

ORIGINAL

IN THE SUPREME COURT OF OHIO

	)	CASE NO. 2013-1778
	)	
	)	
IN RE GUARDIANSHIP OF S.H.	)	On Appeal from the Medina
	)	County Court of Appeals
	)	Ninth Appellate District
	)	
	)	
	)	Court of Appeals
	)	Case No. 13CA0066-M

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**APPELLEE MARIA SCHIMER'S MEMORANDUM IN RESPONSE  
TO PARENTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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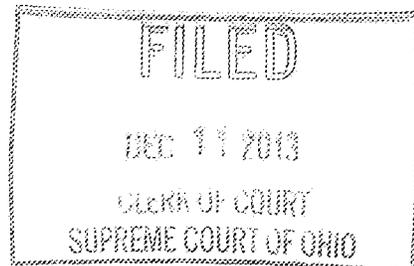
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**THIS CASE WILL SOON BE MOOT, AND, EVEN IF NOT MOOT,  
IT IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

On October 9, 2013, the Medina County Probate Court appointed appellee Maria Schimer as a limited guardian to make medical decisions for S.H. Since that time, appellants, S.H.'s parents, have been hiding her, making it impossible for Ms. Schimer to exercise her authority. As a result, Ms. Schimer, on December 6, 2013, tendered her resignation to the probate court. Once the probate court accepts that resignation, the parents' appeal to this Court will be moot. Accordingly, this Court should decline to exercise jurisdiction over this case.

Even if the parents' appeal does not become moot, this Court should decline to exercise jurisdiction over it. The parents have asked this Court to exercise jurisdiction over three propositions of law. The first two are barred by law of the case, and the third was not part of the appellate court's decision in this case. Accordingly, this is not a case of public or great general interest and this Court should decline to exercise jurisdiction over it.

Ms. Schimer first sought appointment as a limited guardian to make medical decisions for S.H. during July 2013. The Medina County Probate Court denied her application, and she appealed to the Ninth District Court of Appeals. The appellate court reversed, holding that the probate court had incorrectly determined that a court must first find a child's parents unfit or unsuitable before it can appoint a limited guardian under Section 2111.06 of the Ohio Revised Code. *In re Guardianship of S.H.*, 9th Dist. No. 13CA0057-M, 2013-Ohio-3708, at ¶ 41 ("*S.H.-I*") (included in Appendix to Memorandum in Support of Jurisdiction of Appellants, Parents of S.H.). The appellate court remanded to the probate court with instructions for that court to determine, "without regard to the suitability of the parents," whether S.H.'s interests would be

promoted by appointment of a limited guardian. *Id.* at ¶ 42. S.H.'s parents did not appeal that decision.

On remand, the probate court found that S.H.'s interests would not be promoted by appointment of a limited guardian and again refused to do so. On appeal, the Ninth District Court of Appeals again reversed, this time determining that the trial court's decision was not based on competent, credible evidence and was, therefore, "an abuse of discretion." *In re Guardianship of S. H.*, 9th Dist. No. 13CA0066-M, 2013-Ohio-4380, ¶ 39 ("*S.H.-I*") (included in Appendix to Memorandum in Support of Jurisdiction of Appellants, Parents of S.H.). This is the decision S.H.'s parents have appealed to this Court. Because they failed to appeal the decision in *S.H.-I*, however, the first two propositions of law over which they have asked this Court to exercise jurisdiction are barred by law of the case. This Court, therefore, should decline to exercise jurisdiction over those two propositions of law.

The third proposition of law is not properly before this Court because it was not raised by the parents in the court of appeals or addressed by that court. Besides, it is so obviously incorrect that it cannot be viewed as presenting a question of public or great general interest. Accordingly, this Court should decline to exercise jurisdiction over it as well.

#### **STATEMENT OF THE CASE AND FACTS**

S.H. is an eleven-year-old girl who has cancer. During April 2013, her parents thought she had an abscessed tooth, so they took her to Akron Children's Hospital for treatment. She had visible tumors on her neck and chest and was diagnosed with Stage III, T-Cell Lymphoblastic Lymphoma. This condition has an 85% survival rate with prompt and aggressive treatment, but is fatal without that treatment. With her parents' consent, doctors began treating her with chemotherapy.

