

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NO. 71917-3-I

IN RE THE MARRIAGE OF:

GEORGE LANE,

RESPONDENT,

and

SHARON LANE,

APPELLANT

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**BRIEF OF RESPONDENT JENNIFER J. GILLIAM, LITIGATION  
GUARDIAN AD LITEM FOR APPELLANT (DISCHARGED)**

**RAP 10.3 (b)**

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FILED  
JUN 14 2017  
KJ

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## I. RESTATEMENT OF THE CASE

The parties Sharon Lane and George Lane were married on May 8, 1999, separated on March 29, 2013, and Mr. Lane filed a petition for dissolution of marriage on May 13, 2013. CP 601; CP 1-5. The parties have one minor child, age 13 as of May 13, 2013. CP 1.

On July 9, 2013, at the request of Ms. Lane for a reasonable accommodation pursuant to GR 33 (CP 26), attorney Landon Gibson III was appointed by King County Superior Court Commissioner Carlos Velategui to represent Ms. Lane. CP 6-7; CP 27-29. Mr. Gibson represented Ms. Lane throughout the King County Superior Court proceedings. CP 612; CP 528-547.

On July 26, 2013 Mr. Gibson filed on behalf of Ms. Lane a motion and declaration for temporary relief with a number of requests related to spousal maintenance, termination of a domestic violence protection order entered in a different civil proceeding, approval of a temporary parenting plan, or alternatively, unsupervised visits with the minor and telephone contact with the minor, an award of certain items of personal property and a referral to Family Court Services for an investigation and recommendation concerning a parenting plan. CP 8-29; CP 30-32; CP 33-38.

Also on July 26, 2013, Mr. Gibson filed a motion for appointment of a Title 4 Litigation Guardian ad Litem (hereinafter "LGAL") to investigate and report to the court as to whether Ms. Lane was incapacitated within the meaning of RCW 4.08.060, and whether or not an RCW Title 11 guardianship proceeding was in her best interests. CP 39-40. During the brief time between his appointment and the filing of his petition, Mr. Gibson had three meetings with Ms. Lane and his staff had had a number of communications with Ms. Lane that raised concerns about her capacity to protect her best interests in the dissolution proceeding. CP 39-40. Mr. Gibson could not be specific due to attorney-client privilege.

Mr. Lane responded to Ms. Lane's motion for temporary relief with a lengthy declaration and numerous attachments including police incident reports dating from January, 2013 through May, 2013. CP 44-184; CP 623-633. Mr. Lane also filed a financial declaration. CP 185-190.

A hearing on both motions was held before Court Commissioner Pro-Tem Harry McCarthy on August 16, 2013, in which Ms. Lane participated. CP 203-204. The court entered an order requiring Mr. Lane to pay \$800 per month in spousal

maintenance, continuing the previously entered domestic violence protection order, continuing supervised visitation, requiring a transfer to Family Court Services for a Domestic Violence Report and requiring Mr. Lane to liquidate an investment account, to be deposited into Mr. Gibson's trust account and to be managed by him for the benefit of Ms. Lane. CP 199-202; CP 196-198; CP 203-204.

The court also entered an order appointing attorney Jennifer J. Gilliam as LGAL under RCW 4.08.060 for Ms. Lane, to meet with Ms. Lane, to review the court file in this and in a prior dissolution proceeding and to report back to the court as to whether in the opinion of the LGAL Ms. Lane was "incapacitated" under the meaning of RCW 4.08.060; and further, to report to the court as to whether a guardianship proceeding under RCW 11.88 would be appropriate. CP 207; CP 635 (Appellant included the court's order in its Designation of Clerk's Papers, but it does not appear that the Clerk's Office indexed the actual order, Sub #26A). The LGAL's report was due within 60 days. CP 635.

On September 4, 2013 the LGAL filed her full report under seal. CP 634-641. The LGAL fully disclosed the specifics of her investigation, which included the review of numerous documents,

including an April 17, 2013 Forensic Mental Health Report, numerous police incident reports dated 11/20/12 through 5/7/2013, and clearly identified pleadings. CP 637-638; CP 212-214. The LGAL also disclosed in her report that although she had a lengthy telephone interview with Ms. Lane, logistical issues arose making a personal meeting difficult. CP 638. The LGAL discussed the issue of a personal meeting and the substance of the telephone interview with Ms. Lane's attorney, Mr. Gibson, and it was determined that a personal meeting would not add any significant information or insight into the issue of incapacity under RCW 4.08.060. CP 638; CP 214.

