

Court of Appeals No. 32839-9-II

Court of Appeals, Division II of the State of Washington

In re the Marriage of

JOAN HELEN WRIGHT, Appellant,

and

ROBERT DWAYNE WRIGHT, Respondent.

Appellant's Reply to Amended Brief of Respondent

Richard Shepard, WSBA #16194
Co-Counsel for Appellant
818 Yakima Ave., Suite 200
Tacoma, WA 98405-4865

Robin H. Balsam, WSBA #14001
Heather L. Crawford, WSBA #29962
Co-Counsel for Appellant
Attorneys for Guardian
609 Tacoma Avenue South
Tacoma, WA 98402

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY OF THE CASE.....	1
III. ARGUMENT	3
A. Respondent's Citations to the Record.....	3
B. Standards of Review	4
C. Representation of Counsel	4
D. Robert's Knowledge of Joan's Disability	5
E. <i>Res judicata</i> and Collateral Estoppel	8
F. Hearing on Capacity	12
G. Timing of Motion to Vacate: Incapacitated Persons and Minors .	16
H. Judicial Policy Favors Protection of Minors and Incapacitated....	17
I. Collateral Attack on Guardianship Proceedings	19
J. Judge as Witness.....	23
K. Attorney Fees	24
IV. RELIEF	25

TABLE OF AUTHORITIES

Cases

<u>Bordeaux v. Ingersoll Rand Co.</u> , 71 Wn.2d 392, 429 P.2d 207 (1967)	10
<u>Chicago, M. St. P. & P.R. Co. v. Wash. St. Human Rts. Comm.</u> , 87 Wn.2d 802, 557 P.2d 307 (1976).....	24
<u>Flaherty v. Flaherty</u> , 50 Wash.2d 393, 312 P.2d 205 (1957).....	5
<u>Graham v. Graham</u> , 40 Wn.2d 64, 240 P.2d 564 (1952)	14
<u>Haller v. Wallis</u> , 89 Wn.2d 539, 573 P.2d 1302 (1978)	18, 19
<u>In re Dill</u> , 60 Wash.2d 148, 373 P.2d 541 (1962).....	5, 7, 15
<u>In re Estate of Peter</u> , 43 Wn.2d 846, 264 P.2d 1109 (1953)	15, 17
<u>In re Hammermaster</u> , 139 Wn.2d 211, 985 P.2d 924 (1999).....	24
<u>In re Higdon</u> , 30 Wn.2d 546, 192 P.2d 744 (1948)	15, 17
<u>In re Matter of Marriage of Gannon</u> , 104 Wn.2d 121, 702 P.2d 465 (1985).....	25
<u>In re Mignerey</u> , 11 Wn.2d 42, 119 P.2d 440 (1941).....	14
<u>In re the Marriage of Blakely</u> , 111 Wn. App. 351, 44 P.3d 924 (2002).....	8, 12, 13, 15
<u>In re the Marriage of Landry</u> , 103 Wn.2d 807, 669 P.2d 214 (1985).....	18
<u>In re the Matter of Quesnell</u> , 83 Wash.2d 224, 517 P.2d 568 (1974).....	23
<u>Lavigne v Green</u> , 106 Wn.App. 12, 23 P.2d 515 (2001)	4
<u>Maitland v. Zanga</u> , 14 Wash. 92, 44 P. 117 (1896);	23
<u>Potter v. Potter</u> , 35 Wn.2d 788, 215 P.2d 704 (1950).....	14
<u>Shelley v. Elfstrom et al.</u> , 13 Wn. App. 887, 538 P.2d 149 (1975).....	12, 13, 15, 17

<u>Snyder v. Tompkins</u> , 20 Wn. App. 167, 579 P.2d 994 (1978)	18
<u>State ex rel Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	23
<u>U.S. v Choy Kum</u> , 91 F.Supp. 769 (D.C.N.D.Cal.S.D. 1950).....	11
<u>U.S. v. Firman</u> , 98 f.Supp. 944 (D.C.W.D.Pa. 1950)	11
<u>U.S. v. Gas & Oil Dev. Co.</u> , 126 F.Supp. 840, (D.C.W.D.Wa. 1954),	11
<u>Vandercook v. Reece</u> , 120 Wn. App. 647, 86 P.3d 206 (2004).....	23
<u>Tai Vinh Vo v. Pham</u> , 81 Wn. App. 781, 916 P.2d 462 (1996)....	12, 13, 14
<u>Washington v. WWJ Corp.</u> , 138 Wn.2d 595 (1999).....	24

Statutes

CR 24(b)(2).....	10
CR 60(b).....	17
RCW 4.08.060	1, 3
RCW 11.88.010(1)(a), (b), (c)	10
RCW 11.88.040	9
RCW 11.88.090(5).....	20
SPR 98.16W.....	1, 3

