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Division I
State of Washington

73258-7

No. 73258-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of:

STUART C. RIPPEE, Deceased.

DENISE RIPPEE,
executor of the Estate of Stuart C. Rippee,

Appellant,

and

Laura Burwash,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA BENTON

BRIEF OF APPELLANT

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I. INTRODUCTION

Under RCW 4.08.060, a trial court may appoint a guardian ad litem to represent a party's interests in litigation only if the court makes findings, after considering competent medical evidence, to overcome the presumption that the party has the capacity to understand the lawsuit and to represent her own interests. Whenever the issue of a party's capacity is raised, a hearing on the record is required to allow the parties the opportunity to present evidence.

In this will contest brought by the decedent's daughter Laura Burwash against the executrix and sole beneficiary, surviving spouse Denise Rippee, the trial court appointed a litigation guardian ad litem for Laura Burwash without entering specific findings and based solely on the contradictory and inadmissible testimony of her own counsel. Because the trial court's order impairs the integrity of judicial proceedings, and burdens the parties with additional expenses and delay, Mrs. Rippee appeals.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding "[g]ood cause exists under RCW 4.08.060, to appoint a Title 4 Settlement Guardian ad

Litem to represent Laura Burwash's interests in the Decedent's estate." (FF 1.1, CP 77) (Appendix A)

2. The trial court erred in entering its Order Appointing Title 4 Settlement Guardian Ad Litem For Laura Burwash. (CP 77) (Appendix A)

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. May a trial court appoint a Title 4 guardian ad litem in the absence of competent medical evidence that the represented party is incompetent?

IV. STATEMENT OF THE CASE

A. When Stuart Rippee passed away, he was survived by his wife and his daughter from his first marriage.

The decedent Stuart Rippee's first marriage to Marian Bickford lasted from 1972 until 1985, when they divorced. (CP 5) They had one child together, Laura Burwash, who was born in 1973. (CP 5)

In 1985, Mr. Rippee married respondent Denise Rippee. (CP 6) The couple had no children of their own, but Mr. and Mrs. Rippee supported Ms. Burwash throughout her childhood and adulthood. (CP 8) In 1999, Mr. Rippee was diagnosed with prostate cancer. (CP 8) Mrs. Rippee was her husband's primary caregiver while he was

sick until 2007, when he passed away. (CP 9, 17) Mr. Rippee was survived by Denise and his daughter Laura Burwash. (CP 5)

B. Ms. Burwash has challenged the validity of Stuart Rippee's will, which devised his entire estate to his wife, Mrs. Rippee.

Mr. Rippee signed his will in November 2005, which devised his entire estate to Denise Rippee and left nothing to Laura Burwash. (CP 1) The couple also executed a community property agreement. (CP 29)

In 2008, Ms. Burwash contested the validity of the will, alleging that Mr. Rippee lacked capacity and was under Ms. Rippee's undue influence at the time he executed his will. (CP 14) King County Superior Court Judge Suzanne Barnett granted Mrs. Rippee's motion for summary judgment dismissing the will contest. (CP 31) This Court reversed the summary judgment finding material issues of fact on the issues of testamentary capacity and Denise's undue influence. *Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400 at *5-6.

In 2014, after three years of discovery, Mrs. Rippee again sought summary judgment. Judge Monica Benton ("the trial court") again dismissed Ms. Burwash's petition. (CP 43) This Court again reversed and remanded for trial. *Estate of Rippee*, 181 Wn. App. 1007, 2014 WL 1916782 at *4.

C. The trial court appointed a Title 4 guardian ad litem to represent Ms. Burwash's interests without considering any medical evidence.

During a January 2015 status conference, Ms. Burwash's trial counsel informed the trial court that Ms. Burwash was on hospice, and is "not fully participatory" and "unable to track." (RP 4) But there are "other times when she's talkative and more participatory." (RP 4) Later in the hearing, counsel asserted that Ms. Burwash did "ha[ve] the judgmental ability to track." (RP 6)

In February 2015, Ms. Burwash, through her attorney, petitioned the court for appointment of a Title 4 guardian ad litem to represent her interests in the litigation on the ground that Ms. Burwash is incapacitated due to her multiple sclerosis ("MS"). (CP 47) Ms. Burwash's Motion for Appointment of a guardian was supported only by a declaration from her trial counsel. (CP 46, 84)

The Motion for Appointment of a guardian explained that Ms. Burwash is "somewhat able to track conversation," but unable "to meaningfully represent her interests." (CP 48) These conclusions were based on trial counsel's statement that, on two occasions, it was "difficult...to ascertain that [Ms. Burwash] truly understands the significance of these legal proceedings..." (CP 84) Ms. Burwash could "track what [he] was saying," but was "not able to articulate her

responses in any meaningful way." (CP 84) According to trial counsel, during his two interactions with Ms. Burwash, she was "able to respond in whispered, one-word sentences." (CP 85)

