2012 WL 3051525 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

William SCANZANI, and others, Petitioners-Appellants,

v.

Lauretta SCANZANI, Respondent-Appellee.

No. 12-P-0397.
2012.

On Appeal from a Judgment of the Essex County Probate Court; Docket No. ES 11 P 2351 GD

Brief and Supplemental Appendix of Respondent-Appellee, Lauretta Scanzani

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CASES:

***1** STATEMENT OF THE ISSUES

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II. Whether it was error for the Court not to hold an evidentiary hearing for the appointment of a temporary guardian where no such hearing was requested at the Trial Court, and where the Petitioners made no threshold showing that Lauretta was incapable of handling her affairs due to mental illness.

III. Whether the Court erred in not entering specific and detailed Findings where its decision was to dismiss Petitioner's action for temporary guardianship, rather than granting it.

IV. Whether the Court erred in relying on evidence from Lauretta's personal or family lawyers and on her cardiologist when considering the issues before the Court.

V. Whether the Court erred in not crediting the Affidavit of Petitioner's purported expert where that doctor demonstrated obvious bias and also did not address documented remarks of the attending medical practitioner.

***2** STATEMENT OF THE CASE

The subject of the motion for an independent medical examination and the petition for appointment of a temporary guardian is Lauretta Scanzani (hereinafter, “Mother” or “the ward” or “Lauretta”). The motion and the petition were brought by three of Lauretta's sons, William Scanzani, James Scanzani and John Scanzani (hereinafter, “the Petitioners”).

Lauretta is satisfied with the statement of Prior Proceedings presented in Petitioners‘ Brief (“Pet.Br.”).

STATEMENT OF THE FACTS

Petitioners' threshold evidence of Loretta's incompetence was contained in several affidavits, mostly from Petitioners and their families. They alleged that for years, Lauretta attended family gatherings [A 13], she regularly attended church [A 13], she was close to the Petitioners [A 13, 49].

They alleged however, that Lauretta became distant to the Petitioners [A 13, 49, 50, 51, 52; Pet.Br., 5]; she had some confusion in a shopping mall parking lot which resulted in a police report [A 16- ***3** 17]; that family members began noticing “physical and mental deterioration” in Lauretta [Pet.Br., 4]; she stopped dressing up, putting on make-up and dying her hair [id., 10. Most importantly, Lauretta decided to sell her house [A 13]; and changed her entire estate planning to exclude the Petitioners [A 13, 50].

However, paramedics called to the scene at the parking lot incident reported that “[Lauretta] able to answer all questions appropriately and does not appear confused” [A 87] “she appears comfortable and in no distress” [ibid.]. The paramedics assessed Lauretta and left her in the care of the police department [ibid.].

Of substantial importance to the Court was the fact that Lauretta's two attorneys opined that Lauretta was quite competent [T 21, 22, 25]; and that they both had met with Loretta “extensively” [T 22]. The Court also relied on the fact that Lauretta's cardiologist did not have any concerns about her competence so as to warrant a referral for psychiatric evaluation [T 22]. That cardiologist had also reported that Lauretta's memory and cognitive functioning was responsive, her emotional and psychiatric functioning was very responsive, she ***4** managed her own investments, and she had a very good support network [A 92-95].

Lastly, the Petitioners sought to have **Elder** Affairs get involved [see Pet.Br., 6, 11-12]. What the Petitioners **neglect** to note is that, after their evaluation, **Elder** Affairs reported that: (1) Lauretta keeps the inside of her home “immaculate” [A 102]; (2) she “manages her own finances” [ibid.] (3) she cares for her home herself with some help from son Paul [ibid., A 105]; she “is confident of the decisions she has made even if they are upsetting to 3 of her sons” [ibid.; A 104-105]; she “retains capacity” [A 104, 105]; and she feels that the request of **Elder** Affairs made by Petitioners was only in retaliation for her recent financial decisions with which Petitioners were displeased [A 102, 103, 104, 105].

