

**COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**No. 539 AI of 2017
Control No. 171494
2331 EDA 2017**

Estate of ROSE PHILLIPS, An Alleged Incapacitated Person

OPINION SUR APPEAL

OVERTON, J.

Philadelphia Corporation for Aging (“PCA”) has filed an appeal of this Court’s June 23, 2017 Decree denying the Petition for Adjudication of Incapacity and Appointment of Plenary Guardian for Rose Phillips.

Facts and Procedural History

Philadelphia Corporation for Aging (“PCA”) filed a Petition for Adjudication of Incapacity and the Appointment of a Plenary Guardian of the Person and Estate on April 24, 2017. (Pet. for Adjudication). The Petition stated that Rose Phillips is seventy-five years old and alleges that Ms. Phillips suffers from a moderate degree of unspecified neurocognitive disorder. (*Id.* at ¶ 2-4). The Petition alleged that Rose Phillips’ conditions caused functional limitations that affected her ability to receive and evaluate information effectively and to make and communicate decisions. (*Id.* at ¶ 3). The Petition also stated that her conditions interfered with her ability to make informed judgments regarding her personal safety, medical care, and finances. (*Id.* at ¶ 4). The Petition listed Rose Phillips’ next of kin as Shannon Phillips, her son,

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and Paige, relation unknown.¹ (*Id.* at ¶ 7). PCA nominated Steve McCloskey as the proposed guardian of the person and estate.² On April 25, 2017, the Court awarded a citation and scheduled a hearing. (04/25/17 Preliminary Decree).

The Court held a hearing and received testimony on June 22, 2017.

At the hearing PCA presented two witnesses, Dr. Wendy Michelle Spencer and Jennifer Matthews. Dr. Spencer is a full-time psychologist employed by PCA. (N.T. 6/22/17, 11:5-6; 21:19-21). The court accepted Dr. Spencer as an expert in psychology. (*Id.* at 12:14-13:6). Dr. Spencer testified that she visited Ms. Philips twice but that Ms. Phillips declined the second visit (*Id.* at 13:22- 14:12). Dr. Spencer testified on cross that she actually saw Ms. Phillips twice but Ms. Phillips did not participate in the SLUMS test or cooperate otherwise the second visit. (*Id.* at 19:5-15). The first visit took place on March 29, 2017 and the second on June 19, 2017. (*Id.* at 16: 22-14:2). Even at the first visit Ms. Phillips was not willing to discuss her finances. (*Id.* at 17: 21-24). Dr. Spencer did not know who managed Ms. Phillips' finances. (*Id.* at 18: 2-3). Dr. Spencer did not speak to Ms. Phillips' son, Shannon Phillips, or her aide, Charlotta Bryan. (*Id.* at 20:3-6). Dr. Spencer did not know whether Ms. Phillips' son or aide assisted Ms. Phillips in administering her medicine but yet Ms. Philips' medicine management was the only reason Dr. Spencer believed there was a threat to her safety. (*Id.* at 20: 7-22). Dr. Spencer did not know if Ms. Phillips ever received a blood test to help determine capacity. (*Id.* at 18-16-23). In fact, Dr. Spencer did not review, nor did she even have access to Ms. Phillips medical records or imaging. (*Id.* at 24:8-11). At the time of her evaluation, Dr. Spencer was not aware of what Ms. Phillips' physician was addressing or that Ms. Phillips was seeing a nurse seven hours a day. (*Id.* at 25: 5-

¹ Shannon Philips testified that Paige is his cousin

² Petition proposes Gloria F. Byars but Appellant proposes Steven McCloskey at the hearing.

25). Dr. Spencer could not recall Ms. Phillips' response to whether she knew what a power of attorney was. (*Id.* at 23: 9-14). Dr. Spencer's entire evaluation was based on one SLUMS test and a face-to-face clinical interview. (*Id.* at 24:4-5).

