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BY  _____
DEPUTY

COURT OF APPEALS, DIV. II

OF THE STATE OF WASHINGTON

In re the Guardianship of BERNADYNE JACOBY,
Deceased,
and
In re the Estate of BERNADYNE JACOBY, Deceased.

RANDAL JACOBY, Petitioner,

and

GARY JACOBY, Respondent.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This case addresses whether the superior court may reject a mother's choice of her eldest son as her successor trustee of her living trust when that choice is objected to by her other son. Bernadyne Jacoby in September 2006 appointed her son Randal to succeed her as trustee of her trust when she feared that her other son, Gary, was trying to move her from her own home into a nursing home. Upon learning of his mother's appointment of Randal, Gary commenced a guardianship and maliciously accused Randal of stealing their mother's life savings and of attempting to kidnap her. Gary caused Bernadyne to be abducted and then brainwashed into believing Gary's wild accusations, but no court or agency ever substantiated Gary's accusations. The superior court appointed a professional guardian to manage Bernadyne's person and estate—which estate consisted of both her non-trust assets and her trust assets, according to the court.

After Bernadyne's death in August 2010, Randal filed a motion to be recognized as successor trustee of her roughly \$585,000 trust pursuant to her trust amendment in September 2006 that so appointed him. Responding to Gary's objections, the superior court in August 2011 found Randal unfit to be trustee because of ill will or conflict between him and Gary, the other primary beneficiary of the trust. The court approved the guardian's final accounting and discharged the guardian, then

consolidated the guardianship proceeding with the separate probate estate proceeding that Randal had commenced by filing his mother's will that named the brothers as co-executors. The court then appointed a new professional guardian as trustee of Bernadyne's trust and as personal representative of Bernadyne's probate estate. None of those superior court actions were in response to duly filed and noted motions. There are reasons to question the regularity of the proceedings due to what appear to have been improper communications with the assigned judge.

ASSIGNMENT OF ERROR & ISSUES

Assignment of Error #1: The superior court erred by ruling on motions that had not been noted for hearing and adjudication.

Issue #1: Should the superior court rule on motions that were not noted for hearing?

Assignment of Error #2: The superior court erred by consolidating the guardianship proceeding with the probate estate proceeding.

Issue #2: May the superior court consolidate a guardianship proceeding with a probate estate proceeding?

Assignment of Error #3: The superior court erred by removing Randal as successor trustee based upon alleged conflict of interest and bad will.

Issue #3: Did Randal have a conflict of interest justifying the superior

court's removal of him as successor trustee?

Issue #4: Did allegations of bad will justify the superior court removing Randal as successor trustee?

Assignment of Error #4: The superior court erred by rejecting Bernadyne's two named alternate successor trustees and appointing Johnson as trustee.

Issue #5: Did the superior court have grounds to reject Bernadyne's two named alternate successor trustees and appointing Johnson as trustee?

Assignment of Error #5: The superior court erred by appointing Johnson as personal representative of the estate.

Issue #6: Was the superior court justified in appointing Johnson as personal representative of the estate?

Assignment of Error #6: The superior court's Department 19 erred by apparently considering improper communications from Department 20.

Issue #7: Does it appear that the superior court's Department 19 considered improper communications from Department 20?

Assignment of Error #7: The superior court erred by apparently considering improper unfiled communications from Gary's counsel.

Issue #8: Does it appear that the superior court considered improper unfiled communications from Gary's counsel?

STATEMENT OF THE CASE

In 1985, Bernadyne Jacoby created the Bernadyne E. Jacoby Living Trust (“the Trust”), amended and restated in 1999, with herself as trustee and the life beneficiary. CP at 329-73. The Trust provides distributions after her death of five percent of the corpus to each of two religious organizations, and the balance equally to her two sons, Randal and Gary, in three installments over eleven years. CP at 355. In 2006 while living alone in her Auburn home, Bernadyne began declining cognitively, so at the urging of Gary (a California resident), Randal (a Nevada resident) began residing part time with her to assess her needs and provide assistance. CP at 51, 60-61. On March 14, 2006, Bernadyne signed an amendment to the Trust that named Gary as the trustee and Randal as his alternate, but she simultaneously signed an affidavit declaring that she still was the sole trustee. CP at 369-71.

