

TABLE OF CONTENTS

	<u>Page Number</u>
EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL INTEREST.....	3
STATEMENT OF THE CASE AND FACTS.....	5
ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW.....	7
<u>Proposition of Law Number 1: A guardian may not make decisions regarding life-sustaining medical treatment absent a termination of parental rights....</u>	7
<u>Proposition of Law Number 2: A determination of custody is a necessary element of a limited guardianship of a minor.....</u>	9
<u>Proposition of Law Number 3: Denial of a limited guardianship over a minor child for medical decision making by considering matters outside the trial court record does not constitute an abuse of discretion.....</u>	10
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12
APPENDIX	<u>Page</u>
Judgment Entry of the Medina County Probate Court (July 31, 2013).....	13
<i>In re Guardianship of S.H.</i> , 9th Dist. Medina No. 13CA0057-M, 2013-Ohio-3708.....	20
Judgment Entry of the Medina County Probate Court (Sept. 3, 2013).....	34
<i>In re: Guardianship of S.H.</i> , 9th District No. 13CA0066-M, 2013-Ohio-4380.....	39

EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL INTEREST

This appeal presents issues of great general interest concerning the rights of parents as natural guardians to direct the upbringing and medical treatment of their children. There are three critical issues that potentially affect the future of parent-child relations in Ohio: (1) whether a guardian may make decisions regarding life-sustaining medical treatment absent a termination of parental rights, (2) whether a determination of custody is a necessary element of a limited guardianship of a minor, and (3) whether a probate court abuses its discretion by taking into consideration the nature of the medical procedure called for by a proposed guardian for medical decision making or the effect of potential custody disputes on the proposed guardianship.

On remand from the case *In re Guardianship of S.H.*, 9th Dist. Medina No. 13CA0057-M, 2013-Ohio-3708 [hereinafter *S.H.-I*], the Probate Court of Medina County issued a judgment determining that the appointment of Maria Schimer [hereinafter Schimer] as a limited guardian for the purpose of making medical decisions was not in the best interest of S.H. On Appeal by Schimer, the Ninth District Court of Appeals reversed and remanded the decision of the Medina probate judge, finding that his decision was an abuse of discretion, and that the interests of the state in promoting the health and well-being of a child supersedes the rights of parents as natural guardians to direct the medical care of their child.

This is a case of great general interest because the holding of the Appellate Court reaches into every household in Ohio with a minor child. A third party with no prior relationship to a child may become a guardian and replace any parental decision-making with his or her own as long as this is done under the justification of promoting the health and well-being of a child. If guardians have such authority, a legal precedent will be set to undermine the family unit in a

manner that is contrary to the scheme of O.R.C. Chapter 2111 generally and O.R.C. Section 2111.08 specifically.

The practicalities of this case also dictate an issue of great general interest concerning the role of custody in a limited guardianship for a minor. The Appellate Court in its decision did not consider the role of custody, yet custody is a legal issue that is inextricably bound to any minor guardianship for medical decision-making powers. Any such minor guardianship proceeding must determine the custody status of the ward, and any adjudication of custody status must consider the suitability of the minor's parents.

This Honorable Court has held that the holding of a trial court will not be reversed in a guardianship proceeding absent an abuse of discretion. In the present matter, the Appellate Court held that the probate court's decision was an abuse of discretion. The probate court took into consideration various factors to determine its denial of the guardianship, including the nature of the medical procedure involved and possible custody issues that could flow from the appointment of a guardian. It is not an abuse of the court's discretion to consider such factors in a proceeding of this nature.

STATEMENT OF THE CASE AND FACTS

This case arises from the circumstances surrounding the appointment of Schimer as limited guardian for medical decision-making for S.H., a minor child. S.H. is a ten year old girl who resides with her mother and father in Homerville, Medina County, Ohio. S.H. was diagnosed with T-cell lymphoblastic lymphoma in April, 2013, and had begun a course of chemotherapy treatment at Akron Children's Hospital. After experiencing the effects of chemotherapy on their daughter, S.H.'s parents chose to remove her from the chemotherapy treatment and from Akron Children's Hospital and to begin an alternative course of treatment.

Schimer filed an application for appointment as guardian in the Medina County Probate Court on July 9, 2013, seeking an appointment as a limited guardian for the purpose of consenting to further chemotherapy treatment. Following a hearing on July 26, 2013, the probate court entered a judgment denying the application. Schimer appealed this decision to the Ninth District Court of Appeals. The Ninth District Court recused itself, and this Court assigned the appeal to the Fifth District Court of Appeals. The Appellate Court reversed and remanded the decision of the probate court on August 27, 2013, with instructions for the probate court to make a determination regarding the guardianship without regard to the suitability of S.H.'s parents.

On September 3, 2013, the probate court issued a second judgment entry and denied the application for guardianship. Schimer appealed this decision to the Ninth District Court of Appeals, which again recused itself, and this Court assigned the appeal to the Fifth District. On October 1, 2013, the Appellate Court filed its Opinion [hereinafter *S.H.* 2] sustaining Schimer's assignment of error and ordering the probate court to appoint Schimer as guardian.

The Appellate Court erred in issuing a ruling that that the state's right to promote the health and well-being of a minor child can supersede the right of parents as natural guardians in this case. The Appellate Court also erred in failing to adjudicate custody issues in this case. Finally, the Appellate Court erred in finding an abuse of discretion by the probate court in this case. In support of their position on these issues, the Appellants present the following argument.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law Number 1: A guardian may not make decisions regarding life-sustaining medical treatment absent a termination of parental rights.

A. Law

Revised Code Section 2111.08 states that parents are “the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education...”

Revised Code Section 2111.06 gives the probate courts the power to appoint guardians for children “whose interests, in the opinion of the court, will be promoted by the appointment of a guardian.”

This Court has analyzed the powers of a medical guardianship established under Revised Code Section 2111.06 in the case *In re Guardianship of Stein*, 105 Ohio St. 3d, 30, 2004-Ohio-7114, 821 N.E.2d 1008 (Ohio 2004). Specifically, *Stein* dealt with the power of a guardian, appointed under Revised Code Section 2111.06 with limited medical decision making powers, to remove life support from an infant in a vegetative state. This Court held that, “The right to withdraw life-supporting treatment for a child remains with the child’s parents until the parents’ rights are permanently terminated.” *Id.* at ¶ 35. It remains an open issue of law as to the right to withdraw life-sustaining treatment without permanent termination of the parents’ rights.

B. Chemotherapy is a life-sustaining treatment under *In re Guardianship of Stein* and cannot be ordered by a medical guardian without a termination of parental rights.

For children who are in need of life-sustaining treatment, it is the responsibility of the parents as natural guardians to provide it. Chemotherapy is one such life-sustaining treatment, but it remains for the natural guardians to decide whether it is the best course of treatment for their children. Simply because one disagrees with the course of life-sustaining treatment chosen

by parents does not give right to deprive them of their natural guardianship without a termination of their parental rights.

This Court in *Stein* made a distinction between “life-supporting” and “life-sustaining” treatment, but did not specifically define what treatment is classifiable as “life-supporting” and what treatment is classifiable as “life-sustaining.” *Id.* at ¶ 33. *Stein* mandates that any decision regarding life-supporting treatment is outside the realm of making medical decisions and therefore requires a termination of parental rights. *Id.* at ¶ 35. The final issue in *Stein*, therefore, addressed life-supporting rather than life-sustaining treatment.

However, this Court was not entirely silent as to the role of medical guardianships in life-sustaining treatment in *Stein*. This Court also stated that “the probate court in this instance concluded that it had the jurisdiction to appoint a guardian for the purpose of making or recommending medical decisions...including life-and-death issues of removing life-sustaining treatments.” *Id.* at ¶ 33.

The critical difference between the facts in *Stein* and the facts of the present case is that the *Stein* case only proceeded after an agreement between the parties (the parents, the applicant to be guardian, and Richland County Children Services Board) to establish a limited guardianship for making medical decisions, including making decisions about life-sustaining treatments. *Id.* at ¶ 18. By making such an agreement, the parents consented to give up their rights regarding life-sustaining medical treatments.

No such agreement exists in the present case. The parents have never consented and their rights pertaining to life-sustaining medical treatments remain in effect. The Appellate Court has ordered the establishment of a medical guardianship that authorizes the chemotherapy, a treatment that certainly qualifies as life-sustaining. The Court has previously held that decisions

regarding life-supporting decisions cannot be made by a guardian absent a permanent termination of parental rights. The Court now has an opportunity to extend this reasoning to guardian's decisions regarding life-sustaining treatment as well.

Proposition of Law Number 2: A determination of custody is a necessary element of any limited guardianship of a minor.

A. Law and Argument

In its *S.H.-I* decision, the Appellate Court made the following findings regarding custody:

Child custody disputes under Ohio law fall within the coverage of one of two statutes, depending on the circumstances—R.C. 3109.04 and 2151.23. *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 13. R.C. 2151.23(A)(2) grants juvenile courts exclusive original jurisdiction “to determine custody of any child not a ward of another court of this state.” *Id.* at ¶ 15, 781 N.E.2d 971. R.C. 3105.011 gives domestic relations courts the jurisdiction “appropriate to the determination of all domestic relations matters.” *Id.* at ¶ 14, 781 N.E.2d 971. R.C. 3109.04 dictates the rules and procedures for domestic relations courts to follow in child custody cases. *Id.*

However, the case at bar is not a custody dispute at all. Rather, Schimer filed an application requesting to be appointed as guardian of S.H. for medical purposes pursuant to R.C. 2111.06.

S.H.-I, at ¶¶ 39-40.

Custody is defined in Revised Code Sections 2151.011(A)(21) as follows: “Legal custody’ means a legal status that vests in the custodian the right to have physical care and control of the child...and to provide the child with food, shelter, education, and *medical care*, all subject to any residual parental rights, privileges, and responsibilities” (emphasis added).

The right to make medical decisions for a minor ward will result in a provision of medical care and therefore meets the definition of custody set out above. Therefore, any case regarding a limited guardianship for medical decision-making for a minor ward is inextricably bound to issues of custody. Any ruling regarding such guardianship appointment must therefore

take into account that parents may not be denied custody of their children absent a finding that they are unsuitable parents. This Court has held that “parents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable—that is, that an award of custody would be detrimental to the child.” *In re Perales*, 52 Ohio St.2d 89, 98, 369 N.E.2d 1047, 1052 (Ohio 1977).