Appellant called a PCA nurse investigator, Jennifer Matthews, to testify as to PCA's reasoning for the petition. (*Id.* at 29:24-30:4). Ms. Matthews testified that she visited Ms. Phillips when she returned home from rehabilitation. (*Id.* at 30:22-24). Ms. Matthews indicated Ms. Phillips was discharged home from rehab sometime in February 2017. (*Id.* at 34-8-9). Ms. Matthews testified that Ms. Phillips' family is trying to assist her and that Ms. Phillips is very clear about what she likes. (*Id.* at 35: 3-6). Ms. Matthews also testified as to Ms. Phillips medical conditions and taxes but it was unsubstantiated by anything other than hearsay. (*Id.* at 34: 17-20; 36: 13-17).

Respondent presented Shannon Phillips, her son, Charlotta Bryan, her aide, and Rose Phillips in her case in chief. Mr. Phillips testified that he sees his mother twice a day to ensure that she has food and is taking her medication. (*Id.* at 45:5-46:6). Mr. Phillips buys his mother's groceries and checks every day to make sure she takes her insulin. (*Id.* at 45:24-46:2; 48:15-22). Mr. Phillips testified that his aunt, cousin Paige and Ms. Phillips' goddaughter routinely visit Ms. Phillips. (*Id.* at 49:2-15). Mr. Phillips intends to have his mother live with his family and to hire Ms. Bryan to work full time as his mother's aide. (*Id.* at 50:8-18; 53: 5-8). Mr. Phillips is already his mother's power of attorney and pays her bills. (*Id.* at 51:2-19). Mr. Phillips indicated that the services PCA provided were insufficient and that he intends to increase evening services. (*Id.* at 54:9-20). Mr. Phillips testified that on top of the aide, his wife would be home with his mother while he works. (*Id.* at 55:13-21). Mr. Phillips testified that should his mother require more services in the future that he we would get whatever services she needs. (*Id.* at 54:24-55:6).

Ms. Bryan testified as to the care she provides for Ms. Philips. (*Id.* 58: 16-20). Ms. Bryan corroborated Mr. Phillips testimony by concurring that she will be providing private healthcare assistance to Ms. Phillips. (*Id.* at 58:21-25). Ms. Bryan is prepared to start “as soon as possible. As soon as needed.” (*Id.* at 59: 5).

Rose Phillips testified on her own behalf. Ms. Phillips stated that her son Shannon is her power of attorney. (*Id.* at 61:15-18). Contrary to Petitioner’s evidence, Ms. Phillips indicated that she knows what a power of attorney allows her son to do and that she understands that PCA wants to put somebody over her finances. (*Id.* at 62:7-13; 64:23-25). Ms. Phillips testified that her son, Shannon, her aide, Charlotta, and her sisters take care of everything for her. (*Id.* at 61-64). Ms. Phillips stated she trust her son, sisters and Charlotta. (*Id.* at 64:7-10). She indicated if anyone is going to handle her finances and do things for her then it is going to be her son, Shannon, and she wants Charlotta to help her. (*Id.* at 65: 18-25). She contrasted Ms. Bryan’s care with the nursing homes she has attended in the past. (*Id.* at 66). Ms. Phillips stated numerous times in her testimony that Charlotta is “the best.” (*Id.* at 63:20; 65:25). Ms. Phillips stated “I was sick. I had a stroke. I fell. And I’m sick. But there’s a lot of things that I can do now that I couldn’t before.” (*Id.* at 62: 16-18).

This Court denied the petition. (*Id.* at 70: 10).

On July 24, 2017, Appellant filed a Notice of Appeal. Statements of Matters Complained of on Appeal were requested and properly tendered on August 15, 2017. Appellant raised the following issues in his Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b):

1. It was arbitrary, capricious, and an abuse of discretion for the Court to disregard the evidence of incapacity offered by PCA’s expert Wendy M. Spencer, Ph.D. pursuant 20 §

5518, where the testimony of Dr. Spencer – who was the sole expert witness at the hearing and whom Ms. Phillips accepted as qualified without questioning – was uncontradicted and unrebutted, and there was no contrary competent evidence of record supporting the Court’s independent decision.