By early September 2006, Bernadyne had grown fearful that Gary and others were going to move her from her own home into a nursing home or other facility. CP at 51-53, 62-63, 70, 72, 73, 76, 78, 80, 89-90. She shared her fears with several long-time friends (*id.*), and she amended the Trust on September 16, 2006, to name Randal as its trustee, both during her life and following her death, and two lifelong friends as alternate trustees. CP at 58, 372-73. After Bernadyne informed Gary that she had replaced him with Randal, Gary began alleging to DSHS’s Adult Protective Service that

Randal was abusing and exploiting their mother, and Gary hired a lawyer to seek the appointment of a professional guardian for Bernadyne. CP at 52-53, 63. On September 29, 2006, Gary caused a sheriff deputy to go to Bernadyne's home for a welfare check, and when Randal resisted the deputy's entry without a warrant, the deputy arrested Randal for obstructing him. CP at 53, 66. Gary then caused some of Bernadyne's church friends to hide her in "safe houses" for weeks with based upon accusations—that they "brainwashed" Bernadyne into believing—that Randal sought to kidnap her and had stolen her savings. CP at 53-55, 66-67, 82-84. Gary made his accusations in a report to the sheriff and in filings in the guardianship case that he commenced October 2, 2006. CP at 54. The superior court found Bernadyne incapacitated and fearful of Randal and appointed for her a professional guardian, Ingrid Cameron, who concealed Bernadyne's location from Randal and their friends for the remainder of her life. CP at 40, 55. She died August 12, 2010. CP at 1.

Prior to the guardianship, Bernadyne had titled most of her assets in the Trust. CP at 325. In January 2007 the superior court appointed guardian Cameron as trustee of the Trust, but a year later that action was later ruled void for lack of notice to Randal, Bernadyne's appointed trustee. CP at 7, 55, 95. In early 2008 Cameron sought re-appointment as trustee of the Trust and Randal sought judicial recognition of Bernadyne's 2006 appointment of him as its trustee. CP at 85-95. At a hearing April 25,

2008, Pierce County Superior Court Judge van Doorninck re-appointed Cameron as trustee, consistent with the *Judge's then stated philosophy that when a guardian is appointed for a person and their estate, all that person's assets, including those in a trust, are part of the guardianship estate*. CP at 91. The Judge expressly stated that she had made no assessment of the disputed allegations of misconduct on Randal's part (CP at 92, 95), but observed additionally because "there is at least a conflict between Randal and Gary ... it's better to have a neutral third party" as trustee of the Trust. CP at 92.

Randal appealed Judge van Doorninck's order, arguing that she lacked personal jurisdiction over him in his role as trustee of the Trust and lacked grounds to remove him as trustee. CP at 9, 10. In an unpublished opinion filed December 28, 2009, *Division I of the Court of Appeals shared Judge van Doorninck philosophy that the Trust's assets constituted part of the guardianship estate* so the court had jurisdiction. CP at 9. The appellate court found reports of the 2006 guardian ad litem a sufficient basis for Judge van Doorninck to remove Randal as trustee, even though she had expressly declined in 2008 to consider the past accusations of misconduct by Randal in making her ruling. CP at 10, 92, 95.

Bernadyne died on August 12, 2010, and Cameron filed her final report as guardian and trustee on November 17, 2010. CP at 144. That

same day, counsel Judson Gray representing Gary filed a motion seeking appointment of “Sharon Johnson of Sunrise Guardianship Services, a Certified Professional Guardian” as successor trustee of the Trust. CP at 2. On November 24, 2010, counsel Doug Schafer representing Randal filed Bernadyne’s last will and codicil along with a petition seeking admission of the will and Randal’s appointment as personal representative. CP at 287-303. Schafer did not then note that petition for a hearing, intending to do so after Randal became recognized as successor trustee of the Trust. CP 194-95. That probate estate proceeding, Pierce County Superior Court case number 10-4-01656-5 (“the Estate”), was assigned to Department 19, Judge Lee. CP at 309.

