYS, J.:

{¶ 1} The Cuyahoga County Probate Court awarded guardianship over Douglas A. Gelsinger, Jr. ("Dougie") (d.o.b. Aug. 1, 2000) to petitioner-appellant Douglas A. Gelsinger, father of Dougie, conditioned on the establishment of a visitation schedule for Paulette A. Funk Gelsinger ("Funk"), the mother of Dougie

and Gelsinger's estranged wife. Gelsinger appeals the visitation condition of the guardianship. Gelsinger has been represented by counsel throughout the trial court proceedings and currently before this court. Funk has appeared pro se before both courts.

I. Background and Facts

{¶ 2} Gelsinger and Funk have been involved in a highly contentious divorce proceeding initiated in 2015.[1] The case was still pending in October 2018, the date of the guardianship hearing in the instant case, though the parties stated they were in the process of reaching a final agreement.

{¶ 3} On May 16, 2018, approximately two and one-half months prior to Dougie's eighteenth birthday, Gelsinger, through counsel, filed an application for appointment as guardian of the person only over Dougie as an alleged incompetent under R.C. 2111.03. Dougie has been diagnosed with cerebral palsy, development delay, brittle bone disease, epileptic seizures, and anxiety. The sole listed next-of-kin on the application is Gelsinger who also executed the waiver of notice of consent to the guardianship.

{¶ 4} Funk is not named as next-of-kin or listed elsewhere in the documents. Funk heard about the application, called the trial court to inquire and appeared at the August 16, 2018 hearing. The application was set for a full hearing on October 9, 2018, to allow Funk to apply for guardianship or seek counsel. The day of the hearing, Funk filed a motion for visitation citing the contentious

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[1] *Gelsinger v. Gelsinger*, Cuyahoga C.P. No. DR-15-357362 filed June 1, 2015.

relationship with Gelsinger's family and previous violations of domestic relations court visitation orders. Funk had not been allowed to see Dougie since July 2018. The trial court allowed Funk to introduce as witnesses Funk's sister and the guardian ad litem ("GAL") from the domestic relations case.

{¶ 5} Gelsinger opposed the visitation motion on October 16, 2018, on the ground that Funk filed the motion after the September 14, 2018 deadline to file for guardianship and denied violating domestic relations court orders. Gelsinger also argued that visitation was not in Dougie's best interest because Funk is unable to properly care for Dougie and claimed that Dougie demonstrates anxiety before and after visits with Funk.

{¶ 6} On November 7, 2018, a magistrate's decision was issued appointing Gelsinger as guardian and granting visitation for Funk. The trial court immediately adopted the decision pending objections. Gelsinger filed preliminary objections to the magistrate's decision on November 21, 2018. The transcript of proceedings was filed on January 3, 2019, and on February 1, 2019, Gelsinger filed supplemental objections.

{¶ 7} Gelsinger objected to the grant of visitation and argued that he was not provided notice that the court would entertain visitation that violated his right to due process. He also offered that visitation was not in the best interest of Dougie, and it created a substantial risk to Dougie's health and safety. Gelsinger stated: (1) he had not received a witness list from Funk, (2) he had not received a copy of the subpoena that Funk issued to the GAL as required by Civ.R. 45(A)(3) so he was

not prepared to cross-examine the GAL; and (3) that the magistrate reserved ruling on Gelsinger's objections to the testimony but failed to do so in the decision.

{¶ 8} On March 29, 2019, the trial court issued the final judgment entry. The trial court rejected Gelsinger's objections to the GAL's testimony in short order: (1) there is no rule requiring submission of a witness list in guardianship proceedings under R.C. Chapter 2111; and (2) Gelsinger failed to identify anything in the record to support his claim that Funk failed to serve him with a copy of the subpoena issued to the GAL.

{¶ 9} Gelsinger appeals.

II. Preliminary Matters

{¶ 10} We note that Funk's pro se brief does not fully comply with the Ohio Rules of Appellate Procedure,

> (B) Brief of the appellee. The brief of the appellee shall conform to the requirements of divisions (A)(1) to (A)(8) of this rule, except that a statement of the case or of the facts relevant to the assignments of error need not be made unless the appellee is dissatisfied with the statement of the appellant.

