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NO. 63474-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

IN RE THE GUARDIANSHIP OF JOHN ZANDT,
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, ADULT PROTECTIVE SERVICES

Respondent,

v.

EVANGELINE ZANDT,

Appellant.

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RESPONDENT'S BRIEF

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I. INTRODUCTION

Mrs. Zandt appeals from an order finding her husband John Zandt incapacitated as to his person and estate and appointing a guardian. Respondent DSHS Adult Protective Services requests that this Court affirm the Superior Court order finding Mr. Zandt incapacitated and appointing a guardian.

II. ISSUES

1. Whether the Court properly considered the Medical Report which was prepared and submitted in accordance with RCW 11.88.045(4) and to which neither Mrs. Zandt nor Mr. Zandt filed an objection?

2. Whether the Court properly considered evidence from all sources to make its determination of whether Mr. Zandt was incapacitated as to his person and estate?

3. Whether the Court properly determined that there was no conflict of interest of the appointed guardian and guardian's counsel?

4. Whether the Court appropriately appointed a guardian for Mr. Zandt?

III. COUNTER STATEMENT OF THE CASE

On February 6, 2009, the Attorney General of Washington, on behalf of DSHS Adult Protective Services, filed a Petition for Appointment of Guardian of Person and Estate of John Zandt under King County Superior

Court No. 09-4-00807-5 SEA. CP 1-4. The Petition was filed after an APS investigation revealed that the Court had entered and re-issued vulnerable adult orders of protection against one of Mr. Zandt's long-time friends and Mr. Zandt's wife, Evangeline Zandt. The Court had made a finding that Mr. Zandt did not have the capacity to meaningfully participate in the protection order proceedings, which finding was based on Mr. Zandt's testimony and the recommendation of the GAL in those proceedings. CP 2. Mr. Zandt had recently been described as unable to care for himself due to his dementia. Despite his obvious significant dementia and confusion, Mr. Zandt had taken out a reverse mortgage on his separate property and was unable to recall the transaction or to account for any of the proceeds. CP 2. APS had also received information that Mrs. Zandt told a police detective that she intended to use half of the proceeds of the significant loan on Mr. Zandt's property to purchase real estate out of the country, illustrating that she was aware of the transaction. CP 2.

The hearing on guardianship petition was held on April 15, 2009. The Court considered the GAL's Report, the Medical Reports, the testimony of witnesses, remarks of counsel and the documents filed, including a letter from Dr. Wheeler, and found that Petitioner had met its burden of establishing the statutory bases for imposition of guardianship by clear,

cogent and convincing evidence and appointed a full guardian of the person and estate. CP 327-340; CP 353-505; CP 341-352.

IV. ARGUMENT

A. The Court Did Not Err in Considering Dr. Edwards' Report.

The Court was presented with and considered the written report of Dr. Janice Edwards, which meets all the requirements of RCW 11.88.045(4). CP 341-352. Mr. Zandt did not object to the selection of Dr. Edwards to do the assessment and prepare the Medical Report until after the report was completed. CP 511, lines 7-10. Mr. Zandt referenced Dr. Edwards in his Response/Objection to GAL Report CP 86-101, at 88: “Dr. Edwards saw Mr. Zandt on February 9, shortly after his abrupt admission to the hospital for “other purposes”, not guardianship, and again on February 17, just as he was being discharged to an AFH in Lacey, Washington”; and where he references Dr. Edwards’ CV, her employment at Northwest Hospital and an allegation of her bias based on her employment. CP 89-90. Mr. Zandt appeared to be asking the Court to take these credibility issues into consideration. Mrs. Zandt does not have standing to object to the choice of health care professional selected by the GAL. RCW 11.88.045(4)

Mr. Zandt’s selected medical provider, Dr. Wheeler, did not submit a report that complies with RCW 11.88.045(10). CP 547. The

Court did consider the letter submitted by Dr. Wheeler in making its determination as to Mr. Zandt's incapacity and selection of the guardian. CP 327.

B. The Court Did Not Err in Considering Evidence From Many Sources.

Under RCW 11.88.010(1)(c), the determination of incapacity "is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity." In making this determination, the trial court considers evidence from all sources, not just experts. *Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560, 567 (2008); *In re Guardianship of Stamm v. Crowley*, 121 Wn. App. 830, 841, 91 P.3d 126 (2004). .

It is not error for the court to have considered evidence from all sources, including Ms. Taylor, Dr. Edwards and Dr. Wheeler. The Guardian ad Litem's Reports and the Medical Reports contain clear, cogent and convincing evidence of Mr. Zandt's incapacity and need for a guardian. The court also considered the evidence presented that Mr. Zandt was able to manage his personal and financial affairs without assistance. CP 328, lines 10-13.

C. The Claim of an Improper Conflict is Not Supported by the Record or Legal Authority.

The allegation that the guardian and guardian's counsel have a conflict of interest is not supported by the record or by any legal authority. The courts of appeal have consistently held that they will not consider arguments unsupported by legal authority. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken." *Deheer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The GAL considered the potential for conflict, but her investigation did not reveal a conflict. CP 362, lines 17-26. The trial court considered the GAL Report and was aware of the potential for a conflict, and did not find a conflict. Petitioner cites no authority for its position that there is a conflict which warrants any action by the court.

D. The Court's Finding of Incapacity and Appointment of a Guardian Meets All Relevant Statutory Requirements.

A person is incapacitated as to his person when the superior court determines the individual is at significant risk of personal harm based upon a demonstrated inability to adequately provide for his nutrition,

health, housing, or physical safety. RCW 11.88.010(1)(a). A person is incapacitated as to his estate when the court determines the individual is at significant risk of financial harm based upon a demonstrated inability to manage his or her property or financial affairs. RCW 11.88.010(1)(b). Incapacity is a legal determination based on a demonstration of management insufficiencies over time in the area of person and/or estate. RCW 11.88.010(1)(c). The standard of proof to be applied in a contested case, whether before a jury or the court, shall be that of clear, cogent, and convincing evidence. RCW 11.88.045(3).

Proof by clear, cogent and convincing evidence contains two components: “(1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence; and (2) the burden of persuasion. As to the burden of persuasion, the trier of fact, not the appellate court, must be persuaded that the fact in issue is ‘highly probable.’ *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734-735, 853 P.2d 913 (1993).

In determining whether the evidence meets the clear, cogent and convincing standard of persuasion, the trial court must make credibility determinations and weigh and evaluate the evidence. *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963). It is for the trial court, and not the reviewing court, to determine whether the evidence in a given case meets

the standard of persuasion designated as clear, cogent and convincing. *Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560, 567 (2008).

In making its determination that Mr. Zandt was incapacitated as to his person and estate, and that he was in need of a guardian, the Court considered the written report of the Guardian ad Litem and the Medical/Psychological/ARNP Report, the testimony of witnesses, remarks of counsel, and the documents filed herein, including a letter from Dr. Wheeler. CP 327, lines 22-25.

The legislature has recognized that some people with incapacities cannot fully exercise their rights without the help of a guardian. RCW 11.88.005. The Court is required to explore less restrictive alternatives. The liberty and autonomy of an incapacitated person should be restricted only as necessary through the guardianship process for an individual's own health or safety, or to adequately manage his or her finances. RCW 11.88.005.

The Court considered a less restrictive alternative, but made a specific finding that Mrs. Zandt took proceeds from the loan on the family home and had not provided a full accounting to the court. CP 328-329.

An individual is disqualified from serving as a guardian if he or she: (a) is under the age of 18; (b) is of unsound mind; (c) has been convicted of a felony, or a misdemeanor involving moral turpitude; (d) is a nonresident of

the state who does not have a resident agent; (e) is a corporation not authorized to act as a fiduciary under its bylaws; or (f) is otherwise determined by a court to be unsuitable. RCW 11.88.020(1). Mrs. Zandt, was the respondent in a pending vulnerable adult action at the time of the guardianship hearing. She was unsuitable to be appointed Mr. Zandt's guardian because of her participation in the reverse mortgage and because she did not provide an accounting to the court as ordered. CP 328.

The trial court's ruling on the finding of incapacity and appointment of the guardian is supported by overwhelming evidence as supplied in the GAL and Medical Reports. It did not abuse its discretion in appointing a guardian. "A trial court abuses its discretion if its ruling is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Stated another way, an abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *In re Guardianship of Johnson*, 112 Wn. App. 384, 388, 48 P.3d 1029 (2002).

The best interests of Mr. Zandt required the appointment of a guardian. The court considered evidence from a variety of sources, including a very thorough Guardian ad Litem Report which considered seventeen exhibits, numerous interviews and the careful consideration of who should be appointed Mr. Zandt's guardian. The attachments to the

GAL Report contain medical and psychiatric data regarding Mr. Zandt from three physicians and numerous pages of medical records in addition to the information supplied by Dr. Gillespie and Dr. Edwards.

Mrs. Zandt did not participate in the GAL's initial investigation, despite the GAL attempting contact by phone, cell phone and by mail. CP 359, lines 9-11. The GAL's initial investigation concluded that Mrs. Zandt was either complicit in or was manipulated by another in the financial exploitation of her husband. CP 361, lines 23-26. Mrs. Zandt also was found by the GAL to be complicit in, or was manipulated by, another in concealing Mr. Zandt, to being elusive during the investigation, causing the GAL to have concerns about her future intentions. CP 362, lines 8-13.

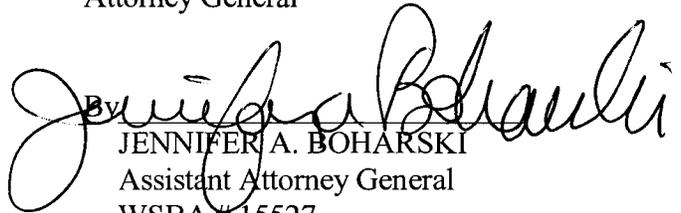
Although Mrs. Zandt later participated in an interview with the GAL, the GAL's recommendations did not change with respect to her suitability to be her husband's guardian. CP 507, 512-515.

V. CONCLUSION

The Department respectfully requests that this Court affirm the ruling of Commissioner Eric Watness finding John Zandt incapacitated as to his person and estate and appointing a full guardian of his person and estate.

RESPECTFULLY SUBMITTED this 4th day of March, 2010.

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In Re the Guardianship of John Zandt,
State of Washington, Department of
Social and Health Services, Adult
Protective Services

DECLARATION OF
SERVICE

STATE OF WASHINGTON,

Respondent,

v.

Evangeline Zandt,

Appellant.

I, Vanessa Valdez, declare as follows:

I am a legal assistant employed by the Washington State Attorney General's Office. On Thursday, March 4, 2010 I sent a copy of: the **Respondent's Brief and Declaration of Service.**

Said copy was sent by US Mail, State Campus Mail, and/or by Legal Messenger, on the 4th day of March, 2010, to: **Henry H. Judson III**, 1218 3rd Avenue, Ste. 512, Seattle, Washington 98101; **Jean Gompf**, 720 3rd Avenue, Ste. 1600, Seattle, Washington 98104; **Timothy Lechner**, 6503 233rd Place South West, Mountlake Terrace, Washington 98043; **Bruce Dillon MacLean**, 5341 Ballard, Washington 98107; **Evangeline Zandt**,

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5963 Rainier Avenue South, Seattle, Washington 98118; and **Care Planning Associates**, 810 Third Avenue, Suite 330, Seattle, Washington, 98104; and **John Scannell**, Attorney at Law, PO Box 3254, Seattle, Washington 98114.

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2010 at Seattle, Washington.



VANESSA VALDEZ
Legal Assistant