Proposition of Law Number 3: Denial of a limited guardianship over a minor child for medical decision making by considering matters outside the trial court record does not constitute an abuse of discretion.

A. Law and Argument

The standard of review involving the appointment of a guardian is abuse of discretion, and a probate court’s decision regarding the appointment of a guardian will not be reversed for an abuse of discretion if it is supported by competent, credible evidence. *In re Guardianship of Miller*, 187 Ohio App.3d 445, 2010-Ohio-2159, 932 N.E.2d 420 (3rd Dist.).

The Appellate Court in its *S.H.-2* opinion summarized that the probate court’s decision of September 3, 2013, was based on three main areas, the first two of which are as follows:

- (1). The Medina County Jobs and Family Services refused to file a complaint alleging Dependency, Abuse, or Neglect and seeking temporary custody of S.H. pursuant to R.C. 2151.27; (2). The length and intensity of the chemotherapy regime was too invasive and destructive of the family unit...

S.H.-2, at ¶ 4.

The probate court used such matters in forming its decision, and weighed them against the reports of the probate court investigator and the guardian *ad litem*, both of which were part of the trial court record. As indicated in the *S.H.-2* opinion as cited above, the probate court took into consideration matters relating to custody and the nature of the intended procedure.

The Appellate Court reversed the probate court's decision on the basis that the court relied on these matters, which were not contained in the trial court record. *S.H.-2* at ¶ 37. The Appellate Court stressed that the reports of the court investigator and the guardian *ad litem* both supported continuing chemotherapy as being in S.H.'s best interest and were both part of the trial court record. *Id.* at ¶ 36.

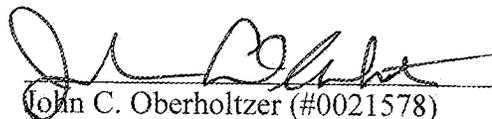
However, the Ninth Circuit Court of Appeals has held that “[W]here the record contains ample evidence to uphold the trial court’s decision, the consideration of evidence outside the record is not necessarily prejudicial.” *Catanzarite v. Boswell*, 2009 Ohio 1211, at ¶ 11, 2009 Ohio App. LEXIS 1041, at 5 (9th Dist. 2009).

If reliance on matters outside the record are not necessarily prejudicial, and courts find that these matters outweigh evidence contained within the trial court record, then the decision of the probate court is not an abuse of discretion and should be upheld.

CONCLUSION

For the foregoing reasons, this case involves matters of great general interest. Therefore, Appellants respectfully ask this Court to accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



John C. Oberholtzer (#0021578)

Counsel for Appellants

Oberholtzer & Filous, LPA

39 Public Sq., Ste. 201

Medina, OH 44256

Phone: 330-725-4929

Fax: 330-723-4929

counsel@medinalaw.com

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was delivered via regular U.S. mail, this 11th day of November, 2013, to the following:

Clair E. Dickinson
Nicholas P. Capotosto
NiCole Swearingen-Hilker
Brouse McDowell, LPA
388 S. Main St., Suite 500
Akron, OH 44308
cdickinson@brouse.com
ncapotosto@brouse.com
nhilker@brouse.com
Counsel for Applicant

Shorain L. McGhee
4141 Rockside Road, Suite 230
Seven Hills, OH 44131
shorain@smcgheelaw.com
Counsel for Ward



John C. Oberholtzer (#0021578)
Counsel for Appellants

MEDINA COUNTY OHIO
PROBATE COURT
FILED

2013 JUL 31 PM 12: 09

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MEDINA COUNTY, OHIO

*In re Application for Guardianship
of Sarah A. Hershberger,
A Minor*

CASE NO. 2013 07 GM 00029

JUDGE JOHN J. LOHN (RET.)

**JUDGMENT ENTRY DENYING
APPLICATION**

On July 26, 2013 the above-referenced matter convened for hearing. Present were the applicant Maria Schimer and her counsel Attorney Nicholas P. Capotosto of Akron; the proposed ward Sarah Hershberger (a minor) and her counsel Attorney Shorain L. McGhee of Seven Hills; Sarah's parents Andy and Anna Hershberger and their counsel Attorney John C. Oberholtzer of Medina, and the Guardian ad litem, Attorney Jennifer Matyac of Medina.

This case is an application for appointment of a limited guardian of a minor child. Sarah Hershberger was born November 30, 2002. Her parents are Andy and Anna Hershberger of Homer Township, Medina County.

The Applicant is Maria Schimer of Rootstown. Mrs. Schimer is an attorney and a registered nurse. Her primary occupation is general counsel for the Northeast Ohio Medical University. She was approached by representatives of Akron Children's Hospital to file this application. The hospital is paying the law firm of Brouse, McDowell LPA to assist Mrs. Schimer in the filing of the application for guardianship.

Sarah and her family are Amish. Her parents make their living raising and selling produce at a stand in front of their house. Sarah has seven brothers and sisters ranging in age from 12 years to 8 months. Sarah is the third oldest child. She just completed the fourth grade at an Amish School in the Black River school district.

In April Sarah was admitted to Akron Children's Hospital for fatigue and an observable mass near her collarbone. After examination and testing, it was determined Sarah has a type of leukemia, T-Cell Lymphoblastic Lymphoma. She had tumors in her neck, chest (mediastinum) and kidneys. Sarah's doctors recommended she undergo

DOCKETED

chemotherapy. The parents consented, but they testified the doctors did not fully explain to them the short-term and long-term effects of chemotherapy. According to the parents, the doctors also understated the risks to Sarah's health if she underwent chemotherapy.

The doctors did not tell the parents that once they consented to begin chemotherapy treatments, they could not withdraw their consent.

Dr. Prasad Bodas testified Sarah's chemotherapy treatment has five separate phases: Induction (which lasts for five weeks), Consolidation (seven weeks), Interim Maintenance (eight weeks), Delayed Intensification (six weeks) and Maintenance (90 weeks). The total duration of the therapy is two years, three months. Dr. Bodas testified that with conventional treatment Sarah has an 85% likelihood of eradicating her cancer and recovering from her illness.¹

Sarah completed the induction phase of her treatment and the first week of the consolidation phase. According to her parents, the effects from the chemotherapy were "horrible" and "terrible." Sarah begged her parents to stop the treatments. Anna said she and Andy could not stand to watch what was happening to their daughter.

They believed chemotherapy was killing her. They had observed firsthand the effects of the treatment and they reconsidered (or became aware of) other long-term effects and risks to Sarah if she continued with treatment. The parents talked to trusted family members, church elders and friends. Anna said she and Andy prayed for Sarah's health and prayed for wisdom to discern God's plan for Sarah.

In June Sarah's cancer had improved but she was still very sick from the side effects of the treatment. The parents decided to stop chemotherapy and to begin to treat Sarah through natural, holistic medicine. They informed Dr. Bodas of their decision.

Dr. Bodas testified no conventional medical treatment would be as effective as the chemotherapy protocol he recommended. He said no alternative treatment, such as "natural" treatments would have any therapeutic effect on her cancer. If Sarah is not treated or if she is treated other than by chemotherapy, Dr. Bodas testified Sarah has no

¹ Recovery is defined as surviving for five years or longer.

chance to survive her illness. She will die in six months to a year. He testified a delay or interruption of her chemotherapy treatment increases the chances she will not survive her cancer once the treatment is resumed. He said Sarah's cancer is growing and becoming more resistant to treatment.

Dr. Bodas testified there are short-term and long-term effects and appreciable risks from being treated with chemotherapy. The short-term effects are: Sarah's hair will fall out, she will suffer fatigue and nausea and she will be at risk for uncontrolled bleeding and developing infections. The long-term concerns are that she will become infertile,² she will have a higher risk of developing cardiovascular disease, the treatment may damage her other organs and there is an increased risk of contracting other cancers. Sarah has a small but appreciable risk of dying from the treatment itself.

Dr. Bodas told the parents he would not accept their decision to stop chemotherapy. Dr. Bodas made a referral to Medina County Job and Family Services in June. The agency refused to file neglect or dependency charges against the parents. Dr. Bodas then referred the matter to the hospital's ethics committee and legal staff to have a guardian appointed to make Sarah's medical decisions.

On July 9, 2013 with the assistance of Attorneys NiCole Swearingen-Hilker and Nicholas P. Capotosto, the applicant filed a motion for appointment of an emergency guardian for medical decision-making for Sarah and an application for the appointment of a limited guardian for medical purposes.

The case was referred to Magistrate Brobst to dispose of preliminary motions and to conduct the emergency hearing. On July 11, 2013 the magistrate granted the parents' motions to appoint a Guardian ad litem and an attorney for Sarah and a motion to order an investigation of Sarah's circumstances by the Court Investigator. The magistrate denied the parents' motion for their own court-appointed counsel and their motion to continue the emergency hearing or to convert the hearing to a pretrial conference.

On July 12, 2013 the magistrate did not appoint an emergency guardian, but determined an emergency existed. She ordered the parents to take Sarah to Akron Children's Hospital for an evaluation. She advised the parties the Court could order

² Infertility is a substantial possibility, estimated by one of Dr. Bodas' colleagues as a 50 per cent chance.

resumption of the chemotherapy treatments if they were necessary to keep Sarah alive during the pendency of the case.

Later on July 12 and as a result of the court order, Sarah was examined and evaluated at Akron Children's Hospital. The mediastinal tumor was smaller. The tumors in her kidneys possibly had been eradicated. The cancer in her abdomen was still present. The crucial factor, according to Dr. Bodas, was not that the cancer responded to treatment but that the cancer was still present and still growing.

At the hearing on July 26, 2013 the Court determined no other court in Ohio or any other state was exercising jurisdiction over the minor. Proceeding on the application would not violate the Uniform Child Custody and Judicial Enforcement Act, *R.C. Chapter 3127*.

The Court received a note written by Sarah and, without objection, entered the note into evidence as a court exhibit. Sarah's note concludes with this sentence:

"Pleeeaaasse Let my parents take care of me. I feel like runnig and playing and working again."