While conceding that Ms. Burwash suffered from MS, Mrs. Rippee opposed the motion on the ground that it was unsupported by competent evidence of Ms. Burwash's mental capacity. (CP 50-56) Mrs. Rippee objected to the statements of Ms. Burwash's counsel as inadmissible speculation, improper expert testimony, and lacking foundation. (CP 57-58)

Without further findings, the trial court concluded that "[g]ood cause exists under RCW 4.08.060, to appoint a Title 4 Settlement Guardian ad Litem to represent Laura Burwash's interests in the Decedent's estate," found that she "lacks the means to pay for the fees of the Guardian ad Litem, and it is equitable that the estate pay the reasonable fees and expenses . . . ." (CP 77-78)

V. ARGUMENT

A. The trial court erred in appointing a Title 4 guardian ad litem in the absence of competent evidence of Ms. Burwash's incapacity.

The trial court abused its discretion in appointing a litigation guardian ad litem under RCW 4.08.060 in the absence of competent medical evidence of Ms. Burwash's incapacity. RCW 4.08.060

governs the trial court's authority to appoint a guardian ad litem to represent "an incapacitated person" in litigation:

> When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian . . . the court shall appoint one to act as guardian ad litem. Said guardian shall be appointed as follows: (1) When the incapacitated person is plaintiff, upon the application of a relative or friend of the incapacitated person . . .

RCW 4.08.060

"[A]n adjudication of incompetency must precede or at least be contemporaneous with the appointment of a guardian ad litem." *Graham v. Graham*, 40 Wn.2d 64, 68, 240 P.2d 564 (1952). The threshold requirement of incapacity must be based on competent evidence. While RCW 4.08.060 "sets out no procedure for appointment of the GAL beyond application requirements . . ., case law provides that whenever the issue of a party's competence to understand the legal proceedings is raised, the trial court should conduct a hearing to determine whether the party is mentally competent or requires a GAL." *Marriage of Blakely*, 111 Wn. App. 351, 358, 44 P.3d 924 (2002), *rev. denied*, 148 Wn.2d 1003 (2003) (citing *Vo v. Pham*, 81 Wn. App. 781, 786, 916 P.2d 462 (1996)). The trial court must be "reasonably convinced that the litigant is not competent to understand the significance of legal proceedings and

the effect of such proceedings on the litigant's best interests." *Marriage of Blakely*, 111 Wn. App. at 358; *see also Graham*, 40 Wn.2d at 66 ("[T]he principle is well established that it is proper and desirable for courts to appoint guardians ad litem for parties litigant when reasonably convinced that a party litigant is not competent . . .").

Our adversary system is based on the principle that each party will advance his or her own interests in litigation and presumes that the parties are competent to do so. Before a trial court may be "reasonably convinced" that a litigant lacks capacity, there must be sufficient, "proper evidence" to overcome the presumption that all litigants are competent. *Vo*, 81 Wn. App. at 784, 791 (citing *Binder v. Binder*, 50 Wn.2d 142, 148, 309 P.2d 1050 (1957)). The observations of one party are not enough to determine mental competency. *Vo*, 81 Wn. App. at 787, 791.

Vo was a quiet title action in which the defendant exhibited bizarre behavior and vocal outbursts during the trial. 81 Wn. App. at 783. The trial court expressed concern about the defendant's capacity, but determined that she was mentally competent without considering any medical evidence. 81 Wn. App. at 787. Following an adverse ruling, the defendant claimed the trial court erred in failing

to appoint a Title 4 guardian. 81 Wn. App. at 784. This Court vacated and remanded the case because "the trial court erred by failing to conduct a hearing to determine whether [the defendant] was mentally competent or required a guardian ad litem." This Court noted "the presumption of competency and the fundamental right of a party to use his or her personal judgment and intelligence in connection with his or her lawsuit . . . ." 81 Wn. App. at 785. However, where a question of competency was raised, the Court held that the trial court was required to conduct a hearing to consider "proper evidence" to determine the defendant's competency. 81 Wn. App. at 791.