On November 30, 2010, Gary filed in both the Estate case and in the guardianship case a motion, based on Civil Rule (CR) 42, to transfer the Estate case from Department 19 (Judge Lee) to Department 20 (Judge van Doorninck) and consolidate it with the guardianship case. CP at 20-22, 306-08. Counsel Gray noted Gary’s consolidation motion in the Estate case for hearing December 10, 2010, but received a letter from Dept. 19 rescheduling it to December 17, 2010. CP 304, 309.

On December 8, 2010, Randal filed pleadings in the guardianship case opposing Gary’s motion to consolidate and his motion to appoint Johnson as successor trustee of the Trust. CP at 23-43. At the resulting hearing on December 10, 2010, Judge van Doorninck expressly denied

Gary's consolidation motion and declined to rule on Gary's motion to appoint a successor trustee, asserting that Judge Lee in the Estate case could address that matter. Report of Proceedings on December 10, 2010 (RP1) at 6, 9-10, 12. CP at 44-46. Judge van Doorninck approved Cameron's final accounting and discharge order, but indicated she would enter it after Judge Lee enters an order on the Trust. RP1 at 12, CP at 44-46. There apparently were some communications between Judge van Doorninck or her staff and Judge Lee or her staff, because the clerk's Memo of Journal Entry from that hearing, entered on the day of that hearing in the guardianship case court file (CP at 45-46), was entered five days later in the Estate case court file with a cover sheet bearing a stamp reading "FILED DEPT 19 IN OPEN COURT DEC 15, 2010". CP at 310-12.

Since Judge van Doorninck had denied Gary's motion to consolidate, counsel Gray did not confirm the hearing on that motion in the Estate case, so it was not held. On December 22, 2010, Gray filed notice of his intent to withdraw as Gary's counsel in both the guardianship and the Estate cases. CP at 47-48, 313-14. On December 30, 2010, counsel Thomas Lofton filed in the Estate case a notice of his substitution as counsel for Gary. CP at 315.

Recognizing that applicable law, RCW 11.98.039(1), provides a nonjudicial procedure for a named successor trustee of a private trust to

assume the trusteeship, Randal on January 14, 2011, followed that procedure by sending a letter giving notice to all beneficiaries of the Trust and filing in both the guardianship case and the Estate case a declaration of having followed that procedure with a copy of the letter and its enclosures. CP at 49-115.¹ After more than 30 days elapsed with no beneficiary of the Trust filing a petition under RCW 11.98.039 objecting to Randal's succession as its Trustee, Randal on March 1, 2011, filed a motion in the guardianship case for an order directing Cameron to transfer the Trust's assets and records to him. CP at 116-18.² Schafer noted a hearing before Department 20 (Judge van Doorninck) for March 11, 2011. CP at 119-20. That department rescheduled that hearing for March 18, 2011. CP at 121. On March 15, 2011, Lofton, representing Gary, filed a responsive pleading with the guardianship's case number, though he changed the case caption to read "In re the Guardianship, Probate, and Trust of Bernadyne E. Jacoby, Deceased." and he titled his responsive pleading "Motion Objecting to Randal Jacoby Serving as Trustee and Personal Representative." CP at 122-30. Lofton never noted for hearing this motion, but the next day he filed in the guardianship case a notice of appearance for Gary. CP at 131. Also on March 16, 2011, Schafer,

¹ The clerk's papers includes the copy that was filed in the guardianship case. An identical declaration (but for the case caption) was filed in the Estate case. To avoiding duplication, as directed by RAP 9.1(d), the 67-page pleading filed in the Estate case was not included in the clerk's papers.

² This motion mistakenly referred to Judge Lee's department as Dept. 10, though it correctly is Dept. 19.

representing Randal, filed a response pointing out that Gary's motion was not noted for a hearing and was untimely for the hearing then scheduled for March 18, 2011. CP at 132-38. The next day, Schafer learned that Department 20 struck that hearing from its docket for lack of a timely confirmation, so he re-noted Randal's "motion to disburse funds" at the first available date—April 22, 2011. CP at 139.

It appears that on or before April 21, 2011, Department 20 (Judge van Doorninck) communicated with Department 19 (Judge Lee) about transferring the guardianship case because on that date the Department 20 judicial assistant completed a "Request for Reassignment" to transfer the case to Department 19 handwriting on it "to run w/ Judge Lee's probate matter under same name. Motion 4/29/11 at 9:00 Dept. 19." CP at 141. Department 19 on April 27, 2011, sent a letter to counsel in the guardianship case stating, "Please report to Judge Lee for the motion to disburse funds currently scheduled to be heard at 9:00 am April 29, 2011."