Rules

Canon of Judicial Conduct 3(4)	24
RAP 2.5(a)(3).....	24

Treatises

20 Am.Jur. 2d, <u>Courts</u> , §129	11
21 C.J.S., <u>Courts</u>	11

46 Am. Jur. 2d Judges §§ 112-14 (1969)..... 23

I. INTRODUCTION

We are dealing with a very unique set of facts and timing related to an incapacitated person. Analysis and review of this case cannot be accomplished by simply relying on precedent that deals with vacating consent decrees of competent individuals. Joan could not assent to the CR2A Settlement Agreement (“Settlement Agreement”) because she was legally incapacitated at the time of the Settlement Agreement. Statutory procedure related to settlement of claims for incapacitated people were not followed as Joan was not protected by a guardian or guardian ad litem, nor was there a Guardian ad Litem investigation or a hearing to approve the settlement.¹

II. SUMMARY OF THE CASE

Joan Wright suffered a severe and permanent closed head injury on January 16, 2002, in an auto accident that also broke several bones and required hospitalization for a month. Less than a year later, in an application for disability benefits, her husband Robert told the Social Security Administration among other things that she had short-term memory loss and an inability to follow instructions. Every professional examination of Joan corroborated some aspect of Joan’s organic brain damage. In connection with the guardianship action, not appealed here, a

¹ SPR 98.16W, RCW 4.08.060.

guardian ad litem, Virginia Ferguson, investigated Joan's background and concluded Joan was legally incapacitated from the date of the accident. The guardianship court also found and ruled that Joan was legally incapacitated since the date of the accident in 2002.

This case involves combined appeals from entry of a Decree of Dissolution based on a Settlement Agreement and from the lower court's order denying Joan's motion to vacate that Decree after the guardianship order was entered. The core issues on appeal are: (1) whether the order of the guardianship court applies in the dissolution proceedings based on principles of stare decisis (2) whether Joan had the cognitive ability to sign a Settlement Agreement in connection with her divorce, (3) whether Robert had properly disclosed community assets and Joan's incapacity to the trial court, and (4) whether the trial court should have denied the motion to vacate the Decree and Settlement Agreement.

The medical record and guardianship pleadings as well as Robert's own statements clearly demonstrate Joan's incapacity at the time of the Settlement Agreement. The court record also shows Robert failed to disclose material community assets and Joan's incapacity to the trial court. Both non-disclosures were material to the outcome of the case.

Robert's arguments in opposition either lack merit or are unpersuasive. The doctrine of stare decisis applies to the guardianship

court order and the trial court in this case should have followed the order. Joan's representation by counsel does not cure the statutory requirement for a guardian or specialized procedures for an incapacitated person.² The trial judge should have recused herself on the Motions to Vacate sua sponte. Her failure to do so amounts to a due process irregularity that alone justifies reversal.

III. ARGUMENT

A. Respondent's Citations to the Record

In his response brief, Robert has failed to cite to the record for support on some of his factual allegations and in some cases, overstated the facts. In particular, citing to CP 107 on page 8 of Respondent's Brief, Robert alleges that his name was on his mother's accounts merely as an estate and tax planning precaution. That document does not make that factual statement. Citing to CP 647, 652, and 663-663, Robert alleges that Joan was becoming obsessed with the divorce proceedings, when the actual medical conclusion was that Joan was 'stressed.' While these discrepancies may not be dispositive, they do indicate that Robert's version of the case must be viewed with discretion.

² SPR 98.16W, RCW 4.08.060.

B. Standards of Review

In the opening briefs, both parties stated the standard of review for this court to apply is whether the trial court has abused its discretion when denying Joan's motion to vacate.³ However, two separate appeals were consolidated in this case—one from the Decree, which was based on the Settlement Agreement now in dispute, and the second, which was made from the order denying the motion to vacate that Decree.⁴

While an order denying a motion to vacate may be reviewed for an abuse of discretion, an order enforcing a settlement agreement based on affidavits or declarations, such as the Decree of Dissolution here, is in the nature of an order on summary judgment, and is thus reviewed de novo.⁵ The application of a CR2A settlement agreement to a particular set of facts is a question of law that is also reviewed de novo.⁶ Consequently, each appeal is subject to a different standard of review.

C. Representation of Counsel

In trying to dispense with statutory requirements and case law, Robert argues over and over again that an experienced family law attorney represented Joan, so the Settlement Agreement is valid. It does not matter.

³ Appellant's Updated Opening Brief ("Appellant's Brief"), page 12; Amended Brief of Respondent ("Respondent's Brief"), page 18.

⁴ CP 364-416, 592-595.

⁵ Lavigne v Green, 106 Wn.App. 12, 16, 23 P.2d 515 (2001).

⁶ Id.