Importantly, the Court noted this matter is motivated by Petitioner's concerns about financial moves Lauretta has made and by the fact that Lauretta has shut the Petitioners out of her life [T 23].

The Petitioners came forward in a second hearing with an Affidavit from a Dr. Portnoy, which the Petitioners summarized by saying Portnoy felt that Lauretta was “seriously confused and mentally ***5** impaired” during that one incident in the shopping mall parking lot [Pet.Br., 14; A 38; and that she would continue to suffer progressive deterioration over time [ibid.]. Dr. Portnoy

also reviewed the reports from Lauretta's cardiologist and gratuitously criticized him for some purported conflict of interest [A 39]; and he gratuitously criticized Lauretta's attorneys as well [A 40]. This was noted by the Court [T 23].

Even after that purported evidence, the Court still concluded that "that's not enough to get the relief requested" [1] [T 21]; and "I don't have any issues regarding her competency that would warrant the relief requested" [T 24].

The Court sua sponte dismissed the Petitioners' complaints [T 27].

ARGUMENT

INTRODUCTION

Burden of proof / standard of review

In many of its particulars, this case is governed by ***6** *Guardianship of Jackson,* 61 Mass.App.Ct. 768 (2004), wherein it was found that the petitioners: "(1)... did not sustain their burden of demonstrating that, at the time of trial, their adult son was incompetent by reason of mental illness to manage his own personal and financial affairs; and (2)... they failed to show, by a preponderance of the evidence, that Jackson was not able to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial interests." At 768.

Further, this was a Petition for temporary guardian which, pursuant to G.L. c. 190B, § 5-308 [2], requires a showing that a failure to appoint a temporary guardian will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated. The Petitioners here also failed to make this showing.

The starting point for such cases is that any person is presumed to be competent unless shown by the evidence to be incompetent. *Jackson,* at 770; citing ***7** *Lane v. Condura,* 6 Mass.App.Ct. 377, 382 (1978). And the Petitioners must prove their case by a preponderance of the evidence. *Guardianship of Roe,* 383 Mass. 415, 425 (1981).

As a matter of review:

> [T]he weight and credibility of the evidence lie within the province of the trial judge. Our task on appeal is limited solely to determining whether the judge's findings were plainly wrong.

Clark v. Clark, 47 Mass.App.Ct. 737, 739 (1999).

Although the Court did not enter specific findings of fact (discussed at length below), the entry of a final decree carries with it an implication that the judge found all the facts necessary to support it. *Petition of Dept. of Public Welfare,* 376 Mass. 252, 256 (1978); *Yee v. Yee,* 2 Mass.App.Ct. 897, 897 (1974). *See also, Jones v. Clark,* 272 Mass. 146, 149 (1930) ("[t]he general finding of the trial judge imports a finding of all subsidiary facts and the drawing of all permissible inferences in its support)."

Further, although the Court sua sponte dismissed the Petitioners' actions [T 27], the Petitioners' brief did not address this issue nor present this ***8** Court with the standards to be applied for reviewing such a dismissal.

Under the normal circumstance where the defendant/respondent files a motion to dismiss before the presentation of any evidence, the following standards apply.

> We review the allowance of a motion to dismiss de novo. (citations omitted) We accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff. (citations omitted)

> We consider whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief. (citations omitted).

Massachusetts State Police Comm. v. Commonwealth, 462 Mass. 219, 221 (2012).

Even if this had been the usual motion to dismiss presented before the commencement of the evidence, "[f] actual allegations must be enough to raise a right to relief above the speculative level ". *Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School District*, 461 Mass. 366, 374 (2012).

An excellent discussion of this principle is discussed in ***9** *O'Leary v. Cape Cod Healthcare, Inc.*, Barnstable Superior Court (Muse, J.), BACV 201100431 (Jan. 11, 2012):
The Supreme Judicial Court has adopted the standard of review for motions to dismiss set forth by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), which states: "While a complaint attacked by a... motion to dismiss does not need detailed factual allegations... a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions... Factual allegations must be enough to raise a right to relief above the speculative level... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)..." (citations omitted). Under this heightened standard, what is required at the pleading stage are factual allegations that possess enough heft to show that the pleader is entitled to relief.