The Court conducted an *in camera* interview with Sarah. Although she was shy at first, during the interview Sarah demonstrated maturity, composure and intelligence. She has a basic understanding that she is gravely ill and that there are risks and benefits associated with her treatment choices. Sarah said she wished to discontinue chemotherapy and to try natural things to see if they will help with her cancer. She said if the natural things do not work, maybe she would go back to having chemotherapy. But she said she does not want chemotherapy now for these reasons: it makes her very sick, it can damage her organs and it will make her unable to have babies. Sarah was respectful, attentive and emotionally grounded during the interview.

The Court admitted the Court Investigator's report. The Court Investigator recommended: 1) the Court not appoint a guardian, 2) the Court order the parents to get a second opinion and 3) the Court order resumption of chemotherapy but the parents be permitted to continue natural treatments as palliative care.

The Court admitted the Guardian ad litem's report. The Guardian ad litem recommended the Court appoint a guardian and order Sarah to resume chemotherapy since it gives her her best chance for survival. The Guardian ad litem saw no reason to order a second opinion.

The Applicant Maria Schimer testified as to her education, training and experience in the healthcare and legal fields. Mrs. Schimer is competent, suitable and willing to serve as limited guardian for medical purposes for Sarah. If a limited guardianship is established, Mrs. Schimer is qualified to be the guardian.

Mrs. Schimer testified she intends to exercise her guardianship authority remotely, by telephone.

The applicant called two witnesses and rested. The parents called two witnesses and rested. The parents moved to dismiss the application at the conclusion of the applicant's case and at the conclusion of their case. The Court denied the motions to dismiss for the reason that *Civil Rule 41(B)(2)* is not applicable to a guardianship action, a non-adversarial statutory proceeding.

Neither the child nor the Guardian ad litem offered evidence.

The attorneys were ordered to submit written arguments by July 29.

There is no evidence the parents are unfit or unsuitable. To the contrary, these parents are caring, attentive, protective and concerned. They cooperated fully with the orders of this Court which included having their daughter endure a seven hour long examination on the evening of July 12 and the morning of July 13.

Parents have a fundamental right to the care, custody and control of their children, *In re D.A.* (2007), 113 Ohio St. 3d 88. They are the natural guardians of their minor children, *R.C. 2111.08*. Suitable parents have a "paramount right" to their children's custody, *In re Perales* (1977), 52 Ohio St. 2d 89.

A guardianship may not be established solely because the child's "interests would be promoted thereby." Parents have a fundamental right to make medical decisions for their children; "[A] finding of parental unsuitability has been recognized by this court as a necessary first step in child custody proceedings between a natural parent and

nonparent," *Hockstock v. Hockstock* (2002), 98 Ohio St. 3d 238, Ohio courts have determined that a guardianship may not be established unless a non-parent applicant establishes the parents abandoned the child, contracted away their custodial rights to the child or are otherwise unfit. *In re Guardianship of Stein* (2004), 105 Ohio St. 3d 30. Similarly, when a parent consents to a temporary guardianship and later wishes to regain custody, a court should employ a good cause standard rather than a best interest standard, *In re Austin Tyler Hoffman* 200 Ohio App. LEXIS 6105, (June 30, 2000), Lake App. No. 99-L-199, unreported.

The principle is well-settled. The Court cannot deprive these parents of their right to make medical decisions for their daughter because there is not a scintilla of evidence showing the parents are unfit. There was no basis in law and no basis in fact to file this action.

IT IS ORDERED that the application for guardianship is dismissed with prejudice.

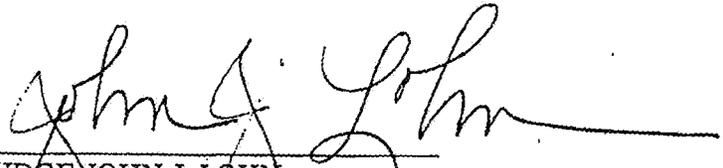
IT IS FURTHER ORDERED that the Guardian ad litem and the minor's appointed counsel shall—no later than seven days from the date of this entry—prepare and submit billing statements to the Court, to the applicant and to the parents. These billing statements shall describe the work performed and the amount of hours expended (to the nearest quarter hour) in connection with this case. The statements shall apply a billing rate identical to the rate applied to indigent representation in the juvenile division of the Court of Common Pleas to wit: \$40 per hour, out of court; \$50 per hour, in court. Due to the nature of this case and the time constraints associated with it, the full costs of the services of the Guardian ad litem and the minor's counsel shall be assessed as costs in the case.

IT IS FURTHER ORDERED costs of this action are assessed against the applicant. The applicant shall make full satisfaction of all costs no later than 30 days from the date of the submission of the billing statements.

IT IS FURTHER ORDERED that the applicant Maria Schimer, and her attorneys, Nicholas P. Capotosto and NiCole Swearingen-Hilker are notified the Court shall conduct a hearing on whether the filing and prosecution of this action constituted

frivolous conduct and the amount of reasonable attorney's fees and other reasonable expenses the court shall award to the parents if the actions of the applicant and her attorneys are found to have been frivolous, *R.C. 2323.5* and *Civ.R. 11*. The hearing shall be conducted on September 12, 2013 at 9:00 a.m. The applicant and both attorneys must appear. Counsel for the parents, John C. Oberholtzer, must appear to give testimony as to amount of expenses and the value of legal services he provided to the parents. The Guardian ad litem and the minor's appointed counsel are not required to appear at the hearing since their fees are being assessed as court costs.

SO ORDERED.



JUDGE JOHN J. LOHN
Retired Judge Sitting by Assignment
Certificate of Assignment No. 13 JA 1703

COURT OF APPEALS

13 AUG 27 PM 12:41

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

COURT OF APPEALS
MEDINA COUNTY, OHIO
NINTH APPELLATE DISTRICT

IN RE: GUARDIANSHIP OF
S.H.

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.
Sitting by Supreme Court Assignment

Case No. 13CA0057-M

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Medina County Court of
Common Pleas, Probate Division, Case No.
2013 07 GM 00029

JUDGMENT:

Reversed and Remanded.

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For- Applicant-Appellant Maria Schimer

For - Proposed Ward

CLAIR E. DICKINSON
NICHOLAS P. CAPOTOSTO
NICOLE SWEARINGEN-HILKER
388 South Main Street, Ste. 500
Akron, OH 44311

SHORAIN L. MCGHEE
4141 Rockside Road, Ste. 230
Seven Hills, OH 44131

Guardian Ad Litem

For - Andy and Anna H.

JENNIFER MATYAC
326 N. Court Street
Medina, OH 44256

JOHN C. OBERHOLTZER
39 Public Square, Ste. 201
Medina, OH 44256

Medina County, Case No. 13CA0057-M

2

Gwin, P.J.

{¶1} Appellant Maria Schimer ["Schimer"] appeals the July 31, 2013 decision of the Medina County Probate Court denying her application for appointment of a limited guardian of the proposed ward, S.H.¹, a minor child, for the limited purposes of making medical decisions. The appellees are Andy H. and Anna H. ["Parents"], the parents of the minor child.

Facts and Procedural History

{¶2} On July 9, 2013, Schimer filed an application in the Medina County Probate Court for appointment as guardian of the proposed ward, S.H., for the limited purpose of making medical decisions. Specifically, Schimer filed 1). A Motion for Appointment of an Emergency Guardian with a Supplement and a Statement of Expert Evaluation pursuant to Supp.R. 66 and R.C. 2111.29; 2). Application for Appointment of Guardian of Minor, pursuant to R.C. 2111.03(C) with an Addendum, Probate Form 16 and Next of Kin of Proposed Ward, a Minor pursuant to R.C. 2111.04, Probate Form 15.0(A); Schimer's Affidavit pursuant to R.C. 3109.27, Probate Form 16.1; and Fiduciary's Acceptance Guardian, pursuant to R.C. 2111.14, Probate Form 15.2.

{¶3} On July 10, 2013, a magistrate appointed a guardian ad litem for S.H. On July 11, the parents' attorney filed a motion to continue the emergency hearing for guardianship or convert that hearing to a pre-trial conference. Parents also filed a motion to have counsel appointed to represent them. Finally, also on July 11, 2013, the parents filed a motion to appoint an investigator to investigate the need for, or the

¹ For purposes of anonymity, initials designate father's, mother's and the child's name. See, e.g., *In re C.C.*, 10th Dist. Franklin App. No. 07-AP-993, 2008-Ohio-2803 at ¶1, n.1. Counsel should adhere to Sup.R.Rule 45(D) concerning disclosure of personal identifiers.

Medina County, Case No. 13CA0057-M

3

circumstances of the guardianship and file a report to the court pursuant to R.C. 2111.042.

{¶4} By Magistrate's Order filed July 11, 2013, the magistrate denied the parents' motion to continue the emergency hearing for guardianship. The magistrate found that the parents were duly notified of the hearing and "to delay a ruling to prevent significant injury to the minor, if ultimately found, is not in minors [sic.] best interest." The magistrates further found no authority to appoint counsel for the parents because the motions filed do not seek to permanently divest the parents of their parental rights and are civil in nature; therefore, the parents were not entitled to counsel at state's expense. Further, there is no statutory authority for the appointment of counsel for parents in a guardianship proceeding. The magistrate granted the parents' motions to appoint an Investigator and to appoint an attorney to represent S.H.

{¶5} Following an evidentiary hearing before the magistrate on the application held July 12, 2013, the magistrate directed that S.H. be examined by Akron's Children's Hospital. The magistrate further ordered the guardian ad litem "shall consult with Dr. Bodas and provide a recommendation to the Court regarding continuation and/or resumption or [sic.] chemotherapy for [S.H.]".

{¶6} On July 16, 2013, parents filed a motion to dismiss contending the case more properly belonged in the Juvenile Division of the Common Pleas Court pursuant to R.C. 2151. et seq. Parents also filed a motion to appoint Dr. Richard R. Mason, MS DO as an expert to assist the Court in alternative therapies available to S.H.

Medina County, Case No. 13CA0057-M

4

{¶7} On July 17, 2013, the parents filed a motion to dismiss contending R.C. 2111.02, the statute authorizing an emergency guardianship is unconstitutional "due to its language referring to 'an interested party' being void for vagueness."