It appears that the trial court mistakenly relied on the fact that Joan had counsel as satisfying the statutory requirements as well.⁷ Statutory mandates are not satisfied when the person under legal disability is represented by an experienced or inexperienced attorney.⁸ Therefore, the fact that Joan was represented by counsel does not change the issue with regard to capacity to contract.⁹

D. Robert's Knowledge of Joan's Disability

Robert had a duty to disclose his knowledge of Joan's disabilities.¹⁰ Robert's knowledge is clear based on his answers in the SSI benefit questionnaire.¹¹ There, Robert commented on Joan's short-term memory lapse, concentration problems, inability to pay attention, and follow directions. Further, by declaration Robert states that:

I provided the Petitioner with 24hr. [sic] in home care from 1-16-02, the date of her auto accident, until 6-23-03....I cooked, cleaned, and carried her to the restroom and bath when necessary because she could hardly walk and required total care. I tended her for 18 straight months...CP 481, lines 12-15.

This statement proves Robert's knowledge of Joan's disability. If he had to provide her with twenty-four hour care, her injuries were very

⁷ VR, July 14, 2006, page 18, line 18-20 'dissolution attorney with many years experience'; page 19, line 17 'competent counsel'.

⁸ Appellant's Brief, page 28. Flaherty v. Flaherty, 50 Wash.2d 393, 397, 312 P.2d 205 (1957).

⁹ See In re Dill, 60 Wash.2d 148, 373 P.2d 541 (1962).

¹⁰ Flaherty, 50 Wash.2d at 397. Appellant's Brief, pages 26-29.

¹¹ Detail of those answers was set out in Appellant's Brief, pages 5-6 and CP 441-445.

serious. Taken together with Robert's statements in the questionnaire, the medical reports, guardian ad litem report and the order adjudicating Joan incapacitated by the car accident, those injuries extended to Joan's mental competency. Plainly, Robert was aware of Joan's limitations despite his attempts to pass her problems off on drinking.

Robert's defense is that this issue was not raised at the trial court level; that restraining orders prevented him from having contact with Joan; that Joan was no stranger to the trials and tribulation of separation and divorce because this was her third marriage; that he has no medical background; and that he did not know he was filling out the document under penalty of perjury.¹² These arguments lack merit.

The disclosure issue was raised multiples times on the motion to vacate: (1) Declaration of Robin H. Balsam...;¹³ (2) Exhibit B to the declaration was the questionnaire;¹⁴ (3) Memorandum of Law in Support of Petitioner's Motion to Vacate Decree of Dissolution;¹⁵ and (4) at the hearing on the motion to vacate.¹⁶ In addition, Robert's declaration in response to the motion to vacate addresses the questionnaire. CP 488.

¹² Respondent's Brief, pages 34-39.

¹³ CP 434, line 16-CP 435, line 2.

¹⁴ CP 441-445.

¹⁵ CP 461, line 1-CP 462, line 10.

¹⁶ VR, July 14, 2006, page 5, lines 11-22.

The record is replete with argument regarding Robert's knowledge of Joan's disability.

Moreover, Joan's domestic history does not relieve Robert of his duty to disclose his knowledge of Joan's disability.¹⁷ 'Experience' does not eliminate mandatory statutory procedure regarding incapacitated people. The fact that Joan was divorced previously is not relevant.

On one hand, Robert uses his lack of medical background as a defense to his duty to disclose; however, he also urges the court to adopt his personal opinion that Joan was not incapacitated. Similarly, he tries to use restraining orders as a defense, even though he admits providing Joan with twenty-four hour care.

Robert's non-disclosure was obviously self-serving. His failure to disclose Joan's lack of capacity to the trial court so the trial court could take appropriate protective action renders the Decree, conclusions of law, findings of fact, and Settlement Agreement void.¹⁸ Had Robert disclosed his knowledge of Joan's disability, the procedural process of this case would be different.

Similarly, the issue of vacating the decree as a void order was raised in the trial court. CR 60(b)(5) was raised in the Memorandum of Law in Support of Petitioner's Motion to Vacate...as a basis for voiding

¹⁷ Joan objects to Robert bringing this up on appeal without citation to authority.

¹⁸ See In re Dill, 60 Wash.2d 148, 373 P.2d 541 (1962).

the decree because Joan was not afforded due process since no guardian ad litem was appointed. CP 463. Interestingly, Robert did not respond to it in his response to the motion to vacate and argues that Joan did not raise it.

Regardless of Robert's failure to disclose and admission that he provided twenty-four hour care, his comments in the questionnaire further support Joan's incapacity, and the court's abuse of discretion in not vacating the decree. At the very least, the court abused its discretion by not having an evidentiary hearing regarding Joan's capacity.¹⁹

E. Res judicata and Collateral Estoppel

Robert alleges for the first time in Respondent's Brief that Joan is attempting to apply principles of *res judicata* and collateral estoppel to bar his claim that she had capacity to enter into the Settlement Agreement.²⁰

Contrary to Robert's assumption, Joan and her Guardian do not claim the twin preclusion doctrines, *res judicata* and collateral estoppel, prevent Robert from arguing Joan was competent to sign the Settlement Agreement. Robert also argues erroneously that he was not notified and had no standing to intervene in the guardianship. Further, he states that

¹⁹ See In re the Marriage of Blakely, 111 Wn. App. 351, 44 P.3d 924 (2002).