The Court in the instant case clearly determined that Petitioners' allegations were mere "labels and conclusions", they did not have "enough heft", and they did not rise above a "speculative level".

Further, since the judge acted in this matter after all the parties presented their full case, his actions here are more akin to dismissal after the close of evidence in a nonjury trial.

> In granting a motion to dismiss at the close of evidence in a nonjury trial, a judge is entitled to weigh the evidence and resolve all questions of credibility, ambiguity, and ***10** contradiction in reaching a decision. (citations omitted). To the extent, if any, that the board engaged in any "weighing" of the expert testimony, there was nothing improper in such weighing.

Western Mass. Lifecare Corp. v. Board of Assessors, 434 Mass. 96, 108 (2001).

I. The Court did not err in refusing to order an independent medical examination of Lauretta

Petitioners cite to no statutory provision nor any case law which requires that the Court order an independent medical examination of Loretta in these circumstances.

Of course the Court here found that Petitioner's had not produced any sufficient evidence of Lauretta's incompetence ("I just can't order relief without something more that what I have here" [T 21]; and "I can't force that [a psychiatric exam of Lauretta] and I don't have any issues regarding her competence that would warrant the relief requested" [T 22]. Yet Petitioners still maintain that they were entitled to have Lauretta examined by an independent doctor.

***11** Unfortunately, the logical extension of the Petitioners' argument would be that any time a family member alleges that a parent is incompetent, even on the flimsiest of evidence, the parent must be subjected to the indignities of a psychiatric

examination. Again, the Petitioners have yet to provide any statutory or case law in support of that position. See discussion, infra, concerning the lack of evidence to provide even a threshold, "bona fide" case warranting further action by the Court.

In further support of its decision, the Court properly disregarded the "new" evidence from Petitioners' expert [T 21-25 - and see Argument Section V below]. The Court quite properly relied on the lack of a psychological or psychiatric referral from Lauretta's two attorneys [T 21,22,25] or from her cardiologist [T 22]; and relied on a report from **Elder** Affairs [A 102-105; T 9-10, 15, 25], in which they refused to evaluate further, noting that Lauretta "retains capacity" [A 104], and that Lauretta feels that the request of **Elder** Affairs made by Petitioners was only in retaliation for her recent financial decisions with which Petitioners were displeased [A 102, 103, 104, 105].

***12** The Court was correct in rejecting Petitioner's motion for an independent medical evaluation.

II. The Court did not err in failing to hold an evidentiary hearing for the appointment of a temporary guardian

A. The Standard for appointing a temporary guardian

"A probate judge has substantial discretion in guardianship matters." *New England Merchants National Bank v. Spillane,* 14 Mass.App.Ct. 685, 693 (1982).

Lauretta does not dispute Petitioners' statement [see Pet.Br., 9] that the burden is on them to prove their case by a preponderance of the evidence. *Guardianship of Jackson,* supra at 61 769.

In order to appoint a temporary guardian for an incapacitated person, there must be a finding that the welfare of the proposed ward requires a guardian's immediate appointment. *Spillane,* supra at 690; *Guardianship of Roe,* supra at 383 Mass. 426. Further, there must be some evidence before the Court "to show that [the purported ward] was incapable of handling ***13** her affairs because of mental illness." *Spillane* , id., at 690. "[A] finding that a person is in need of a guardian 'due to mental illness,' is not sufficient. Clearly, the requirement that a mentally ill person be found incapable of taking care of himself lies at the very heart of a guardianship proceeding." *Fazio v. Fazio,* 375 Mass. 394, 399 (1978). The relevant inquiry is twofold: "[t]he petitioners must show not only that the proposed ward is incapable of taking care of himself, but also that he is incapable of taking care of himself by reason of mental illness." *Jackson* supra at 61 Mass.App.Ct. 769.