Based on the review of records, the lengthy telephone interview with Ms. Lane, and review of the relevant legal authority concerning the appointment of an LGAL (CP 638) the LGAL concluded that Ms. Lane was in need of a Title 4 GAL. CP 638-639. The issue of whether a guardianship proceeding was in Ms. Lane's best interest was less clear (CP 639-640) and the LGAL recommended that Mr. Gibson discuss with family members who would have personal knowledge of Ms. Lane's demonstrated ability or inability to adequately manage personal and financial matters over a period of time, a possible guardianship petition. CP 639-641.

On September 6, 2013 Mr. Gibson filed a motion and declaration requesting that the LGAL's report be approved. CP 216-217. On October 1, 2013, a hearing was held before King County Superior Court Family Law Commissioner Leonid Ponomarchuk and an order was entered directing attorney Jennifer Gilliam to continue acting as LGAL, who "shall have full authority to act on Ms. Lane's behalf and for her best interest with regard to any issues arising under this litigation, to confer with Ms. Lane's counsel about any such issues, and to provide counsel with authorizations needed to effectuate Ms. Lane's best interests." CP 244. Findings of Fact in support of the order were also entered. CP 243-244. Ms. Lane appeared at the hearing and the order was entered over her objections and after her opportunity to directly address the court. RP 4; RP 5; CP 239. Commissioner Ponomarchuk's order was not appealed. RP 5.

From September 4, 2013 through January 9, 2014, the LGAL spent a total of 17 hours performing her duties as LGAL for Ms. Lane. CP 248. Time spent included extensive communications (primarily e-mail, but also scheduled telephone conferences) with Mr. Gibson ranging from the more routine tasks of authorizing the filing of a

response to the petition for dissolution and confirmation of issues to authorizing the issuance of interrogatories, requests for production of documents, and subpoenas, and reviewing the results of discovery. CP 248-260; CP 530-536. Significant additional time was spent documenting numerous telephone messages (often several in one day) from Ms. Lane and discussing the substance of the calls with Mr. Gibson. CP 248-260; CP 530-536. Mr. Gibson also received extensive telephone communications from Ms. Lane, which were documented by his office and discussed with the LGAL, including Ms. Lane's numerous requests for disbursements from the funds held by Mr. Gibson for her benefit, much of which was authorized. CP 530-536. The LGAL corresponded with Ms. Lane. CP 248-260. Additional time by the LGAL was spent reviewing reports of the visitation supervisor monitoring Ms. Lane's visits with the parties' minor child. CP 248-260. Ms. Lane has never disputed the accuracy of the LGAL's time records for this period.

From January 10, 2014 through April 18, 2014, the LGAL expended an additional 35 hours acting on behalf of Ms. Lane. CP 297. Time spent included authorizing additional discovery by Mr. Gibson and review of discovery, authorizing the obtaining of

appraisals and valuations recommended by Mr. Gibson and reviewing the valuations and appraisals, documenting numerous telephone messages from Ms. Lane and discussing the substance of the messages with Mr. Gibson, participating in the pre-trial conference, reviewing the detailed Family Court Services Report (CP 642-667), reviewing and discussing with Mr. Gibson the draft mediation letter and other materials he prepared on behalf of Ms. Lane, participating in a telephone conference with Ms. Lane and Mr. Gibson, participating in mediation and researching, briefing and bringing to the trial court's attention the very issue on appeal – whether Ms. Lane had a substantial right to a trial that cannot be waived by an LGAL. CP 296-308. Ms. Lane has never disputed the accuracy of the LGAL's time records for this time period.

On January 30, 2014 Ms. Lane filed a motion and set a hearing for February 13, 2014 requesting that the court dismiss both the LGAL and Mr. Gibson as her attorney. CP 265-266. Neither the LGAL or Mr. Gibson filed objections to her request. CP 302-303; CP 537-538. The hearing was stricken, with no explanation, by Ms. Lane. CP 303; CP 538.

Counsel for Appellant has alleged that the LGAL and Mr.

Gibson excluded Ms. Lane from participation in the mandatory mediation, held with King County Court Commissioner Eric Watness (Ret.) on April 3, 2014. Counsel's references to the record (CP 248; 310) are unrelated to Ms. Lane's participation in mediation. The record supports that she did in fact actively participate. Mr. Gibson drafted an extensive mediation/settlement letter/package (CP 542), reviewed by the LGAL (CP 306) and by Ms. Lane (CP 542). Revisions to the settlement package were made following Mr. Gibson's meeting with Ms. Lane (CP 542; CP 306). The LGAL and Mr. Gibson held a telephone conference with Ms. Lane the evening prior to the scheduled mediation (CP 307; CP 544). Due to the confidential nature of mediations, the record does not specifically reflect the fact that Ms. Lane attended the mediation and actively participated. The record does reflect that the day prior to the scheduled mediation, arrangements were made through Mr. Gibson's office to have separate rooms (one for Mr. Gibson and Ms. Lane and a different room for the LGAL). CP 307. Mediation and negotiations were lengthy and lasted most of the day. CP 307; CP 544. A settlement was reached between Mr. Lane, his counsel, and the LGAL. Ms. Lane objected and did not authorize Mr. Gibson to

approve the agreement. There is nothing in the record suggesting that Mr. Gibson independently objected to the agreement or that he recommended to the LGAL that it was not equitable or otherwise not based on known facts and that a better result could be obtained at trial.