At the hearing before Judge Lee, she confirmed that Randal's motion was the only matter on her docket, stating "[T]his morning there is on my docket a motion—it's labeled as a motion to disburse funds, but I've—the working papers say 'Motion for order directing guardian to deliver trust assets and records to successor trustee.' That's what I have on my docket." Report of Proceedings on April 29, 2011 (RP2) at 3. Because Judge Lee was admittedly unprepared for the hearing, she continued the hearing until

mid-June 2011. RP2 at 28. Lofton claimed to have submitted voluminous working papers to Judge van Doorninck that Judge Lee apparently had not received, so Judge Lee invited counsel to “resubmit what you want me to review by next Friday.” RP2 at 25.

By argumentative letters dated May 3 and 5, 2011, (CP 204-05, 242) Lofton mailed to Judge Lee a number of documents, several of which had never before been filed, including documents from Randal’s 2001 bankruptcy case. CP at 235-41. Lofton did not file his letters or the previously unfiled enclosures. CP at 203. In the May 5 letter, Lofton argued that because the two medical reports he enclosed, by Bernadyne’s doctors from examinations on October 10 and 12, 2006, recommended her guardianship, Judge Lee should disregard the Fifth Amendment to the Trust that Bernadyne executed September 16, 2006, appointing Randal as trustee. CP at 242. On June 13, 2011, Schafer filed a declaration responding to Lofton’s argument in his letter of May 5, 2011, with case law distinguishing guardianship capacity determinations from testamentary capacity determinations. CP at 151-77.

At the resumed hearing on June 14, 2011, Judge Lee began by stating that the guardianship case and Estate case had been consolidated, to which Schafer strongly objected. Report of Proceedings on June 14, 2011 (RP3) at 2-4. Schafer pointed out that the only petition filed in the Estate case had not been noted for a hearing, that he had no Estate case papers with

him, and that “We were here simply to conclude the guardianship case. ... We’re just here for Ms. Cameron to be discharged and be told who to turn the assets over to.” RP3 at 8-9. After some argument, Judge Lee disagreed, stating, “I believe there are two motions that are appropriately before me this morning”—apparently Randal’s motion of March 1, 2011, and Gary’s motion of March 15, 2011. RP3 at 12-13. Thereupon counsel argued their respective positions, and Judge Lee stated that she would further review the file and issue a letter ruling. RP3 13-52.

During that hearing, Judge Lee entered the order, previously approved by Judge van Doorninck, approving Cameron’s accounting and final report through December 10, 2011, with her attorney orally reporting the non-trust assets were roughly \$40,000 and the Trust’s assets were roughly \$585,000. CP at 178-81, RP3 at 22.

On August 1, 2011, Judge Lee entered a letter ruling that consolidated the Estate case into the guardianship case and appointed Johnson as successor trustee of the Trust and as personal representative of the Estate. CP at 185-92. On September 23, 2011, at Schafer’s request Judge Lee re-entered that same order on line-numbered paper in a double spaced format with a title of “Amended Order.”³ CP at 249-60. Randal timely filed a motion for reconsideration (CP at 193-97), to which Gary responded (CP at 198-202), to which Randal replied (CP at 319-22). Judge Lee on

³ References in this brief to Judge Lee’s ruling will be to the Amended Order because its passages may be referenced by page and line numbers.

December 16, 2011, denied Randal's motion for reconsideration. CP at 286. Randal appealed Judge Lee's orders, except the part that denied Gary's request for attorney's fees and sanctions. CP at 268-81.