Here, the trial court did not consider any "proper evidence" in making its competency determination. In *Vo*, it was improper for the court to rely only on its own observations without entering specific findings to resolve the contested issues of competency. *Vo*, 81 Wn. App. at 787, 791. It is likewise improper here for the trial court to consider only trial counsel's personal opinions and observations, which are insufficient to overcome the presumption that Ms. Burwash is competent and to establish "good cause" to appoint a guardian ad litem. (CP 77, 84)

"Proper evidence" of a litigant's capacity requires that the trial court consider competent and admissible evidence. *See Vo*, 81 Wn. App. at 791; *Marriage of Blakely*, 111 Wn. App. at 359-60. For example, in *Marriage of Blakely*, the trial court properly determined a litigant was mentally incompetent after considering medical experts' testimony and documentation of psychological tests and interviews, which reported the effects of his paranoid schizophrenia and personality disorders. 111 Wn. App. at 354, 359. This extensive medical evidence demonstrated that the party had poor memory, difficulty with abstract concepts, and delusional thought processes. 111 Wn. App. at 359. This Court relied on this evidentiary record in affirming the trial court's finding that the litigant could not understand the significance of the proceedings and in holding that the trial court correctly appointed a litigation guardian. 111 Wn. App. at 356, 358.

Here, the trial court did not consider any medical evidence. There is no testimony from Ms. Burwash's doctors or from medical experts, nor is there any medical documentation that her multiple sclerosis may impact her capacity to understand the lawsuit and to represent her interests. The scant observations of Ms. Burwash's counsel do not constitute competent evidence of a mental or medical

condition. *See* ER 702. Even an expert's conclusory opinions on capacity are inadmissible in the absence of "an adequate scientific basis" or foundation. *See Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177-78, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010 (1992).

Furthermore, the only evidence before the trial court was counsel's own declaration, submitted in violation of RPC 3.7, which prohibits a lawyer from acting as both advocate and witness. The purpose of RPC 3.7 is "to protect the tribunal from prejudice and confusion." *Disciplinary Proceedings Against Pfefer*, 182 Wn.2d 716, 726 ¶13, 344 P.3d 1200 (2015) (internal quotation marks omitted) (citing RPC 3.7 cmt. 3). In order for an attorney to testify to a disputed factual issue, the attorney must "provide material evidence unobtainable elsewhere." *State v. Schmitt*, 124 Wn. App. 662, 666-67, ¶14, 102 P.3d 856 (2004) (citing *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994)).

The trial court erred in considering trial counsel's sworn testimony as the basis for concluding that Ms. Burwash lacked capacity to participate in this litigation. This Court should reverse and remand with instructions for the trial court to consider

competent medical evidence regarding Ms. Burwash's multiple sclerosis and how it affects her capacity to represent her interests.

VI. CONCLUSION

The trial court erred in appointing a litigation guardian ad litem in the absence of specific findings or competent evidence to overcome the presumption that all parties are mentally competent. This Court should reverse the order, or at a minimum, remand to the trial court for consideration of competent evidence to assess the capacity of Ms. Burwash.

Dated this 14th day of September, 2015.

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By:_____
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Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 14, 2015, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail ✓ E-File
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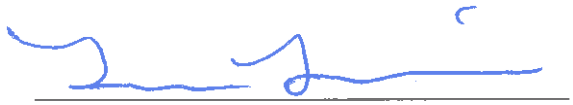
DATED at Seattle, Washington this 14th day of September, 2015.



Tara D. Friesen

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Estate of: STUART RIPPEE, Deceased.	NO. 07-4-04207-2 SEA ~~[PROPOSED]~~ ORDER APPOINTING TITLE 4 SETTLEMENT GUARDIAN AD LITEM FOR LAURA BURWASH

THIS MATTER having come on regularly for hearing upon the Motion to Appoint a Title 4 Settlement Guardian ad Litem filed by Laura Burwash, by and through her attorneys of record, Helsell Fetterman, LLP, and Michael L. Olver; the Court having reviewed the motion and all attachments thereto and the court being fully advised in the premises, the court now enters the following:

I. FINDINGS OF FACT & CONCLUSIONS OF LAW

1.1 Good cause exists under RCW 4.08.060, to appoint a Title 4 Settlement Guardian ad Litem to represent Laura Burwash's interests in the Decedent's estate;

1.2 Timothy Williams, WSBA #26734, is found to be a suitable person who possesses the requisite knowledge, training, and background to adequately represent the interests of Ms. Burwash;

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1.3 Ms. Burwash lacks the means to pay for the fees of the Guardian ad Litem, and it is equitable that the estate pay the reasonable fees and expenses approved by this Court pursuant to RCW 11.96A.150.

II. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

2.1 The Motion is Granted.

2.2 Timothy Williams is hereby appointed litigation Guardian ad Litem, to represent the interests of Ms. Laura Burwash in the estate of the Decedent.

2.3 The Guardian ad Litem shall charge his normal hourly rate of $300 per hour, and payment of the court approved Guardian ad Litem's fees shall be made from assets of the Estate of Stuart Rippee.

Dated March 10, 2015

Judge/Court Commissioner

Presented by:
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