App.R. 16(B).

{¶ 11} App.R. 16(A)(1) to (A)(8) requires:

> (1) A table of contents, with page references.
>
> (2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.
>
> (3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.
>
> (4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.

> (5) A statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below.
>
> (6) A statement of facts relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule.
>
> (7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.
>
> (8) A conclusion briefly stating the precise relief sought.

Id.

{¶ 12} Funk's brief is heavily weighted toward the facts and the history of the parties though it also contains a degree of legal support. Where deemed a failure to file, "this 'court may accept the appellant's statement of the facts and issues as correct and reverse judgment if appellant's brief reasonably appears to sustain such an action.'" *Smallwood v. Shiflet*, 8th Dist. Cuyahoga No. 103853, 2016-Ohio-7887, ¶ 8, fn. 1, quoting App.R. 18(C).

{¶ 13} However,

> App.R. 18(C) does not impose a form of appellate default judgment where the court of appeals can reverse solely because the appellee failed to file a brief. Reversal is warranted only if the arguments in the appellant's brief reasonably appear to support a reversal. Contrast this with a different provision of App.R. 18(C) that allows the court of appeals to "dismiss" an appeal as a consequence of the appellant's failure to file a brief. The Ohio Supreme Court has found that dismissal for failure to file an appellant's brief is a "sanction." *Hawkins v. Marion Corr. Inst.*, 28 Ohio St.3d 4, 501 N.E.2d 1195 (1986).

In re S.M.T., 8th Dist. Cuyahoga No. 97181, 2012-Ohio-1745, ¶ 3.

{¶ 14} This court is also cognizant that an appeal is to be determined "on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21." App.R. 12(A)(1)(b). Thus, our "review is strictly limited to the record that was before the trial court, no more and no less." *Napper v. Napper*, 3d Dist. Allen No. 1-02-82, 2003-Ohio-2719, ¶ 5. *See also Najjar v. Najjar*, 8th Dist. Cuyahoga No. 91789, 2009-Ohio-3880, ¶ 21. We proceed with our analysis cognizant of these guidelines and, to the extent that information contained in Funk's appellate brief as well as the appellant's brief is supplemental to the record, it will be excluded.

III. Assignments of Error

{¶ 15} Gelsinger advances three assigned errors:

I. The trial court erred as a matter of law and abused its discretion by granting and conducting a hearing on Funk's request for visitation prior to the filing of a motion for visitation and without proper notice to Gelsinger.

II. The trial court erred as a matter of law and abused its discretion by permitting the introduction of testimony and evidence resulting from an improperly issued subpoena over the objections of counsel for Gelsinger.

III. The trial court erred as a matter of law and abused its discretion by granting Funk's motion for visitation.

A. Standard of Review

{¶ 16} This court reviews a probate court's appointment of a guardian over an incompetent for an abuse of discretion. *In re Estate of Collins*, 8th Dist. Cuyahoga No. 87978, 2007-Ohio-631, ¶ 10. "'The paramount concern is the welfare of the ward and absent an abuse of discretion the probate court's decision will not

be disturbed.'" *Id.*, quoting *In re Tutt*, 8th Dist. Cuyahoga No. 77028, 2000 Ohio App. LEXIS 3961, at 10 (Aug. 31, 2000). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} "The probate court, as the 'superior guardian,' is the ultimate arbiter of whether it is in the best interest of a ward for an individual to have visitation." *Guardianship of Basista*, 11th Dist. Geauga No. 2015-G-0012, 2015-Ohio-3730, ¶ 13; R.C. 2111.50(C).