ARGUMENT

1. **The superior court should not rule on motions that were not noted for hearing.**

Pierce County Superior Court Local Rule (PCLR) 7(a)(3)(A) requires that motions be filed and served on opposing parties at least six court days before the date that the moving party sets for a hearing on the motion. Opposing responses must be filed and served by noon two court days *before the scheduled hearing date*. PCLR 7(a)(5). And a moving party's reply must be filed and served by noon the court day *before the scheduled hearing date*. PCLR 7(a)(6). So until a motion is noted for a hearing on a specific day, opposing parties may rest assured that it will not be ruled on by the court. Notice and an opportunity to be heard on a motion affecting a party's right are essential elements of due process. In *Chai v. Kong*, 122 Wn. App. 247, 93 P.3d 936 (2004), the appellate court vacated a superior court judgment because the appealing party had not been notified of the motion for it *and* of the time and place of the hearing on the motion. In *Moore v. GAB Robins North America, Inc.*, 840 So.2d 882 (Ala. 2002), the Alabama Supreme Court reversed, for lack of due process, a trial

court's ruling on a motion that the lower court entered before setting a definite hearing date because doing so denied the nonmoving party an opportunity to be heard. Similarly, in *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977), the Washington State Supreme Court held that "An order based on a hearing in which there was not adequate notice or opportunity to be heard is void" as "a denial of procedural due process."

Here, the Amended Order recites that it is ruling on several motions that were *not noted for a hearing*. CP at 249 lines 12-18. It lists the following motions:

1. Gary's Petition to Appoint Successor Trust filed November 17, 2010, in the guardianship case, (CP at 2) that was denied by Judge van Doorninck on December 10, 2010, and was never re-noted for a hearing.
2. Randal's Petition for and Order Probating Will, Appointing PR, and Granting Nonintervention Powers that was filed November 24, 2010, in the Estate case (CP at 287) but was never noted for a hearing.
3. Gary's Motion to Consolidate Probate Case With Guardianship/Trust Case that was filed November 30, 2010, in both the guardianship case, and was denied by Judge van Doorninck on December 10, 2010, and that was filed in the Estate case, but was never re-noted for a hearing after the hearing for December 17, 2010, was struck.
4. Gary's Motion Objecting to Randal Jacoby Serving as Trustee and

Personal Representative that was filed March 15, 2011, in the guardianship case but was never noted for a hearing.

Notably the Amended Order fails to list the one and only motion that was noted for hearing by Judge Lee—Randal’s Motion for Order Directing Guardian to Deliver Trust Assets and Records to Successor Trustee, filed March 1, 2011, in the guardianship case—though Judge Lee acknowledged on at the April 29, 2011, hearing that it was the only motion on her docket. RP2 at 3.

Judge Lee’s rulings on the motions that were not properly set to be heard, with appropriate notice of the hearing date given to Randal so he could timely file a written response and present arguments at the hearing, were a denial of Randal’s procedural due process.

2. The superior court may not consolidate a guardianship proceeding with a probate estate proceeding.

Even though Judge van Doorninck on April 25, 2008, and Division I of the Court of Appeals in its unpublished opinion of December 28, 2009, agreed philosophically that the Trust’s assets were part of Bernadyne’s guardianship estate (*supra* at 6), that ought not cause the guardianship case to continue after Bernadyne’s death with judicial supervision of the Trust continuing for its remaining term of existence. Following a ward’s death, non-trust assets of in their guardianship estate should be delivered

to the personal representative of the ward's probate estate, and any trust assets in their guardianship estate should be delivered to the person designated as the post-death trustee in the governing trust instrument.

Washington case law makes it clear that at the death of a ward, the jurisdiction of the court supervising the guardianship is limited to approving the guardian's final report if a separate probate estate case has been commenced. In *Guardianship of Heath v. Seattle-First Nat. Bank*, 30 Wn. App. 115, 632 P.2d 908 (1981), the appellate court held that the trial court in a guardianship proceeding lacked jurisdiction after the death of the ward to rule on a claim that was properly within the jurisdiction of the trial court's probate estate proceeding. The post-death jurisdiction of the guardianship court is limited to approving the guardian's final report. In that case, the court stated at 117:

“Dr. Heath died testate on May 16, 1979. In its petition for approval of its final accounting and termination of the limited guardianship, the trust department of the Olympia branch sought a credit for the \$5,891.14 loss absorbed by the Sixth and Denny branch. The trial court granted the credit over the objection of the executor of Dr. Heath's estate. The executor of Dr. Heath's estate challenges the trial court's order on the ground that the trial court lacked jurisdiction to order payment of a claim made against the guardianship estate after the ward's death. We find that the trial court did lack jurisdiction and reverse. [Footnote omitted.]