²⁰ Respondent's Brief, page 11-13. Respondent did not make any arguments relating to collateral estoppel and *res judicata* in respondent's memorandum of law in response to the motion to vacate and the transcript of hearing. For purposes of accuracy, the word 'collateral' is found in the trial court record in a quote from a case at CP 507 and on page 16 of Respondent's Brief, but respondent is not using that reference for purposes of making a collateral estoppel argument.

the issue of Joan's legal capacity to contract was not litigated in the guardianship proceeding.

First, Robert had knowledge of the guardianship proceedings.²¹ The Motion to Stay Proceedings in This [appellate] Court Pending Disposition of Guardianship Petition was signed by appellate counsel on September 28, 2005 and a copy was served on Robert's counsel.²² That motion detailed the reason for the motion to stay: '[t]he capacity (or lack thereof) of Joan to execute the Settlement Agreement on which the final decree in this case was entered has not been addressed below....'²³

The order adjudicating Joan incapacitated was not entered until October 31, 2005.²⁴ Robert could have filed a response to the petition for guardianship, but did not. He could have objected to the stay in the appellate court, but did not. Robert had over a month to respond.

The underlying basis for the guardianship petition was the very same head injury that provided the basis for her SSI benefits. It was obviously foreseeable to Robert that the guardianship court would have addressed questions as to whether Joan lacked the legal capacity to enter into any sort of contract or settlement agreement at any time after her head

²¹ Notice was not required to Robert. RCW 11.88.040.

²² Appellate pleading file, Motion to Stay Proceedings...filed approximately September 28, 2005.

²³ Motion to Stay Proceedings in this Court...page 4.

²⁴ CP 666.

injury. Here, he attempts to turn his failure to intervene in the guardianship proceeding into an advantage.

Second, CR 24(b)(2) specifically allows intervention “When an applicants claim or defense and the main action have a question of law or fact in common.”²⁵ Thus, Robert knew about and could have requested leave to intervene in the guardianship proceeding if he had so desired.

Third, Robert argues that Joan’s ability to contract was not litigated in the guardianship. By statute, the Superior Courts have been granted the authority to determine whether someone is incapacitated and appoint guardians for incapacitated persons.²⁶ A determination of incapacity is a legal not a medical decision.²⁷

The preclusion doctrines raised by Robert are equitable doctrines designed to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts."²⁸ Robert is correct to say that those concerns do not apply here. However, Robert incorrectly argues that Joan is attempting to use preclusion against him.

Instead, Joan and her Guardian argue that the court hearing the dissolution should have followed the precedent established by the guardianship court.

²⁵ CR 24(b)(2).

²⁶ RCW 11.88.010(1)(a) and (b).

²⁷ RCW 11.88.010(c).

²⁸ Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 395, 429 P.2d 207 (1967).

Upon the settled rule of stare decisis, in the absence of cogent reasons for departing therefrom, a prior ruling of the court controls the disposition of a subsequent motion thereon....Judges of coordinate jurisdiction should not ordinarily overrule the decisions of their associates based on the same set of facts, unless required by higher authority.²⁹

The contrary proposition advocated by Robert to this court—the same individual, over the same period of time, may be declared incapacitated for the purposes of one legal proceeding and legally capable for the purposes of another proceeding—is absurd and runs directly counter to the core objectives of the judicial process, i.e., evenhandedness, predictability and consistency.³⁰

Setting aside Robert’s strategic decision to avoid the guardianship proceeding and thus the doctrines of preclusion, the final order of the guardianship judge has the effect of stare decisis and the judge in the dissolution proceeding should have followed it. “Decisions of coordinate courts, while not binding, will ordinarily be followed unless clearly erroneous.”³¹ Otherwise, guardianship orders in general are meaningless.

Here the dissolution court never questioned the findings and conclusions of the guardianship court or the correctness of its order

²⁹ U.S. v. Gas & Oil Dev. Co., 126 F.Supp. 840, 843-844 (D.C.W.D.Wa. 1954), vacated on other grounds, 233 F.2d 871 (9th Cir. 1955) (citing U.S. v. Firman, 98 F.Supp. 944 (D.C.W.D.Pa. 1951) & ²⁹ U.S. v Choy Kum, 91 F.Supp. 769, 770 (D.C.N.D.Cal.S.D. 1950).

³⁰ 20 Am.Jur. 2d, Courts, §129, p. 510.