> [T]he type of evidence necessary to support such a finding, apart from evidence as to mental illness, should consist of facts showing a proposed ward's inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial interests.

Guardianship of Roe, supra at 383 Mass. 428 (citing Fazio at 403).

The current controlling statute [G.L. c. 190B, § 5-308] requires a showing that the failure to appoint a temporary guardian "will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated".

***14** Even evidence of "mental weakness" is not sufficient to warrant the appointment of a temporary guardian. *Spillane,* at 690.

Curiously, Petitioners make no argument in their Brief that there was evidence to the effect that the appointment of a temporary guardian was necessary in this case because an *emergency* was at hand or that the safety or welfare of Lauretta otherwise required an *immediate* appointment of a temporary guardian.

B. There was no error in failing to order an evidentiary hearing

Petitioners assert in their Statement of the Issue that it was error for the Court to deny Petitioner's motions "without an evidentiary hearing" [Pet.Br., 7]. They appear to make a similar argument at p. 16 of their Brief, under the heading "Required Proceedings" and then present what might best be described as a rather cursory argument on the subject [3].

***15** Initially, Petitioners never asked for an evidentiary hearing during either of the hearings before the Court [T 1-27);; and never requested an evidentiary hearing in their submissions to the Court [4]. This issue is therefore considered waived. *BPR Group Ltd. v. Bendetson,* 453 Mass. 853, 869 n.24 (2009); *Knott v. Racicot,* 442 Mass. 314, 327 (2004); *Guardianship of Hocker,* 439 Mass. 709, 719 (2003).

In support of their position of entitlement to an evidentiary hearing, Petitioners cite to *Guardianship of Smith,* 43 Mass.App.Ct. 493, 502 (1997). Petitioners have misconstrued the *Smith* case. That case does not stand for the proposition that any petition for a *temporary* guardianship requires an evidentiary hearing. It merely holds that the persons who were nominated by the ward as guardians in the event of his future incapacity in that case were entitled to notice and an opportunity to be heard on ***16** any hearing to determine *permanent* guardianship. It is to be noted that if Lauretta were to need a guardian, none of the Petitioners have been nominated by her to serve in that capacity.

In fact, Petitioners here point to no statutory or case law requiring an evidentiary hearing on a motion for appointment of a temporary guardian.

As noted below, the Petitioners also did not present even a threshold case for the judge to conclude that a "bona fide doubt" exists as to Lauretta's incompetence [see discussion of *Laurore* at p. 25, infra] such as would support further inquiry by the Court.

Lauretta also contends that Petitioners have in effect waived any right to complain about the Court's decision. They were expressly invited by the Court to bring forward at a later date any other information they have to support a finding that Mother was incompetent to manage her personal affairs by reason of mental illness [SuppApp 1]; and that she was unable to act for herself in matters of her own health, safety or welfare; and, most importantly, that she was so incapable of handling her personal and financial ***17** affairs as to warrant the immediate appointment of a temporary guardian.

A future hearing was held, and Petitioners failed again to make any threshold showing to support their petition. The only "new" evidence they presented was an affidavit from a Dr. Portnoy, which the Court clearly refused to rely on [T 17-27].

Lauretta asserts that Petitioners have not met their burden to make even a threshold showing under either c. 190B, § 5-308, or under any of the controlling case law, which would have warranted any further hearing, evidentiary or not.

Initially, the Petitioners appear to be arguing that the Appeals Court is free to find its own facts in this case [see Pet.Br., 7]. That is not so.

The ruling in this case was clearly based on a finding by the court that the Petitioners did not meet their burden of presenting sufficient evidence of Lauretta's incompetence [see SuppApp 1]. Thus, it is not a matter of the Appeals Court's authority to find other facts which are supported in the record. In the first place, there are no other facts in this record to support the Petitioners position; and the Petitioners do not point to any -- other than that of ***18** Dr. Portnoy, which the Court clearly (and quite properly) rejected. More importantly, the Court's ultimate finding is based on its weighing of the evidence presented by all parties. The Court found that: "The Plaintiffs have failed to establish any issues of incompetency at this time" [SuppApp 1]. Whether that is a mixed question of law and fact, or whether it is determined to be a pure conclusion of law, it is surely based on weighing of the evidence presented (or not presented) by the Petitioners and Respondents and is therefore entitled to deference by this Court. "The judge's determination of weight and credibility is entitled to deference." *Jackson, supra* at 61 Mass.App.Ct.

