

COURT OF APPEALS NO. 69450-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

In re the Guardianship of Robert Hamlin,
State of Washington,
Department of Social and Health Services (DSHS),
Daniel Smerken, Guardian

Respondents,

vs.

Avis Hamlin,

Appellant.

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BRIEF OF RESPONDENT DANIEL SMERKEN

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I. COUNTERSTATEMENT OF THE ISSUES

- A. Whether this appeal is untimely and should be dismissed pursuant to RAP 5.2(a)?
- B. Whether the appeal should be dismissed for Avis Hamlin's failure to cite any facts or authorities to support her Assignment of Error C?

II. COUNTERSTATEMENT OF THE CASE

Respondent Smerken is satisfied with the Counterstatement of the Case as set forth in the Brief of Respondent Department of Social and Health Services.

III. ARGUMENT

A. This appeal is not timely and should be dismissed pursuant to RAP 5.2(a).

Avis Hamlin assigns error to the trial court's oral ruling denying her a trial on her Petition for Appointment as Guardian. She further cites as error the trial court's appointment of someone other than herself as Guardian. Both alleged errors were contained in the court's Order that appointed Daniel Smerken as Guardian of Robert Hamlin entered on February 1, 2012. CP 399-416.

No appeal was taken within 30 days of the February 1, 2012 Order, although Avis Hamlin's Motion of Revision was filed and

dismissed as untimely on March 30, 2012. CP 610-612. RAP 5.2 (a) requires a notice of appeal of the February 1, 2012 Order to be filed "within the longer of (1) 30 days after entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." The current appeal of issues included in the February 1, 2012 Order is untimely and therefore should be dismissed.

B. The Appeal should be dismissed for Avis Hamlin's failure to cite any error by the trial court.

Robert Hamlin died on February 20, 2012. CP 527. In accordance with RCW 11.92.053 and RCW 11.92.040 (2), the Respondent Smerken, in his capacity as Guardian, filed his "First and Final Report of Guardian and Petition for Order Approving Guardian's Activities and Reports." CP 533-587. On August 21, 2012 the trial court entered "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." CP 915-919. Avis Hamlin cites as Assignment of Error C that the trial court was in error in approving this report.

RAP 10.3 (a)(4) requires "a concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." Neither Avis Hamlin's alleged errors A or B, the denial of a trial on Avis Hamlin's petition or her suitability as a Guardian, were addressed in the August 21, 2012 Order. Avis Hamlin assigns no error to any of the eighteen detailed Findings of Fact contained in the August 21, 2012 Order. CP 916-918. She makes no references to any portion of the record on appeal to support her Assignment of Error C. RAP 10.3(g) requires that a separate assignment of error for each finding of fact a party contends was improperly made be included with reference to the finding by number. It is well-established that, if findings of fact are not set forth in the appellant's brief as required by rule, they must be accepted as verities. *Mallicott v. Nelson*, 48 Wn.2d 273, 293 P.2d 404 (1956). Failure to assign error to findings of fact render them verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Avis Hamlin also cites no authority in support of her Assignment of Error C. A party waives an assignment of error not adequately argued in its brief. *Milligan v. Thompson*, 110 Wn.App. 628, 42 P.3d 418 (2002). Assignment of error on appeal is without merit where no reference is made to records, and no authority is cited in support of its contention. *Glazer v.*

Adams, 64 Wn.2d 144, 391 P.2d 195 (1964). If no authority is cited, the Court of Appeals may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405, 36 P.3d 1065 (2001), review denied 146 Wn.2d 1014, 51 P.3d 88.

RAP 10.7(2) authorizes the appellate court to strike an improper brief and to impose sanctions on a party or counsel for a party who files a brief that does not comply with the Rules of Appellate Practice. The court should strike Avis Hamlin's brief and/or impose sanctions.

**C. The Guardian's First and Final Report
Complied with all Statutory Requirements.**

Upon Mr. Hamlin's death, the Guardian was required, pursuant to RCW 11.92.040 (2), to file a final report and seek court approval of same. Mr. Smerken's First and Final Report of Guardian was filed on March 15, 2012. CP 533-587. The Report contained a detailed account of Mr. Hamlin's Care Plan, his medical condition and needs, treatments and last illness. CP 534-537. In addition to identifying the property of the guardianship estate as of the date of the Guardian's appointment, the report also identified additional property received into the guardianship. CP 537-542. The Final Report also contained proposed expenditures the Guardian

recommended, in light of the fact that the period of the guardianship was only 20 days, from the date of appointment, February 1, 2012, to the date of Mr. Hamlin's death, February 20, 2012. CP 542-545.

The Report was approved by the trial court on August 21, 2012. CP 916-918. Avis Hamlin cites no specific error to the August 21, 2012 Order Approving the Guardian's Final Report, except to state that it was the report of an "improperly appointed Guardian." (Brief of Appellant, page 1). As noted above, no timely appeal was filed with respect to the Order of February 1, 2012 that appointed the Guardian.

D. Respondent Should be Awarded His Attorneys' Fees and Costs on Appeal.

RAP 18.1 (a) provides as follows:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RCW 11.96A.150, states in relevant part as follows:

Either the superior court *or any court on appeal* may, in its discretion order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs,

including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. (Emphasis added.)

In this case, the applicable law, RCW 11.96A.150, provides the statutory authority for payment of reasonable attorney fees in this matter. The court may exercise its discretion and consider all factors that it deems relevant and appropriate, which factors may, but need not, include whether the litigation benefited the estate herein.

E. CONCLUSION

For the foregoing reasons, Respondent Smerken requests that this court dismiss this appeal as untimely, for Avis Hamlin's failure to file the requisite appeal notice within 30 days of the February 1, 2012 Order which appointed Daniel Smerken Guardian of Robert Hamlin.

Respondent requests dismissal of this appeal for the failure to assign error to any of the trial court's findings of fact, for failure to cite any alleged error in the record, and because no authority is cited to support any alleged error.

Last, the Respondent requests reasonable attorney fees as authorized by statute for having to respond in this matter.

DECLARATION OF SERVICE

I, JOANNA DAVIS, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 11th day of September, 2014, a copy of the Brief of Respondent Daniel Smerkin was served on the parties designated below as follows:

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SIGNED in Seattle, WA this 11th day of September, 2014.



Joanna Davis