A limited guardianship automatically terminates upon the death of the ward. RCW 11.88.140(1)(c). After the death of the ward, the guardian's powers are limited to rendering a final accounting and distributing the property under his control to the proper person. *State ex rel. National Bank of Commerce v. Frater*, 18 Wash.2d 546, 140 P.2d 272 (1943); *In re Mayou*, 6

Wash.App. 345, 492 P.2d 1047 (1972).”

In *State ex rel. National Bank of Commerce v. Frater*, 18 Wn.2d 546, 140 P.2d 272 (1943), the supreme court had stated at 254:

“On the death of the ward or his restoration to competency, the guardian must account concerning his trust, and turn the ward’s property over to the person entitled to receive the same, and *the guardianship continues for that purpose and that purpose only.*” [Emphasis added.]

The Court should recognize that Bernadyne’s guardianship terminated with her death leaving the superior court in that guardianship case with only the power to review and approve the accounting of the guardian.

The Court should recognize that citizens create living trusts specifically to avoid the great costs and burdens of judicial supervision of their financial affairs upon their incapacity or death. Though the courts in Bernadyne’s guardianship case ignored the 1996 legislation (RCW 11.88.030(1)(i), .045(5), .090(5)(e), .090(5)(f)(iv), and .090(9)) that was enacted to spare citizens costly guardianship court supervision of their living trusts and other guardianship alternatives (RP2 at 18, RP3 at 6-7, 20), there is no justification after Bernadyne’s death to continue burdening her living trust, the Trust, with costly judicial supervision and a costly judge-chosen trustee. Under Washington law, private trusts and trustor-chosen trustees are not subject to judicial intervention unless a beneficiary files a petition as permitted by RCW 11.96A.080 under the Trust and Estate Dispute Resolution Act (RCW Ch. 11.96A, “TEDRA”) for the

superior court to address a specific matter.

Most trusts are administered for years, or for their entire term, without judicial intervention. *See, e.g., Cook v. Brateng*, 158 Wn. App. 777, 262 P.3d 1228 (2010)(No judicial intervention from 1995 until 2001 when a beneficiary filed a TEDRA petition.). In *Monroe v. Winn*, 16 Wn.2d 497, 133 P.2d 952 (1943), the State Supreme Court approved actions that the trustor's chosen trustees of his testamentary trust had taken without judicial intervention over a period of eighteen years, stating at 509-10 the following admonition for judicial restraint and deference to the testator's chosen trustees:

“We disagree with the trial judge in his belief that the appellants should have invoked the jurisdiction of the court and secured its permission to make repairs to, improvements upon, and replacements of the property of the trust estate and to have the court decide upon questions of policy or to interpret the terms of the trust, which are plain and unambiguous. The powers conferred upon the appellants by the testator in his will creating the trust are very broad and comprehensive, and a wide discretion was given. The trust was a part of the nonintervention will, and it is apparent that the testator desired the exercise of the discretion and sound judgment of the experienced trustees in the management and operation of the trust property rather than the judgment of the court. A beneficiary of a trust has the right to appeal to the court and call in question actions of trustees which he may feel are not in his best interests, and the court has the power to intervene. But this jurisdiction must be exercised sparingly with reference to a trust of the kind we are now considering.”

In the instant case, by purporting to consolidate the terminated guardianship case with the ongoing probate Estate case, Judge Lee

exceeded her authority and defied the nonintervention system that the legislature has established and our courts have recognized for private trusts such as the Trust.

3. Randal did not have a conflict of interest justifying the superior court's removal of him as successor trustee.

A number of judicial precedents in Washington assert that a “conflict of interest” justifies removal of a trust, but that phrase refers to conflicting *financial* interests, not to personal hostility or ill will (discussed *infra*). The earliest Washington case, it appears, asserting the “conflict of interest” grounds for trustee disqualification was *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604 (1944), in which the State Supreme Court stated, at 769:

“Where a trustee finds himself in the position where he has either individually or as trustee for another, an interest which conflicts with that of the beneficiaries of the trust, he should resign from the trust so as not to attempt the impossible task of representing conflicting interests.”