2. It was against the weight of evidence for the court not to appoint guardians of the person and estate for Ms. Phillips where Ms. Phillips failed to rebut PCA’s prima facia [sic] case-in-chief, which demonstrated that Ms. Phillips was in need of guardianship services. Specifically, Ms. Phillips did not contradict the testimony of: (a) PCA’s expert witness, Wendy M. Spencer, Ph.D.- who was the sole expert at the hearing, and whom Ms. Phillips accepted as qualified without questioning – providing evidence of Ms. Phillips’ incapacity; and (b) PCA nurse investigator Jennifer Matthews that she discovered Ms. Phillips sitting in Urine and Feces, Ms. Phillips was unable to identify who was assisting her or when, months had passed since Ms. Phillips – who had a history of cognitive impairment, strokes, seizures, insulin dependency, diabetes, hypertension, and high cholesterol – had seen a doctor and had her blood drawn, and Ms. Phillips’ taxes were in arrears and in collection. None of the testimony presented by Ms. Phillips cast doubt upon the evidence from PCA’s disinterested witnesses, including by allegedly demonstrating that Ms. Phillips had sufficient family support somehow to counterbalance her incapacity. Indeed, neither Ms. Phillips nor her son Shannon Phillips even recognized that Ms. Phillips had any impairment. Moreover, while insisting that Mr. Phillips had a power of attorney, they failed to produce the document. In these circumstances, the Court’s decision not to appoint a guardian, either of the person or the estate, was against the weight of the evidence.

Discussion

A. This Court did not abuse its discretion in denying Appellant's Petition.

Appellant asserts that it was arbitrary, capricious, and an abuse of discretion for the court to disregard the evidence of incapacity offered by Appellant's expert. This claim is without merit.

Abuse of discretion standard of review requires proof of more than a mere error in judgment; it requires evidence that the law was misapplied or overridden, or that the judgment was manifestly unreasonable or based on bias, ill will, prejudice, or partiality. *Simmons v. Simmons*, 723 A.2d 221, 222 (Pa. Super. Ct. 1998). The Superior Court does not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. *Morgante v. Morgante*, 119 A.3d 382, 386 (2015). An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion than the trial court. *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 194 (2013).

Pursuant to 20 Pa. C.S. § 711-712, Orphans' Court has mandatory jurisdiction over the estate of an incapacitated person and non-mandatory jurisdiction over the appointment of a guardian of an incapacitated person. Pursuant 20 Pa. C.S. § 721 and § 5512, venue lies in the county where the incapacitated person is domiciled, is a resident or is residing in a long-term care facility. 20 Pa. C.S. § 5501 defines an incapacitated person as "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he (or she) is partially or totally unable to manage his (or her) financial resources or to meet essential requirements for his (or her) physical health and safety."

Section 5518 provides as follows:

To establish incapacity, the petitioner must present testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills. The petition must also present evidence regarding the services being utilized to meet essential requirements for the alleged incapacitated person's physical health and safety, to manage the person's financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.

20 Pa. C.S. § 5518.

A person is presumed to be mentally competent, and the burden is on the petitioner to prove incapacity by clear and convincing evidence. *In re Hyman*, 811 A.2d 605, 608 (2002). A finding of mental incompetency is not to be sustained simply if there is any evidence of such incompetency but only where the evidence is preponderating and points unerringly to mental incompetency. *Id.* “A petition for adjudication of incapacity, without more, may not itself serve as a *carte blanche* [sic] for a broad inquest into the allegedly incapacitated person's physical and mental health and personal finances; the potential for abuse is simply too great.” *Id.* at 610.

Pursuant 20 Pa. C.S. § 5512.1 the court shall consider and make specific findings of fact concerning:

1. The nature of any condition or disability which impairs the individual's capacity to make and communicate decisions.
2. The extent of the individual's capacity to make and communicate decisions.
3. The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives such as durable powers of attorney or trusts.
4. The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.
5. The duration of the guardianship.