{¶8} On July 18, 2013, Schimer filed responses to each of the parents' motions. By Magistrate's Order filed July 19, 2013, the magistrate granted the parents motion to appoint Dr. Mason as an expert witness. The court continued the hearing on the application for appointment of a guardian until July 26, 2013. By separate entry filed July 19, 2013, the magistrate overruled the parents' motion to dismiss for lack of jurisdiction. By Judgment Entry, filed July 24, 2013 the trial judge overruled the parents' motion to dismiss for lack of jurisdiction and motion to dismiss based upon the void for vagueness doctrine.²

{¶9} A full evidentiary hearing on the application was held before the trial court on July 26, 2013. The parties filed post-hearing briefs on July 29, 2013.

{¶10} The following facts were presented during the hearings before the trial court.³

{¶11} S.H. and her family are Amish. Her parents make their living raising and selling produce at a stand in front of their house. S.H. has seven brothers and sisters ranging in age from 12 years to 8 months. S.H. is the third oldest child. She just completed the fourth grade at an Amish School in the Black River school district. S.H. is ten years old.

² Parents have not appealed the trial court's rulings overruling their motions to dismiss. See, App.R. 4(B).

³ Many of the facts were set forth in the Magistrate's Order filed July 12, 2013 and the trial judge's entry denying the application filed July 31, 2013.

Medina County, Case No. 13CA0057-M

5

{¶12} In April 2013, S.H. was admitted to Akron Children's Hospital for fatigue and an observable mass near her collarbone. After examination and testing, it was determined S.H. has a type of leukemia, T-Cell Lymphoblastic Lymphoma, Stage III. She had tumors in her neck, chest (mediastinum) and kidneys. The most significant concern was the mass in S.H.'s neck area, which prior to initial treatment, impacted her airway and caused her admission into the pediatric intensive care unit. Sarah's doctors recommended she undergo chemotherapy. The parents consented, but they testified the doctors did not fully explain to them the short-term and long-term effects of chemotherapy. According to the parents, the doctors also understated the risks to S.H.'s health if she underwent chemotherapy.

{¶13} Dr. Prasad Bodas testified that S.H.'s chemotherapy treatment has five separate phases: Induction (5 weeks), Consolidation (seven weeks), and Interim maintenance (eight weeks), Delayed Intensification (six weeks) and Maintenance (90 weeks). The total duration of the therapy is two years, three months. Dr. Bodas testified that with conventional treatment S.H. has an 85% likelihood of eradicating her cancer and recovering from her illness, i.e. surviving for five years or longer.

{¶14} S.H. completed the induction phase of her treatment and the first week of the consolidation phase. According to her parents, the effects from the chemotherapy were "horrible" and "terrible." S.H. begged her parents to stop the treatments. Mother said she and Father could not stand to watch what was happening to their daughter.

{¶15} The parents believed chemotherapy was killing S.H. They had observed firsthand the effects of the treatment and they reconsidered (or became aware of) other long-term effects and risks to S.H. if she continued with treatment. Mother testified she

Medina County, Case No. 13CA0057-M

6

and Father prayed for S.H.'s health and prayed for wisdom to discern God's plan for her.

{¶16} In June, S.H.'s cancer had improved but she was still very sick from the side effects of the treatment. The parents decided to stop chemotherapy and to begin to treat S.H. through natural, holistic medicine. They informed Dr. Bodas of their decision.

{¶17} Dr. Bodas testified no conventional medical treatment would be as effective as the chemotherapy protocol he recommended. He said no alternative treatment, such as "natural" treatments would have any therapeutic effect on her cancer. If S.H. is not treated or if she is treated other than by chemotherapy, Dr. Bodas testified S.H. has no chance to survive her illness. S.H. will die in six months to a year. He testified a delay or interruption of her chemotherapy treatment increases the chances she will not survive her cancer if the treatment is resumed. He said S.H.'s cancer is growing and becoming more resistant to treatment.

{¶18} Dr. Bodes further testified there are short-term and long-term effects and appreciable risks from being treated with chemotherapy. The short-term effects include S.H.'s hair falling out, she will suffer fatigue and nausea and she will be at risk for uncontrolled bleeding and developing infections. The long-term concerns are that she will become infertile, and she will have a higher risk of developing cardiovascular disease. In addition, the treatment itself may damage her other organs and there is an increased risk of contracting other cancers. S.H. has a small but appreciable risk of dying from the treatment itself.

{¶19} Dr. Bodes told the parents he would not accept their decision to stop chemotherapy. Dr. Bodas made a referral to Medina County Job and Family Services in

Medina County, Case No. 13CA0057-M

7

June. The agency refused to file neglect or dependency charges against the parents. Dr. Bodes then referred the matter to the hospital's ethics committee and legal staff to have a guardian appointed to make S.H.'s medical decisions.

{¶20} On July 9, 2013, Schimer filed a motion for appointment of an emergency guardian for medical decision making for S.H. and an application for the appointment of a limited guardian for medical purposes. Schimer is an attorney and a registered nurse. Her primary occupation is general counsel for the Northeast Ohio Medical University. Schimer was approached by representatives of Akron's Children's Hospital to file the application.

{¶21} On July 12, 2013, the magistrate ordered the parents to take S.H. to Akron Children's Hospital for an evaluation. The examination revealed that the mediastinal tumor was smaller. The tumors in her kidneys had possibly been eradicated and the cancer in her abdomen was still present. The crucial factor according to Dr. Bodas was that the cancer was still present and still growing.

{¶22} The trial court conducted an in camera interview with S.H. In his judgment entry the trial judge noted,

[S.H.] said she wished to discontinue chemotherapy and to try natural things to see if they will help with her cancer. She said if the natural things do not work, maybe she would go back to having chemotherapy. But she said she does not want chemotherapy now for these reasons: it makes her very sick, it can damage her organs and it will make her unable to have babies.

{¶23} The trial court also admitted the Court Investigator's report and the report of the guardian ad litem. Both reports recommended S.H. resume chemotherapy.

Medina County, Case No. 13CA0057-M

8

{¶24} By Judgment Entry filed July 31, 2013, the trial court denied Schimer's application for limited guardianship.

{¶25} On August 5, 2013, Schimer filed a Notice of Appeal in the Ninth District Court of Appeals. The Ninth District Court of Appeals recused itself and the Ohio Supreme Court assigned this appeal to the Fifth District Court of Appeals effective August 7, 2013.

{¶26} On August 7, 2013, Schimer filed a Motion and Brief for an Injunction Pending Appeal seeking an order directing the parents to resume treatment at Akron Children's Hospital or at another recognized Children's Hospital in the area, during the pendency of the appeal. Parents filed a brief in opposition on August 14, 2013. By Judgment Entry filed August 14, 2013, this Court granted Schimer's motion for an injunction and ordered that the treatment of S.H. resume subject to modification or termination by this Court during the pendency of this appeal.

Assignments of Error

{¶27} Schimer raises two assignments of error,

{¶28} "I. THE TRIAL COURT INCORRECTLY DENIED MARIA SCHIMER'S APPLICATION TO BE [S.H.'S] LIMITED GUARDIAN WITH AUTHORITY TO CONSENT TO LIFE-SAVING MEDICAL TREATMENT.

{¶29} "II. THE TRIAL COURT INCORRECTLY DETERMINED THAT THERE WAS NO BASIS IN LAW OR FACT FOR THE FILING OF THIS ACTION."

Medina County, Case No. 13CA0057-M

9

I.

{¶30} Schimer's applied to the Medina County Probate Court for appointment of an emergency guardian and appointment of a limited guardian to make medical decisions for S.H. In denying this motion the trial court stated,

{¶31} There is no evidence the parents are unfit or unstable.

A guardianship may not be established solely because the child's "interests would be promoted thereby." Parents have a fundamental right to make medical decisions for their children: "[A] finding of parental unsuitability has been recognized by this court as a necessary first step in child custody proceedings between a natural parent and nonparent," *Hockstock v. Hockstock* (2002), 98 Ohio St.3d 238, Ohio Courts have determined that a guardianship may not be established unless a non-parent applicant establishes the parents abandoned the child, contracted away their custodial rights to the child or are otherwise unfit. *In re Guardianship of Stein* (2004), 105 Ohio St.3d 30.

The principle is well-settled. The Court cannot deprive these parents of their right to make medical decisions for their daughter because there is not a scintilla of evidence showing the parents are unfit.

Medina County, Case No. 13CA0057-M

10

{¶32} The issue presented in Schimer's first assignment of error is whether the trial court erred in finding that she was required to demonstrate parental unsuitability as a prerequisite to being appointed as a guardian for S.H.

{¶33} Schimer filed a petition in the probate court requesting to be appointed as guardian of S.H. for medical purposes pursuant to R.C. 2111.06. This statute provides,

A guardian of the person of a minor shall be appointed as to a minor having no father or mother, whose parents are unsuitable persons to have the custody of the minor and to provide for the education of the minor as required by section 3321.01 of the Revised Code, or whose interests, in the opinion of the court, will be promoted by the appointment of a guardian. A guardian of the person shall have the custody and provide for the maintenance of the ward, and if the ward is a minor, the guardian shall also provide for the education of the ward as required by section 3321.01 of the Revised Code.

{¶34} We apply a de novo standard of review upon an appeal of the trial court's interpretation and application of a statute, without giving deference to the trial court's determination. *State v. Trivette*, 195 Ohio App.3d 300, 2011-Ohio-4297, 959 N.E.2d 1065 (Wayne, 2011), ¶ 7; *State v. Sufronko*, 105 Ohio App.3d 504, 506, 664 N.E.2d 596 (4th Dist.1995); *State v. Woods*, 5th Dist. Licking No. 12-CA-19, 2013-Ohio-1136, ¶41.

{¶35} The primary purpose of the judiciary in the interpretation or construction of a statute is to give effect to the intention of the legislature, as gathered from the provisions enacted by application of well-settled rules of construction or interpretation. *Henry v. Central National Bank*, 16 Ohio St.2d 16, 20, 242 N.E.2d 342(1968). (Quoting *State ex rel. Shaker Heights Public Library v. Main*, 83 Ohio App. 415, 80 N.E.2d

Medina County, Case No. 13CA0057-M

11

261(8th Dist.1948)). It is a cardinal rule that a court must first look to the language itself to determine the legislative intent. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378(1973). If that inquiry reveals that the statute conveys a meaning that is clear, unequivocal and definite, at that point, the interpretive effort is at an end, and the statute must be applied accordingly. *Id.* at 105–106, 304 N.E.2d 378. In determining legislative intent, it is the duty of the court to give effect to the words used, not to delete words used or to insert words not used. *Columbus–Suburban Coach Lines v. Public Utility Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). *See also, In re: McClanahan*, 5th Dist.Tusc. No. 2004AP010004, 2004–Ohio–4113, ¶16.