It was understood by the LGAL that she may not have authority to enter into a settlement agreement over Ms. Lane's objections and that Ms. Lane's wish to proceed to trial may be a substantial right that the LGAL cannot waive; the LGAL immediately prepared a motion and declaration for order granting relief concerning this threshold issue. CP 283-295. The LGAL's motion included Ms. Lane's position and opposition to an agreement and order that did not include specific provisions. CP 285-286. The motion included the specifics of the agreement, including dollar amounts, to be awarded to Ms. Lane (CP 286-287), and the evidence and factors considered by the LGAL as to all issues included in the agreement. CP 287. The motion provided the legal authority governing the authority and duties of an LGAL and the cases in which a substantial right of the party litigant could not be waived by an LGAL. CP 289-291. The motion also provided the statutory provisions governing spousal

maintenance, parenting plans and equitable division of separate and community property.

On April 18, 2014 a court hearing was held on the LGAL's motion before the Honorable Ronald Kessler, the King County Superior Court judge preassigned to the parties' dissolution matter. RP 1-34. Mr. Gibson, on behalf of Ms. Lane, submitted a lengthy declaration opposing the settlement agreement (CP 309-546) and argued that Ms. Lane had a substantial right to a trial that cannot be waived by the LGAL. RP 6-7. Mr. Gibson did not provide additional legal authority in his response. The LGAL took no position on this issue due to the lack of clarity in the statute and in the case law cited in her motion, and clearly left the decision to Judge Kessler. RP 14. Mr. Gibson also disclosed to the court that there was substantial disagreement between him and Ms. Lane as to the scope of discovery, that he had consulted with both Ms. Lane and the LGAL and exercised his best judgment on that issue. RP 5-6, 8, 10-12. There was extended discussion concerning spousal maintenance and the possible reduction or elimination of public benefits which would result in insufficient monthly income for Ms. Lane. RP 9-10. Although the proposed decrees and orders finalizing the dissolution,

also before the court on April 18, 2014, made spousal maintenance modifiable, Judge Kessler ordered that the reduction or loss of public benefits would be a specific substantial change in circumstances allowing Ms. Lane to immediately move for modification of the spousal maintenance award. RP 17. The Family Court Services report which recommended continued supervised visitation (CP 642-667) was discussed as was Ms. Lane's missed opportunities to more actively participate in the evaluation. RP 7-8. Mr. Gibson told Judge Kessler that if he (Judge Kessler) was inclined to approved the settlement, that both he (Mr. Gibson) and the LGAL had reviewed the pleadings (Decree, Findings, Conclusions and Orders), that Mr. Lane's counsel had made requested changes and that he (Mr. Gibson) was prepared to sign them. RP 12.

Ms. Lane, although arriving late, actively participated in the hearing before Judge Kessler. RP 19-28; RP 29-32; CP 548-549.

Judge Kessler ultimately determined that Ms. Lane's due process rights had been protected by the LGAL and that the LGAL could enter into a settlement agreement and had reasonably exercised her authority to do so. RP 18-19. The form of the order presented to Judge Kessler as prepared by the LGAL required that

he specifically and actively determine whether or not Ms. Lane had a substantial right to proceed to trial, whether or not the LGAL had the authority to enter into a settlement agreement, whether or not the agreement as to financial matters was reasonable, equitable, and consistent with applicable statutes and whether or not the parenting plan was in the best interests of the minor child. CP 612-616. It is this order (among others entered by Judge Kessler on April 18, 2014) that is the subject of this appeal.

## II. ARGUMENT

### A. AUTHORITY AND DUTIES OF THE LGAL

Counsel for Appellant has incorrectly cited and attempted to apply case law in guardianships and in dissimilar civil matters to this case with its unique facts and limited statutory and case law.