³¹ 21 C.J.S., Courts, § 153, p. 189.

establishing guardianship. Neither has Robert suggested to the dissolution court or to this court that the guardianship order was clearly erroneous. Rather, Robert has argued that the dissolution court did not abuse its discretion, when in fact the dissolution court had abused its discretion; by drawing upon its own experiences with Joan at the settlement conference, and not relying upon the findings and conclusions of the guardianship court in order to reach its conclusions.³²

F. Hearing on Capacity

Once Joan's adjudicated incapacity was brought to the trial court's attention, it was an abuse of discretion for the trial court to deny the motion to vacate thereby deciding Joan had the capacity to enter into the Settlement Agreement with a hearing in line with In re the Marriage of Blakely, Tai Vinh Vo v. Pham, and Shelley v. Elfstrom et al.³³

Robert further argues that the logical extension of the *res judicata* and collateral estoppel arguments is that not only would the Decree and stipulation need to be vacated, but that the underlying dissolution itself needs to be dismissed as no guardian ad litem was appointed to prosecute the case at the initial hearing.³⁴ This is incorrect.

³² VR, July 14, 2006, page 18, line 15-page 20, line 1.

³³ See In re the Marriage of Blakely, 111 Wn. App. 351, 44 P.3d 924 (2002); Tai Vinh Vo v. Pham, 81 Wn. App. 781, 916 P.2d 462 (1996); Shelley v. Elfstrom et al, 13 Wn. App. 887, 538 P.2d 149 (1975).

³⁴ Respondent's Brief, page 12.

Appointment of a guardian ad litem is not a jurisdictional requirement.³⁵ An action commenced by an incompetent not having a guardian should not be dismissed, but merely delayed until a guardian or guardian ad litem is appointed.³⁶ In re the Marriage of Blakely outlines the procedure for the appointment of a Guardian ad Litem under RCW 4.08.060.³⁷

...The GAL appointed under RCW 4.08.060 is appointed WHENEVER an incapacitated person is a party to litigation in superior court...The statute sets out no application requirements...³⁸

However, 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.³⁹

The court goes on to describe the mandatory hearing: this hearing must allow the alleged incapacitated person the opportunity to present evidence on the question of mental capacity.⁴⁰ The court properly appoints a guardian ad litem for a litigant party when the court is reasonably convinced that the litigant is not competent to understand the

³⁵ Shelley, 13 Wn. App. at 888.

³⁶ See e.g., Shelley v. Elstrom et al, 13 Wn. App. 887, 538 P.2d 149 (1975).

³⁷ See In re the Marriage of Blakely, 111 Wn. App. 351, 44 P.3d 924 (2002).

³⁸ Blakely, 111 Wn. App. at 358 (citing Tai Vinh Vo v. Pham, 81 Wn. App. at 786) (emphasis added).

³⁹ Id. (emphasis added).

⁴⁰ Id.

significance of legal proceedings and the effect of such proceedings on the litigant's best interests.⁴¹

In Tai Vinh Vo v. Pham, Division One of the Court of Appeals vacated a judgment, decree and remanded for further proceedings when it appeared on the record the defendant had multiple personalities and outbursts in court.⁴² There, although the trial court briefly addressed the issue of appointment of a guardian ad litem on the record, it proceeded to enter a judgment absent a hearing on the issue of mental competency.⁴³

Luckily, in the Tai Vinh Vo matter, the appellate court had a transcript of the trial court proceeding; however, here, the appellate court does not have a transcript of the settlement conference. Nonetheless, when dealing with matters related to incapacitated persons, an appellate court will act sua sponte to protect the apparent interests of a ward (incapacitated person).⁴⁴ "The welfare of incompetent persons and the care of their property are objects of particular care and attention on the part of the courts."⁴⁵

⁴¹ Id. (citing Graham v. Graham, 40 Wn.2d 64, 68, 240 P.2d 564 (1952)). The court's determination of the need for a GAL under RCW 4.08.060 is reviewed for abuse of discretion. Id. (citation omitted).

⁴² Tai Vinh Vo, 81 Wn. App. at 784–790.

⁴³ Id. at 791.

⁴⁴ Id. at 889.

⁴⁵ Id. (quoting In re Mignerey, 11 Wn.2d 42, 49, 119 P.2d 440 (1941)); Potter v. Potter, 35 Wn.2d 788, 215 P.2d 704 (1950).

RCW 4.08.060 is a mandatory statute.⁴⁶ The statutory requirement is not met “when the person under a legal disability is represented by an attorney.”⁴⁷ If a person is legally disabled and a guardian ad litem is not appointed, the court will find reversible error.⁴⁸

A person adjudicated incompetent is presumed to continue in that status. The burden of overcoming the presumption is upon the person asserting competency.⁴⁹

Here, the evidence of Joan’s incapacity is more than would normally be put forth for purposes of appointing a guardian ad litem under Blakely.⁵⁰ Although the record lacks a transcription of the settlement conference proceedings, the record not only contains the conclusions of medical providers and the guardian ad litem that Joan was not able to assist her counsel at the settlement conference, was incapacitated at the time of the settlement conference but also the order adjudicating her legally incapacitated at the time of the settlement conference.

