[Cite as *In re M.R.*, 2017-Ohio-8027.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF THE GUARDIANSHIP OF M.L.R.	)	
	)	CASE NO. 16 HA 0009
	)	OPINION
CHARACTER OF PROCEEDINGS:		Civil Appeal from Court of Common Pleas, Probate Division of Harrison County, Ohio Case No. 20162007
JUDGMENT:		Affirmed
APPEARANCES: For Appellee		Attorney Amanda Abrams Suite 1210 Chase Bank Building P.O. Box 608 Steubenville, Ohio 43952
For Appellant		Attorney Craig Allen 500 Market Street Suite 10 Steubenville, Ohio 43952

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: September 22, 2017

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DONOFRIO, J.

{¶1} Appellant, M. R., appeals from a Harrison County Probate Court judgment appointing his sister, appellee, P. R., to be the guardian of his person.

{¶2} On March 14, 2016, appellant was released from prison and went to reside with appellee. In the days after arriving at appellee's house, appellee noticed that appellant was delusional. For example, appellee stated appellant believed that their mother, who had passed away nine years prior, was still living and that appellee was deceased. Appellee further stated that appellant talked to himself, went in and out of the house all day and all night, and never slept. According to appellee, appellant became violent with her one day and broke her toilet. She called the police and appellant was transported to the hospital for psychiatric care.

{¶3} On May 5, 2016, appellee filed an application in the probate court to appoint her as appellant's emergency guardian. She attached a physician's report that opined appellant was "completely psychotic," that this condition had been ongoing for the last three months since appellant was released from prison, that appellant required psychiatric group home placement, and that if discharged appellant would end up on the street and would not follow up with psychiatric care. Appellee also attached the affidavit of an employee of Trinity Behavioral Medicine, where appellant was admitted at the time. The employee averred that unless an emergency guardian was appointed who could give consent to medical care, Trinity Behavioral Medicine would not be able to provide appellant with necessary care and long-term placement.

{¶4} That same day, the probate court held a hearing on the application and issued an ex parte order appointing appellee as appellant's emergency guardian. On appellee's motion, the court extended the order for 30 days.

{¶5} Appellee next filed an application for appointment of a guardian of appellant. At appellant's request, the probate court appointed an attorney to represent him.

{¶6} The court held a hearing on the matter. Appellant was not present for the hearing, but his counsel attended. The court heard testimony from appellee and

from the director of social services of the facility where appellant was placed at that time. At the conclusion of the hearing, the probate court found that appellant suffered from chronic, severe schizophrenia and was currently completely psychotic. It determined that appellant was unable to take proper care of himself. Therefore, the court appointed appellee as the guardian of appellant's person.

{¶7} Appellant filed a timely notice of appeal on June 16, 2016. He now raises two assignments of error.

{¶8} Appellant's first assignment of error states:

> THE TRIAL COURT VIOLATED [M.R.]'S RIGHTS TO PROCEDURAL DUE PROCESS WHEN THE COURT CONDUCTED THE GUARDIANSHIP APPLICATION WITHOUT HAVING [M.R.] PRESENT FOR THE HEARING AND WITHOUT MAKING A RECORD OF WHY [M.R.] WAS NOT PRESENT FOR THE HEARING.

{¶9} Appellant argues the probate court erred in not providing an explanation on the record as to why he was not present at the guardianship hearing. He contends his right to procedural due process was violated by his absence at the hearing. Appellant contends there was testimony that he was compliant and not a flight risk. Therefore, he asserts he should have been transported to the court for the hearing.

{¶10} Appellee relies on R.C. 2111.02(C)(7) for her proposition that appellant did not have the right to attend the hearing because this right is not mentioned here. R.C. 2111.02(C)(7) provides:

> (7) If the hearing concerns the appointment of a guardian or limited guardian for an alleged incompetent, the alleged incompetent has all of the following rights:
>
> (a) The right to be represented by independent counsel of the alleged incompetent's choice;

(b) The right to have a friend or family member of the alleged incompetent's choice present;

(c) The right to have evidence of an independent expert evaluation introduced;

(d) If the alleged incompetent is indigent, upon the alleged incompetent's request:

(i) The right to have counsel and an independent expert evaluator appointed at court expense;

(ii) If the guardianship, limited guardianship, or standby guardianship decision is appealed, the right to have counsel appointed and necessary transcripts for appeal prepared at court expense.

{¶11} Notably, R.C. 2111.02(C)(7) does not include the right to be present at the hearing.

{¶12} But R.C. 2111.04(A)(2)(a)(i) provides:

(2) In the appointment of the guardian of an incompetent, notice shall be served as follows:

(a)(i) Upon the person for whom appointment is sought by personal service, by a probate court investigator, or in the manner provided in division (A)(2)(a)(ii) of this section. The notice shall be in boldface type and *shall inform the alleged incompetent, in boldface type, of the alleged incompetent's rights to be present at the hearing*, to contest any application for the appointment of a guardian for the alleged incompetent's person, estate, or both, and to be represented by an attorney *and of all of the rights set forth in division (C)(7) of section 2111.02 of the Revised Code*.

(Emphasis sic.) Thus, pursuant R.C. 2111.04(A)(2)(a)(i) an alleged incompetent person does have the right to be present at the guardianship hearing. Whether the

alleged incompetent person chooses to exercise that right, however, is another matter.

