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DIVISION II

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STATE OF WASHINGTON
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No. 38301-2-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

In re the Guardianship of BERNADYNE E. JACOBY,
an Incapacitated Person

RANDAL JACOBY, Petitioner,

and

INGRID CAMERON, Respondent.

APPELLANT'S REPLY BRIEF

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Appellant Randal Jacoby (Randal) offers the following reply to the brief titled “Respondent’s Opening Brief” (Resp. Br.) filed by respondent Ingrid Cameron (Cameron).

JURISDICTION

1. Effect of Trial Court’s Vacating Order Finding No Jurisdiction.

Cameron argues, at Resp. Br. 22-28, that the trial court had personal jurisdiction to remove Randal as trustee of the Jacoby Trust while failing even to mention or explain away the trial court’s order entered January 10, 2008 (Vacating Order) vacating the Trusteeship Order of a year earlier as a void order based upon its conclusions that the court then “lacked personal jurisdiction over Randal Jacoby in his capacity as Trustee of the Bernadyne Jacoby Trust” and Cameron’s failure to notify Randal of her petition and hearing on it that resulted in the Trusteeship Order. CP 176-77.

Randal sought the Vacating Order by asserting that because he had never been served with process or pleadings for the hearing on his removal as trustee of the Jacoby Trust in January 2007, the court lacked personal jurisdiction over him in that capacity. CP 153-55. The trial court agreed.

Cameron did not seek reconsideration or revision of the Vacating Order, nor did she seek appellate court review of it. CP 427. Instead, Cameron simply ignored it, and continues to ignore it in this appellate

proceeding. This appellate court should not ignore that order.

Upon the trial court's ruling that it lacked personal jurisdiction to remove Randal from the trusteeship of the Jacoby Trust, Cameron should have at least attempted to serve him with legal process if she were going to continue to pursue his removal. She did not.

2. RCW 11.96A.090(2) Did Not Excuse the Jurisdictional Step of Serving Process on Randal Before Removing Him as Trustee of the Jacoby Trust.

Cameron argues, at Resp. Br. 26-28, that RCW 11.96A.090(2) excuses the need to serve process on Randal to obtain jurisdiction before removing him as trustee of the Jacoby Trust. Cameron made that same argument, unsuccessfully, to the trial court when Randal sought the Vacating Order, and the trial court then rejected it. CP 160-62, 176-77. That statute, describing judicial proceedings commenced under Chapter 11.96A RCW (TEDRA) states, in relevant part:

(2) A summons must be served in accordance with this chapter and, where not inconsistent with these rules, the procedural rules of court, however, if the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset, notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings; [Emphasis added.]

A guardianship estate is not the same as a trust estate. A guardianship proceeding is brought under, and governed by, Chapters 11.88 and 11.92,

RCW. A guardianship estate consists of the property of which a ward is the legal owner. A ward also may be a beneficiary (along with other beneficiaries) of any of a variety of private express trusts, including those settled by their relatives, by a spouse, or by the ward herself. A trust estate of which a ward is a beneficiary is separate and distinct from their guardianship estate, and the law requires that assets of such separate estates be separately invested and accounted for by the fiduciaries thereof. In re Carlson's Guardianship, 162 Wash. 20, 28-29, 297 P. 764 (1931) (Guardian of minor's estate who was also the trustee of a trust estate for her benefit must "keep proper accounts to prevent funds becoming commingled and confused.")

In the Washington Trust Act (Ch. 11.98 RCW), there is a provision permitting any beneficiary of a trust to petition the superior court for a change of trustee for reasonable cause. RCW 11.98.039(4). That provision provides that such a petition to change a trustee is addressed by the superior court pursuant to the procedures provided in RCW 11.96A.080 through .200. But RCW 11.96A.090(2) does not obviate service of process upon a trustee whose removal is sought simply because that trustee happens to be an interested party in a judicial proceeding concerning a different estate—a guardianship estate for one of the beneficiaries of the trust.

RCW 11.96A.090(2) did not excuse the jurisdictional step of serving process on Randal before removing him as trustee of the Jacoby Trust.