The LGAL's investigative duties in this matter were limited to investigating and reporting to the court as to the possible incapacity of Ms. Lane under RCW 4.08.060 in the dissolution proceeding only, as set forth in the court's order of August 16, 2013. The nature of the LGAL's investigation was fully disclosed to the court in her report of September 4, 2013, including the fact that she conducted a telephone interview in lieu of a personal meeting. Mr. Gibson, who brought the motion for approval of the LGAL's report and appointment of an

ongoing LGAL, did not complain of an insufficient investigation. Commissioner Ponamarchuk, at the hearing conducted on October 1, 2013, certainly had the option of continuing the hearing so that a personal meeting could occur or of removing or discharging the LGAL due to an insufficient investigation. Instead, the Commissioner, after hearing argument from Ms. Lane, approved the LGAL's report and appointed an ongoing LGAL. That order was not appealed either through a motion for reconsideration, a motion for revision or to this Court. Appellant's counsel cannot now argue on appeal that the LGAL failed in her investigative duties as set forth in the August 26, 2013 order. *Roller v. Dep't of Labor & Indus.*, 128 Wash.App. 922,927, 117 P.3d 385 (2005); *Malang v. Dep't of Labor & Indus.*, 139 Wash.App. 677, 683-84, 162 P.3d 450 (2007).

Appellant's counsel continuously refers to Ms. Lane as the LGAL's "ward", an anachronistic legal term used in the guardianship context prior to the overhaul of the guardianship statute in 1990, to describe incapacitated persons as defined in RCW 11.88.010(1)(a) and (b). Ms. Lane does not have a guardian and has not been adjudicated incapacitated pursuant to RCW 11.88.010(a) and/or(b). RCW 4.08.060 directs that where there is no guardian for an incapacitated party litigant, as in Ms. Lane's case, a guardian ad litem is to be appointed. The duties of a guardian, set forth

throughout RCW 11.88, RCW 11.92 and RCW 11.93 and associated case law are vastly different from the duties of a Title 4 LGAL as set forth in *In re Marriage of Blakely*, 111 Wash. App. 351, 84 P.2d 1024 (2002). *In re Blakely* at 360 states that the specific duty of the LGAL is to protect the rights of the party litigant in the proceeding before the court. The case of *In re Dill*, 60 Wash. 2d 148, 372 P.2d 541 (1952) holds that the LGAL will have complete statutory authority to represent the party litigant in the proceeding. Further, the court's order of October 1, 2013 specifically authorized the LGAL to have "full authority to act on Ms. Lane's behalf and for her best interest with regard to any issues arising under this litigation, to confer with Ms. Lane's counsel about any such issues, and to provide counsel with authorizations needed to effectuate Ms. Lane's best interests." CP 244.

The lower court record in this matter substantiates that the LGAL did exactly what is required by statute, the *Blakely* and *Dill* cases and the court's order of October 1, 2013. The LGAL worked closely with Ms. Lane's counsel to evaluate the case, determine the scope of discovery, authorized discovery recommended by Mr. Gibson, evaluated the evidence resulting from discovery, considered the concerns and information provided by Ms. Lane to both the LGAL and to Mr. Gibson, engaged in lengthy mediation, negotiated a

settlement that she believed to be in Ms. Lane's best interests based on the evidence obtained through discovery and after considering the costs of proceeding to trial and the likely outcome of trial, brought to the trial court's attention that the LGAL may in fact, not have authority to enter into a settlement agreement without the consent of Ms. Lane and that her request for a trial may very well be a substantial right the LGAL cannot waive, and provided the relevant legal authority for the court's consideration.

There is nothing in the record to suggest that the LGAL did not authorize actions recommended by Mr. Gibson. There is nothing in the record to suggest that she acted in bad faith during mediation (or excluded Ms. Lane from the process) or that Mr. Gibson independently recommended to the LGAL that the ultimate settlement agreement was not in Ms. Lane's best interests or was not well grounded in law, or was not based on evidence obtained through discovery, or that proceeding to trial, with the associated expense, would yield a substantially better result for Ms. Lane. There is nothing in the record to suggest that the LGAL misled the trial court with inadequate briefing on the issue of Ms. Lane's substantial right to proceed to trial.

Indeed, given Mr. Gibson's advocacy on behalf of Ms. Lane as supported by the lower court record, it is reasonable to assume that

had he felt the LGAL was failing in her duties, he would have sought her removal and the appointment of a new LGAL (Mr. Gibson did bring to the court's attention a potential conflict based on a Washington State Bar Association grievance against the LGAL filed by Ms. Lane, initially dismissed without investigation by the WSBA; Ms. Lane appealed the WSBA's decision, which was pending just prior to the scheduled mediation; Judge Kessler declined to discharge the LGAL and declined to continue the mediation; that order was not appealed. CP 270-276; CP 277-280).