{¶ 18} Also,

> "the probate court maintains the authority to address matters of visitation in relation to guardianships." *In the Guardianship of B.I.C.*, 9th Dist. Wayne No. 09CA0002, 2009-Ohio-4800, ¶ 16. Nonetheless, all powers of the probate court that relate to any person whom the probate court has found to be incompetent and for whom it has appointed a guardian, must be exercised in the best interest of the ward. R.C. 2111.50(C). Accordingly, "[t]he probate court, as the 'superior guardian,' is the ultimate arbiter of whether it is in the best interest of a ward for an individual to have visitation." *Guardianship of Basista*, 11th Dist. Geauga No. 2015-G-0012, 2015-Ohio-3730, ¶ 13 ("*Basista II*"). "A probate court's decision regarding matters involving guardianships will not be reversed on appeal unless the probate court's decision amounts to an abuse of discretion." *In re Guardianship of Lavers*, 6th Dist. Lucas No. L-11-1044, 2012-Ohio-1668, ¶ 32. An abuse of discretion implies that the probate court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

In re Guardianship of Bakhtiar, 9th Dist. Lorain No. 16CA011029, 2017-Ohio-8617, ¶ 8.

B. Discussion

{¶ 19} We address the first assigned error only because it is determinative of this appeal. We find that the assigned error has merit.

{¶ 20} Gelsinger complains that his due process rights have been violated because the trial court granted and conducted a hearing on Funk's request for visitation prior to the filing of a motion for visitation and without proper notice to Gelsinger. This court also appreciates the irony, as recognized by the trial court,

> The court finds it ironic that Gelsinger's objections are based upon perceived procedural errors when he himself blatantly failed to name Funk as a next of kin on the original application, thereby denying her notice of the guardianship application.

Journal entry No. 2070463, p. 3. (Mar. 29, 2019). Funk independently discovered that the guardianship application had been filed. But for that discovery, Funk would have been denied the right to participate — a violation of Funk's due process rights as next-of-kin. R.C. 2111.04. *In re Estate of Collins*, 8th Dist. Cuyahoga No. 87978, 2007-Ohio-631, ¶ 9.

{¶ 21} Funk agreed that Dougie required a guardian but was concerned that she would not be allowed to visit Dougie because of the contentious divorce proceedings and history of the parties, including the antagonistic relationship with the paternal grandparents with whom Gelsinger and Dougie reside. Instead of seeking guardianship, Funk first requested the appointment of an independent guardian who would not interfere with her relationship with Dougie. The trial court explained that an independent guardian would not be appointed in this case where the application for guardianship is over the person only and not the person's estate.

{¶ 22} Funk argues that, contrary to Gelsinger's claims of surprise, the question of visitation was discussed at the August 16, 2018 hearing where Gelsinger advised that she has not been allowed to see Dougie since July 2018. Once Dougie attained the age of 18, the domestic relations visitation order was no longer effective. The transcript filed by Gelsinger at the time that the supplemental objections were filed to the magistrate's decision is for the October 2018 hearing and does not include a transcript from the August 2018 proceeding. The trial court's order setting the October 9, 2018 hearing does not reference visitation and only states that additional applications for appointment as guardian must be filed by September 14, 2018.

{¶ 23} At the inception of the October 9, 2018 hearing, Gelsinger advised that he was presenting medical evidence that had not been filed with the trial court or provided to Funk because it had just been received. Funk informed the trial court that she had subpoenaed the attorney who served as the GAL in the domestic relations case to testify. Funk stated, over Gelsinger's objections, that the GAL "will testify to the amount of aggravation that I've had to go through for the last three years because of stuff that they've put in my child's mouth." (Tr. 38.) The GAL was not asked to provide documents or other nontestimonial evidence.

{¶ 24} While the trial court was waiting for the GAL to arrive, Funk introduced her sister M.K. as a witness who testified about the antagonistic relationship between Funk, Gelsinger, and Gelsinger's parents. M.K. also testified about Funk's relationship with Dougie in support of visitation.

{¶ 25} The trial court advised Funk prior to the GAL's testimony that Funk should "confine [her] questions to whether or not Mr. Gelsinger is an appropriate person to be appointed" and "his suitability or lack thereof." (Tr. 87, 88.) The GAL testified that the divorce was extremely contentious and that Gelsinger and his parents did not want Dougie to spend time with Funk.

{¶ 26} The trial court disagreed that Gelsinger's due process rights had been infringed and cited its broad authority under R.C. 2101.24(A)(1)(e) to appoint and remove guardians and to direct and control their conduct. Included in that authority is the right to "order visitation as a condition of the guardianship. *In Re Zahoransky*, 22 Ohio App. 3d 75, 488 N.E. 944 (8th Dist. 1985)." Journal entry No. 2070463, p. 2-3 (Mar. 29, 2019).