3. Randal Did Not Waive the Requirement That the Court Obtain Personal Jurisdiction over Him Before Removing Him as Trustee of the Jacoby Trust.

Cameron argues, at Resp. Br. 22-26, that by Randal's participation in the guardianship proceeding under RCW Ch. 11.88 he waived the requirement that the court obtain personal jurisdiction over him in what should have been a separate change-of-trustee proceeding under RCW 11.98.039(4). Cameron absurdly asserts that by asserting the trial court's lack of jurisdiction in his Motion to Vacate Void Order filed December 13, 2007, Randal waived his defense of lack of personal jurisdiction! Resp. Br. 23-24, 4th bullet.

The case that Cameron cites in support of her argument is inapplicable to the facts here. In that case, Kuhlman Equipment v. Tammermatic, 29 Wn. App. 419, 628 P.2d 851 (1981), the court held that because defendant filed a third party claim without raising its jurisdictional defense it waived that defense. Randal filed no third party claims or other claims. None of the objections and other pleadings in the eleven-bullet list on pages 23-25 of Cameron's response brief constitute requests for "affirmative relief" as contemplated by the Kuhlman Equipment court.

And Randal filed no pleadings or motions that, under CR 12(b), (g), or (h)(1), would result in waiver of his position that the court must obtain personal jurisdiction over him before removing him as trustee of the Jacoby Trust.

REMOVAL OF RANDAL AS TRUSTEE

Cameron asserts, at Resp. Br. 19-22 and 28-29, that the trial court's decision to remove Randal as trustee of the Jacoby Trust "was based upon tenable grounds and reasons."

RCW 11.98.039(4) does permit a superior court, upon a petition by a beneficiary, to change the trustee of a trust for any "reasonable cause." But some "reasonable cause" is nonetheless a precondition for removal. And the cause must be stated in the trial court's findings of fact to permit appellate court review if the removal is challenged as arbitrary.

Case law applicable to removals of personal representatives ought to apply equally to removals of trustees. Concerning the review by appellate courts of trial court rulings removing personal representatives, in Estate of Jones, 152 Wn.2d 1, 100 P.3d 805 (2004), the court said, at page 8, "Where the findings do not support the removal of a personal representative, the removal is arbitrary and improper." It repeated that standard at page 10, saying, "The superior court must have valid grounds

for removal and these grounds must be supported in the record.”

The Jones court cited In re Estates of Aaberg, 25 Wn. App. 336, 607 P.2d 1227 (1980), in which the appellate court stated at page 339, “Although the trial judge is given broad discretion as to the grounds upon which he may remove an executor, the grounds must be valid and supported by the record.” For the same point it cited In re Beard’s Estate, 60 Wn.2d 127, 372 P.2d 530 (1962), in which it had stated at page 132:

“[A]lthough a superior court has a very wide discretion as to the grounds upon which it may remove an executor or administrator, with which this court should not ordinarily interfere, the grounds must be valid and supported by the record.”

The Jones court also cited Estate of Ardell, 96 Wn. App. 708, 980 P.2d 771 (1999), in which the appellate court stated, at page 720, “Because the findings simply do not support the removal of the personal representative for the reasons allowed by RCW 11.68.070, RCW 11.28.250, or RCW 11.48.210, the court’s decision was arbitrary.”

In the present case, not only are there no findings of “reasonable cause” by the trial court to support its removal of Randal as trustee of the Jacoby Trust, but the trial judge expressly stated that her removal decision was not based upon any misconduct or other cause. The trial judge at the hearing on April 25, 2008, stated, “I have no comment or assessment about the allegations ... against Randal. I don’t know anything about that ...” RP 12. And when explaining her decision to replace Randal with

Cameron as the trustee, the judge stated, "I think it is better in this particular case, under these circumstances — again, not talking about misconduct on his part." RP 14-15.

