2013 WL 10114473 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Maryland.
Montgomery County

In the Matter of Laurie F. FLEISCHMAN for the Appointment of a Guadian of the Person and Property.
In the Matter of Michael KONOPKA for the Appointment of a Guardian of the Person and Property.

Nos. 111030-FL, 111395-FL.
November 25, 2013.

Cross-Petitioner Andreas K. Konopka's Motion to Alter or Amend Judgments

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COMES NOW Andreas K. Konopka ("husband"), by and through his undersigned counsel, and respectfully moves pursuant to Maryland Rule 2-534, to alter or amend the separate written judgments entered in the above-referenced consolidated cases on the grounds set forth below.

BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This case involves the care of Andreas' wife Laurie E. Fleischman ("wife") and Andreas 21 year-old son Michael Konopka ("Michael"), born XX/XX/1991. Husband has been the primary caretaker of Michael since his birth; Michael has suffered from autism since the age of four. Husband acted as primary caretaker of wife for over a decade after wife was diagnosed with multiple schlerosis. However, on April 24, 2013, while husband was recovering from quadruple bi-pass heart surgery, Adventist HealthCare, Inc., d/b/a Shady Grove Adventist Hospital ("Adventist"), field a petition for the appointment of guardians of wife's person and property. The petition was followed on May 13, 2013, by petition filed by Uma Ahluwalia, in her capacity as Director of the Montgomery County Department of Health and Human Services ("HHS"), seeking appointment of temporary and permanent guardians of Michael. At subsequent separate hearings, wife and Michael were each appointed a guardian of the person, with Robert M. McCarthy, Esquire ("McCarthy") was appointed guardian of the property for both wife and Michael.

Once husband learned of the proceedings, he filed cross-petitions in both cases. On June 25, 2013, the Court granted an oral motion by counsel for HHS and the case were scheduled for a two-day trial to begin September 10, 2013.

The trial on the two consolidated cases took place as scheduled on September 10 and *September* 11, 2013, but then was carried over for one additional day, to October 17, 2013. On October 29, 2013, the Court then ruled from the bench ("the October 29 ruling"), after which separate orders were entered on November 13,2013, finding good cause in both cases to pass over husband, under § 13-707(c)(1) of the Estates & Trusts Article, in favour of other guardians. The order issued in Case No. 111030-FL names wife's estranged sister Dana Lehrman ("the sister") as guardian of her person, while the order issued in Case No. 111395 names the Director of HHS as the guardian of Michael's person. Both orders name McCarty as the guardian of each ward's property.

AUTHORITY FOR MOTION

This motion is timely brought under Maryland Rule 2-534. That rule provides, in pertinent part, that:

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment....

ARGUMENT [1]

A. *THE COURT SHOULD AMEND THE JUDGMENT AS TO WIFE.*

1. The Court appointed Robert M. McCarthy, Esquire ("McCarthy"), first as temporary and then as permanent guardian of wife's property, at the request of Adventist, pursuant to § 13-206 of the Estates & Trusts Article, without regard to the fact. That on April 23, 2013, the Maryland Attorney Grievance Commission reprimanded McCarthy for his lack of diligence in carrying out a similar appointment, over a period of one year, on behalf of an ***elderly*** *woman suffering from dementia.*

The bulk of the Court's ruling from the October 29, 2013, ruling from the bench consisted of summarizing in detail husband's numerous alleged shortcomings and the effect of these shortcomings on Michael and Laurie. Given the microscopic scrutiny to which husband was subjected, however, it is remarkable that the Court paid no attention whatsoever, based upon the October 29 ruling, to the fitness of the persons named over husband as guardians.

Yet while the Court hardly pulls punches in laying open every aspect of husband's relationship with his wife and son, the only serious complaint that the Court makes regarding husband's handling of **financial** affairs is that he delayed for several years in filing for Social Security Disability Income benefits for Michael. However, husband has never been accused of acts of dishonesty or malfeasance, and even the Court seems to concede in the October 29 ruling that for many years husband acted as full-time care-giver to his wife and child for no reason other that they were his wife and child.

McCarthy on the other hand, has been officially reprimanded by the Attorney Grievance Commission for failure to comply wit his ethical obligations in a case very much like the cases involving wife and Michael. Furthermore, the reprimand was issued by the Attorney Grievance Commission not years ago, but on April 23, 2013, one day before Adventist filed its petition involving the guardianship of wife. This reprimand, which is part of the public record, was disseminated to Maryland Bar Counsel, as reflected in the attached **Exhibit A**. As the Court can see, McCarthy was reprimanded for violating rules 1.1 and 1.3 of the Maryland Lawyers' Rules of Professional Conduct while acting as court-appointed guardian of an **elderly** woman with dementia, by failing to protect the woman's retirement benefits form **exploitation**, b failing to marshal other known assets, and by failing to prepare and file several application for medical benefits.

