

***COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION***

O. C. No. 293 of 1999

**Estate of ARTHUR D. LEWIS,
An Incapacitated Person**

Before: BONAVIDACOLA, P. J., LAZARUS, J. and PAWELEC, S.J.

OPINION SUR EXCEPTIONS

PAWELEC, S.J.

This court en banc has before it exceptions to a Decree of Administrative Judge Tucker dated August 16, 1999.

Arthur D. Lewis was born on July 8, 1933, and, has been married twice. He has two children by his first marriage, namely Carol D. Lewis Fleming and Cherie R. Lewis. He married Shirley Smith-Lewis on July 31, 1993. Since May 13, 1998, Mr. Lewis has been residing in the Veterans Administration Nursing Home Facility in Coatesville, Pennsylvania.

On March 24, 1999, Mrs. Smith-Lewis filed a Petition seeking to have her husband declared an incapacitated person, and, to have herself appointed guardian of his person and estate.

By Decree dated May 11, 1999, Administrative Judge Tucker appointed Wallace A. Walker, Esquire, to represent the alleged incapacitated person. See Section 5511 (a) of the Probate, Estates and Fiduciaries Code.

A hearing was held before Administrative Judge Tucker on June 22, 1999. In closing argument, appointed counsel conceded that his client was an incapacitated person, but, opposed the proposed appointment of the client's wife as guardian. Mr. Walker argued that the wife has interests which are adverse to those of her husband. Mr. Walker suggested that the wife had caused confusion as to the husband's assets by commingling his income from pensions and rentals, and, that she had engaged in "self-dealing" in connection with transfers or attempts to transfer the husband's real property at 5721 Woodstock Street, Philadelphia, to her relatives. NT 154 to 157. Mr. Walker called for an accounting by the wife of substantial sums of money which she had received as her husband's attorney-in-fact and "representative payee". Mr. Walker asked for the appointment of a "neutral person" as guardian to call the wife to account. In addition, Mr. Walker suggested that the guardian should investigate a conveyance of the Woodstock Street property to the husband's daughters by Deed recorded July 9, 1997.

By Decree dated August 16, 1999, Administrative Judge Tucker found that Arthur D. Lewis suffers from mild dementia, and, ".....a moderate degree of intellectual impairment with erratic judgment." She further found that Mr. Lewis was partially incapacitated, and, in need of guardianship services. After recounting some of the testimony adduced before her, Administrative Judge Tucker made the following statement:

“Due to the rivalry among family members, no member shall be considered as a guardian for Arthur Lewis.” Decree, page 3. She then appointed Anne S. Maxwell, Esquire, to serve as limited guardian of the person and estate of Mr. Lewis. Finally, in her said Decree, Administrative Judge Tucker declared two instruments to be null and void, to wit: the Deed recorded July 9, 1997, conveying premises 5721 Woodstock Street from Mr. Lewis to his daughters, with a retained life estate in Mr. Lewis, and, a power of attorney which Mr. Lewis executed on October 3, 1993 in favor of his sister-in-law, Dolores Harris.

Shirley Smith-Lewis has filed exceptions to the aforementioned Decree of August 16, 1999. In her exceptions, Mrs. Smith-Lewis argues: that she is a dutiful wife and the only person who regularly tends to the needs of her husband; that the appointed limited guardian cannot tend to the needs of her husband because the guardian is a stranger to her husband, a busy attorney, and, in Philadelphia versus Coatesville; that there is insufficient evidence in the record to support the statement that no family member should be appointed guardian due to rivalry among family members; and, that the appointed limited guardian will not protect the interests of Mrs. Smith-Lewis in her husband’s pension benefits, and, in the marital estate.

No one has excepted to the findings that Arthur D. Lewis is partially incapacitated, and, in need of guardianship services. The only issue raised by the wife’s exceptions is whether or not the hearing Judge

erred in appointing Anne S. Maxwell, Esquire, to serve as limited guardian of Mr.Lewis' person and estate.

The marital relationship of spouses does not, standing alone, constitute an adverse interest such as would preclude the appointment of one spouse as guardian of the estate of the other spouse. Heidtman Estate, 452 Pa. 441 (1973). Speaking in Heidtman, supra, at 445, our Supreme Court made the following statement:

“When a decree of incompetence is entered the incompetent is made a ward of the court appointing the guardian, and his estate is in the custody of that court. ‘Necessarily, therefore, the appointment of guardians for the incompetent is within the sound discretion of the court to which the application has been made; and [the appellate] court will not reverse unless there has been an abuse of discretion.’” (citations omitted)

In disposing of exceptions, this court en banc is, “....performing an essentially appellate function.” In Re Duncan Trust, 480 Pa. 608 (1978).

The scope of our review is set forth in Estate of Dembiec, 321 Pa.SuperiorCt. 515, 519-520 (1983):

“ On appeal, the findings of an Orphans’ Court judge who hears testimony without a jury are entitled to the weight of a jury verdict. *In re: Masciantonio’s Estate*, 396 Pa. 16, 151 A.2d 99 (1959). This rule is particularly applicable to ‘findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony’ *Herwood v. Herwood*, 461 Pa. 322, 336 A.2d 306 (1975). In reviewing the Orphans’ Court’s findings, our task is to ensure that the record is

free from legal error and to determine if the Orphans' Court's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence. *In re: Estate of Damario*, 488 Pa. 434, 412 A.2d 842 (1980). However, we are not limited when we review the legal conclusions that Orphans' Court has derived from those facts. *In re: Ischy Trust*, 490 Pa. 71, 415 A.2d 37 (1980).”

Having reviewed the record in this matter, this court en banc finds no abuse of discretion by Administrative Judge Tucker in her Decree of August 16, 1999.

Arthur D. Lewis is a mildly demented person who is caught in a tug of war between his spouse and his daughters. The record clearly shows that the excepting spouse does have interests which are adverse to those of her husband. Administrative Judge Tucker was fully justified in appointing a “neutral” person as limited guardian. There is no reason to believe that Anne S. Maxwell, Esquire, will not act to protect the interests of the incapacitated person. If Ms. Maxwell fails to perform her duties, she may be removed.

For the foregoing reasons, the exceptions of Shirley Smith-Lewis must be dismissed.

BY THE COURT:

PAWELEC, S.J.

Andre C. Dasent, Esquire
for Exceptant, Shirley Smith-Lewis

Anne S. Maxwell, Esquire
Limited Guardian, pro se