

[Cite as *Kelley v. Lipman*, 2015-Ohio-883.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101918

ELLIOTT RAY KELLEY, ET AL.
PETITIONERS

vs.

ATTORNEY KEVIN LIPMAN
RESPONDENT

JUDGMENT:
PETITION DISMISSED

Writ of Habeas Corpus
Motion No. 478870
Order No. 482942

RELEASE DATE: March 6, 2015

FOR PETITIONERS

For Elliott Ray Kelley

For Connie Webster Kelley

Connie Webster
2501 Kemper Road, #103
Shaker Heights, Ohio 44120

ATTORNEY FOR RESPONDENT

Ellen S. Mandell
25700 Science Park Drive
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Beachwood, Ohio 44122-7312

LARRY A. JONES, SR., P.J.:

{¶1} This is a habeas corpus action brought by Connie Webster Kelley on behalf of her husband and petitioner, Elliott Ray Kelley, against the respondent, Kevin Lipman, whom the Cuyahoga County Probate Court appointed as guardian of Elliott in the underlying case, *In the Matter of the Guardianship of Elliott Ray Kelley*, Cuyahoga C.P. Probate Division Case No. 2011 GDN 0161112B. The gravamen of the petition is that the guardian has not acted in the best interest of the ward by, inter alia, secluding him in a care facility without telephone or television; neglecting his health care resulting in missing teeth, weight loss, and memory loss; interfering with his marriage to Connie by limiting access, failing to consult, and failing to provide records; failing to consult with Elliott about his care and estate; ignoring his wishes about his care; and preventing Elliott from attending church and voting. Accordingly, Lipman has deprived Elliott of due process of law and inflicted upon him various torts, such as negligent and intentional infliction of emotional distress, false imprisonment, and breach of fiduciary care. Connie asserts that these egregious actions warrant relief in habeas corpus.

{¶2} The guardian has moved to dismiss the petition because Elliott has not been unlawfully restrained of his liberty. Pursuant to Ohio Revised Code Title 21, the probate court has jurisdiction to appoint a guardian over an incompetent person. The guardian submits that in the underlying case the probate court properly found Elliott, an 83-year old man, to be an incompetent because of a combination of a long-ago head injury, Alzheimer's disease, alcohol consumption, vascular disease, and diabetes and appointed a guardian. Thus, Elliott is not being unlawfully held. The guardian also argues that this habeas petition is not properly before this court because Connie is not a lawyer and cannot represent Elliott. He also submits that there are adequate remedies at law, such as a motion to terminate the guardianship or a motion to remove the guardian with a subsequent appeal, if necessary. In her "answer" to the motion to

dismiss, Connie emphasizes the improper and debilitating “care” Elliot has received under Lipman’s guardianship. She also submits that a motion to remove the guardian is not an adequate remedy because the probate court has refused to rule on such motions.

{¶3} R.C. 2725.05 provides:

If it appears that a person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ of habeas corpus shall not be allowed.

The probate court has jurisdiction to declare people incompetent and to appoint guardians for those people. Connie does not attack the jurisdiction of the court or the court’s jurisdiction to appoint guardians or the jurisdiction to appoint Lipman as Elliott’s guardian. Elliott is being held pursuant to an order of a court that has jurisdiction to issue that order. Thus, pursuant to R.C. 2725.05, habeas corpus will not lie in this case. *State ex rel. E.S.B. v. B.E.B.*, 8th Dist. Cuyahoga Nos. 95940 and 95941, 2011-Ohio-2797.

{¶4} Moreover, the petition is defective. R.C. 2754.04 requires petitions for habeas corpus to be verified. This petition is not verified, nor is it supported by an affidavit specifying the details of claim as required by Loc.App.R. 45(B)(1)(a). The failure to fulfill these mandatory requirements is sufficient reason to dismiss the petition. *Chari v. Vore*, 91 Ohio St.3d 323, 2001-Ohio-49, 744 N.E.2d 763; and *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St.3d 124, 2009-Ohio-4688, 914 N.E.2d 402. R.C. 2725.04(D) also requires that a “copy of the commitment or cause of detention of such person shall be exhibited.”

Although Connie has submitted some court filings, along with medical records, medical reports, correspondence, petitions to the probate court, letters, and photographs, she has not exhibited the commitment papers, such as the finding of incompetency, the appointment of Lipman as

guardian, or orders or contracts confining Elliott to a care facility. “This omission renders the petition fatally defective and subject to dismissal.” *Fugett v. Turner*, 140 Ohio St.3d 1, 2014-Ohio-1934, 14 N.E.3d 984, ¶ 2.

{¶5} This court declines to issue a writ of habeas corpus pursuant to a defective complaint to release a person from custody that was imposed by a court that had jurisdiction over the matter and to issue the order. Thus, this court grants the respondent’s motion to dismiss and dismisses this petition for a writ of habeas corpus. Petitioner to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶6} Petition dismissed.

LARRY A. JONES, SR., PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
TIM McCORMACK, J., CONCUR