6. The court shall prefer limited guardianship.

A person cannot be deemed incapacitated if his impairment is counterbalanced by friends or family or other support. *In re Peery*, 727 A.2d 539, 541 (1999). The critical fact is whether or not the alleged incapacitated person needs a guardian. *Id.* If the court finds that a person does not need a guardian, it does not matter whether he is incapacitated, the court cannot proceed to the appointment of a guardian. *Id.*

PCA has the burden of proving incapacity and need for guardianship by clear and convincing evidence. The Supreme Court has defined clear and convincing evidence as testimony “so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *In re Cicchetti*, 743 A.2d 431, 743 (2000). The hearing begins with the assumption that Rose Phillips has capacity. An expert witness gives his or her opinion to a reasonable degree of professional certainty based upon the assumption of certain facts. This Court does not have to accept an expert’s opinion just because he or she is considered an expert in his or her field regardless of whether there is conflicting expert testimony. It is up to the trier of fact to accept or reject any expert's ultimate opinion. *In re Jones*, 246 A.2d 356, 361 (1968). Dr. Spencer’s opinion was undercut by the very lucid and compelling recitation given by Rose Phillips on her own behalf at the time of the hearing. Dr. Spencer testified that she did not review medical records. (N.T. 6/22/17, 24:8-11). More importantly as a psychologist, she cannot render medical opinions. Juxtaposing Dr. Spencer’s report and opinion with the testimony of Rose Phillips made it very clear that Rose Phillips was not incapacitated and simply choose not to cooperate with Dr. Spencer at time of evaluation. Given the alleged medical history of Rose Phillips it would appear that appellant

would have presented, in addition to Dr. Spencer, medical evidence to meet the clear and convincing evidence standard.

As further support of this Court's decision not to adjudicate Rose Phillips incapacitated, this Court took particular note of the following testimony from Ms. Phillips: "I was sick. I had a stroke. I fell. And I'm sick. But there's a lot of things that I can do now that I couldn't before." (*Id.* at 62: 16-18). Ms. Matthews testified that Ms. Phillips was discharged from the hospital sometime in February 2017. (*Id.* at 34-8-9). Ms. Matthews visit where she allegedly encountered Ms. Phillips sitting in urine and feces occurred shortly after she returned home from rehabilitation. Ms. Phillips was still recovering from the hospital stay. Furthermore, Dr. Spencer's first visit was in March 2017. (*Id.* at 16: 22-14:2). This also was within a month of Ms. Phillips' discharge. Given the recent hospitalization it would have been prudent to have medical records available for review to give insight into the past and current condition of Ms. Phillips. Dr. Spencer's report and opinion did not coincide with Rose Phillips' testimony. When resolving conflicting witness testimony the court must weigh credibility and believability. Appellant's witnesses were not wholly independent but rather employees of the appellant who the court chose not to fully rely upon in making its decision. Therefore, this Court found appellant failed to prove by clear and convincing evidence that Ms. Phillips was incapacitated.

Moreover, Shannon Phillips indicated that should his mother become incapacitated or get worst then he would be prepared to take care of her and do whatever it takes. Mr. Phillips was already seeing his mother twice a day. (*Id.* at 45:5). Mr. Phillips visited her before and after work every day. In addition, Ms. Phillips also had routine visits from her sisters and granddaughter. (*Id.* at 49:2-15). Mr. Phillips intends to have his mother move in with him and his family. (*Id.* at 50:8-18). Mr. Phillips' wife does not work so she will be there for Ms.