774. “The judge, with a firsthand view of the presentation of the evidence, is in the best position to judge the weight and credibility of the evidence.” *Goodman v. Atwood*, 78 Mass.App.Ct. 655, 657-658 (2010).

It is also noteworthy that the Temporary Guardianship Form filed in this case (see A 19] requires a showing that “any delay in the appointment [of a temporary guardian] will cause immediate and substantial harm to the health, safety and welfare of the Respondent”. The Petitioners made no recitation ***19** on that Form -- or in any other evidence offered at the hearings -- which would show that Lauretta “was incapable of handling her affairs because of mental illness”. See discussion in *Spillane*, at 14 Mass.App.Ct. 690. The Petitioners' recitations on that Form do not rise to the required level of a risk of “immediate and substantial harm” to Lauretta in the absence of a temporary guardian.

It is clear from the Court's discussion at the hearings, as well as its ultimate conclusion, that the Petitioners failed to produce sufficient evidence of Lauretta's incompetence to handle her affairs, so it was unnecessary to even consider whether Mother suffered from mental illness. *Spillane*, at 690.

Petitioners refer to Lauretta's “severe cognitive impairment” [Pet.Br., 9]; and they rely on the case of *Paine v. Sullivan*, 79 Mass.App.Ct. 811 (2011) for the suggestion that Lauretta's “decisional impairments” and “dementia” may be evidence of a loss of ability to handle one's financial affairs [Pet.Br., 13].

First, at least in the related area of competence to stand trial, it has been determined that evidence of cognitive impairment was insufficient to establish ***20** incompetence. *Commonwealth v. Laurore*, 437 Mass. 65, 79 n.3 (2002).

Second, the distinctions between the instant matter and the *Paine* case are substantial and unavoidable:
- in *Paine*, there was “little doubt” that the ward suffered from dementia [813];

- the ward had “significant frontal dysfunction” [ibid.];

- he had mild anomia and moderate amnesia [814];

- some of his conditions were “highly suggestive of a diagnosis of Senile Dementia of the Alzheimer's Type (SDAT)” [ibid.];

- unless his mental status improves appreciably, he will continue to need close supervision [ibid.];

- with regard to dementia, his primary care physician “strongly encouraged [him] to follow-up with the neurologist for additional evaluation” [ibid];

- he needed a personal care attendant twenty-four hours per day [ibid];

- his primary care physician opined that he suffered from senile dementia and was unable to live alone [815]; and

***21** - perhaps most importantly, he had lost the ability to handle the family's finances, a task he had always performed [ibid.].

Here, the Petitioners rely on a 2009 Police Report as the basis for the opinions of their expert, Dr. Portnoy. Yet, the Police Report was controverted by a simultaneous medical observation by paramedics; and Dr. Portnoy's opinion as to Lauretta's incompetency was formed without even meeting Lauretta.

A further significant distinction is that, because *Paine* involved the question of testamentary capacity, the burden of proof was on the proponents to establish that the testator was competent to make a will --a burden they were not able to meet. In the instant case, however, the burden is reversed because the Petitioners here have the burden to show Lauretta's incompetence by reason

of mental illness. In the former case, the plaintiffs had the benefit of the presumption of competence. In the instant case, they have the much harder burden of overcoming that presumption.

It is also possible to compare and contrast the instant case with *Fazio v. Fazio*, supra, at 400-405, where the evidence at a hearing on petitions for ***22** appointment of temporary and permanent guardians included evidence that the respondent had been diagnosed at various times as having an "obsessive compulsive neurosis," "phobia," "psyhoneurosis," "schizophrenic personality," and "definite mentalillness . Despite this evidence (which is much stronger than in the case at bar), the court properly concluded that was insufficient to warrant a finding that the respondent was incapable of taking care of himself by reason of mental illness or that his welfare required the immediate imposition of a temporary guardian.