Standard care for the cancer S.H. has is comprised of five phases, lasting two years and three months. The first phase, induction, takes approximately five weeks. The goal of induction is remission.

S.H. completed the induction phase. Unfortunately, while the visible tumors were reduced in size, the cancer was not in remission. She received one treatment of the next phase, consolidation. Following that one treatment, at the end of June 2013, her parents told Dr. Prasad Bodas, S.H.'s treating physician, that they were not going to allow her to receive any further chemotherapy. They said that, in lieu of chemotherapy, they were going to treat her with homeopathic products.

In the hope of securing for S.H. the care necessary to save her life, Maria Schimer applied to the Medina County Probate Court to be appointed, under Section 2111.02 of the Ohio Revised Code, as her emergency guardian and, under Section 2111.06 of the Ohio Revised Code, as her limited guardian for the purpose of making medical decisions. Following an evidentiary hearing, a magistrate denied her application to be appointed emergency guardian, but determined that the application served as notice that an emergency existed under Section 2111.02(B)(3) and ordered her parents to take her to Akron Children's Hospital for an immediate consultation with Dr. Bodas.

The probate court held a separate evidentiary hearing on Ms. Schimer's application to be appointed as limited guardian for the purpose of making medical decisions for S.H. At that hearing, Dr. Bodas testified unequivocally that, if S.H. received only homeopathic products and didn't complete the prescribed chemotherapy, she would die within six months to a year. The parents did not present any contradictory medical evidence.

Following that hearing, the probate court denied Ms. Schimer's application. In doing so, it focused solely on S.H.'s parents rather than on whether appointment of a guardian would promote S.H.'s interests:

"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."

Judgment Entry of the Medina County Probate Court (July 31, 2013) at 6 (included in Appendix to Memorandum in Support of Jurisdiction of Appellants, Parents of S.H.).

Ms. Schimer appealed to the Ninth District Court of Appeals and assigned two errors:

- I. THE TRIAL COURT INCORRECTLY DENIED MS. SCHIMER'S APPLICATION TO BE [S.H.'S] LIMITED GUARDIAN WITH AUTHORITY TO CONSENT TO LIFE-SAVING MEDICAL TREATMENT.
- II. THE TRIAL COURT INCORRECTLY DETERMINED THAT THERE WAS NO BASIS IN LAW OR FACT FOR THE FILING OF THIS ACTION.

*S.H.-I.*, at ¶ 28-29. The appellate court sustained the first assignment of error and determined that the second was premature. *Id.* at 42-43.

In sustaining the first assignment of error, the appellate court held that the probate court had incorrectly determined that Ms. Schimer had to demonstrate parental unsuitability as a prerequisite to being appointed as guardian for S.H.:

"Schimer sought a limited guardianship over S.H. based upon the third ground [under Section 2111.06 of the Ohio Revised Code], 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.”

*S.H.-I*, at ¶ 41. Accordingly, the appellate court reversed and remanded to the probate court for the sole purpose of allowing that court to determine whether S.H.’s interests would be promoted by appointment of a limited guardian to make medical decisions for her:

“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.”

*Id.* at ¶ 42.

On remand, Ms. Schimer moved for immediate appointment as S.H.’s limited guardian. The probate court again refused to do so, this time concluding that “the guardianship will not promote [S.H.’s] interests.” Judgment Entry of the Medina County Probate Court (Sept. 3, 2013) at 5 (included in Appendix to Memorandum in Support of Jurisdiction of Appellants, Parents of S.H.). In reaching that conclusion, the trial court ignored the undisputed medical evidence that, without chemotherapy, S.H. will die. Among other things, it relied on matters outside the record and speculated that “R.C. 2111.06 will be found unconstitutional as applied to [S.H. and her family].” *Id.* at 4.

Ms. Schimer again appealed. This time she assigned one error:

I. THE TRIAL COURT INCORRECTLY DENIED MARIA SCHIMER’S  
MOTION FOR IMMEDIATE APPOINTMENT OF A LIMITED  
GUARDIAN.

*S.H.-II*, at ¶ 3.

The appellate court sustained Ms. Schimer's assignment of error, concluding that the probate court's decision was not based on competent, credible evidence and was, therefore, an abuse of discretion:

“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 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. [2111.06] is constitutional as applied.”