During the settlement conference, Joan did not understand what was taking place and did not have the cognitive ability to process the multitude of information.⁵¹ By the time Joan arrived at the settlement

⁴⁶ See In re Dill, 60 Wn.2d 148 (1962).

⁴⁷ Dill, 371 P.2d at 543.

⁴⁸ Id.

⁴⁹ Shelley, 13 Wn. App. at 889, (citing In re Estate of Peter, 43 Wn.2d 846, 264 P.2d 1109 (1953); In re Higdon, 30 Wn.2d 546, 192 P.2d 744 (1948)).

⁵⁰ See In re the Marriage of Blakely, 111 Wn. App. 351, 44 P.3d 924 (2002).

⁵¹ CP 424-431, CP 663-665.

conference, she was already in a state of distress and panic, which exacerbated her cognitive limitations. CP 664-665. According to Marcialyn McCarthy, MAEd, as anxiety levels in head-injured people rise, coping is reduced and brain processing is slowed. CP 665. Additionally, Joan suffers from hearing loss, which further inhibited her ability to comprehend the information at the settlement conference. CP 665.

Robert contends that the record before the trial court, in support of the motion to vacate does not elaborate within the legal evidentiary standard of “within a reasonable medical probability” how the injuries she sustained incapacitated her from entering into the settlement of her divorce case two and one half years later.⁵² Robert cites no authority for applying this standard and it is not applicable to guardianship or the context of review of capacity to contract.

The bottom line is that it was an abuse of discretion for the court to deny the motion to vacate thereby concluding that Joan was competent at the settlement conference. Based on the record, no reasonable person would have arrived at this conclusion.

G. Timing of Motion to Vacate: Incapacitated Persons and Minors

Robert’s contention that Joan’s motion to vacate was time-barred

⁵² Respondent’s Brief, page 30.

under CR 60(b) lacks merit.⁵³ CR 60 addresses timing of motions to vacate judgments involving minors and persons of unsound mind:

If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases.⁵⁴

Joan's disability continues. The motion to vacate was timely. Joan's incapacity started January 16, 2002. CP 670. A person adjudicated incompetent is presumed to continue in that status.⁵⁵ The order adjudicated Joan incapacitated has not been modified. The motion to vacate was filed June 22, 2006.⁵⁶ CR 60 gives a person of unsound, ie. an incapacitated person, one year to bring a motion to vacate a judgment following the removal of the disability.

H. Judicial Policy Favors Protection of Minors and Incapacitated

Robert also argues that judicial policy favors finality of decrees.⁵⁷ However, he fails to acknowledge the overriding policy of protecting minors and incapacitated persons.

There has not been any detrimental reliance on the stipulation by Robert. He continues to live in the family home, run the catering business

⁵³ Respondent's Brief, page 25.

⁵⁴ CR 60(b) (emphasis added).

⁵⁵ Shelley, 13 Wn. App. at 889, (citing In re Estate of Peter, 43 Wn.2d 846, 264 P.2d 1109 (1953); In re Higdon, 30 Wn.2d 546, 192 P.2d 744 (1948)). The burden of overcoming the presumption is upon the person asserting competency. Id.

⁵⁶ CP 423, 433, 446-447. 473.

⁵⁷ Amended Brief of Respondent, pages 13-15.

he and Joan built, is not paying his incapacitated wife any maintenance, and has access to whatever funds he stashed away. On the other hand, Joan is living on social security in state-funded housing, and permanently disabled.

In support of his arguments regarding the finality of consent decrees, Robert cites to cases involving consent decrees between to competent individuals.⁵⁸ That authority does not apply here because Joan lacked the ability to give consent to the Settlement Agreement since she was incapacitated.

Specifically, the Landry case is inapplicable because it deals with challenges to a distribution of property (pension benefits) in a dissolution decree.⁵⁹ Both parties had capacity and the issues all related to how the court apportioned the military pension of the husband.⁶⁰ Robert's cite to a quote from Landry is inapposite. Similarly, the citation to Snyder v. Tompkins is inapplicable as there were no issues of incapacity.⁶¹

Robert also cites to Haller v. Wallis for support on the issue of finality of decrees and the standard for vacating consent judgments.⁶² Haller involves the settlement of claims for an incapacitated minor and the

⁵⁸ For detailed analysis of this issue, see Appellant's Brief, pages 19-26.

⁵⁹ See In re the Marriage of Landry, 103 Wn.2d 807, 669 P.2d 214 (1985).

⁶⁰ Landry, 103 Wn.2d at 809.

⁶¹ Snyder v. Tompkins, 20 Wn. App. 167, 579 P.2d 994 (1978).