As noted in the Statement of the Facts, Petitioners also sought an evaluation of Lauretta by **Elder** Affairs. This evaluation resulted in a report that concluded Lauretta "retains capacity" [A 102-105]. The Court expressly noted that report [T 9-10]; and the Court properly relied on that report [T 15, 25].

***23 III. The Court did not err in failing to enter specific and detailed Findings on its decision to dismiss Petitioner's action for temporary guardianship**

At p. 9 of their Brief, Petitioners state that the Court was required in this case to "[enter] specific findings indicating those factors which persuade him a guardian is necessary".

Lauretta agrees with that statement. The Court would have been required to enter specific findings, *if it were ordering the appointment of a guardian.*

As noted in *Guardianship of Roe,* supra at 383 Mass. 424-426, this principle (of specific findings when the Court finds a guardian is needed) derives from care and protection cases. In those cases, and as a trade-off for employing the "clear and convincing" standard of proof -- as opposed to the more demanding "beyond a reasonable doubt" standard the additional requirement (i.e., evidentiary protection) is imposed that the trial judge enter detailed and specific findings which permits a more heightened review by appellate courts when the particular child is found in need of care and protection. See also *Petition of the Department of Public Welfare,* 383 Mass. 573, 592-593 (1981) ; ***24** discussion in *Doe v. Sex Offender Registry Board,* 428 Mass. 90, 101-102 (1998).

There is no such requirement of specific findings where the court does not find the child in need of care and protection. Similarly, in the instant case, there is no requirement of specific findings where the judge is dismissing the petition for guardianship. See *Guardianship of Hocker,* supra at 439 Mass. 714, noting that "detailed findings of fact must accompany determination of incompetency".

There is also a policy reason why courts have determined that specific findings are beneficial when appointing a guardian:

> [W]e feel that a conscientious judge, being mindful of the adverse social consequences which might follow an adjudication of mental illness, will subject an individual to guardianship only after carefully considering the evidence and entering specific findings indicating those factors that persuade him that a guardian is needed. (cases cited) (emphasis added).

Guardianship of Roe, supra at 383 Mass. 425.

The same "adverse social consequences" (about declaring someone incompetent by reason of mental illness) obviously do not apply when the decision is to *deny* a guardianship.

***25** There is no requirement of specific findings by the judge in this case, and Petitioners have not provided any legal authority in support of their position.

IV. It was not error to rely on evidence from Lauretta's personal or family lawyers and on her cardiologist when considering the issues before the Court

Of course, the burden was on Petitioners at all times in these proceedings to establish the prerequisites for a temporary guardianship, including Lauretta's incompetence; a burden which was never met. Despite that the burden was on the Petitioners, Lauretta produced substantial evidence that she was in fact competent; including evidence from her two attorneys, her cardiologist, and reports from **Elder** Affairs.

Petitioners challenge the Court's reliance on the observations of two attorneys as to Lauretta's competence [Pet.Br., 16].

Petitioners first rely on *Guardianship of Smith,* supra at 43 Mass.App.Ct. 493. In that case, however, the Court expressly said it was not reaching the issue of the competence of attorneys to present evidence on ***26** the issue at hand. Id. at 500. Further, "the issue at hand" in *Smith* (whether attorneys may not be competent to give opinions about whether certain individuals should be disqualified from serving as guardians because of purported conflict of interest) has absolutely no bearing on the issue in the case at bar. And, as noted below, attorneys are allowed to give their opinion in the specific area of the competence of their client, so long as there is a proper foundation (the attorney met with the client, had discussions with him/her, and made personal observations of the client).