Ms. Lane herself had the opportunity to obtain the discharge of the LGAL and Mr. Gibson in February, 2013 when she brought a motion and noted a hearing, to which only Mr. Lane, through his attorney, objected. Ms. Lane did not go forward with her noted hearing.

Appellant's counsel suggests to this Court that although not applicable to LGALs, the Superior Court Guardian ad Litem Rules (GALR) are "instructive". Counsel fails to demonstrate how the LGAL in this matter violated those rules, even if applicable, and the lower court record supports the opposite conclusion.

Ms. Lane's due process and all other rights as a party litigant were fully met and protected by her court appointed counsel and her LGAL from the time of their appointments through the hearing on

April 18, 2014.

#### B. SUBSTANTIAL RIGHTS OF THE PARTY LITIGANT

Counsel for Appellant cites inapplicable case law, again citing guardianship cases and cases in which the attorney for a party litigant (who had full capacity but no knowledge of a proposed settlement) settled a matter without the client's authority.

Relevant case law in Washington State concerning the substantial rights of an incapacitated party litigant represented by both an LGAL and by counsel is sparse and was presented by the LGAL to Judge Kessler for his consideration.

*In re Houts*, 7 Wash. App 476, 499 P.2d 1276 (1971) holds that an LGAL does not have authority to waive the substantial rights of the party litigant. The *Houts* case was a termination of parental rights case in which the attorney for the parents was also their court appointed guardian ad litem (appointed without the ability of the Houts to appear and object) and the attorney/LGAL waived their right to be present during part of the trial and stipulated to the mental illness of Mr. Houts, thus likely influencing the termination outcome. The Court of Appeals reversed and remanded for a new trial based on the failure to comply with due process requirements.

*In re Dill*, 60 Wash. 2d 148, 372 P.2d 541 (1952) was also a termination of parental rights matter in which there was no LGAL

appointed for the mother who was “under a legal disability”. The Supreme Court reversed the termination order for that reason.

A more recent decision in 2011 by the Court of Appeals determined that a meeting in chambers concerning an involuntary medication issue that excluded a defendant in a civil commitment matter but included the defendant’s attorney and the defendant’s LGAL adequately protected the defendant’s due process rights. *In re the Detention of Morgan*, 161 Wn. App. 66 253 P.3d 394 (2011). However, in that case, although the LGAL recommended that the defendant be involuntarily medicated over his objections, the court did not actually issue a ruling, but deferred the issue pending the gathering of more information. That fact seemed important in the court’s ruling.

The LGAL presented the following analysis in her motion of April 10, 2014 (CP 289-291) and her analysis has not changed:

“Whether Ms. Lane’s request for a trial in this matter is a “substantial right” that cannot be waived by an LGAL seems to be an issue of first impression for the court; there does not appear to be any legal authority on point. Arguably, matters that could result in termination of parental rights, a loss of personal freedom (incarceration), or a loss of civil liberties (Title 11 guardianship proceedings) would not and probably should not be settled by

negotiation over the objections of the party litigant, who should have the right to a fact finding hearing. In this case, the issues of the parenting plan and spousal maintenance are potentially modifiable by the court at a later time and are not necessarily final judgments. Property and debt division are final determinations, not modifiable, unless there is later discovered assets that have been concealed (as alleged by Ms. Lane). It might be prudent, at the minimum, to allow Ms. Lane to testify as to her objections to the settlement and to the evidence she plans to provide at trial in support of her position (as set forth on pages three and four herein).”

### III. CONCLUSION

Sharon Lane actively participated in all aspects of her dissolution. Her court appointed attorney consulted with her and took her concerns and allegations into account. The court appointed LGAL communicated regularly with Ms. Lane's attorney, represented her best interests in all respects and ensured that Ms. Lane's due process rights were protected. There is a very real issue to be decided by this Court as to whether the LGAL can enter into a settlement agreement and whether Ms. Lane's request to proceed to trial under the specific circumstances of this matter, regardless of the costs or of the likely outcome, is a substantial right that cannot be waived by the LGAL.

RESPECTFULLY SUBMITTED this 3rd day of January,  
2015.



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**CERTIFICATE OF SERVICE**

I, **JENNIFER J. GILLIAM** certify that on the 3rd day of January, 2015, I arranged for the originals of the preceding Respondent's Brief and Certificate of Service to be filed in Division I of the Court of Appeals and further that a true and correct copy of the foregoing Respondent's Brief was served on the attorney of record for Appellant herein, and to the Attorney for Respondent by hand delivery via United States Postal Service, First Class Mail postage pre-paid, addressed to the following:

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