*S.H.-II*, at ¶ 37. The appellate court again remanded to the Medina County Probate Court, this time with instructions “to appoint Schimer as guardian of S.H. for purposes of making medical decisions on S.H.'s behalf without further delay. . . .” *Id.* at ¶ 40. This is the decision from which the parents have appealed.

## ARGUMENT

### **Proposition of Law No. 1: A guardian may not make decisions regarding life-sustaining medical treatment absent a termination of parental rights.**

“The law-of-the-case doctrine holds that ‘the decision of a reviewing court in a case remains the law of that case *on the legal questions involved* for all subsequent proceedings in the case at both the trial and reviewing levels.’” *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, at ¶ 30 (quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984)) (emphasis added by the Court in

*Davis*). “This doctrine prevents a litigant from relying on arguments at retrial that were fully litigated, or could have been fully litigated, in a first appeal.” *Id.* (citing *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 404-405 (1996)). “A trial court may not vary the mandate of an appellate court, but is bound by that mandate on the questions of law decided by the reviewing court.” *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St. 3d 265, 2006-Ohio-4476, at ¶ 7 (quoting *Transamerica Ins. Co.*, 72 Ohio St. 3d 320, 323 (1995)).

In their Brief of Appellees in *S.H.-I*, the parents argued that “[a] determination of parental unsuitability is necessary before parents may be deprived of their custodial rights as natural guardians.” Brief of Appellees at 7. This is nearly identical to the first proposition of law over which they have now asked this Court to exercise jurisdiction. Even if their first proposition of law can be viewed as different from the argument they made in *S.H.-I*, there can be no doubt that they could and should have made the argument encompassed by that proposition of law as part of their defense of the judgment in their favor in their first appeal. Either way, because they failed to appeal the appellate court’s reversal in *S.H.-I* to this Court, they are foreclosed by law of the case from arguing their first proposition of law now.

In *S.H.-I*, the appellate court remanded to the probate court with a mandate to do one thing: determine whether S.H.’s interests would be promoted by appointment of a guardian without regard to the suitability of the parents. “Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St. 3d 180, 182, 1995-Ohio-98. Accordingly, the probate court was without authority to consider on remand whether a guardian may make decisions regarding life-sustaining medical treatment absent a termination of parental rights, that argument

could not be raised on appeal to the Ninth District Court of Appeals in *S.H.-2*, and it cannot be presented in an appeal to this Court from the Ninth District's decision in *S.H.-2*.

Amicus curiae, 1851 Center for Constitutional Law, has asked this Court to exercise jurisdiction over the parents' first proposition of law because, according to it, doing so would permit this Court to consider the constitutionality of Section 2111.06 of the Ohio Revised Code: "The statute does not provide any guidance for a court to make [the determination of whether appointment of a guardian would be in 'the best interest of the child'], which does not satisfy Federal constitutional protections and Ohio constitutional protections afforded to parents." Brief of *Amicus Curiae* 1851 Center for Constitutional Law, at 3. As noted by the appellate court in *S.H.-II*, "[t]he parties never raised whether R.C. [2111.06] is constitutional." *S.H.-II*, at ¶ 37. In fact, the parents were foreclosed by law of the case from raising the constitutionality of Section 2111.06 on remand from *S.H.-I*. To the extent the trial court speculated about that constitutionality on remand from *S.H.-I*, it exceeded its mandate. Accordingly, the argument the amicus curiae wishes to raise in support of the parents' first proposition of law regarding the constitutionality of Section 2111.06 is foreclosed, both by law of the case and because it was never raised by the parents in either the probate court or the appellate court and never passed upon by either of those courts. This Court should decline to exercise jurisdiction over the parents' first proposition of law.

**Proposition of Law No. 2: A determination of custody  
is a necessary element of a limited guardianship of a minor.**

As with their first proposition of law, the second proposition of law over which the parents have asked this Court to exercise jurisdiction is foreclosed by law of the case. As discussed above, the appellate court's mandate to the probate court in *S.H.-I* was to determine, without regard to the suitability of the parents, whether S.H.'s interests would be promoted by

appointment of a guardian for her. That mandate foreclosed the probate court from determining whether custody is a necessary element of a limited guardianship of a minor, that argument could not have been raised by the parents before the appellate court in *S.H.-II*, and they cannot properly raise it before this Court in an appeal from the Ninth District's decision in *S.H.-II*. Accordingly, this Court should decline their request to exercise jurisdiction over their second proposition of law.

