

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: The Guardianship of Marcia S. Clark, :

(Richard Bringardner, Guardian, :

Appellant). :

No. 09AP-871

(Prob. No. 519798)

(ACCELERATED CALENDAR)

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D E C I S I O N

Rendered on December 15, 2009

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*Wiles, Boyle, Burkholder and Bringardner Co., L.P.A., Michael Close and Dale D. Cook*, for appellant Richard Bringardner.

*Morris, Starkey & Waid LLC, and Robert V. Morris, II*, for John Clark and Louise Clark (children of Marcia S. Clark).

*Giorgianni Law LLC, and Paul Giorgianni; Dinsmore & Shohl, LLP, Charles E. Ticknor, III and Nicole M. Loucks*, for appellee Paula Clark.

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APPEAL from the Franklin County Probate Court

TYACK, J.

{¶1} This is an expedited appeal from an entry of the Franklin County Probate Court overruling a motion to quash a subpoena from appellee, Paula Clark. Appellant, Richard D. Bringardner ("Bringardner" or the "guardian"), seeks to prevent the disclosure of documents pertaining to Paula Clark's elderly parents, Dean and Marcia Clark.

{¶2} The case was before this court on an earlier appeal from a decision and entry that granted the motion to quash. *In re Guardianship of Marcia S. Clark*, 10th Dist. No. 09AP-96, 2009-Ohio-3486. In the earlier case, Paula Clark had asked the case manager, Marcia Wool, from Golden Guidance, LLC for:

[a]ny and all documents relating to Dean O. Clark and Marcia S. Clark, including but not limited to:

1. All correspondence, including E-mails and handwritten notes to and from Nursefinders Home Care.
2. All correspondence, including E-mails and handwritten notes to and from Richard D. Bringardner and any personnel from his office.
3. All invoices.
4. All documents regarding doctor, physical therapy, hospital, or other medical treatment.
5. All documents regarding hospice care provided to Dean O. Clark.

{¶3} The guardian objected on the basis that the Health Information Portability and Accountability Act of 1996 ("HIPPA"), protected health information from disclosure. This court resolved the HIPPA issue and remanded the matter to allow the probate court to resolve the guardian's remaining objections to the subpoena.

{¶4} Upon remand, the guardian moved to exclude the documents on the basis of physician-patient privilege. After a brief evidentiary hearing, the probate court denied the guardian's motion to quash. By way of background, the court stated that there had been interference in the past by Paula Clark with the medical care involving her father,

Dean O. Clark.<sup>1</sup> The court also noted that it had already found the guardian to be acting properly in the matters of both Dean and Marcia Clark.

{¶5} Paula Clark argued that the guardian had shared medical information with her on past occasions and that she was authorized to make medical decisions about her mother if the guardian were not present. The probate court was persuaded by the arguments of past waiver, and noted the liberal rules of discovery. Consequently, the court overruled the motion, stating that it did not have a problem letting Paula Clark see the medical records of the agency charged with overseeing Marcia Clark's care.

{¶6} This appeal followed with the guardian asserting the following assignment of error:

The Probate Court erred in overruling the Guardian's motion to quash Paula Clark's subpoena of privileged medical records.

{¶7} A trial court has broad discretion when dealing with discovery issues. In general, discovery orders are reviewed under an abuse of discretion standard. However, the Supreme Court of Ohio has ruled that the question of whether the information is privileged is a question of law that should be reviewed de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶13; *Mason v. Booker*, 10th Dist. No. 09AP-500, 2009-Ohio-6198, ¶16.

{¶8} The State of Ohio does not recognize a common law physician-patient privilege, but the legislature has created a statute governing the privilege. *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464, ¶12; R.C. 2317.02(B). "The party

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<sup>1</sup> Dean O. Clark is now deceased.

claiming the privilege has the burden of proving that the privilege applies to the requested information." *Guisti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, ¶17.

{¶9} In this case, it was the guardian's burden to demonstrate that the privilege applied. *Ward v. Summa Health System*, 9th Dist. No. 24567, 2009-Ohio-4859, ¶14. The guardian does not meet his burden merely by resting on conclusory statements of privilege. An examination of the subpoena shows that while some of the information sought is arguably covered by the physician-patient privilege, other records may or may not be. The guardian did not provide the probate court with sufficient evidence to conclude that the documents are privileged under the statute.

{¶10} At oral argument, counsel for the guardian raised for the first time the issue of an in camera inspection. This court has refused to find error where a trial court did not conduct an in camera inspection, but the appealing party had not requested one. *Booker* at ¶19.

{¶11} Furthermore, the probate court reiterated that the guardian had previously shared medical information with Paula Clark. The sharing of medical information was an explicit waiver of the privilege with respect to that information. R.C. 2317.02(B). Moreover, the April 10, 2007 judgment entry appointing Bringardner as guardian specifically authorizes Paula Clark to make urgent health care decisions if the guardian is not available to make those decisions. We fail to see why Paula Clark should be less informed than the guardian if she is called upon to make an urgent medical decision.

{¶12} The guardian also argued that the documents were not relevant. However, this court instructed the probate court to conduct a new hearing on Paula Clark's motion

to remove Bringardner as guardian if disclosure of the requested information were granted. *In re Guardianship of Marcia S. Clark* at ¶28.

{¶13} This leaves the remaining issue of Paula Clark's past interference with the health care of her parents. The probate court has knowledge of all the parties, and conducted a three-day hearing on the issue. Obviously, the probate court is in the best position to evaluate any potential harm to Paula Clark's mother caused by Paula Clark's interference versus Paula Clark's need for the information. As superior guardian, the probate court did not abuse its discretion in overruling the motion to quash.

{¶14} Based on the foregoing, we overrule the guardian's assignment of error, and affirm the judgment of the probate court. The motion to dismiss this appeal is overruled.

*Motion to dismiss overruled;  
judgment affirmed.*

KLATT and McGRATH, JJ., concur.

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