Considering that HHS referred to McCarthy the disabled client whom McCarthy was reprimanded for failing to diligently represent, it is hard to believe that HHS was not aware of this reprimand, and it is simply astonishing than none of a closely knit group of Montgomery County attorneys specializing in guardianship law-would bother to check McCarthy's recent background or, if they did so, disclose it to the Court before agreeing that McCarthy should be given priority over husband of his family's property.

2. The Court lacked the legal authority to ignore a durable power of attorney ("POA") appointing father as prospective guardian, where no evidence was introduced at trial to overcome the presumption that wife was competent to execute that document.

The last numbered paragraph of the petition filed by Adventist in Case no.

17. Petitioner is not aware of an instruments signed by Ms. Fleishman naming any other person as guardian or constituting durable power of attorney.

If paragraph 17 is true, it is true only because Adventist and its counsel did not exercise due diligence in making any inquiry into the existence of a POA or an appointment Although husband was staying at the same health care facility as wife shortly before Adventist filed its petition, and then returned to his home, Adventist made no attempt to advise father that it intended to file a petition for guardianship of his wife, and husband did not even learn that a petition had been filed for another several weeks.

Had Adventist shown due diligence and made proper inquity, husband would have produced a POA executed in the presence of two witnesses, including husband's former counsel, on October 1, 2012. Page eight of the document (which is unnumbered), under the caption “Special Instructions,” contains the following provision making it clear that the document is to be construed as a durable POA:

3. In the event that this Personal **Financial** Power of Attorney is to be used by my agent in a jurisdiction other than Maryland, then I direct that the Personal **Financial** Power of Attorney shall not be affected by any disability of the principal and shall be construed and interpreted to be a durable power of attorney.

This interpretation is supported by the last page of the document; under “Termination of Agent's Authority,” where are listed five events that would terminate the POA Disability of the principal is not a listed event.

Furthermore, although the October 29 ruling makes it clear that wife's illness did not begin in 2013, but years before, husband contends that nothing on the record allows the Court to infer that wife was incompetent when she signed the POA, and husband denies that a court has the right, in a guardianship proceeding to declare hull and void a power of attorney for **finances** simply because a court does not believe that the principle acted prudently in signing the document, unless perhaps a breach of fiduciary duty has been pled and proven, which did not happen with either of the cases before the Court.

3. The Court did not comply with case law governing guardianship proceedings in accepting vague and incomplete certificates of incompetency and in not requiring any of the physicians who signed those certificates to testify at the hearing.

In making the October 29 ruling, the Court cited only one opinion, namely, *Kicherer v. Kicherer*, 285 Md. 114,400 A.2d 1097 (1979), in which the Court of Appeals of Maryland, after finding that neither party had standing to challenge the judgment below, nonetheless commented briefly on the guardianship regime established by then-recent amendments to Title 13 of the Estates & Trusts Article.

However, *Kicherer* is not the only nor the most recent opinion in which a Maryland appellate court has been called upon to interpret these provisions: In a 1990 opinion, *In re Sonny E. Lee*, 132 Md. App. 426,754 A.2d 426 (1990), the Court reversed the trial court's appointment of a guardian and remanded the case for a new hearing where the trial court failed to adhere strictly to the requirements of statutes prescribing the manner in which guardianship proceedings are to be conducted.

The Court found that the trial court had erred: (1) By failing to hold a hearing on whether the alleged disabled person was “presently under a disability and in need of a full guardianship;” (2) by accepting boilerplate certificates of incompetency without requiring their authors to testify at a competency hearing; and (3) by not providing the alleged disabled person with “adequate legal representation.” 754 A.2d at 428. Husband reserves further comment on the issue of whether his wife receive adequate legal representation, but shall address (1) and (2) below.

As to (1), the Court held that the Estates & Trusts Article and the Maryland Rules do not allow a waiver of a full competency hearing, at which the petitioner must show by clear and convincing evidence that a person is “disabled” as defined in § 13-705(b) of the Estates & Trusts Article. While the Court in the case at bar did make such a finding as to wife, the written order suggests that the finding was based upon the parties' agreement or stipulation. Under In re Sonny E. Lee, 754 A.2d at 435-436, that is not permitted.

As to (2), the Court was sufficiently concerned with the adequacy of the certificates of competency that it addressed the issue even though neither party raised it on appeal: The affavits were nine months old by the time of trial; they were “pre-prepared, single-paged forms” with blank spaces to be filled in; and they did not provide all the information required by Maryland Rule 202(a)(1), such as “a brief history of involvement with the disabled person” and a specification of the “cause” of the alleged disability. The Court found the certificates particularly unsatisfactory because they contained single word descriptions of Sonny E. Lee's alleged condition. 754 A.2d at 436.