{¶ 27} "The Ohio Supreme Court has stated that the probate division has continuing and exclusive jurisdiction over all matters pertaining to a guardian and ward." *Rheinhold v. Reichek*, 8th Dist. Cuyahoga No. 99973, 2014-Ohio-31, ¶ 10, citing *In re Clendenning*, 145 Ohio St. 82, 92, 60 N.E.2d 676 (1945). "'Indeed, the probate court's jurisdiction extends "to all matters 'touching the guardianship.'"" *Id.*, citing *In re Guardianship of Jadwisiak*, 64 Ohio St.3d 176, 180, 593 N.E.2d 1379 (1992), quoting *In re Zahoransky*, 22 Ohio App.3d 75, 488 N.E.2d 944 (8th Dist.1985).

{¶ 28} It is true that the probate court has jurisdiction over guardianship visitation matters. The issue here, however, is due process:

> Due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I, Ohio Constitution, requires that every party to an action be afforded "a reasonable opportunity to be heard after a reasonable notice of such hearing." *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 125, 502 N.E.2d 599, 604 (1986). In *Ohio Valley Radiology*, the Ohio Supreme Court held that "some form of reasonable notice" is required, while rejecting an "inflexible rule" requiring the entry of a trial date on a court's docket in every case. *Id.* at 124, 502 N.E.2d at 604. Thus, the issue of what constitutes reasonable notice is left for a case-by-case analysis. At the very least, where actual notice is not provided, constructive notice that comes from the court's setting down the trial date upon its docket may satisfy the dictates of due process. *Id.*; *Weaver v. Colwell Financial Corp.*, 73 Ohio App.3d 139, 596 N.E.2d 617 (8th Dist.1992); and *State Farm Mut. Auto. Ins. Co. v. Peller*, 63 Ohio App.3d 357, 578 N.E.2d 874 (8th Dist.1989).

Zashin, Rich, Sutula & Monastra Co., L.P.A. v. Offenberg, 90 Ohio App.3d 436, 443, 629 N.E.2d 1057 (8th Dist.1993).

{¶ 29} According to the record, there was no motion for visitation pending before the trial court at the time of the hearing. The motion was file-stamped by the clerk on that date but had not been served on opposing counsel pursuant to Civ.R. 5(A) and had not been received by the trial court. Also, Funk stated during the proceedings that she would file a motion for visitation.

{¶ 30} We also observe that the certificate of service in Funk's motion states that a true and correct copy of the motion was electronically served on October 9, 2019 "to:" but there are no designated recipients. Neither Gelsinger nor his counsel is named.

{¶ 31} The "'language of the Civil Rules regarding service of process is mandatory, and * * * a trial court may not consider a motion if the motion failed to

comply with the rules regarding service of process.'" *Palnik v. Crane*, 8th Dist. Cuyahoga No. 107400, 2019-Ohio-3364, ¶ 46, quoting *Pla v. Wivell*, 9th Dist. Summit No. 25814, 2011-Ohio-5637, ¶ 14.

{¶ 32} While Funk proceeds pro se, "'pro se litigants are presumed to have knowledge of the law and legal procedures and * * * they are held to the same standard as litigants who are represented by counsel.'" *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25, at ¶ 10, quoting *Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App. 3d 651, 654, 763 N.E.2d 1238 (8th Dist.2001). "'Pro se litigants are not entitled to greater rights, and they must accept the results of their own mistakes.'" *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586, at ¶ 9, quoting *Williams v. Lo*, 10th Dist. Franklin No. 07AP-949, 2008-Ohio-2804, ¶ 18.

{¶ 33} The first assigned error has merit. Our disposition of the first assigned error renders the remaining assigned errors moot. App.R. 12(A)(1)(c).

IV. Conclusion

{¶ 34} The trial court's judgment granting visitation as a condition of the guardianship is reversed and the case is remanded to the trial court for a hearing on Funk's motion for visitation with proper notice and compliance with the civil rules.

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

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

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ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR