

NO. 69450-2-I

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

IN RE THE GUARDIANSHIP OF ROBERT HAMLIN,
STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

RESPONDENT,

V.

AVIS HAMLIN,

APPELLANT.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

- A. Whether this appeal should be dismissed as untimely?**
- B. If not dismissed as untimely, whether the issues presented are moot, in that there is no relief to be given to Avis Hamlin, because the subject of the guardianship is deceased?**
- C. Whether there was sufficient evidence from which the Court could conclude that Avis Hamlin was unsuitable to serve as Robert Hamlin's guardian?**
- D. Whether Avis Hamlin has the right to request a jury trial when Robert Hamlin, the subject of the guardianship, did not wish to exercise his right to trial?**

II. COUNTERSTATEMENT OF THE CASE

Since approximately February 2011, Mr. Hamlin had been in and out of multiple hospitals and other medical care facilities. Adult Protective Services received a referral in August 2011 that Avis Hamlin was neglecting her husband. CP 923. In its investigation of the neglect of Mr. Hamlin by Avis Hamlin, Adult Protective Services found that Mr. Hamlin's health had been declining over the past several months, he required extensive medical care due to frequent falls, and he was not receiving his medications correctly while in Avis Hamlin's care. CP 2. In February, 2011 Mr. Hamlin was hospitalized for altered mental state, a urinary tract infection, Parkinson's disease and dementia. His medical providers concluded that he was not safe at home, in large part because his wife had shown a lack of understanding of his intensive care needs.

Avis Hamlin was also observed at that time to be showing tendencies towards paranoia and memory loss herself. CP 932-933.

Avis Hamlin removed Robert Hamlin from a skilled nursing facility against medical advice in March 2011. CP 925. Mr. Hamlin was hospitalized in May 2011 after Avis Hamlin drove him to the Emergency Room and did not seem to have sufficient insight or judgment into his medical conditions. CP 936. It was clear to hospital staff that Mr. Hamlin did not receive his medications and did not eat much while at home the previous week. CP 936. Mr. Hamlin had severe sepsis and acute renal failure. Surgery was required. CP 936. At critical junctures in his care, Avis Hamlin's insight into the severity and causes of Mr. Hamlin's medical conditions were defined as "questionable," by his medical staff. CP 937. For example, when medical staff were attempting to discuss with her Mr. Hamlin's need for emergency surgery, Avis Hamlin frequently interrupted and redirected the conversation to her own sore throat. CP 937.

Mr. Hamlin was admitted to the Seattle Veteran's Hospital on October 5, 2011, his third admission since August 2011. CP 946. When he was admitted to the hospital, staff observed evidence of Mr. Hamlin eating inappropriate foods at home. CP 946. Mrs. Hamlin thwarted the hospital's attempt to provide Mr. Hamlin home-based care services by declining all services, by becoming paranoid that the nursing staff were

having an affair with Mr. Hamlin, and by refusing to have persons of color in her home. CP 946. Medical staff had attempted to work with Avis Hamlin in coordinating her husband's care to no avail. CP 927, 928, 946.

Mr. Hamlin was seen at Swedish Edmonds Emergency Room on October 4, 2011. CP 930. The ER notes indicate, "He is not being well cared for at home by his wife; ...colostomy bag [was] exploding because it has not been changed in over a month, covered in feces." CP 930. The Department of Social and Health Services, Adult Protective Services' investigation revealed that numerous medical professionals caring for Robert Hamlin raised concerns of Mrs. Hamlin's inability to make decisions for herself and her husband due to her own possible dementia and mental illness. CP 931.

In October, 2011 Adult Protective Services petitioned for a Temporary Vulnerable Adult Order for Protection on Robert Hamlin's behalf to prevent his wife Avis Hamlin from removing him from medical facilities. Adult Protective Services also filed a petition for guardianship for Mr. Hamlin. The final hearing on both the Vulnerable Adult Protection Order and the guardianship petition was held on February 1, 2012. CP 1-5.

The guardianship petition alleged a nine-month history of Avis Hamlin's failed attempts to care for her husband, whose level of complex medical circumstances surpassed her ability to maintain his

safety. Mr. Hamlin's medical professionals expressed concerns about Avis Hamlin's mental competency as it pertained to her decision-making ability about her husband's care. CP 923-931, 933, 936-937, 946. The doctor who prepared the guardianship Medical Report also recited concerns about Mrs. Hamlin's ability to manage her husband's care: "Avis Hamlin (wife) appears to have poor insight into patient's illness and appears to be out of touch of reality." CP 951. The guardian ad litem's investigation also revealed serious concerns about Avis Hamlin's competency and related inability to make safe and reasonable decisions about her husband's care and finances. Based on his meeting with Avis Hamlin, Mr. Hamlin's guardian ad litem concluded that Avis Hamlin either did not understand his medical needs or she lacked the capacity to care for him and handle his finances. CP 964-65.

At the February 1, 2012 hearing, the court issued a five-year Vulnerable Adult Protection Order against Avis Hamlin prohibiting her from removing her husband from any medical facility, based on the evidence that she had previously removed him from medical facilities against medical advice to Mr. Hamlin's detriment. CP 507-508.

Also at the February 1, 2012 hearing the court made the finding of fact that Mr. Hamlin was incapacitated as to his person and estate. CP 337. The guardian ad litem reported that when he interviewed

Mr. Hamlin, he did not have a coherent response to the question of whether he wanted to exercise his right to a trial. CP 1054. Avis Hamlin orally requested a trial at the February 1, 2012 hearing. CP 467. Based on the record which included the evidence of Avis Hamlin's inability to provide her husband's care, her interference with his care as outlined in the declarations of Terri Cox from the Veterans' Hospital, and Heidi Winter, Adult Protective Services Social Worker, the court found that Avis Hamlin did not possess the requisite qualities to be her husband's decision maker. CP 337. The Order Appointing Guardian was signed on February 1, 2012. CP 348. Mr. Hamlin died on February 20, 2012. CP 527.

On February 13, 2012 Avis Hamlin filed a motion for revision of the Order Appointing Guardian. CP 367. The motion was denied as untimely on March 30, 2012.¹ CP 610-12.

On August 21, 2012 a final hearing was held on a Petition for Instructions of the guardian ad litem who was appointed to review Mr. Hamlin's court-appointed guardian's activities and reports. CP 915-916. The result of the August 21, 2013 hearing was the Findings of Fact and Order Discharging Guardian ad Litem, Approving Guardian's First and Final Report, Approving Fees and Costs, and Other Relief and

¹ A motion for revision of a superior court commissioner's decision must be filed within ten days. RCW 2.24.050.

Unblocking Account to Pay Approved Fees. CP 915-20.

Avis Hamlin filed this appeal of the court's August 21, 2012 order on September 20, 2012. CP 913. This order addresses neither Avis Hamlin's request for trial nor the court's consideration of her suitability to serve as her husband's guardian. CP 913-20. Rather, it was the February 1, 2012 order that established the guardianship and considered those issues.

III. ARGUMENT

A. This appeal is untimely and should be dismissed pursuant to RAP 5.2(a).

Under RAP 2.2(a)(7), an order declaring an adult legally incompetent or establishing a guardianship for an adult is appealable as a matter of right. A notice of appeal must be filed within "30 days after the entry of the decision of the trial court that the party filing notice wants reviewed," subject to exceptions that are not relevant here. RAP 5.2(a). In this case, the order of guardianship was entered on February 1, 2012, but Avis Hamlin did not appeal that order until September 20, 2012. It therefore was filed several months late and should be dismissed as untimely.

The August 21, 2012 Order, "Findings of Fact and Order Discharging Guardian ad Litem, Approving Guardian's First and Final

Report, Approving Fees and Costs, and Other Relief and Unblocking Account to Pay Approved Fees,” does not address the issues that Avis Hamlin argues on appeal. Rather, Mrs. Hamlin argues that the guardianship order was erroneous and that she should have been granted a jury trial prior to issuance of that order. Although her third assignment of error is regarding the approval of the guardian’s final report, Avis Hamlin presents no argument in support of the assignment of error. Therefore the court need not consider the issue. “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.” *Deheer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, P.2d 193 (1962).

RAP 5.2(a) required the notice of appeal of the February 1, 2012 Order Appointing Guardian to be filed in the trial court within thirty days. Thirty days from the February 1, 2012 Order was March 2, 2012. A Motion for Revision was filed, but dismissed as untimely on March 30, 2012. She appealed neither the original order establishing the guardianship nor the decision dismissing her motion for revision. Thus, the appeal is untimely and the Department requests that it be dismissed.

Although untimely, if the court wishes to consider Avis Hamlin’s appellate issues, the Department offers the following argument:

B. Because the Court can no longer provide effective relief, the Court should dismiss Mrs. Hamlin's appeal as moot under RAP 18.9(c).