{¶36} R.C. 1.42 states: "1.42 Common and technical usage. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

{¶37} The word "shall" is usually interpreted to make the provision in which it is contained mandatory. *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834 (1971). In contrast, the use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary. *Id.* The words "shall" and "may" when used in statutes are not automatically interchangeable or synonymous. *Id.* To give the "may" as used in a statute a meaning different from that given in its ordinary usage, it must clearly appear that the Legislature intended that it be so construed from a review of the statute itself. *Id.* at 107– 108, 271 N.E. 2d 834. *In re: McClanahan*, *supra* at ¶ 17.

Medina County, Case No. 13CA0057-M

12

{¶38} The language of R.C. 2111.06 is clear and unambiguous on its face and needs no interpretation. In the case at bar, the trial court failed to apply the appropriate standard of review. Instead of reviewing the controlling statute, R.C. 2111.06, the trial court relied on case law holding that in a custody dispute between a parent and nonparent, the juvenile court must make a determination of parental unsuitability before awarding custody to a nonparent in a legal custody proceeding.

{¶39} Child custody disputes under Ohio law fall within the coverage of one of two statutes, depending on the circumstances—R.C. 3109.04 and 2151.23. *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶ 13. R.C. 2151.23(A)(2) grants juvenile courts exclusive original jurisdiction "to determine custody of any child not a ward of another court of this state." *Id.* at ¶ 15, 781 N.E.2d 971. R.C. 3105.011 gives domestic relations courts the jurisdiction "appropriate to the determination of all domestic relations matters." *Id.* at ¶ 14, 781 N.E.2d 971. R.C. 3109.04 dictates the rules and procedures for domestic relations courts to follow in child custody cases. *Id.*

{¶40} However, the case at bar is not a custody dispute at all. Rather, Schimer filed an application requesting to be appointed as guardian of S.H. for medical purposes pursuant to R.C. 2111.06.

{¶41} The trial court in the case at bar failed to consider R.C. 2111.06. Under R.C. 2111.06, there are three separate, disjunctive grounds for appointment of a limited guardian over a minor, (1) the minor has no parents, (2) the minor's parents are unsuitable or (3) if the minor's interests will be promoted by appointment of the guardian. Schimer sought a limited guardianship over S.H. based upon the third ground,

Medina County, Case No. 13CA0057-M

13

that S.H.'s "interests will be promoted by the appointment of a guardian." There is no requirement the trial court find the parents to be unfit or unsuitable before appointing a guardian on this ground.

{¶42} Because the trial court failed to even consider whether S.H.'s interests will be promoted by appointment of the guardian, we sustain Schimer's first assignment of error and remand this case to the trial court to make that determination without regard to the suitability of the parents.

II.

{¶43} In her second assignment of error, Schimer urges this Court to find the trial court erred in determining there was no basis in law or fact for the filing of the petition for guardianship. In light of our disposition of Schimer's first assignment of error, we find Schimer's second assignment of error to be premature.

{¶44} For the foregoing reasons, the judgment of the Medina County Probate Court is reversed in its entirety and this case is remanded for proceedings in accordance with our opinion and the law.

Medina County, Case No. 13CA0057-M

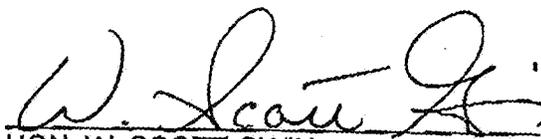
14

{145} We express our appreciation for the expeditiousness with which the courts and the parties have presented these matters. Upon remand, we are certain the trial court will give resolution of this matter the utmost priority.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur


HON. W. SCOTT GWIN


HON. WILLIAM B. HOFFMAN


HON. JOHN W. WISE

Sitting by Supreme Court Assignment

WSG:clw 0827

MEDINA COUNTY OHIO
PROBATE COURT
FILED
JUDGE KEVIN W. DUNN

IN THE COURT OF COMMON PLEAS-3 A 8:36
PROBATE DIVISION
MEDINA COUNTY, OHIO

IN RE SARAH HERSHBERGER,
A minor child

CASE NO. 2013 07 GM 00029

JUDGE JOHN J. LOHN,
SITTING BY ASSIGNMENT

JUDGMENT ENTRY

This matter comes before the court upon remand by the Court of Appeals.

The facts of this case were set out in this Court's July 31, 2013 decision. They are incorporated here by reference.

In April 2013 Andy and Anna Hershberger received the devastating news that their daughter Sarah has an aggressive form of cancer, t-cell lymphoblastic lymphoma. At that time the parents probably did not envision that their medical provider—Akron Children's Hospital—would misinform them about the effects of chemotherapy; file a child neglect report with Children's Services when they decided to stop Sarah's treatments and arrange for a lawsuit to try to take away their right to make medical decisions for Sarah.

Andy and Anna Hershberger are Amish. They live a simple life but this does not mean they are simple-minded. The Hershbergers are intelligent, thoughtful and sober people. They are good parents. They understand completely the grave situation their daughter is in and the consequences of their choice to refuse chemotherapy for Sarah at this time. This is not a case where the parents eschew modern medicine as part of a religious belief. The Hershbergers initially consented to chemotherapy. They do not object to resuming chemotherapy for Sarah at some point in the future.

In Ohio parents "are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education," *R.C. 2111.08*.

"[A] parent's desire for and right to 'the companionship, care custody and management of his or her children' is an important interest that undeniably warrants

deference and, absent a powerful countervailing interest, protection.' *In re Guardianship of Stein*, 105 Ohio St.3d 30, 2004-Ohio-7114 (citations omitted).

R.C. 2111.06 sets forth the circumstances when a guardian may be appointed for a minor child:

A guardian of the person of a minor shall be appointed as to a minor having no father or mother, whose parents are unsuitable persons to have the custody of the minor and to provide for the education of the minor as required by section 3321.01 of the Revised Code, or whose interests, in the opinion of the court, will be promoted by the appointment of a guardian.

R.C. 2111.06 is used most often in situations where a child's parents consent to the establishment of a guardianship and the proposed guardian is a family member or friend. A typical case is where the parents are members of the military and both parents are deployed overseas. Guardianship of a child is given to an aunt or uncle while the parents are out of the country. The Court has never seen the statute used against suitable parents to prevent them from making medical decisions for their child.

If the Court establishes a guardianship it would do so against Sarah's wishes, without her parents' consent and in derogation of the Hershberger's parental authority. The parents do not trust Sarah's doctors because they believe they misinformed them about the risks and effects of treatment. Sarah says her doctor should be put in jail. Mrs. Schimer has never met Sarah, never been to her home, never spoken with her parents. This is a poor environment for therapy.

There are instances where a court can step in and make medical decisions for a child over the objection of the child's parents. Those cases are filed privately in juvenile court. The Hospital referred Sarah's case to Medina County Job and Family Services to file such a complaint to obtain court orders for medical treatment for Sarah. The agency declined to do so.

In some cases courts have intervened to order things like emergency surgery, a blood transfusion or antibiotics for a minor whose parents will not permit medical treatment. Generally court-ordered treatment does not involve incapacitation or pain for the child. Court-ordered treatment usually requires no participation on the part of the

objecting parents. The treatment does not involve long-term health risks for the minor. It is uncomplicated and surefire.

When a court orders medical treatment for a child over the parents' objection, it should do so confidentially and the treatment should be brief, self-contained, safe and certain to succeed.

None of those factors are present here.

Sarah's name, medical condition and diagnosis were set out in the application for guardianship, accessible to the public. The news media are interested in this case. The Medina daily newspaper refers to Sarah as "The Amish Girl with Cancer." A Hospital spokesman has been appearing on television news programs disclosing facts about Sarah's condition and her prognosis. The Hospital has a web page giving details about Sarah's cancer and answering the public's "frequently asked questions" about her case.¹ Mr. Hershberger and his attorney have been forced to respond to media inquiries. Last week Mrs. Schimer made statements to the press.

If a guardianship is established the media will write stories about Sarah's progress as she undergoes forced medical treatments. Sarah's personal and medical privacy will be utterly destroyed. The entire family's right to a quiet, dignified life will be compromised.

Imposing the guardianship will have other negative effects on Sarah and her family. The guardian's medical decisions will involve the parents in issues surrounding transportation, communication and nutrition. If the parents fail to satisfy the guardian in any of these areas, the parents could ultimately be found in contempt of court and put in jail. If the parents are jailed, they cannot provide for Sarah and her young siblings.

The guardian has the ability to apply for full guardianship of Sarah if she feels the parents are not doing enough to advance her medical decisions. If a full guardianship is ordered, Sarah would have to live in a foster home while she completes her treatment.

Mrs. Schimer stated she would not be present while Sarah is being treated. She intends to exercise her authority remotely, by telephone. The parents will have to take Sarah to her treatments, stay with her during the treatments and then take her home

¹ <http://inside.akronchildrens.org/2013/08/28/akron-childrens-addresses-questions-about-court-case-involving-amish-girl/>.

afterwards. They will have to make arrangements for the care of their other children and for someone to manage their farm and produce stand when they are at the hospital with Sarah.

The parents did not complain about the time and inconvenience involved when they agreed to have Sarah undergo chemotherapy. They were willing to do whatever it took to help their daughter. That was one thing. It will be quite another thing if they are forced to obey a medical guardian. They will be ordered to take her to treatments they believe will kill her.

The guardianship will last for as long as the treatment lasts. Subordinating the parents to a guardian interferes with their natural rights and interferes with Sarah's need and desire to be cared for by her loving parents. The parents' medical decision making powers would be suspended for two years under the current protocol. The fact that the Court and the guardian would impinge upon the parent-child relationship for such a long time counts against establishing the guardianship.

Chemotherapy is not certain to cure Sarah. Fifteen percent of patients who receive the treatment die anyway. Chemotherapy will cause Sarah pain, abject suffering and incapacitation. Even if the treatments are successful, there is a very good chance Sarah will become infertile and have other serious health risks for the rest of her life.