Petitioners also rely on the Paine case in this regard. The only reason evidence from the attorney was rejected in *Paine,* however, was because the basis of the attorney's knowledge was not sufficiently established --he didn't meet with the testator, had not seen him in years, he only talked with him over the phone, and he was unaware that ward had been diagnosed with dementia years earlier. Id., at 820. The Paine case is not a general disqualification of evidence from a personal attorney as to competence. Indeed, by stark contrast it establishes the validity ***27** of the Court's reliance on the observations by the attorneys in the case at bar.

The Court here noted that it had the opinion of two attorneys that Lauretta is competent [T 21, 22, 25][5]. Importantly, the Court sought affirmation that both attorneys had met with Lauretta "extensively" [T 22]. At the hearings, the Petitioners never objected on the basis that attorneys are generically not qualified to give opinions as to the competence of their clients. The Petitioners only noted with specific reference to these two attorneys, that "they also are not geriatric psychiatrists" [T 22]. That does not serve to preserve the issue they argue in their brief.

Furthermore, private attorneys are in fact qualified to give evidence of their client's competence. See *Palmer v. Palmer,* 23 Mass.App.Ct. 245, 251 (1986) (very similar to Jennifer Scuteri's Affidavit in the instant case, the lawyer who prepared the decedent's will in Palmer, after a series of ***28** questions, concluded the decedent had been competent to make a will); *Rempelakis v. Russell,* 65 Mass.App.Ct. 557, 561-562 (2006) (same).

Lastly, Petitioners suggest it was improper to accept the attorneys' opinions unless they sought psychiatric assessment of Lauretta [Pet.Br., 17]. The point here is precisely the opposite. One of the reasons for the Court's acceptance of the statements of the attorneys in the case at bar is that their observations of Lauretta (which were "extensive" [T 22]) did not lead them to conclude that neurological evaluation was necessary (which is also exactly what the Court noted in its acceptance of the reports from Lauretta's cardiologist[6] -- the Court expressly said it was relying on those reports, not because of their conclusions that Lauretta was competent, but because, after seeing her, the cardiologist had no concerns which would warrant referring Lauretta for further evaluation. "that he didn't have any concerns to me that is very probative -- I mean very much of a factor" [T 22]). See and contrast the Paine case, at 814, where a partial basis for determining the ward's incompetence was that the ward's primary care ***29** physician "strongly encouraged [the ward] to followup with the neurologist for additional evaluation"; and at 816, where the attorney testified that if he had been aware of the ward's diagnosis of dementia, he would have requested a medical

consultation on the question of testamentary capacity. The fact that neither of these events occurred in the instant case was properly relied upon by the Court.

Analogy may also be made to the area of diminished capacity to commit a criminal act, or the defendant's competence to waive counsel, where the judge has no obligation for further inquiry or an evidentiary hearing unless the evidence presented raises a "bona fide doubt" as to the defendants competence. *Commonwealth v. Laurore*, supra at 437 Mass. 77-78, 79 (diminished capacity) [7] ; *Commonwealth v. Means*, 454 Mass. 81, 95-96 (2009) (competence to waive counsel); *Commonwealth v. Barnes*, 399 Mass. 385, 389 (1987) (same). See also, *Commonwealth v. Vales*, 360 Mass. 522 (1971), allowing for a hearing as to ***30** defendant's competence because the parties agreed that there is a "substantial question of possible doubt" on that question.

Again, from the *Jackson* case:

> On our review of this record, the petitioners have not sustained their burden of showing that the judge's findings were clearly erroneous, or that his decision that they had not sustained their burden of proof was against the weight of the evidence.

Id. at 774-775.

V. The Court did not err in discrediting the Affidavit of Petitioner's purported expert

As an initial matter, the Court is free to accept or reject the evidence from any witness, including an expert. *Caveney v. Caveney*, 81 Mass.App.Ct. 102, 109 (2012); *Charara v. Yatim*, 78 Mass.App.Ct. 325, 333 (2010).

Furthermore, in this instance, the Court obviously questioned the bias of Dr. Portnoy's opinions when it mentioned Portnoy's "concerns regarding the lawyers and their fiduciary responsibilities here" [T 23]. Portnoy also gratuitously attacked Laurettas cardiologist on the ***31** basis of some purported conflict of interest [see Affidavit at A 39, ¶ ,11].

