[Cite as *Guardianship of Carey*, 2016-Ohio-7166.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

GUARDIANSHIP OF	:	**O P I N I O N**
LOUISE ANN CAREY	:	**CASE NO. 2016-T-0011**
	:	
	:	
	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2013 GDP 0103.

Judgment: Affirmed.

Dyan Ikehorn, pro se, 8388 Parkman Mespo Road, Middlefield, OH 44062 (Appellant).

Michael R. Babyak, 1075 Susan Road, Ravenna, OH 44266 (Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Dyan Ikehorn, appeals from the January 13, 2016 judgment of the Trumbull County Court of Common Pleas, Probate Division, adopting the magistrate's decision, removing appellant as Guardian of her mother, Louise Ann Carey, and appointing appellee, Attorney Michael R. Babyak, as Successor Guardian of the Ward.

{¶2} On October 8, 2013, appellant was appointed Guardian of her mother who was found incompetent. Appellant is listed as the sole next of kin. During that time, the Ward resided at her home in Middlefield. The following month, a Guardian's Inventory was filed listing the Middlefield property as an asset of the Ward's estate. In the spring of 2014, appellant desired to sell the real estate.

{¶3} In the fall of 2014, appellant was sent a notice to file the annual Guardian's Account and Expert Evaluation. Appellant requested that the Guardianship be dissolved. Appellant opined that her mother no longer needed psychiatric medications and indicated that her mother could make her own financial decisions. Appellant filed a confirmation with the trial court indicating that she had placed her mother at Briar Hill Healthcare. However, the trial court did not receive prior notification or approve of such move. The Guardian's Account was filed in January 2015 and approved that spring.

{¶4} Thereafter, the trial court received correspondence in the form of a letter from Briar Hill to appellant. The letter advised appellant that she was no longer permitted to enter the facility due to allegations of unwanted contact with a male staff member and allegations of a menacing behavior. A memorandum was provided to the court investigator detailing the allegations against appellant. As a result, appellant filed five applications seeking to change the residential placement of her mother. Following a hearing, the court appointed Attorney David Shepherd as guardian ad litem for the Ward. Appellant filed an objection to the appointment as well as various motions.

{¶5} In June 2015, the trial court received another correspondence from Briar Hill to appellant. The letter set forth an agreement to allow appellant to have supervised visitation with the Ward under the auspices of the GAL. Appellant filed other applications seeking to change the residential placement of her mother. The GAL filed his report and a hearing to change residential placement was held in July 2015. The trial court approved the relocation of the Ward to Eagle Pointe in Orwell.

{¶6} On November 10, 2015, a hearing on the removal of the Guardian was held before the magistrate. The hearing was scheduled upon the court's own motion due to the fact that appellant could not be contacted directly, had engaged in disruptive behavior, and provided solid food to her mother, contrary to doctor's orders.

{¶7} In his January 13, 2016 decision, the magistrate recommended that appellant be removed as Guardian and replaced with Attorney Babyak as Successor Guardian. In support of his decision, the magistrate found the following: appellant's actions as Guardian of her mother have been adverse to the best interests of the Ward; due to appellant's actions and behavior, it became necessary to relocate the Ward from one facility to another; appellant has not made herself directly available to the Ward's health care providers; appellant has not provided a cogent reason as to why she may not be contacted directly; this continued arrangement is not in the best interests of the Ward, as direct and immediate contact with appellant may be necessary to ensure needed medical decisions in a clear and expeditious manner; the Ward was provided foods which were prohibited due to the Ward's medical condition, despite the Guardian's awareness of the dietary restrictions; appellant has repeatedly taken action

and sought to take action contrary to the advice of the Ward's medical providers; and appellant has used guardianship funds for her own benefit.

{¶8} The trial court adopted the magistrate's decision that same date. Appellant did not file timely objections.[1] Appellant also did not file a transcript of proceedings or an appropriate App.R. 9 alternative.[2] Appellant timely appealed and asserts the following four assignments of error:[3]

{¶9} "[1.] The court committed prejudicial error leaving Mr Wallace and his Atty. into this hearing unannounced without proper court notification by mail of such for this placement hearing. Despite my objections to them being there. And Magistrate Davis

1. Appellant filed her objections to the magistrate's decision on January 28, 2016, one day late. On February 2, 2016, the trial court overruled appellant's objections noting that Civ.R. 6 does not extend the period in which objections to a magistrate's decision may be filed pursuant to Civ.R. 53(D)(3)(b)(i). *See Keyerleber v. Keyerleber*, 11th Dist. Ashtabula No. 2007-A-0009, 2008-Ohio-2131, ¶33-34 (the time limit for filing objections begins to run when the magistrate's decision is filed, not upon the date of service.)