In Randal's answer filed April 16, 2008, to Cameron's petition to replace him as trustee of the Jacoby Trust, Randal demonstrated that the malicious allegations against him were utterly unfounded. CP 326-74. He included a letter from a DSHS Adult Protective Services supervisor stating that its investigator did not find it probable that Randal had mistreated his mother, Ms. Jacoby. CP 374. Randal's answer described (CP 330-31) Ms. Jacoby's susceptibility to manipulation by those who abducted her and "programmed" her into believing that Randal had stolen her savings and presented a threat to her. The letters referenced in that pleading are at CP 1163-64 (Donley) and CP 1168 (Rev. Egerdahl). Detective Ostrum's 244-page report of November 16, 2006, was included twice in the record, at CP 619-862 and CP 872 -1117. In it, Det. Ostrum stated (CP 628, 883):

At this point of my investigation, I have three main issues at hand. One is where are the missing items that were known to be in Bernadyne's Safety Deposit Box, especially the missing \$118,000.00 worth of missing [sic] Savings Bonds. Second, is the concern that Randal unduly influenced Bernadyne into changing her Power of Attorney naming Randal as her attorney-in-fact. Third, is to make a full review of all of Bernadyne's bank account records.

Randall declarations filed March 21, 2007 (CP 68-120) and of March 26, 2007 (CP 129-36) fully explained his temporary custody of the items

from his mother's safe deposit box. And the declarations of Nick and Marie Jurlin (CP 350-51), of Camille Hutchison (CP 352-54), and of Molly Murphy (CP 368-69) amply explain Ms. Jacoby's reasons for deciding to replace her son Gary with Randal as her trustee and attorney-in-fact (and demonstrate that Det. Ostrum failed to thoroughly investigate the matter). Det. Ostrum's declaration signed and filed March 5, 2008, (CP 283-87) indicates that she was unable to find probable cause of any theft or similar misconduct by Randal, for she asserts only that she then believed there to be probable cause of criminal acts incident to Ms. Jacoby's signing the documents to replace Gary with Randal as her trustee and attorney-in-fact (thereby indicating that the detective never interviewed the Jurlins, Ms. Hutchison, or Ms. Murphy).

Randal to this day has never been charged with any crime as a result of Det. Ostrum's over-zealous investigation.

There simply is no evidence that Randal breached any fiduciary duty or otherwise acted in a way that would be "reasonable cause" to remove him as Ms. Jacoby's chosen trustee of the Jacoby Trust.

**AUTHORITY OF COURT IN GUARDIANSHIP CASE
TO ALTER ALTERNATIVE ARRANGEMENTS**

Cameron argues, at Resp. Br. 20-21, that RCW 11.88.090(5)(f)(iv) "implicitly gives the trial court the authority to revoke or modify []

alternative arrangements [to guardianship] put in place by Ms. Jacoby”

That clause directs guardians ad litem to include in their reports to the court—

“(iv) A description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such alternatives should be used in lieu of a guardianship, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;”

That provision does not indicate that a court considering a guardianship petition has jurisdiction to alter or dissolve a trust previously established by an alleged incapacitated person, particularly when read consistently with RCW 11.88.045(5) and .090(9), which read, respectively, as follows:

“(5) During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary relief under chapter 7.40 RCW, to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40 RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.”

“(9) The court-appointed guardian ad litem shall have the authority to move for temporary relief under chapter 7.40 RCW to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed

before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40 RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.”

It is apparent from RCW 11.88.045(5) and .090(9) that an action to alter or dissolve a trust or other alternative-to-guardianship arrangement previously established by an alleged incapacitated person must be commenced as an action separate from the guardianship petition, with jurisdiction over and notice to all parties directly affected by it.

Respectfully submitted this 15th day of June, 2009.



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STATE OF WASHINGTON
BY _____
DEPUTY

**In the Court of Appeals for the State of Washington
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**In re Guardianship of
BERNADYNE E. JACOBY,
an incapacitated person.**

**No. 38301-2-II
Proof of Service of
Appellant's Reply Brief**

I declare under penalty of perjury under Washington state law that today, I mailed by USPS first class mail copies of Appellant's Reply Brief (filed today) and this Proof of Service to the following persons at the following addresses:

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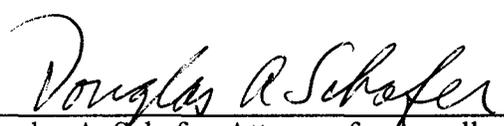
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