

[Cite as *In re Guardianship of Smith*, 2010-Ohio-4528.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

IN RE: GUARDIANSHIP OF :
 CARL SMITH, AN INCOMPETENT :

: C.A. CASE NO. 09CA0069

: T.C. CASE NO. 01-12036

: (Civil Appeal from
 Common Pleas Court,
 Probate Division)

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O P I N I O N

Rendered on the 24th day of September, 2010.

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Adult Protective Services, 4110 N. High Street, 2nd Floor, Columbus,
 OH 43214
 Plaintiff-Appellee

Peggy L. Stewart, 2318 Paradise Lane, Springfield, OH 45502
 Defendant-Appellant, pro se

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GRADY, J.:

{¶ 1} This matter is before the court on a timely notice of
 appeal filed by Peggy L. Stewart, from a final order of the Probate
 Court removing Stewart as the duly-appointed guardian of her son,
 Carl Verland Smith.

{¶ 2} Smith has Down syndrome. He was raised to adulthood

by Stewart. When Smith attained his majority, Stewart applied to be appointed Smith's guardian. Stewart was appointed guardian of Smith's person by the Probate Court on February 15, 2001, upon the court's finding that Smith is incompetent. Thereafter, Smith continued to reside with Stewart at her home in Springfield.

{¶3} On June 17, 2009, the Probate Court, citing an investigation and recommendation of its Court Investigator, ordered Smith removed from Stewart's home and detained in a temporary residence recommended by the Clark County Board of Mental Retardation and Developmental Disabilities ("MRDD"). The order further states that "[a] hearing on the suitability of the current guardian" would be held by the Probate Court on June 23, 2009. A return of service endorsed on the order indicates it was served on Stewart on June 18, 2009.

{¶4} When the matter came on for hearing on June 23, 2009, the court took testimony from Stewart, from Lori West, an investigator for MRDD, and from Andrew Picek, an Assistant County Prosecutor. Stewart confirmed that on June 17, 2009, she had married James Stewart. West testified concerning James Stewart's relationship with Carl Smith, that Smith was fearful of James Stewart, and that James Stewart had inflicted injuries on Smith using a belt. Picek confirmed that James Stewart had been convicted of misdemeanor assault as a result. West also testified

while a "no contact order" was in effect requiring James Stewart to stay away from Smith, Stewart permitted them to be together.

Peggy Stewart disputed that fact. She also testified that James Stewart struck Smith with his belt only after Smith kicked James Stewart.

{¶ 5} At the conclusion of the hearing on June 23, 2009, the court found that Peggy Stewart had compromised Smith's safety and the duty of care she owed him by allowing Smith to come into contact with James Stewart. The court terminated Stewart's appointment as Smith's guardian. On June 23, 2009, the court granted the application of Advocacy and Protective Services, Inc., of Columbus, Ohio, to be appointed guardian of Smith's person. (Dkt 27). On June 26, 2009, the court journalized its order terminating Peggy Stewart's appointment. The court also ordered Advocacy and Protective Services, Inc. "to ensure reasonable visitation between Peggy (Smith) Stewart and Carl Smith." (Dkt. 26). Stewart filed a notice of appeal from that final order.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT WHEN IT REMOVED APPELLANT AS GUARDIAN OF HER SON AT THE PROMPTING OF AN MRDD INVESTIGATOR WHICH USURPED HER STATUTORY AUTHORITY."

{¶ 7} The record contains a written report filed on June 17,

2009, and prepared by Linda M. Cotter, an investigator appointed by the Probate Court. (Dkt. 20). Cotter's report indicates that it was prepared at the request of Probate Court, and it relates information from Cotter's interview of Lori West concerning "the relationship between James Stewart and Carl Smith." Attached to Cotter's report is a three-page report dated April 28, 2009, prepared by Lori West.

{¶ 8} Stewart argues that Lori West acted outside the authority conferred by R.C. 5126.221 and 5126.313 when she filed her report with the Probate Court instead of the agency that employs her as an investigator, MRDD, which would have allowed the agency to evaluate the contents of the report before deciding whether to provide it to the Probate Court.

{¶ 9} A question arises as to whether Stewart has standing to complain that West exceeded her authority. In any event, we need not determine whether West did, because the record fails to reflect that Stewart raised the matter of West's authority in the Probate Court as an objection to the proceedings the court held.

Error not raised in the trial court, where it may be cured, is waived and may not be assigned on appeal. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71.

{¶ 10} Stewart also complains that neither she nor any of the other next-of-kin of Carl Smith that were identified by Advocacy

and Protective Services, Inc. on the standard form it filed in support of its application for appointment (Dkt. 24) received notice of the application. R.C. 2111.04(A)(2) provides that, except for an emergency or interim appointment pursuant to R.C. 2111.02(B)(2) or (3), no guardian of the person of an incompetent shall be appointed until at least seven days after the probate court has caused written notice to be served on the proposed ward and his next-of-kin who are residents of the State.

{¶ 11} R.C. 2111.02(B)(2) authorizes appointment of an interim guardian, ex parte and without notice, if a guardian who was previously appointed is removed, for a maximum period of fifteen days. The court must specify the reason for so acting "as soon as possible." *Id.* The appointment may be extended for an additional thirty days after notice to the ward.

{¶ 12} R.C. 2911.02(B)(3) authorizes appointment of an emergency guardian, when no guardian was previously appointed, for a maximum period of seventy-two hours.

{¶ 13} The appointment of Advocacy and Protective Services, Inc., as Carl Smith's guardian (Dkt. 27) was neither an interim nor emergency appointment. The appointment was therefore voidable because it lacked the notice to next-of-kin that R.C. 2111.04(B)(2) mandates.