⁶² Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978).

guardian ad litem's refusal to sign a release.⁶³ Interestingly, in settling the claim for the minor the court both appointed a guardian ad litem and the attorneys petitioned the court for approval of the settlement.⁶⁴

In sum, the issue of 'consent' is disposed of with the fact that Joan could not consent because she lacked the mental capacity.⁶⁵ Her incapacity at the time of the Settlement Agreement vitiated her ability to assent to any contract.

I. Collateral Attack on Guardianship Proceedings

Robert also attempts to defend his conclusion that Joan had capacity on the day of the Settlement Agreement by challenging the credentials of the medical providers and guardian ad litem involved in the guardianship proceeding.⁶⁶

Specifically, Robert's alleges that the report of guardian ad litem Virginia Ferguson was submitted to the court by someone who is not competent to diagnose medical or psychological conditions. This misses the point that the guardian ad litem is charged with the duty of making a recommendation to the court based on their investigation.⁶⁷ Guardians ad

⁶³ Id. at 542.

⁶⁴ The settlement was only \$1,000 as liability was difficult if not impossible to prove. Haller, 89 Wn.2d at 540.

⁶⁵ For detailed analysis of this issue, see Appellant's Brief, pages 19-26.

⁶⁶ Respondent's Brief, pages 25-32.

⁶⁷ RCW 11.88.090(5).

litem do not make medical diagnoses. Robert's argument that the guardian ad litem was not a doctor is a red herring.

Robert questions the veracity of Ms. Balsam's opinion in her declaration as to Joan's capacity.⁶⁸ The declaration was not submitted as a medical diagnosis, but merely to provide the trial court with additional evidence from a person who had contact with Joan and was experienced in working with incapacitated persons. CP 432-445. On one hand Robert alleges the presumption that family law attorney Josephson would have recognized Joan's impairments while challenging the conclusions of Dr. Brzezinski-Stein and Marcilyn McCarthy.

There was no irregularity in the guardianship process. The record amply supports the conclusion that Joan's incapacity is the result of the January 2002 car accident. The investigation of the guardian ad litem and doctor's reports made part of the clerk's papers should not be overlooked.

Dr. Wanwig, a specialist in psychiatry and internal medicine, prepared the statutory medical report for the guardianship court. CP 631-633. He noted Joan's mental disorders are organic and unlikely to improve, and that she needs help interpreting legal papers. CP 632. Marcialyn McCarthy's assessment was that Joan did not have a chance to understand what was being asked of her, and was unable to comprehend

⁶⁸ Respondent's Brief, page 28.

the meaning of her act of signing papers. CP 665. Further, she felt that even though Joan's attorney may have gone over the settlement with Joan, it was quite conceivable that under pressure Joan would have been at a total loss to understand the full significance of the events. CP 665.

During her investigation, guardian ad litem Virginia Ferguson telephonically interviewed licensed mental health counselor and certified domestic violence treatment provider, Lori Harrison. CP 619. After working with Joan for several months, Ms. Harrison identified areas of particular difficulty for Joan as being her inability to make sound decisions based on a reasonable analysis of the long term consequences of the choices facing her. CP 619. She identified behaviors that are common to brain-injured people, including a low tolerance for stress, pressured speech when attempting to communicate, and with withdrawal from complex situations. CP 620.

While accompanying Joan to her husband's home to get personal possessions, Ms. Harrison:

...[I]dentified a number of behaviors on the part of Joan's now-ex-husband that she considered indicative of a relationship characterized by emotional and psychological abuse. CP 620-621.

At one point during the visit, Ms. Harrison felt compelled to confront Robert when it appeared to her that he was going to physically restrain Joan or take her camera from her. CP 621

Ms. Harrison expressed her opinion that Joan was under such distress at the time of the settlement conference that she was functionally unable to comprehend the process or to effectively assist her attorney on her own behalf. CP 621.

With regard to Joan's relationship with Robert being potentially abusive, the guardian ad litem opined that the abuse may have worsened after Joan lost the business abilities that made her an asset to her husband and the family business, Joan may have not been in a position to challenge her husband effectively....CP 625.

Respondent's opinion of his wife's legal capacity is not relevant. Should Robert's opinion be given more weight than that of a judge who signed the order declaring Joan incapacitated or the medical providers who saw her or the guardian ad litem who is experienced in guardianship proceedings. Robert acts as if the medical providers are biased against him when he is the only one who stands to gain from the court not vacating the decree and Settlement Agreement.

In sum, Robert doubts the veracity of the guardianship court order, the credentials and opinions of the underlying medical opinions, and then he argues that presumably a domestic attorney would have noticed if Joan was incapacitated. The record does not support Robert's collateral challenge of the guardianship order. He had an opportunity to challenge the proceeding and chose not to, but now complains.