The three hurriedly prepared certificates submitted in support of Adventist's petition are even more flawed than the certificates from *In re Sonny E. Lee*. Other than containing the same one-word description of the cause and nature of wife's illness, namely, “encephalopathy” (apparently no doctor noticed the multiple schlerosis) and the writers predict that wife's condition will last “weeks to months” or, in one case, “months,” where the first day of trial was more than five months later.

B. *THE COURT SHOULD AMEND THE JUDGMENT AS TO MICHAEL.*

1. The Court appointed McCarthy, first as temporary and then as permanent guardian of Michael's property, at the request of HHS, pursuant to § 13-206 of the Estates & Trusts Article, without regard to the fact that on April 23,2013, the Maryland Attorney Grievance Commission reprimanded McCarthy for his lack of diligence in carrying out a similar appointment, over a period of one year, on behalf o f an ***elderly*** *woman suffering from dementia.*

Husband incorporates as though fully set forth herein the argument offered in support of Section 1 of Part A above.

2. The Court's decision to override husband's priority to act as guardian of Michael's property under § 13-207(a)(4) and of Michael's person under § 13-707(a)(4) violates husband's rights under the Fourteenth Amendment o f the United States Constitution.

In finding “good cause” to appoint someone other than husband to act as guardian of Michael's property and person, the Court relied upon § 13-207(c) of the Trusts & Estates Article and § 13-707(c)(l) of the Estates & Trust Article, respectively, as interpreted by Kicherer. “rests solely in the discretion of the equity court,” 285 Md. at 119. However, Kicherer did not involve a battle between a parent and a third party.

As far as the undersigned counsel is aware, no Maryland appellate court has considered the Constitutional limitations of Maryland guardianship law as it applies to deprive a parent of his rights as natural guardian. However, the power of Maryland courts sitting in equity to render decisions in custody case is also very broad. Yet that power is limited by the Fourteenth Amendment of the United Slates Constitution. In *Troxel et vir. v Granville,* 530 U.S. 57,120 S. Ct 2054 (2000), after reciting a long line of cases, Justice O'Connor writing for the majority concluded that (530 U.S. at 66):

In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Following *Troxel v. Granville*, Maryland appellate courts have repeatedly acknowledged that the Due Process clause trumps the broad power of family law courts to decide custody matters in this State. See, e.g. F*rase v. Bamhardt*, 379 Md. 100, 840 A.2d 114(2003) (striking down a provision requiring a fit mother to relocate to a specific housing unit as a condition of maintaining custody of her youngest child).

In particular, Maryland appellate courts have repeatedly struck down orders by. which lower courts have sought to delegate child-raising decisions to third parties. Before *Troxel v. Granville*, most such opinions relied primarily upon former § 3-602(a) of the Courts Article (now § 1-201 of the Family Law Article), which vests jurisdiction over custody cases in the equity courts. See, e.g., *Shapiro v. Shapiro,* 54 Md App. 477,484, 458 A.2d 1257 (1983)(reversing order of the trial court delegating to a

psychiatrist the right to decide terms of visitation for the father); *In Re Justin D & Joshua R.*, 357 Md 431,745 A.2d 408 (2000)(reversing order of the trial court in a CINA case delegating visitation decisions to the Department of Social Services).

However, Maryland appellate courts quickly seized upon *Troxel v. Granville* as more compelling authority for preventing the delegation of child-raising to State controlled third parties (except under other special circumstances). Thus in *In re Mark M.*, 365 Md 687,782 A.2d 332 (2001), this Court cited both *In Re Justin D & Joshua R.* and Supreme Court cases in declaring that the trial court had erred in ruling that a mother could not exercise visitation with her son absent approval from both a therapist and the Department of Social Services. See also, *Tarachanskaya v. Volodarsky*, 168 Md App. 587, 897 A.2d 884 (2006).

Husband does not claim to be a perfect father. But he is Michael's only father, and this Court should not, after husband has served in that role for 21 years without much help from the State, deprive him of his Constitutional right to serve in that capacity.

CONCLUSION

WHEREFORE, the Court should (1) alter and amend the judgments entered in the above-referenced consolidated cases so as to appoint husband guardian of the person and property of wife and Michael, subject to such supervision by the Court and reporting requirements that the Court deems necessary in the interests of justice; and (2) grant such other and further relief as the nature of the cause requires.

Respectfully submitted,

<<signature>>

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Footnotes

1 The omission of any argument from this analysis, including but not limited to an argument that the Court abused its discretion in findings good cause to override the statutory priorities established by the legislature for guardianship cases, should not be viewed as and abandonment or waiver of the argument for the purposes of further appeal.

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