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*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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APR 17 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

In re the Guardianship and Conservatorship )	2 CA-CV 2012-0058
of )	DEPARTMENT A
)	)
CHRISTINE A. COLEMAN. )	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure
)	)

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APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. GC201100296

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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H O W A R D, Chief Judge.

¶1 After a guardianship hearing, the trial court appointed the Pinal County Public Fiduciary (“Public Fiduciary”) as Christine Coleman’s permanent guardian with authority and the directive to place her in an inpatient mental health care facility, including a level one behavioral health facility. On appeal, the Public Fiduciary argues the court erred by ordering Coleman into a level one behavioral health facility in violation of her due process rights, improperly expanding the Public Fiduciary’s duties, improperly considering the Public Fiduciary the entity of last resort, and determining the Public Fiduciary was required to accept additional guardianship responsibilities. Because the statutory requirements for a level one inpatient commitment were not followed, we vacate that portion of the order and remand.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to upholding the guardianship ruling. *See In re Guardianship & Estate of Marriotte*, 127 Ariz. 291, 291, 619 P.2d 1068, 1068 (App. 1980). In November 2011, the Public Fiduciary filed a

guardianship petition seeking to appoint a guardian for Coleman. That petition was supported by the letter of a psychiatric nurse and a physician, who attested Coleman “hears voices [and] . . . takes only part of her medications . . . depend[ing] on what medications she wants to pick out of the cup” and “needs . . . to be taken to [a] hospital for care.” Coleman also had refused to go to a hospital in an ambulance despite having severe respiratory problems and was only able to be transported to the hospital after those problems caused her to lose consciousness. But once at the hospital she was combative and after her discharge she continued to be uncooperative. The nurse believed “[h]er continued refusal to accept medical care . . . could result in circumstances that ultimately . . . lead to her death.”

¶3 After a court-appointed investigator looked into Coleman’s condition, she reported that Coleman was “severely disabled and suffers from schizophrenia, renal failure, [chronic obstructive pulmonary disease], [gastroesophageal reflux disease] and depression,” that she had no understanding of her condition, and that her only relative “refuses to answer mail requests for contact.” The investigator recommended a guardianship as soon as possible, “because without immediate proper medical treatment in crisis situations, Ms. Coleman will continue to reject medical care and may die.”

¶4 The court appointed the Public Fiduciary as the temporary guardian in February 2012, and after a review hearing in March made it the permanent guardian with mental health powers pursuant to A.R.S. § 14-5312.01. It is unclear from the record, but it appears from oral argument at the review hearing and a minute entry from a few days

prior that the court had considered and dismissed a petition under title 36 to force mental health treatment, instead opting to expand the powers of the Public Fiduciary as a guardian under title 14. The court did not see a distinction between the authority vested in the guardian under title 14 and the request for court ordered treatments under title 36. The Public Fiduciary appeals. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(9); 14-1201(21).

### **Due Process and Enlargement of Guardianship Duties**

¶5 The Public Fiduciary argues the trial court erred by ordering Coleman to a level one behavioral health facility without the clear and convincing evidence required by A.R.S. § 14-5312.01(B) or the affidavits of two physicians required by A.R.S. § 36-533(B), and that such action amounted to a violation of Coleman’s right to due process of law under the Arizona and United States Constitutions.<sup>1</sup> The Public Fiduciary also argues the court improperly expanded its duties as a guardian without following the statutory requirements. We resolve cases on non-constitutional grounds if possible, instead determining first if “other principles of law are controlling and the case can be decided without ruling on the constitutional questions.” *Little v. All Phx. S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 101, 919 P.2d 1368, 1372 (App. 1995). Accordingly, we determine first if the court erred by misapplying either § 14-5312.01(B) or § 36-533(B).

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<sup>1</sup>No party argued below that the proffered evidence did not meet the clear and convincing evidence standard. Accordingly, we could consider the issue waived. *See Motzer v. Escalante*, 228 Ariz. 295, ¶ 16, 265 P.3d 1094, 1097 (App. 2011). But Coleman did not argue the issue was waived, and we have the discretion to address the issue in any event. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) (rule of waiver procedural, not jurisdictional).

¶6 We review guardianship orders for an abuse of discretion, a review in which we are cognizant of the trial court’s “wide latitude to perform its statutory duty to safeguard the well-being of the ward.” *See In re Guardianship of Kelly*, 184 Ariz. 514, 518, 910 P.2d 665, 669 (App. 1996). A court abuses its discretion when it “commits legal error in reaching a discretionary conclusion.” *In re Commitment of Jaramillo*, 217 Ariz. 460, ¶ 5, 176 P.3d 28, 30 (App. 2008); *see also* 39 Am. Jur. 2d *Guardian and Ward* § 69 (2012) (appellate court reviews guardianship ruling for reasonableness and support from substantial competent evidence).

¶7 A trial court may expand the powers of a guardian appointed under title 14 to include the ability to consent to place the ward in a level one behavioral health facility upon a showing of clear and convincing evidence that the person is mentally incapacitated and that showing must be supported by the opinion of a mental health expert who is a psychiatrist or a psychologist. § 14-5312.01(B). Because granting the authority to involuntarily commit the ward to a level one behavioral health facility involves the risk of a serious deprivation of liberty, the statutory requirements under the guardianship statutes must be strictly followed. *In re Coconino Cnty. No. MH 1425*, 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995).

¶8 The record does not contain the statute’s requisite opinion from a mental health expert. The report of an uncredentialed investigator, a letter from a physician with no apparent specialty, and a letter from a psychiatric nurse practitioner are not sufficient. The court did request something in writing from a physician to “cover [its] tracks” or

alternatively suggested it could “cut and paste from the . . . infirm attempt to file a Title 36 petition,” but the record does not show the court ever received such evidence, nor would such evidence necessarily meet the required standard. This evidence is neither clear and convincing nor compliant with the statutory requirements.

¶9 We recognize the difficulty facing the trial court. No one disputed that Coleman was disabled and in need of treatment. But the statute requires that a certain standard be met to protect Coleman before admission to a level one behavioral healthcare facility and, when a party challenges whether that standard is met, we are required to enforce it. *See Coconino Cnty. No. MH 1425*, 181 Ariz. at 293, 889 P.2d at 1091. In the absence of the required statutory showing, the trial court abused its discretion both in permitting Coleman to be committed to a level one behavioral health facility and in expanding the powers of the Public Fiduciary to place her there. Accordingly, we vacate that portion of the trial court’s guardianship ruling and remand for an evidentiary hearing on Coleman’s eligibility for treatment in a level one behavioral health facility. Because we vacate this portion of the trial court’s ruling due to its failure to comply with § 14-5312.01, we do not reach the Public Fiduciary’s other statutory or constitutional arguments regarding the ruling.<sup>2</sup> *See Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 528 n.2, 869 P.2d 500, 502 n.2 (1994).

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<sup>2</sup>After we requested amicus briefing on these issues, the Cochise, Yavapai, and Pinal County Attorneys filed briefs. We thoroughly reviewed these briefs in reaching our decision not to address these other issues.

## Conclusion

¶10 For the foregoing reasons, we affirm the portion of the March 2012 order appointing the Public Fiduciary as Coleman's guardian, but vacate the portion committing her to a level one treatment facility and expanding the Public Fiduciary's authority under § 14-5312.01, and remand for proceedings consistent with this decision.

*/s/ Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Peter J. Eckerstrom*

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PETER J. ECKERSTROM, Presiding Judge

*/s/ Michael Miller*

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MICHAEL MILLER, Judge