Under RAP 18.9(c) an appeal should be dismissed if the appeal involves only moot questions or abstract propositions. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A case is moot where a court can no longer provide effective relief. *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994), (citing *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). Robert Hamlin died on February 20, 2012. As to the issues of whether Avis Hamlin had a right to trial, and whether she was unsuitable to be appointed as her husband's guardian, the court can no longer provide relief.

In limited circumstances, the appellate court may decide a case despite it being moot if it involves a matter of continuing and substantial public interest. The public interest exception was explained in *In re Detention of Swanson*, 115 Wn.2d 21, 24, 804 P.2d 1 (1990). Under *Swanson*, the public interest mootness exception requires consideration of the following factors: "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *In re Detention of McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984). See also *Westerman v. Cary*, 125 Wn.2d 277,

286-87,892 P.2d 1067 (1994).

Mrs. Hamlin has not identified any justification for the application of the mootness exception. None of the factors for the exception are met. This is a fact-specific case regarding the specific situation between Avis Hamlin and her deceased husband. There is no allegation that future guidance would be needed by public officers in a case such as this. It is unlikely that this question would recur. Mr. Hamlin is deceased, and therefore, there would be no point in the court re-visiting why Mrs. Hamlin is unsuitable to be appointed as his guardian. Likewise, whether there should be a trial on the fact-specific issues in this case does not present a public question and could not change the outcome of the case. This case meets none of the criteria required to justify reviewing it under the public interest exception.

Should the court wish to consider the issues which the Department has argued are moot, the Department offers the following argument:

C. The best interests of Robert Hamlin were served by appointing a certified professional guardian, not Avis Hamlin, as his guardian.

A superior court's factual findings in a contested guardianship proceeding are reviewed to determine whether they are supported by substantial evidence from which a rational trier of fact could find the necessary facts proved by clear, cogent, and convincing evidence.

RCW 11.88.045(3); *In re Guardianship of Stamm*, 121 Wn.App. 830, 842, 91 P.3d 126 (2004); *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999); *In re Guardianship of Atkins*, 57 Wn. App. 771, 775, 790 P.2d 210 (1990). The review of a trial court's decision regarding the admission of evidence is for abuse of discretion. *Stamm*, 121 Wn. App. at 835. The clear, cogent and convincing standard of proof pertains to the issue of the alleged incapacity of the subject of the guardianship. RCW 11.88.045(3).

While there is authority for the proposition that courts should give preference to spouses in appointing a guardian for an incapacitated person; and that a nominated guardian in an alleged incapacitated person's power of attorney should be appointed, those preferences are not without limitation. CP 71, 73; *In re Wood*, 110 Wash. 630, 631, 188 P. 787,788 (1920); RCW 11.88.010(4); RCW 11.94.010. The issue of who should be appointed as the guardian for a person adjudged to be incapacitated remains within the sound discretion of the court. In appointing a guardian, the trial court is called upon to exercise a wide discretion, and the conclusion of the court carries great weight when its action is reviewed before an appellate tribunal. *In re Mignerey*, 11 Wn.2d 42, 49-50, 118 P.2d 440 (1941). When a wife who was, "...[S]omewhat advanced in years, but it is apparent that her faculties are not impaired by age or any

other cause,” the court reviewed the issue of who should be appointed guardian under the abuse of discretion standard. *In re Wood*, 110 Wash. 630, 631, 188 P. 787,788 (1920). The Ex Parte Court Commissioner did not abuse her discretion by not appointing Avis Hamlin as her husband’s guardian because there was good cause not to make that appointment, and Avis Hamlin was not suitable to be her husband’s guardian. RCW 11.88.020(1)(f).

At the February 1, 2012 hearing the court issued a five-year Final Order of Protection against Avis Hamlin because the court found sufficient evidence that she had removed Robert Hamlin against medical advice from a couple of facilities. CP 507. The court found that Mr. Hamlin had severe sepsis, which can be fatal; that Mr. Hamlin had a colostomy, and moderate to severe dementia. “This is not a person who can be safely removed against medical advice from a facility.” CP 507. A person against whom a vulnerable adult protection order is entered should be adjudged as unsuitable to serve as the guardian of the same vulnerable adult that is being protected. The court was presented with many other factors demonstrating Avis Hamlin’s unsuitability to serve as her husband’s guardian. An individual is disqualified from serving as 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 determined by the court to be unsuitable. RCW 11.88.020(1).