Phillips when Mr. Phillips has work. (*Id.* at 55:13-21). Additionally, Charlotta Bryan has agreed to serve as Ms. Phillips private aide full time. (*Id.* at 58: 21-25). Ms. Phillips sang Ms. Bryan's praises every chance she had in court. Mr. Phillips testified that he intended to increase the amount of services his mother currently receives. (*Id.* at 54: 9-20). Ms. Phillips indicated in her testimony that if anyone was going to handle her finances it would be her son and that she wanted Charlotta to continue to help her. (*Id.* at 65: 18-25). Mr. Phillips is more than willing to serve as a guardian should Ms. Phillips become incapacitated in the future. (*Id.* at 54: 24-55:25). Notwithstanding the issue of capacity, here as in *Peery*, a guardianship is not warranted. Ms. Phillips demonstrated that she was not incapacitated, has plenty of family support and that her son has a plan in place to meet her ongoing needs.

Therefore this claim is without merit.

B. The weight of evidence clearly warranted the denial of Appellant's Petition.

Appellant asserts this Court's decision to not appoint a guardian was against the weight of the evidence. This claim is without merit.

A true weight of the evidence challenge concedes that sufficient evidence exists to sustain a verdict. *Armbruster v. Horowitz*, 744 A.2d 285, 286 (1999). A new trial should not be granted because of a mere conflict in testimony or because a court on the same facts would have arrived at a different conclusion but rather a new trial should be awarded when the verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Armbruster v. Horowitz*, 813 A.2d 698, 703 (2002).

As the Supreme Court has repeatedly indicated, the weight to be accorded expert testimony is to be determined by the jury or the judge sitting without a jury, according to the fact

finder's evaluation of the expert's qualifications and the reasons and facts on which he or she based the opinion expressed. *Smith v. Shaffer*, 515 A.2d 527 (1986). As discussed in greater detail in the previous section, Dr. Spencer's report and opinion were not based on any medical records but rather a SLUMS test and a clinical interview. Dr. Spencer failed to explain the necessity of a second clinical interview which Ms. Phillips declined. Given the refusal by Ms. Phillips, it appeared that Dr. Spencer's findings were inconclusive. Accordingly, Dr. Spencer's testimony could not be reconciled with Ms. Phillips' lucid testimony, thereby, affecting the weight given to her expert opinion by this Court.

If the witness is not testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific technical, or other specialized knowledge within the scope of Rule 702. *Com v. Huggins*, 68 A.3d 962, 967 (2013). Ms. Matthews did not testify as a medical nurse but rather as a PCA investigator. All of Ms. Matthews's references to alleged medical history of Ms. Phillips were hearsay. Hearsay medical evidence is insufficient to meet a clear and convincing standard. Furthermore, Ms. Matthews conceded there was no allegation or suspicion of undue influence. (N.T. 6/22/17, 38:17-21). Any references Ms. Matthews made to taxes was unsubstantiated hearsay as well. Also, as discussed in greater detail in the previous section, Ms. Matthews' observations were made shortly after Ms. Phillips returned home from the hospital.

Pursuant 20 Pa. C.S. § 5512.1, when determining the need for guardianship services, if any, the court is to consider such factors as the availability of family, friends and other support. As aforementioned in the previous section, Ms. Phillips has plenty of family and a home health

aide who are ready and able to meet her ongoing needs. Appellant reference to a power of attorney is of no relevance to the proceeding inasmuch as had the court determined incapacity, power of attorney would be null and void as the principal no longer would have the ability to make her wishes known to the agent. The weight of evidence clearly warranted a finding that Rose Phillips was not incapacitated and any action by PCA was premature.

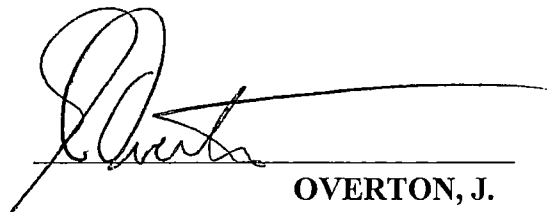
Therefore this claim is without merit.

Conclusion

Based on the record, this Court's Decree dated June 23, 2017 Denying PCA's petition should be **AFFIRMED**.

BY THE COURT:

Date: August 28, 2017



OVERTON, J.

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