{¶13} In this case, appellant was served with the notice by a probate court investigator. The notice contained a statement, among other things, that appellant had the right to be present at the hearing to contest the guardianship and to be represented by an attorney. (Notice to Prospective Ward of Application and Hearing). The court investigator also filed a report regarding the proposed guardianship after meeting with appellant. In her report, the investigator noted that appellant was opposed to the guardianship and wanted an attorney to represent him. She further remarked that appellant "explained over & over to me he wanted an Attorney to represent him!" There is no similar mention that appellant stated that he wanted to be present at the hearing.

{¶14} At the opening of the guardianship hearing, the court noted that appellee was present as was appellee's attorney. (May 26 Tr. 3). It further noted that appellant's attorney was present and representing appellant's interest. (May 26 Tr. 3). The court then noted that the parties had met in pre-trial with the court and that appellant's counsel had informed the court that appellant was opposed to the guardianship. (May 26 Tr. 3). Appellant's counsel reiterated this by telling the court that he had met with appellant last week and appellant was still opposing the guardianship application. (May 26 Tr. 3).

{¶15} At no time during this exchange did appellant's attorney state that appellant wished to be present at the hearing nor did appellant's attorney object to proceeding with the hearing without appellant.

{¶16} Additionally, at the conclusion of the hearing, the probate court announced its decision from the bench granting appellee's guardianship application. (May 26 Tr. 34). Appellant's attorney did not object or argue that the decision was improper because appellant was not present.

{¶17} Appellant's right to procedural due process was not violated. Appellant was provided with notice of the hearing and was informed of his right to be present.

Appellant met with the court investigator and exercised his right to have an attorney appointed to represent him. While an alleged incompetent person does have the right to be present at the guardianship hearing, there is no requirement that he must be present. A right can be waived. Appellant's attorney gave no indication that appellant wished to be present at the hearing. Moreover, it could have been a strategical decision not to have appellant present depending on his mental state on the day of the hearing.

{¶18} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶19} Appellant's second assignment of error states:

> THE TRIAL COURT VIOLATED [M.R.]'S RIGHTS TO PROCEDURAL DUE PROCESS BY CONSIDERING RECORDS FROM DIXON'S NURSING AND REHABILITATION WHICH WERE FAXED TO COUNSEL FOR THE GUARDIAN, FILE-STAMPED ON THE DAY OF THE GUARDIANSHIP HEARING, WERE NOT FAXED TO MR. R[.]'S ATTORNEY, AND WERE NOT AUTHENTICATED AT THE HEARING AND ADMITTED AS EVIDENCE.

{¶20} In this assignment of error appellant takes issue with several documents in the record that are file-stamped May 26, 2016, which was the date of the guardianship hearing. These documents include a Dixon's Nursing & Rehabilitation facsimile cover sheet dated May 25, 2016, stating that the documents were sent from "Jason," presumably Jason Sperlaza the director of social services at Dixon Health Care, to "Amanda," presumably appellee's attorney Amanda Abrams. Appellant asserts there is no indication that these documents were also faxed to his counsel. Moreover, appellant argues the attached documents from Dixon's were never authenticated or offered as evidence at the hearing.

{¶21} Appellant asserts that the probate court impermissibly relied on these documents in reaching its decision. He points to the court's statement at the

conclusion of the hearing, which he contends indicates that the court relied on these documents:

> Then based upon the expert evaluation previously submitted to this Court, *the current ones that were submitted today*, the testimony of Mr. Sperlaza, the testimony from the emergency hearing as well as from Ms. R[.] on both dates I find that it is appropriate to grant the guardianship of the person.

(May 26 Tr. 34; emphasis added). Appellant contends his attorney was denied the opportunity to examine the documents in question and denied the chance to challenge their admissibility and evidentiary value.

{¶22} The documents appellant takes issue with are filed-stamped May 26, 2016, the day of the guardianship hearing. They contain: (1) a fax cover sheet; (2) a physician's statement of patient's capability to manage benefits; (3) a social security form; (4) a continuity of care document; and (5) a mini-mental state examination.

{¶23} The mini-mental state examination was performed at the court's request. In the court investigator's report, the court stated that it wanted to have another expert evaluation done on appellant. Appellee responded to the court by stating that Sperlaza would conduct a mini-mental state examination and would bring the results of the examination to the hearing. Both of these documents were served on appellant's counsel. Thus, appellant's counsel was aware that the court wanted another evaluation done, that Sperlaza was conducting an examination, and that Sperlaza would bring the results to the hearing.

{¶24} At the hearing, Sperlaza testified regarding the mini-mental state examination. (May 26 Tr. 7). He explained the test and appellant's results. (May 26 Tr. 7-9). The trial court noted that Sperlaza's reports had been filed with the court. (May 26 Tr. 6). Appellant did not object. Appellant's counsel then cross-examined Sperlaza regarding numerous things, including the examination. (May 26 Tr. 14-18). Thus, appellant's counsel was not denied the opportunity to challenge the results of

the mini-mental examination as appellant now contends. Additionally, appellant's counsel could have questioned Sperlaza regarding any of the other documents had he chosen to.

{¶25} Given the above circumstances, appellant was not denied the opportunity to examine the documents in question or to cross-examine the witness who submitted them. Moreover, appellant's counsel was aware that the court ordered another evaluation and that Sperlaza was going to conduct the mini-mental state examination and bring the results to the hearing. And appellant never made an objection. Under these facts, the trial court did not err in considering the mini-mental state examination or accompanying documents.

{¶26} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶27} For the reasons stated above, the trial court's judgment is hereby affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.