The court should consider what would best promote the comfort and welfare of the incompetent as well as preserve the estate. In making its selection the court may consider testimony from anyone who can assist in determining the fitness of the prospective guardian and the best interests of the prospective ward. *Mignerey*, 11 Wn.2d at 46. The evidence presented demonstrated that Avis Hamlin had maintained a fairly consistent antagonistic relationship with Mr. Hamlin's care providers at every level. The Medical Report, the Guardian ad Litem Reports, the Declaration of Heidi Wilson with the attached medical records and the Declaration of Terri Cox, M.S.W., outlined Mrs. Hamlin's own limitations which prevented her from providing appropriate care to, and making appropriate decisions for, her husband.

Appointing Avis Hamlin as his guardian would not have protected Robert Hamlin from harm any more than his appointment of Avis Hamlin as his attorney-in-fact did. As the facts outlined on pages 2-4 above demonstrate, the overwhelming evidence showed that Mrs. Hamlin exercised poor judgment with regard to Mr. Hamlin's care. The guardian

ad litem's testimony and reports presented several factors in support of his recommendation for not appointing Avis Hamlin as her husband's guardian. CP 471-473, 487-490. It was in the best interest of Robert Hamlin that a professional be appointed to serve as his guardian of the person and estate. The court did not abuse its discretion in not appointing Avis Hamlin as Robert Hamlin's guardian.

D. The Court's denial of Avis Hamlin's request for a trial was not error, because Robert Hamlin did not request a trial.

"The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. 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) According to the guardian ad litem, Mr. Hamlin could provide no coherent response to his inquiry whether Mr. Hamlin wished to exercise his right to trial or to the appointment of counsel. At the time she orally requested a trial at the February 1, 2012 hearing, Avis Hamlin was restricted by the court under a Vulnerable Adult Temporary Order of Protection, which prevented Avis Hamlin from removing Robert Hamlin from any medical facility.

The right to a trial by jury is reserved to parties. CR 38(b). In a guardianship case the right to demand a jury trial is exclusively reserved

by statute to the Alleged Incapacitated Person. RCW 11.88.045(3). The long-standing canon of statutory construction, *expressio unius*, the expression of one thing suggests the exclusion of others, indicates that others do not have the right to demand a jury trial. RCW 11.88.045(5) provides for any person to move for relief to protect the Alleged Incapacitated Person from abuse. RCW 11.88.045(3) reserves a jury trial right only to the Alleged Incapacitated Person. If the Legislature had intended for any person to be able to demand a jury trial, subsection (3) would have been worded differently to specify that those persons who may petition under subsection (5) may also request a jury trial. A deliberate intention to treat the two subsections differently is indicated, thus excluding anyone but the Alleged Incapacitated Person from demanding a jury trial.

The court had a right to appoint any suitable and proper person as guardian, having in mind what would best promote the comfort and welfare of the incompetent, as well as preserve the estate. *In re Green*, 132 Wash 627, 629, 232 P.689 (1925). The court did not abuse its discretion in not certifying a case for trial at the request of a person against whom the court made findings in the protection order proceeding, because to have ruled otherwise would not have preserved the estate. Robert Hamlin's estate would have borne the costs of a trial which he did

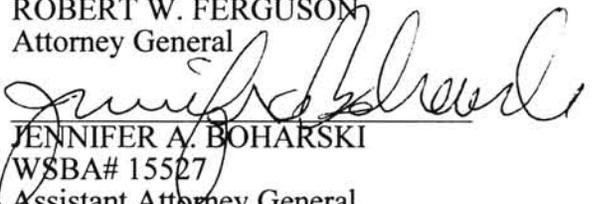
not request. And since Avis Hamlin did not have any right to a jury trial, the superior court's decision denying her request was proper.

IV. CONCLUSION

The Department respectfully requests that this appeal be dismissed because it is untimely. If the court rules that the appeal is not untimely, then the Department respectfully requests that this appeal be dismissed as moot. If the court rules that this appeal is not moot, then the Department respectfully requests that the court affirm the trial court's order because Avis Hamlin was not suitable to be appointed as her husband's guardian based on the restriction placed on her by the Vulnerable Adult Protection Order and other evidence, and because Avis Hamlin was not entitled to a trial where the alleged incapacitated person, Robert Hamlin, did not request a trial.

RESPECTFULLY SUBMITTED this 12th day of September, 2014.

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