Finally, it is quite clear that *R.C. 2111.06* will be found unconstitutional as applied to the Hershbergers. A parent's right to make medical decisions for a child is an important incident of parenthood, subject to broad protection under the Constitution. None of the safeguards afforded to parents under the juvenile statutes in a child abuse/neglect/dependency action were given to the Hershbergers in this case. They were not given fair notice of what conduct put their medical decision-making at risk—indeed when their doctors discussed treating their daughter, the parents were told they were free to order chemotherapy for Sarah or not. Mrs. Schimer was not required to file a sworn complaint. Unlike in juvenile court, the probate file is a non-confidential public record. The parents, who are indigent, did not have the right to a free court-appointed attorney. The proof required to deprive them of their medical decision-making is less than clear and

convincing evidence. The legal standard—whether guardianship would promote the child's interests—is not narrowly tailored to achieve a compelling state interest. If a guardianship is established the case will not survive a strict scrutiny challenge on appeal.

The Hospital's interpretation of the statute has no limits. It would allow grandparents to force a grandchild to attend private school or a hospital to circumcise a newborn baby or a school to put a child in vocational classes—all over the objection of the child's parents. If a probate judge can be convinced such things would promote a child's interests, the parents would be powerless to prevent them.

For the foregoing reasons, it is the Court's opinion is that the guardianship will not promote Sarah's interests.

IT IS ORDERED ADJUDGED AND DECREED that the application for guardianship is denied. The case is dismissed.

The Court has decided it shall not, on its own motion, initiate *Civil Rule 11* or *R.C. 2323.51* proceedings against the applicant and her attorneys. The parents have the right to file a motion for sanctions however.

Costs of the action—including the costs of legal services for the child's appointed counsel and the guardian ad litem—are assessed against the unsuccessful applicant.

Costs shall be paid in full in 14 days.

SO ORDERED.


JUDGE JOHN V. LOHN
Retired Judge sitting by assignment
of the Chief Justice

COURT OF APPEALS
13 OCT -1 AM 11:38

FILED
DAVID S. HADSWORTH
MEDINA COUNTY
CLERK OF COURTS

IN RE: GUARDIANSHIP OF
S.H.

COURT OF APPEALS
MEDINA COUNTY, OHIO
NINTH APPELLATE DISTRICT

JUDGES:

: Hon. W. Scott Gwin, P.J.
: Hon. William B. Hoffman, J.
: Hon. Sheila G. Farmer, J.
: Sitting by Supreme Court Assignment

: Case No. 13CA0066-M

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Medina County Court of
Common Pleas, Probate Division, Case No.
2013 07 GM 00029

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For- Applicant-Appellant Maria Schimer

For - Proposed Ward

CLAIR E. DICKINSON
NICHOLAS P. CAPOTOSTO
NICOLE SWEARINGEN-HILKER
388 South Main Street, Ste. 500
Akron, OH 44311

SHORAIN L. MCGHEE
4141 Rockside Road, Ste. 230
Seven Hills, OH 44131

Guardian Ad Litem

For - Parents of Proposed Ward

JENNIFER MATYAC
326 N. Court Street
Medina, OH 44256

JOHN C. OBERHOLTZER
39 Public Square, Ste. 201
Medina, OH 44256

Medina County, Case No. 13CA0066-M

2

{¶1} In *In re Guardianship of S.H.*, 9th Dist. Medina No. 13CA0057-M, 2013-Ohio-3708 ["S.H.1"], this Court remanded this case to the probate court to determine whether it would be in S.H.'s best interests to appointment a guardian for purposes of making medical decisions on her behalf.¹ Upon remand the Medina County Court of Common Pleas, Probate Division found that it was not in the best interests of S.H. to appoint Schimer as guardian of S.H. for purposes of making medical decisions on S.H.'s behalf.

{¶2} Schimer raises one assignment of error,

{¶3} "I. THE TRIAL COURT INCORRECTLY DENIED MARIA SCHIMER'S MOTION FOR IMMEDIATE APPOINTMENT OF A LIMITED GUARDIAN."

I.

{¶4} The probate judge based his conclusion upon, among other concerns, on three main areas: (1). The Medina County Jobs and Family Services refused to file a Complaint alleging Dependency, Abuse or Neglect and seeking temporary custody of S.H. pursuant to R.C. 2151.27; (2). The length and intensity of the chemotherapy regime was too invasive and destructive of the family unit; and (3). The proposed guardian has never met S.H. and does not intend to transport, accompany or personally support S.H. as she is undergoing the treatments.

{¶5} For the reasons that follow, we find the decision of the probate court is not based upon competent, credible evidence. We further find that the probate court did abuse its discretion in finding that it was not in the best interests of S.H. to appoint Schimer as guardian of S.H. for purposes of making medical decisions on S.H.'s behalf.

¹ For a complete statement of the underlying facts, see *S.H. 1*.

Medina County, Case No. 13CA0066-M

3

PREFACE

{¶16} A parent's decision to subject his or her child to potentially life-threatening, painful or debilitating medical procedures that could either prolong the child's life or, in contrast, prolong the process of dying is a difficult and personal decision. The decision "must be made on the basis of individual values, informed by medical realities, yet within a framework governed by the law. The role of the courts is confined to determining the framework, delineating the ways in which the government may and may not participate in such decisions." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 303, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (Brennan, dissenting). [Hereinafter "*Cruzan*"].

STANDARD OF REVIEW

{¶17} R.C. 2111.02(A) provides that "[w]hen found necessary, the probate court on its own motion or on application by any interested party shall appoint * * * a guardian of the person, the estate, or both, of a minor or incompetent[.]" Regarding the appointment of a guardian, the probate court is required to act in the best interest of the ward. *In re Estate of Bednarczuk*, 80 Ohio App.3d 548, 551, 609 N.E. 2d 1310 (12th Dist. 1992); R.C. 2111.50(C). The probate court's ruling regarding the appointment of a guardian will not be reversed absent an abuse of discretion if it is supported by competent, credible evidence. *In re Guardianship of Miller*, 187 Ohio App.3d 445, 2010-Ohio-2159, 932 N.E.2d 420 (3rd Dist.). *Accord*, *In re Guardianship of Waller*, 192 Ohio App.3d 663, 2011-Ohio-313, 950 N.E.2d 1207(1st Dist.), ¶16; *In re Guardianship of Anderson*, 2nd Dist. Montgomery No. 25367, 2013-Ohio-2012, ¶15; *In re Guardianship of Borland*, 5th Dist. Stark No. 2002CA00410, 2003-Ohio-6870, ¶18.

Medina County, Case No. 13CA0066-M

4

ABUSE OF DISCRETION

{¶8} The term "abuse of discretion" has been applied in a somewhat rote manner by the courts without analysis of the true purpose of the appellate court's role in the review of a trial court's discretionary powers. *State v. Firouzmandi*, 5th Dist. Licking App. No.2006-CA-41, 2006-Ohio-5823, ¶ 54.

{¶9} As was noted in *Firouzmandi*, an excellent analysis of the misconception surrounding the concept of "abuse of discretion" was set forth by the Arizona Supreme Court sitting en banc:

The phrase "within the discretion of the trial court" is often used but the reason for that phrase being applied to certain issues is seldom examined. One of the primary reasons an issue is considered discretionary is that its resolution is based on factors which vary from case to case and which involve the balance of conflicting facts and equitable considerations. *Walsh v. Centeio*, 692 F.2d 1239, 1242 (9th Cir.1982). Thus, the phrase "within the discretion of the trial court" does not mean that the court is free to reach any conclusion it wishes. It does mean that where there are opposing equitable or factual considerations, we will not substitute our judgment for that of the trial court.

State v. Chapple, 135 Ariz. 281, 296-97, 660 P.2d 1208, 1223-24(1983), *superseded by statute as stated in State v. Benson _P.3d_2013 WL 3929153(Ariz. July 31, 2013)*. The Court further explained,

The term "abuse of discretion" is unfortunate. In ordinary language, "abuse" implies some form of corrupt practice, deceit or impropriety.

Medina County, Case No. 13CA0066-M

5

Webster's Third New International Dictionary (1976). In this sense, the application of the word to the act of a trial judge who ruled in accordance with all the decided cases on the issue is inappropriate. However, in the legal context, the word "abuse" in the phrase "abuse of discretion" has been given a broader meaning. In the few cases that have attempted an analysis, the ordinary meaning of the word has been considered inappropriate and the phrase as a whole has been interpreted to apply where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice. *State ex rel. Fletcher v. District Court of Jefferson County*, 213 Iowa 822, 831, 238 N.W. 290, 294 (1931). Similarly, a discretionary act which reaches an end or purpose not justified by, and clearly against, reason and evidence "is an abuse." *Kinnear v. Dennis*, 97 Okl. 206, 207, 223 P. 383, 384 (1924).

The law would be better served if we were to apply a different term, but since most appellate judges suffer from misocainea, we will no doubt continue to use the phrase "abuse of discretion." Therefore, we should keep some operative principles in mind. Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. *Walsh v. Centeio*, supra. Where a decision is

Medina County, Case No. 13CA0066-M

6

made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers. This process is sometimes, unfortunately, described as a determination that the trial judge has "abused his discretion ..."

Chapple, 660 P.2d at 1224 n. 18 (citations omitted). Accord, *State v. Garza*, 192 Ariz. 171, 175-76, 962 P.2d 898, 902(1998); *Firouzmandi*, ¶¶54-55; *State v. Saunders*, 5th Dist. Licking App. No.2006-CA-00058, 2007-Ohio-1080 at ¶¶ 27-28.

RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT

{¶10} The common law doctrine of "informed consent" has been viewed as generally encompassing the right of a competent adult to refuse medical treatment. *Cruzan*, 497 U.S. at 277, 110 S.Ct. 2841, 111 L.Ed.2d 224. "The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to the intrusion." *Cruzan*, 497 U.S. 261, 309, 110 S.Ct. 2841, 111 L.Ed.2d 224 (Brennan, dissenting). In *Cruzan*, the Court found the right of a competent adult to refuse unwanted medical treatment to be a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment.