J. Judge as Witness

Robert argues that the issue of Judge Stolz's recusal was raised for the first time on appeal. That is not the case.⁶⁹

Robert asserts: (1) that the trial judge presided at the settlement conference and signed the resulting Settlement Agreement as a "witness", and (2) that the trial judge acquired facts and information in connection with the settlement conference relevant to the matters in dispute and never made part of the court record. Thus, Robert concedes that the judge became a "fact witness" and was precluded from presiding at hearings regarding the validity of the Settlement Agreement, but nonetheless claims that trial counsel waived this issue by not demanding that Judge Stolz recuse herself.⁷⁰ Robert fails to acknowledge that a substantial right of an incapacitated person cannot be waived by counsel.⁷¹

As a result, Joan has not waived her right to allege error with regard to the trial court's failure to recuse herself from the motion to vacate. Judges should...except as authorized by law, neither initiate nor

⁶⁹ CP 458-459 (Memorandum of Law in Support of Petitioner's...Vacate...); CP 500-504 (Respondent's Legal Memo Re: Motion to Vacate); VR, July 14, 2006, pages 3-4. Comparatively, it is disingenuous for Robert, when lacking a response to an argument, to state that issues were raised for the first time on appeal. This was the case with the argument regarding Robert's knowledge of Joan's disability, which was already addressed by this reply.

⁷⁰ See Maitland v. Zanga, 14 Wash. 92, 44 P. 117 (1896); State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971); Vandercook v. Reece, 120 Wn. App. 647, 86 P.3d 206 (2004). See also, 46 Am. Jur. 2d Judges §§ 112-14 (1969).

⁷¹ In re the Matter of Quesnell, 83 Wash.2d 224, 238, 517 P.2d 568 (1974).

consider ex parte or other communications concerning a pending or impending proceeding.⁷²

Citing a case that predates the Rules of Appellate Procedure for the general proposition that issues not raised in the trial court may not be raised on appeal, he argues that Joan and her Guardian cannot raise the recusal issue now on appeal. In fact, the Rules of Appellate Procedure specifically allow Joan and her Guardian to allege “manifest error affecting a constitutional right” for the first time on appeal.⁷³

A judge cannot avoid her duty to comply with the constitutional requirements of fair proceedings, due process or the Canons of Judicial Conduct simply by acting in good faith that the practice complied with the law or by acting in reliance on the advice of attorneys.⁷⁴ Even the mere *suspicion* of irregularity or the *appearance* of bias or prejudice, is to be avoided by the judiciary.⁷⁵

K. Attorney Fees

Joan renews her request for fees as set out in the Appellant’s Amended Brief on pages 45-48. Joan bases her request on the statutory authority related to RAP 18.1(a), RCW 26.09.140 and RCW 11.96A.150.

⁷² Canon of Judicial Conduct 3(4).

⁷³ RAP 2.5(a)(3); Washington v. WWJ Corp., 138 Wn.2d 595 (1999).

⁷⁴ See In re Hammermaster, 139 Wn.2d 211, 985 P.2d 924 (1999).

⁷⁵ See Chicago, M. St. P. & P.R. Co. v. Wash. St. Human Rts. Comm., 87 Wn2d 802, 557 P.2d 307 (1976) (emphasis added).

It should be noted that Robert did not respond to Joan's arguments regarding fees.

IV. RELIEF

Equity and statutory procedures mandate reversing the trial court's denial of the motion to vacate the decree, findings of fact, conclusions of law, and underlying Settlement Agreement with directions to assign the case to a different department. The dissolution proceeding should return to the status quo prior to the Settlement Agreement. The parties could proceed toward resolution of the dissolution with Joan being represented by and through Commencement Bay Guardianship Services in accord with Gannon, RCW 11.92.060, and the order adjudicating Joan legally incapacitated.⁷⁶

Respectfully submitted this 20th day of December, 2007.



RICHARD SHEPARD, WSBA #16194
ROBIN H. BALSAM, WSBA #14001
HEATHER L. CRAWFORD, WSBA #29962
Attorneys for Appellant

⁷⁶ In re Matter of Marriage of Gannon, 104 Wn.2d 121, 702 P.2d 465 (1985).

DECLARATION OF SERVICE

I certify that on the 20th day of December, 2007, I served a copy of the APPELLANT'S REPLY TO AMENDED BRIEF OF RESPONDENT upon the following parties to this proceeding and their attorneys or authorized representatives, as listed below.

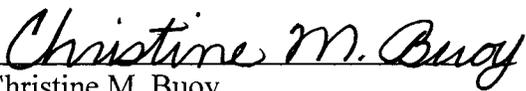
Richard Shepard
Shepard Law Office, Inc.
818 S. Yakima Street, #200
Tacoma, WA 98405
Via ABC Legal Messenger

Kevin G. Byrd
10116 – 36th Ave. Ct. SW
Suite 108, Perkins II Bldg
Lakewood, WA 98499-4791
Via e-mail and ABC Legal

Messenger

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of December, 2007.


Christine M. Buoy