**Proposition of Law No. 3: Denial of a limited guardianship over a minor child for medical decisions by considering matters outside the trial court record does not constitute an abuse of discretion.**

The parents' third proposition of law is not foreclosed by law of the case, but it is also not properly before this Court. On remand from *S.H.-I*, as part of its determination of whether S.H.'s interests would be promoted by appointment of a limited guardian on her behalf, the probate court considered a number of things that were not in the record before it. In her Appellant's Brief in *S.H.-II*, Ms. Schimer noted that the probate court had considered things outside the record and suggested that it's having done so could, in and of itself, be viewed as an abuse of discretion: "[I]n *Taylor v. Hamlin-Scanlon*, 9<sup>th</sup> Dist. No. 23873, 2008-Ohio-1912, ¶ 13, the Ninth District Court of Appeals determined that a trial court's reliance on matters outside the record was, in and of itself, an abuse of discretion." Brief of Appellant Maria Schimer in Case No. 13CA0066-M, at 10. The appellate court, however, did not hold that the probate court's reliance on things outside the record was, in and of itself, an abuse of discretion. Rather, that was one of a number of things that caused the appellate court to determine that the probate court had abused its discretion. Specifically, the appellate court determined that the probate court abused its discretion by disregarding the findings of the guardian ad litem, disregarding the

findings of the court's own investigator, and disregarding the undisputed medical evidence while relying, at least in part, on matters outside the record coupled with speculation:

“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. . . . 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 in the trial court record. Further, the trial court's decision was wrought with speculation. . . .”

*S.H.-II*, at ¶ 37.

In *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, at ¶ 86, this Court refused to address an issue that had neither been raised by the appellant in the court of appeals nor addressed by that court: “Akron asserts that the doctrine of first public use precludes the claims of the affected communities; however, this issue was neither raised by Akron in the court of appeals nor addressed by the court of appeals and may not be raised in this court for the first time in this appeal.” (Citing *Moats v. Metro. Bank of Lima*, 40 Ohio St. 2d 47 (1974).) The parents, the appellees in the appellate court, obviously did not raise in that court whether the probate court's consideration of matters outside the record was an abuse of discretion. While the probate court's consideration of matters outside the record was one of a number of factors that led to the appellate court's conclusion in *S.H.-II* that the probate court had abused its discretion, the appellate court did not hold that the probate court's consideration of matters outside the record was, in and of itself, an abuse of discretion. The parents' third proposition of law,

therefore, is not properly before this Court, and this Court should decline to exercise jurisdiction over it.

This Court should also decline to exercise jurisdiction over the parents' third proposition of law because, even if it were properly before the Court, it is not a question of public or great general interest. There can be no doubt that a trial court's consideration of matters outside the record in deciding an issue before it is an abuse of discretion. As recognized by the United States Court of Appeals for the Sixth Circuit in *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980), "[u]nquestionably, it would be impermissible for a trial judge to deliberately set about gathering facts outside the record of a bench trial over which he was to preside." In fact, the Ohio Code of Judicial Conduct specifically forbids judges from doing independent investigations and considering matters outside the record:

"A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may be judicially noticed."

Code of Judicial Conduct, Rule 2.9(C) (2009). Accordingly, this Court should decline to exercise jurisdiction over the parents' third proposition of law because, even if it were properly before it, it is so obviously incorrect that it cannot possibly be viewed as presenting a question of public or great general interest.

### **CONCLUSION**

This Court should decline to exercise jurisdiction over this matter because it soon will be moot. Further, the parents' first two propositions of law are barred by law of the case and the third was never raised by the parents in the appellate court or addressed by that court. Even if it had been, it is so obviously incorrect that it cannot be viewed as presenting a question of public

or great general interest. Accordingly, this Court should decline to exercise jurisdiction over any aspect of this case.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were served by electronic and regular U.S.

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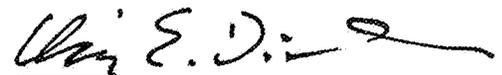
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