2. In her "Notice of Appeal," appellant checked the box that a statement pursuant to App.R. 9(C) or (D) was to be prepared in lieu of a transcript. Directly underneath on that form is a handwritten indication that "Court won't provide me[.] They say I'm not indigent." We note that the record provides no credible evidence that appellant is indigent. In fact, on February 4, 2016, the trial court specifically found that appellant had failed to demonstrate that she is indigent. Nevertheless, even if appellant were indigent, she is not entitled to a transcript at state's expense in this civil matter. *See Burton Carol Mgmt., LLC v. Tessmer*, 11th Dist. Lake No. 2015-L-035, 2015-Ohio-4321, ¶29 (Colleen Mary O'Toole, J., concurred with a Concurring Opinion) ("Unlike criminal cases, due process does not require that indigent civil litigants be provided trial transcripts at state's expense. *Griffin v. Illinois*, 351 U.S. 12 * * * (1956); *State ex rel. Jackson v. Official Court Reporter*, 8th Dist. Cuyahoga No. 98346, 2012-Ohio-3968, ¶3. "'In Ohio, indigent litigants are provided with a cost-effective alternative to purchasing a trial transcript from the court reporter"' under App.R. 9. *In re Adoption of C.M.H.*, 4th Dist. Hocking No. 07CA23, 2008-Ohio-1694, ¶20, quoting *Watley v. Dep't of Rehab. and Correction*, 10th Dist. Franklin No. 06AP-1128, 2007-Ohio-1841, ¶17. In the context of a civil case, the Supreme Court of Ohio has held that '(t)he narrative statement provided for in App.R. 9(C) is an available, reliable alternative to an appellant unable to bear the cost of a transcript.' *State ex rel. Motley v. Capers*, 23 Ohio St.3d 56, 58 * * * (1986).") (Parallel citations omitted.) On February 17, 2016, appellant filed a statement with this court. However, on March 15, 2016, this court instructed the clerk of courts to strike appellant's statement for failure to follow the guidelines set forth in App.R. 9(C).

3. Appellant's notice of appeal was filed on February 10, 2016. Appellant timely filed her pro se appellate brief on February 25, 2016. The "Proof of Service" page indicates she served "Trumbull County Probate Court, 161 High Street, Warren, Ohio 44481." However, there is no indication she served opposing counsel, appellee, Attorney Michael R. Babyak, 1075 Susan Road, Ravenna, Ohio 44266, as required by App.R. 18(B). *See* App.R. 18(B), "Number of copies to be filed and served," ("one copy shall be served on counsel for each party separately represented.") In apparent consequence, appellee did not file a brief in this appeal.

still left them in anyway Fuertes vs Shevin 407 US 67 1972 Hampering my due process to be able to defend myself properly. This court further errored by not asking Mr Wallace to prove his allegations. Shineseki vs Sanders 129 SCT 1696 1707 2009. Its not enough to just say something you have to back it up too. He never backed any of it up. The burden of proof is on the plaintiff in civil law procedure. So civil law procedure was never followed here[.][4]

{¶10} "[2.] Did the trial court cause prejudicial error? I never said I bought any food from McDonalds for my mom it was mine. But Magistrate Davis claims I bought it for my mom. He questioned me about McDonalds, Wendys, and groceries that were bought. He could not have known about these places any other way except by looking at the annual report. Because none of this was ever brought into evidence Overton v Nicholson by him an Atty or court investigator, guardian ad litem, but he used it. He never took into account that prior to Aug 2014 my mom did a lot of her own shopping and was eating food from many restaurants because she liked to, and Mary Yoders was her favorite. He just stated in his report that I bought stuff with my moms money. Like I bought all these food items just for me. Which is not true. How can someone use evidence that was never presented in this case doesn't this favor the other party to do this? Victorian Workcare 1994 Vic SC 494, McDonald J[.]

{¶11} "[3.] In talking a discussion with an Atty. in the hall way and turning it around and printing it. Hamdi Rumsfield 542 US 507, 533 like it was given as testimony when it wasn't Perr Dodds-Streeton J Rusussey Justices; Exparte Mccarthy 124 IKB 2 256 at 259 1923 Shineseki v Sanders SCT 1707 2009 there was never testimony given

4. Joshua Wallace is an administrator at Briar Hill.

in July about solid food, it didn't come up. I would love to read the transcripts and hear the recording to this. Because at no time did I ever say I gave my mom solid food. I wasn't allowed in this place unsupervised at Briar Hill and bought no food and why is this date on PG 40 so late, Oct 8, 2015? Because me and Atty, had this conversation at this pre trial in the hall. My mom already had the peg tube May 28, 2015 because she couldn't eat. So there was no food. I was told three days before this pre trial that the court had filed no motion to get rid of me as guardian and I was never notified by mail of it either. How can a guardian be removed when I wasn't even around to give her the food. I didn't have any to give.

{¶12} "[4.] How can a trial court say and write so many errors in the magistrates report and judgment order entry. Because I was at these hearings and I know what went on and what was said. I also know that a lot of things that happen weren't according to law like they should have been. Like letting Josh Wallace in unannounced, which I objected to. And I didn't object because he perjured himself he did that in this hearing May 11th I objected because he was there unannounced like he wasn't suppose to be. Your hampering due process leaving him in and unfairly not letting the other person time to get councel or proof against him RV Sussex Justices; Exparte McCarthy 124 KB2 256 at1923 AIL 233, 93L JK 129, Lord Hewat CJ[.]"