The State Supreme Court in *Porter v. Porter*, 107 Wn.2d 43, 726 P.2d 459 (1986), cited *Tucker* in upholding the removal of a trustor's surviving second wife as trustee of a trust for the trustor's child due to her *financial* conflict of interest, stating at 467:

“[The trustee] asserted a community property interest in the cash value policies which were intended to fund the trust. In so doing she set up a conflict of interest between herself and [the child],

the trust beneficiary, thereby failing in her duty as trustee to administer the trust in [the child's] best interest.”

And the State Supreme Court in *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987) upheld the removal of a bankrupt trustee who had grossly overcharged charitable trusts and been ordered to restore excess fees to the trusts, stating at 715:

“Whether Holman’s bankruptcy creates a conflict of interest justifying his removal. Holman concedes the obvious that so long as he is required to reimburse the fees and interest, there exists a conflict in his roles as debtor and creditor of the trusts, which justifies his removal.”

Judge Lee in her Amended Order (CP at 256 lines 16-20) supported her conclusion that Randal has a disqualifying conflict of interest by quoting phrases from the letter that counsel Schafer sent on Randal’s behalf to the other beneficiaries of the Trust (CP at 54-55), stating—

“in the letter dated January 14,2011, and sent to all beneficiaries of the Trust on behalf of Randal Jacoby, Gary Jacoby is accused of falsely swearing, of filing a false report with the county sheriff, of ‘brainwashing’ Bernadyne Jacoby, of maliciously implanting beliefs about Randal in Bernadyne, and of making ‘vile accusations’ against Randal that were ‘merely malicious falsehoods with no basis in fact.’”

And Judge Lee’s Amended Order (CP at 255 lines 4-16; 260 lines 1-13) also quoted from Randal’s petition filed in the Estate case the following passage (CP at 288) to support her conflict-of-interest conclusion:

“Petitioner asserts that his brother, Gary Jacoby, has a conflict of interest that bars him from appointment as co-PR or sole PR. One potentially significant asset of the estate is a cause of action

against Gary and others who in late 2006 wrongfully conspired to exploit the Decedent, who wrongfully abducted and ‘brainwashed’ her into fearing the Petitioner and mis-believing he had stolen her funds, who inappropriately isolated her from her family and regular activity, and who abused the legal process. None of the malicious accusations by Gary and others against the Petitioner have been substantiated and all can be proven, in a proper forum, to have been false.”

The undersigned counsel for Randal authored those passages after concluding that Bernadyne’s Estate may well have a direct claim or set-off claim under the common law or the Abuse of Vulnerable Adult Act, RCW Ch. 74.34, against Gary and persons who conspired with him to deceive Bernadyne into fearing and distrusting Randal and to isolate her from her family and long-time friends. Such a considered legal assessment by an experienced lawyer with far more knowledge of the actual 2006 facts than Judge Lee possesses ought not be viewed as a “conflict of interest” that disqualifies his client from any fiduciary role concerning Bernadyne’s trust and estate.

The possibility that a prospective fiduciary for an estate might pursue a legal claim on behalf of the estate against a beneficiary certainly ought not be viewed as a disqualifying “conflict of interest.” Randal has no interests that conflict with the interests of Bernadyne’s Trust or Estate. He simply believes, for good reasons, that Gary and others acted wrongfully in 2006, harming Bernadyne, and might be held accountable for that. Gary’s actions may ultimately be assessed by a jury. *See In re Estate of*

Haviland, 161 Wn. App. 851, 251 P.3d 289 (2011)(Abuser of vulnerable adult disqualified from receiving any benefits from the adult’s death.)

4. Allegations of bad will did not justify the superior court removing Randal as successor trustee.

In the Amended Order, Judge Lee repeatedly states that “bad will generated by years of litigation” between Randal and Gary disqualify either from being trustee of the Trust or personal representative of the Estate. CP at 256 line 15, 257 line 2, 259 lines 24-25. But there has been no litigation between Randal and Gary, much less “years of litigation” between them. Gary’s lawyer filed the guardianship petition in October 2006 and a few related pleadings, then withdrew once Cameron was appointed a guardian in November 2006. Gary did not participate in any subsequent disputes between Randal and Cameron or in the 2008 appeal, and Gary only reappeared in the guardianship case after Bernadyne’s death when his new lawyer, Gray, in November 2010 filed the motions to appoint trustee and to consolidate as discussed above.