Medina County, Case No. 13CA0066-M

7

This constitutionally protected right to refuse unwanted medical treatment has been recognized in Ohio,

The Supreme Court of Ohio recognizes an Ohioan's fundamental right to refuse medical treatment on the basis that "personal security, bodily integrity, and autonomy are cherished liberties." *Steele [v. Hamilton Cty. Community Mental Health Bd.]*, 90 Ohio St.3d 176, 736 N.E.2d 10, 2000-Ohio-47] at 180, 736 N.E.2d 10. "These liberties were not created by statute or case law. Rather, they are rights inherent in every individual." *Id.* at 180-81, 736 N.E.2d 10 (citing Section 1, Article I, Ohio Constitution). The court has further held that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Id.* at 181, 736 N.E.2d 10 (quoting *Schloendorff v. Soc. of N.Y. Hosp.* (1914), 211 N.Y. 125, 105 N.E. 92, 93).

Licking & Knox Community Mental Health & Recovery Bd. v. T.B., 10th Dist. Franklin No. 10AP-454, 2010-Ohio-3487, ¶19. A competent person may refuse medical treatment regardless of the fact that there may be severe consequences involved for refusing treatment. *Cruzan*, 497 U.S. 261, 306, 110 S.Ct. 2841, 111 L.Ed.2d 224 (Brennan, dissenting). That the state may disagree with a competent individual's decision to forego medical treatment is of no consequence, "[t]he regulation of constitutionally protected decisions...must be predicated on legitimate state concerns *other than* disagreement with the choice the individual has made...Otherwise the interest in liberty would be a nullity...."(emphasis sic.) *Cruzan*, 497 U.S. 261, 313-314,

Medina County, Case No. 13CA0066-M

8

110 S.Ct. 2841, 111 L.Ed.2d 224 (Brennan, dissenting) (*quoting Hodgson v. Minnesota*, 497 U.S. 417, 435, 110 S.Ct. 2926, 111 L.Ed.2d 344(1990)).

{¶11} Children are entitled to the protection of the Constitution and possess certain constitutional rights. *Bellotti v. Baird*, 443 U.S. 622, 633-634, 99 S.Ct. 3035, 61 L.Ed.2d 797(1979); *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527(1967). However, the constitutional rights of minors cannot be equated with those of adults. Three reasons have emerged for the difference in treatment, (1). The peculiar vulnerability of children; (2). Their inability to make critical decisions in an informed, mature manner, and (3). The importance of the parental role in child rearing. *Bellotti*, 443 U.S. at 634, 99 S.Ct. 3035, 61 L.Ed.2d 797.

{¶12} To be sure, the constitutional rights of children are generally exercised by his or her parent. "The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483, 110 S.Ct. 2926, 111 L.Ed.2d 344(1990) (Kennedy, J. concurring in part, dissenting in part).

PARENTS' RIGHT TO MAKE MEDICAL DECISIONS FOR HIS OR HER CHILD

{¶13} Since *Meyer v. Nebraska*, 262 U.S. 390, 399, 401-03, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the United States Supreme Court has recognized the fundamental liberty interest of parents in the custody, care and control of their children.

{¶14} In his dissenting opinion, Justice Katz of the Supreme Court of Connecticut traced the line of Supreme Court cases, beginning with *Meyer*, in which this fundamental liberty interest is recognized,

Medina County, Case No. 13CA0066-M

9

The Supreme Court's decisions recognizing this fundamental right date back to at least 1923. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 401-03, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (concluding that "proficiency in foreign language ... is not injurious to the health, morals or understanding of the ordinary child" and recognizing right of parents to "establish a home and bring up children" and to "control the education of their own"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that state could not interfere with parents' decision to send children to private schools when decision was "not inherently harmful" and recognizing right "to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (exempting Amish from state compulsory education law requiring children to attend public school until age eighteen, recognizing that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); see also *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this [c]ourt with a momentum for respect lacking when

Medina County, Case No. 13CA0066-M

10

appeal is made to liberties which derive merely from shifting economic arrangements' "); *Quillain v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed. 2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) ("[I]n a long line of cases, we have held that, in addition to the specific freedoms protected by the [b]ill of [r]ights, the 'liberty' specially protected by the [d]ue [p]rocess [c]lause includes the right [t] ... to direct the education and upbringing of one's children" [citations omitted]).

Fish v. Fish, 285 Conn. 24, 93 n.3, 939 A.2d 1040(2008 (Katz, J., dissenting)).

{¶15} There can be no doubt that a parent is required to exercise his or her maturity, expertise and judgment to make medical decisions on behalf of the child,

[A parents duty includes] a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's

Medina County, Case No. 13CA0066-M

11

difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries * 447; 2 J. Kent, Commentaries on American Law * 190.

Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Parham v. J.R., 442 U.S. 584, 602-603, 99 S.Ct. 2493, 61 L.Ed.2d 101(1979).

The welfare of the child has always been the central concern of laws with regard to minors. The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent. *Parham v. J.R.*, 442 U.S. 584, 621, 99 S.Ct. 2493, 2513, 61 L.Ed.2d 101 (1979) (STEWART, J., concurring in judgment).

Hodgson v. Minnesota, 497 U.S. at 482, 110 S.Ct. 2926, 111 L.Ed.2d 344(Scalia, concurring in part, dissenting in part).

Medina County, Case No. 13CA0066-M

12

{¶16} In the case at bar, both parents and S.H. assert the right to refuse chemotherapy. However, R.C. 2111.50(F) gives the probate court full *parens patriae* powers,² "When considering any question related, and issuing orders for, medical or surgical care or treatment of incompetents or minors subject to guardianship, the probate court has full *parens patriae* powers unless otherwise provided by a section of the Revised Code." *In re Stein*, 105 Ohio St.3d 30, 2004-Ohio-7114, 821 N.E.2d 1008, ¶85 (O'Conner, J. dissenting); *Accord, In re Guardianship of Constable*, 12th Dist. Clermont No. CA97-11-101, 1998 WL 142381(March 30, 1998); *In re Guardianship of Myers*, 62 Ohio Misc. 2d 763, 610 N.E.2d 663(C.P. 1993). Further, R.C. 2111.50(C) mandates the best interest test be applied in all medical decisions for a ward. *Myers*, 62 Ohio Misc. at 774, 610 N.E.2d 663.

THE BEST INTEREST OF THE CHILD

{¶17} In the case at bar, Dr. Prasad Bodas testified that S.H.'s chemotherapy treatment has five separate phases: Induction (five weeks), Consolidation (seven weeks), and Interim maintenance (eight weeks), Delayed Intensification (six weeks) and Maintenance (ninety weeks). The total duration of the therapy is two years, three months.

{¶18} Dr. Bodes further testified there are short-term and long-term effects and appreciable risks from being treated with chemotherapy. The short-term effects include S.H.'s hair falling out, she will suffer fatigue and nausea and she will be at risk for uncontrolled bleeding and developing infections. The long-term concerns are that she

² "*Parens patriae*" means "parent of his or her country," and refers to "the state in its capacity as provider of protection to those unable to care for themselves," such as children. *Black's Law Dictionary* 1144 (8th ed. 2004). For a brief history of this doctrine see, *Fawzy v. Fawzy*, 199 N.J. 456, 973 A.2d 347, 359, n. 3(N.J. 2009

Medina County, Case No. 13CA0066-M

13

will become infertile, and she will have a higher risk of developing cardiovascular disease. In addition, the treatment itself may damage her other organs and there is an increased risk of contracting other cancers. S.H. has a small but appreciable risk of dying from the treatment itself. Based upon the record before this Court, it cannot be said that the concerns of S.H. and her parents are entirely unfounded.

{¶19} R.C. 2111.02 and 2111.06 vest the probate court with broad power, Upon a mere finding that it is in the "best interest of a * * * minor," R.C. 2111.02(B) (1) authorizes a probate court to supplant a parent's rights and responsibilities through appointment of a limited guardian. Similarly, R.C. 2111.06 authorizes a probate court to appoint a guardian of a minor not only where the court finds the child's natural parents to be "unsuitable persons" but also upon the mere finding that the child's "interests * * * will be promoted thereby."

In re Guardianship of Stein, 105 Ohio St.3d 30, 2004-Ohio-7114, 821 N.E.2d 1008, ¶57. (Moyer, C.J. concurring in part, dissenting in part). However, R.C. 2111.08 recognizes a suitable parent's superior right to the guardianship of his or her children against the rights of a nonparent third party.

The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education and the care and management of their estates. The wife and husband have equal powers, rights, and duties and neither parent has any right paramount to the right of the other concerning the parental rights and responsibilities for the care of the minor or the right to be the residential

Medina County, Case No. 13CA0066-M

14

parent and legal custodian of the minor, the control of the services or the earnings of such minor, or any other matter affecting the minor; provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, that parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent who is the residential parent and legal custodian of the child.

{¶20} The Supreme Court of Ohio has recognized the superior guardianship rights and obligations of a child's parents over those of a nonparent,

The major statement by this court on the custody rights of a parent and a nonparent was made in *Clark v. Bayer* (1877), 32 Ohio St. 299, a century ago. In that opinion, Judge Ashburn acknowledges for the court, at page 310, that "in all cases of controverted right to custody, the welfare of the minor is first to be considered," but he also determined that parents who are "suitable" persons have a "paramount" right to the custody of their minor children unless they forfeit that right by contract, abandonment, or by becoming totally unable to care for and support those children.

Perales v. Nino, 52 Ohio St. 89, 97, 369 N.E.2d 1047(1977). Although *Perales* concerned a custody petition under R.C. 2115.23(A)(2), the holding has been extended to guardianship proceedings. *In re Guardianship of Wright*, 3rd Dist. Defiance No. 4-01-20, 2002-Ohio-404, citing *In re Jewell*, 4th Dist. Athens No. 1190, 1984 WL 5681(Dec. 6, 1984).

Medina County, Case No. 13CA0066-M

15

{¶21} Accordingly, although R.C. 2111.02 does not explicitly require a finding of "parental unsuitability" it remains a factor for the court to consider.³ If the probate court finds that a parent is unsuitable, it clearly would not be in the "best interest" of the minor child to allow the parent to make medical decisions on behalf of the child. However, a finding of parental "suitability" does not end a probate court's inquiry. Parental rights, even if based upon firm belief and honest convictions can be limited in order to protect the "best interests" of the child. "[W]here parental involvement threatens to harm the child, the parents authority must yield." *Hodgson v. Minnesota*, 497 U.S. 417, 471, 110 S.Ct. 2926, 111 L.Ed.2d 344(1990) (Marshall, J. concurring, in part, dissenting, in part) (citing *Prince v. Massachusetts*, 321 U.S. at 169-170; *H.L. v. Masterson*, 450 U.S. at 449(Marshall, J. dissenting)).