{¶13} After reviewing appellant's four assignments of error, it appears her main argument on appeal is that the trial court erred in adopting the magistrate's decision, removing her as Guardian of her mother, and appointing Attorney Babyak as Successor Guardian. For ease of discussion, we will address her assignments together.

{¶14} At the outset, we note that appellant is proceeding pro se in this civil matter. "[A] pro se litigant is generally afforded leniency, however, there are limits to the court's leniency. *See In re Rickels*, 3rd Dist. No. 11-03-13, 2004-Ohio-2353, ¶4, citing *State v. Chilcutt*, 3rd Dist. Nos. 3-03-16, 3-03-17, 2003-Ohio-6705, ¶9; citing *State ex rel. Karmasu v. Tate*, 83 Ohio App.3d 199, 206 * * * (4th Dist.1992); *In re Paxton*, 4th Dist. No. 91-CA2008 (June 30, 1992). 'It is true that a court may, in practice, grant a certain amount of latitude toward pro se litigants.' *Goodrich v. Ohio Unemp. Comp. Rev. Comm*., 10th Dist. No. 11AP-473, 2012-Ohio-467, ¶25, citing *Robb v. Smallwood*, 165 Ohio App.3d 385, 2005-Ohio-5863, ¶5 * * * (4th Dist.2005). 'However, the court cannot simply disregard the rules in order to accommodate a party who fails to obtain counsel.' *Id*. Although we recognize the difficult task a pro se litigant faces when representing himself, we must adhere to the established rule that '"(a) pro se litigant is held to the same standard as other litigants and is not entitled to special treatment from the court."' *Lopshire v. Lopshire*, 11th Dist. No. 2008-P-0034, 2008-Ohio-5946, ¶32, quoting *Metzenbaum v. Gates*, 11th Dist. No. 2003-G-2503, 2004-Ohio-2924, ¶7, citing *Kilroy v. B.H. Lakeshore Co*., 111 Ohio App.3d 357, 363 * * * (8th Dist.1996)." (Parallel citations omitted). *Henderson v. Henderson*, 11th Dist. Geauga No. 2012-G-3118, 2013-Ohio-2820, ¶22; *see also State v. Perry*, 11th Dist. Trumbull No. 2014-T-0029, 2015-Ohio-1221, ¶15.

{¶15} As stated, a hearing on the removal of the Guardian was held before the magistrate on November 10, 2015. In his January 13, 2016 decision, the magistrate recommended that appellant be removed as Guardian and replaced with Attorney Babyak as Successor Guardian. In support of his decision, the magistrate made

numerous findings, as addressed above. In closing, the magistrate's decision specifically stated the following:

{¶16} "A party shall not assign as error on appeal the Court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b)."

{¶17} Again, the trial court adopted the magistrate's decision that same date.

{¶18} Civ.R. 53(D)(3)(a)(ii), Findings of fact and conclusions of law, states:

{¶19} "Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law."

{¶20} In addition, Civ.R. 53(D)(3)(b), Objections to magistrate's decision, provides:

{¶21} "(i) Time for filing. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a

timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

{¶22} "(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶23} "(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶24} "(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶25} The limits of our review are circumscribed. Pursuant to Civ.R. 53(D)(3)(b)(iv), any error, factual or legal, in a magistrate's decision is waived, except "plain error," unless a party files objections compliant with Civ.R. 53. Since appellant

failed to properly object to the magistrate's decision in a timely manner, we may only review for "plain error." *Nitschke v. Nitschke*, 11th Dist. Lake No. 2006-L-198, 2007-Ohio-1550, ¶19, citing *Diffenbacher v. Diffenbacher*, 11th Dist. Lake No. 2005-L-074, 2006-Ohio-2238, ¶24; *see also Smith v. Treadwell*, 11th Dist. Lake No. 2009-L-150, 2010-Ohio-2682, ¶17; *Musson v. Musson*, 11th Dist. Trumbull No. 2015-T-0049, 2016-Ohio-1311, ¶16-17.

{¶26} The standard of review was stated by the Ohio Supreme Court in *Goldfuss v. Davidson*, 79 Ohio St.3d 116, syllabus (1997):

{¶27} "[i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself."

{¶28} Further, as stated, appellant did not file a transcript of proceedings before the magistrate or an affidavit. Appellant also failed to file an appropriate App.R. 9 alternative. As a result, our review of any factual finding is limited to plain error appearing on the face of the magistrate's decision. *Nitschke, supra,* at ¶21; Cf. *In re Clowtis*, 11th Dist. Lake Nos. 2006-L-042 and 2006-L-043, 2006-Ohio-6868, ¶13; Civ.R. 53(D)(3)(b)(iii); App.R. 9(C) and (D).

{¶29} By each of her four assignments of error, appellant attacks the magistrate's decision and findings. However, we cannot question these findings, in the absence of any timely objections or proper Civ.R. 53 record of the proceedings. *See Nitschke, supra,* at ¶23. Certainly, there is no plain error in the magistrate's decision.

{¶30} Appellant's assignments of error are without merit.

{¶31} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

THOMAS R. WRIGHT, J.,

concur.