The potential bias of a witness, expert or otherwise, is a proper concern for the Court. *Commonwealth v. Bishop*, 461 Mass. 586, 598 (2012); *Commonwealth v. Ahearn*, 370 Mass. 283, 286-287 (1976); *Dempsey v. Goldstein Bros. Amusement Co.*, 231 Mass. 461, 464-465 (1919).

And the Court also had some concerns about Dr. Portnoy's qualifications, noting his apparent expertise was in the area of estate planning, "and this isn't a challenge to estate plan, this is a request to have a person medically tested for competence" [T 23]. Although the Court did not expressly say it would have rejected Dr. Portnoy's qualifications, the Court certainly would have been within its discretion to do so. *Adoption of Hugo*, 428 Mass. 219, 234 (1998).

It therefore was not error for the Court to disregard or minimize the evidence from Dr. Portnoy.

Furthermore, even if it was error to disregard Dr. Portnoy's opinions, it was entirely harmless error because there was ample evidence on the other side of ***32** the issue which the judge was free to weigh [8] . He clearly and properly weighed the evidence [9] from Lauretta's attorneys, from her cardiologist, and from **Elder** Affairs heavily against Petitioners' motions.

CONCLUSION

For all of the foregoing reasons, Lauretta requests that this Court affirm the trial court decree in all respects.

COUNSEL'S CERTIFICATION PURSUANT TO MASS.R.A.P. RULE 16(K)

Pursuant to Mass.R.A.P. Rule 16(k), we, Jeffrey Scuteri and Jennifer Scuteri, attorneys for the Appellee herein, do hereby certify that the within ***33** brief complies with the rules of court that pertain to the filing of briefs, including: Mass.R.A.P. 16(a)(6); Mass.R.A.P. 16(e); Mass.R.A.P. 16(f); Mass.R.A.P. 16(h); Mass.R.A.P. 18; Mass.R.A.P. 20.

Footnotes

1 Appointment of a temporary guardian or court referral to an independent medical evaluation.

2 General Laws c. 201, § 5, was repealed by St. 2008, §. 521, § 21, 44; and was replaced by G.L. c. 190B, § 5-204(a), inserted by St. 2008, c. 521, § 9 (the Uniform Probate Code governing guardianship of incapacitated persons).

3 It is suggested here that this assertion "does not rise to the level of adequate appellate argument required by Mass.R.A.P. 16(a) (4)". *Willowdale LLC v. Board of Assessors of Topsfield*, 78 Mass.App.Ct. 767, 772 (2011).

4 No request for evidentiary hearing was made in their Motion for IME or for Temporary Guardianship [A 30-35] and no request was made in the Petition for Temporary Guardian, even in the section asking for any additional relief being sought, which Petitioners left blank [A 20]. Indeed, there was no objection raised when the Court declined to hear directly from one of the Petitioners at the first hearing [T 16]; and, thus being on notice, they still made no oral or written motion that the second hearing be evidentiary.

5 It would appear the Court is referring to the Affidavit of attorney Jennifer Scuteri [A 83], and the statements of attorney Jeffrey Scuteri at the September 27, 2011 hearing ("I am going to present overwhelming evidence right now that this woman is competent") [T 9].

6 See A 92, 94-95.

7 As a possible basis of comparison with the instant case, in the *Laurore* case, at 79, the Court noted that the fact that the defendant had experienced a single episode of emotional distress was not sufficient by itself to raise a "bona fide doubt" as to his competence to stand trial.

8 *See Durbin v. Board of Selectmen of Kingston*, 62 Mass.App.Ct. 1, 10 (2004); *Toney v. Zarynoff's*, 52 Mass.App.Ct. 554, 562 (2001); and Mass.R.Civ.P Rule 61.

9 More precisely, the *lack* of evidence that the attorneys or the doctor found cause to refer Loretta for psychological evaluation.

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