{¶22} It is beyond dispute that the *state* may regulate certain areas that touch upon areas of traditional family concern,

Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

(Footnotes omitted).

Prince v. Massachusetts, 321 U.S. at 166, 64 S.Ct. 438, 88 L.Ed. 645. When the state seeks to regulate parental decision making against the wishes of the parents, the competing interests "must be determined by balancing [the] liberty interests [of the

³ We modify our previous statement that the best interest of the child be determined "without regard to the suitability of the parents," accordingly. *S.H. 1*, ¶42.

Medina County, Case No. 13CA0066-M

16

parents and child] against the relevant state interest." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. at 279, 110 S.Ct. 2841, 111 L.Ed.2d 224 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321, 102 S.Ct. 2452, 2461, 73 L.Ed.2d 28 (1982)).

{¶23} In *Prince v. Massachusetts*, the United States Supreme Court recognized the importance of children to the future of our nation is a legitimate state concern that may override parents' wishes,

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action. (Footnotes omitted).

321 U.S. at 168, 169, 64 S.Ct. 438, 88 L.Ed.2d 645. Indeed,

[O]ur courts have overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a child's life. See *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101, 119 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (Citations

Medina County, Case No. 13CA0066-M

17

omitted)); *Prince, supra*, 321 U.S. at 166–67, 64 S.Ct. at 442, 88 L.Ed. at 652–53 (noting that state, as *parens patriae*, can intrude on parental autonomy to protect child from ill health or death); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F.Supp. 488, 498–99, 504–05 (W.D.Wash.1967) (holding Washington State statute that declared children to be dependents of state for purpose of authorizing blood transfusions against expressed wishes of parents was constitutional), *aff'd*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968) (per curiam); *State v. Perricone*, 37 N.J. 463, 474, 181 A. 2d 751 (finding state may act under its *parens patriae* authority to protect child's welfare by declaring him or her neglected to obtain necessary medical treatment), *cert. denied*, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962); *Muhlenberg Hosp. v. Patterson*, 128 N.J.Super. 498, 503, 320 A.2d 518 (Law Div.1974) (ordering blood transfusion to infant over parents' wishes). [*Fawzy v. Fawzy*, 199 N.J. 456, 474, 973 A.2d 347 (2009) (quoting *Moriarty, supra*, 177 N.J. at 102–03, 827 A.2d 203); *see also Hojnowski v. Vans Skate Park*, 187 N.J. 323, 901 A.2d 381 (2006) (invoking *parens patriae* doctrine to invalidate exculpatory waiver executed by parent on behalf of minor child).]

"Indeed, the state has an obligation, under the *parens patriae* doctrine, to intervene where it is necessary to prevent harm to a child." *Fawzy, supra*, 199 N.J. at 474–75, 973 A.2d 347 (footnote omitted) (citations omitted).

Medina County, Case No. 13CA0066-M

18

In re D.C. and D.C., 203 N.J. 545, 569 4 A.3d 1004 1018(NJ 2010).

{¶24} The courts of Ohio recognize the state obligation to intervene to protect its children,

The state's authority over children's activities must, as we have already noted, be broader than it is over like activities of adults if those of tender years are to be protected against some clear and present danger. Adults are ordinarily free to make choices denied to those of less than full age, but when those choices threaten the welfare of a child, the state must intervene.

In re Willmann, 24 Ohio App.3d 191, 199, 493 N.E.2d 1380(1st Dist. 1986),

{¶25} Thus, we find that it is well established in Ohio and in other jurisdictions, that, when parents cannot or will not consent to potentially life-saving treatment for a minor, then a court may appoint another to approve the procedure and thereby protect the child's life and health.

{¶26} In the case at bar, we note that Schimer has made the application for guardianship,

Because I believe that [S.H.] needs someone to speak for her and to assist her to have the best chance for survival and to live a long and full and happy life.

1T., July 26, 2012 at 76.

{¶27} Schimer's qualifications include her background as a R.N. Schimer is also an Assistant Attorney General for the State of Ohio; a former associate and assist dean of the College of Medicine; and a teacher at Kent State University. Schimer has been

Medina County, Case No. 13CA0066-M

19

appointed as Guardian in the past, most notable in the 1990's. During that time, Schimer was appointed to assist the Courts in the withdrawal of life-sustaining treatment from older adults who had no Durable Power of Attorney for Health Care decisions and who were unable to speak for his or her self and had no one to speak for them. (1T., July 26, 2012 at 31-32). She was then asked by the Courts to review the cases of several medically compromised, developmentally disabled adolescents, who were unable to speak for themselves and had no family members to speak for them. (Id. at 32-33). Schimer currently has wards in the courts of Summit, Portage and Medina counties. (Id. at 33).

{¶28} Upon being granted access to S.H.'s records and doctors, Schimer consulted with Dr. Bodas, S.H.'s primary oncologist. Dr. Bodas described the prognosis and treatment of S.H. giving her a 85 - 90% survival rate if she receives treatment in accordance with the National Cancer Institute protocol. (Id. at 36 -37).

{¶29} Schimer also met with Dr. Jeffrey Hord, Director of Hematology-Oncology at Akron's Children's Hospital. (1T., July 26, 2012 at 42). Dr. Hoard is also a member of the hospital's Tumor Board, a group of approximately 45 professionals, including physicians, surgeons, nurses, social workers, palliative care personnel who review each and every case of cancer that comes through Akron Children's Hospital for treatment. (Id. at 42).

{¶30} Schimer also met with Dr. Sara Friebert, Palliative Care Director at Akron Children's Hospital. (1T., July 26, 2012 at 43). Palliative care is "a form of medical therapy that provides pain and symptom control for patients who are undergoing any form of care who might be at the end of life." (Id.).

Medina County, Case No. 13CA0066-M

20

{¶31} Finally, Schimer reviewed S.H.'s financial situation and assured the court that S.H. and her family owe nothing and will owe nothing for her medical treatment because it is paid for through government programs. (1T., July 26, 2012 at 44-45).

{¶32} Schimer expressed a desire to meet with and work with S.H. and her parents,

I do believe they're reasonable people. I think people at the hospital are used to dealing with these kind of issues and would assist us in working out a mechanism that would be acceptable to the parents.

* * *

And my approach to life is not to hit people head-on. It's to try to work with families, to come to a good place with them so that we can begin to develop some trust so that they can begin to collaborate and approach this in a way that isn't frightening for [S.H.], isn't hostile for [S.H.] (1T., July 26, 2012 at 60; 74).

{¶33} Schimer also testified that the nausea S.H. experienced was ameliorated while S.H. was in the hospital, but things broke down when she went home,

No. Because she had already had symptoms and waited too long to call, and suffered for a period of time before she was treated. (1T., July 26, 2012 at 85). Further, the cancer itself can cause symptoms of fatigue and incapacitation. (Id. at 87).

{¶34} The probate court's own investigator Nicki Shook spoke with [A.L.] the individual who was providing natural health alternative treatment to S.H. She indicated that she is under a "fellowship program with Dr. [P.L.T.]" whose products are offered on

Medina County, Case No. 13CA0066-M

21

his web site. Some of the products are FDA approved. All contain warnings and disclaimers. When the Investigator attempted to speak with the doctor, the receptionist stated that [A.L.] "was only a customer of ours." In relationship to the long-term effects regarding S.H.'s health, [A.L.] stated "we just don't know the outcome."

{¶35} The Investigator found S.H. is not in remission and her disease will remain active. S.H. will die without treatment.

{¶36} Both the Investigator and S.H.'s Guardian ad litem suggest the family obtain a second opinion if that will allay the families concerns. Both indicate that no one has presented any evidence, studies or statistics that support a finding that the natural alternative treatment is as effective as chemotherapy. Both the Investigator and the Guardian support continuing S.H.'s treatment.

{¶37} In the case at bar, the medical evidence presented is that the proposed treatment will give S.H. a chance to grow and to thrive. While we respect the wishes of the parents and believe them to be honest and sincere, we are unwilling to adhere to the wishes of the parents under the facts of this case. Both the child's Guardian ad litem and the probate court's own Investigator found it to be in the best interest of S.H. to undergo treatment aimed at saving and preserving her life. The trial court in this case has disregarded those individuals choosing instead to base its decision, at least in part, on matters that are not contained in the trial court record. Further, the trial court's decision is wrought with speculation. The parties have never raised whether R.C. 2116.06 is constitutional as applied.

Medina County, Case No. 13CA0066-M

22

CONCLUSION

{138} A parent who has demonstrated sufficient commitment to his or her child is entitled to raise the child free from undue interference from third parties. Cf. *Hodgson v. Minnesota*, 497 U.S. at 447, 110 S.Ct. 2926, 111 L.Ed.2d 344. While we have no doubt that, the parents are acting in accordance with their principles, beliefs and honest convictions and that their goal may be a laudable one, it does not nullify or supersede the right of the state and the probate court to protect the health and well-being of a child.

{139} We find the decision of the Medina County Court of Common Pleas, Probate Division is not based upon competent credible evidence and is therefore an abuse of discretion.

Medina County, Case No. 13CA0066-M

23

{¶40} The judgment of the Court of Common Pleas, Probate Division, Medina County, Ohio, is reversed. Section 3(B) (2), Article IV of the Ohio Constitution gives an appellate court the power to affirm, reverse, or modify the judgment of an inferior court. Accordingly, we order the Medina County Probate Court to appoint Schimer as guardian of S.H. for purposes of making medical decisions on S.H.'s behalf without further delay and remand this case to the plenary authority of the Medina County Probate Court for proceedings in accordance with our opinion and the law.

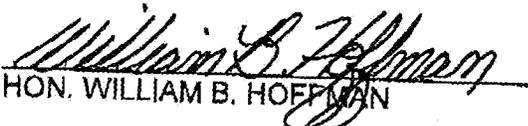
Gwin, P.J.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur


HON. W. SCOTT GWIN


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

Sitting by Supreme Court Assignment

WSG:clw 0930