{¶ 14} Stewart has standing to complain that she did not receive

the notice that R.C. 2111.04(B)(2) requires. Stewart cannot be held to have waived her right to complain on appeal that she was denied a notice she was not provided. Nevertheless, Stewart must properly invoke her right of appeal in order to complain.

{¶ 15} App.R. 3(A) provides that an appeal shall be taken by filing a notice of appeal within the time allowed by App.R. 4. App.R. 3(D) states that the notice of appeal "shall . . . designate the judgment, order, or part thereof appealed from." Division (A) of App.R. 4 states that the notice must be filed within thirty days of the order from which the appeal is taken.

{¶ 16} Stewart filed the notice commencing this appeal on July 23, 2009. (Dkt. 31). The notice designates the Probate Court's order "entered in this action on the 26th day of June, 2009" as the order appealed from. That order is the order of the Probate Court removing Stewart as Smith's guardian. The order of June 23, 2009, appointing Advocacy and Protective Services, Inc. preceded the order from which the appeal was taken. However, because that order of appointment involved issues of fact and law separate from the order from which the appeal was taken, the notice of appeal that was filed from the order of June 26, 2009 fails to preserve the notice error in the order of appointment of June 23, 2009, of which Stewart now complains.

{¶ 17} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 18} "THE TRIAL COURT'S DECISION TO REMOVE APPELLANT AS GUARDIAN IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 19} On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily matters for the trier of facts to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. Therefore, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280.

{¶ 20} "In a removal, it is discretionary with the probate court as to whether the guardian should be removed, and such removal may be based upon any just cause when the interest of the trust demands it. *In re Estate of Jarvis* (1980), 67 Ohio App.2d 94, 21 O.O.3d 411, 425 N.E.2d 939. The probate court need not find that the guardian's action amounted to violations of the law or that

his actions caused injury to the ward or the ward's estate. To warrant a removal, the probate court need only find that the best interests of the ward will be served by the guardian's removal. Further, the evidence presented need not be clear and convincing to justify an order of removal. *In re Estate of Bost* (1983), 10 Ohio App.3d 147, 10 OBR 199, 460 N.E.2d 1156." *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 44.

{¶ 21} The Probate Court found that it is in the best interest of Carl Smith to remove Peggy Stewart as his guardian because she allowed her relationship with James Stewart to compromise the duty of care and protection she owed Carl Smith as his guardian.

The court cited James Stewart's conviction for misdemeanor assault for the injuries James Stewart inflicted on Carl Smith, for which Stewart was sentenced to ninety days in jail. The court relied on the testimony of Lori West to find that, even after James Stewart was ordered to have "no contact" with Carl Smith, Peggy Stewart allowed them to be together. Peggy Stewart disputed that fact in her testimony.

{¶ 22} The cornerstone of the Probate Court's finding that it is the best interest of Carl Smith to terminate Peggy Stewart's appointment as her son's guardian is the proposition that James Stewart poses a danger to Carl Smith's safety and well-being, which was largely predicated on James Stewart's conviction for assault

arising out of the injury Stewart inflicted on Carl Smith with his belt. The fact of the blow with the belt is undisputed, though its circumstances suggest that James Stewart was provoked to act as he did. However any justification for his conduct was implicitly rejected by the finding of James Stewart's criminal liability for his conduct.

{¶ 23} On August 8, 2010, we reversed James Stewart's conviction. *State v. Stewart*, Clark App. No. 2009-CA-36, 2010-Ohio-3657. We found that the trial court erred in allowing Stewart to represent himself in defending against the assault charge, and we vacated Stewart's conviction and remanded the case for a new trial. Though our decision was rendered long after Peggy Stewart's appointment had been terminated, the fact that James Stewart's conviction has been reversed necessarily undermines the Probate Court's reliance on the fact of that conviction to find as it did.

{¶ 24} In our view, the better course is to reverse the Probate Court's order terminating Peggy Stewart's appointment as her son's guardian, which would allow the Probate Court to defer action on the matter until after the issue of James Stewart's criminal liability is settled. We note that Stewart was initially charged with a misdemeanor domestic violence offense, but was subsequently indicted for the felony offense of assault by a caretaker against

a functionally impaired person. R.C. 2903.13(C)(1). Following Stewart's bench trial for that offense, the trial court found Stewart guilty of the lesser-included offense of misdemeanor assault. Those events suggest that the circumstances of Stewart's conduct were questionable, a matter that Peggy Stewart raised when she was before the Probate Court on June 23, 2009.

{¶ 25} We are also concerned that the form of notice that was served on Peggy Stewart on June 18, 2009, stating that on June 23, 2009 "a hearing on the suitability of the current guardian" would be held, wholly failed to notify Stewart of the causes against which she must defend should she wish to retain her appointment.

Had Stewart been made aware of those causes she might have better marshaled evidence and arguments opposing her termination and appreciated the need to retain an attorney to represent her. Perhaps she was aware of those considerations. However, due process imposes a burden on a proponent of a claim to give notice of the causes of a proposed legal action sufficient to allow a person whose interests may be adversely affected an effective opportunity to be heard concerning them. Where, as here, the resulting order severed the connection with her child that Peggy Stewart had enjoyed throughout his life, that need is manifest.

{¶ 26} The second assignment of error is sustained. The judgment from which the appeal was taken will be reversed and the

case remanded for further proceedings consistent with this opinion.

DONOVAN, P.J. And FROELICH, J., concur.

Copies mailed to:

Adult Protective Services
Peggy L. Stewart
Hon. Richard P. Carey