And even if Randal may harbor understandable bad will from Gary’s 2006 actions that harmed him and Bernadyne, that should not disqualify Randal from the trusteeship of the Trust. All Washington reported opinions that assert bad will from litigation as a basis for removing a trustee can be traced to the State Supreme Court’s 1987 opinion in *Fred*

Hutchinson Cancer Research Center, *supra*, in which the court so stated after quoting, at 716, from *May v. May*, 167 U.S. 310, 320-21, 17 S.Ct. 824, 42 L.Ed. 179 (1897) that a court’s discretion to remove a trustee—

“may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated.....”

In *May*, it was significant that the ill-tempered trustee was removed from a trusteeship that required his active interaction with several beneficiaries and his exercise of discretion jointly with his mother, the co-trustee. In contrast, the same high court 20 years earlier had found bad will—an active dispute over legal fees—between a trust beneficiary and the trustee was *not a basis to remove* a trustee whose duties did not require discretion and active interaction with that beneficiary. In *McPherson v. Cox*, 96 U.S. 404, 24 L.Ed. 746 (1877), the court stated at 419:

“Where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal intercourse with the latter, it may be conceded that the mere existence of strong mutual ill-feeling between the parties will, under some circumstances, justify a change by the court. But there is here no such case. *McPherson* will have and can have, nothing to do as trustee which requires any personal intercourse with Mrs. Cox. ... And in all that he may have to do as trustee, his duty is so merely ministerial and so clearly defined, that he can do her no harm whatever.”

An authority the *McPherson* court cited in support of the quoted passage was *Perry on Trusts*, section 277. Coincidentally, *Perry on Trusts*, section 276 was quoted as authority in the seminal Washington case for the rule that removal of a trustee for cause—whether breach of fiduciary duty, conflict of interest, or bad will—is appropriate *only when necessary to save the trust*. In *In re Estate of Cornett*, 102 Wash. 254, 173 P. 44 (1918), the court at 264 quoted that treatise::

“‘The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy.’ 1 *Perry, Trusts*, § 276, p. 417.”

Cornett was cited in *In re Estate of Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996), to support the court’s statement, at 761, that “The petitioning beneficiary must, however, demonstrate that removal is clearly necessary to save the trust property.” And *Ehlers* was cited in *Bartlett v. Betlach*, 136 Wn. App. 8, 146 P.3d 1235 (2006), *rev. denied* 162 Wn.2d 1004, 175 P.3d 1092 (2007), as authority for the court’s following statement of the rule, at 20:

“Reasonable cause has generally been construed as requiring a breach of fiduciary duty, a conflict of interest, or bad will generated by litigation. *But removal must be necessary to save the trust.*” [Emphasis added.]

This rule that bad will or hostility between a trustee and one or more

beneficiaries does not justify the trustee's removal *unless necessary to save the trust* is the general rule followed in the United States:

“It has sometimes been held or stated without qualification that the existence of hostility between a trustee and the beneficiary or beneficiaries of a trust is a sufficient ground for the removal of the former. Such holdings and statements are to be read and evaluated, however, in connection with the particular circumstances or conditions under which they were made. The decisions are generally to the effect that such hostility does not, of itself, warrant or require the removal of the trustee, unless it materially interferes with the proper administration of the trust, or is likely to do so, in which case it is ordinarily held to be a sufficient ground for removal.”

C. R. McCorkle, *Hostility between trustee and beneficiary as ground for removal*, 63 A.L.R.2d 523 (2012 Supp. on Westlaw), sec. 2.

From the foregoing, it is apparent that under Washington law, if bad will exists between Randal and Gary, it would justify Randal's removal as successor trustee of the Trust *only if* Gary has demonstrated that Randal's removal is necessary to save the Trust. He has not made, nor could he make, such a demonstration because the terms of the Trust contemplate no active interaction between trustee and the two sons as beneficiaries, nor the likely exercise of any discretion by the trustee over their Trust distributions. Sections B.2.4 and B.2.5 of the Trust (CP at 355) provide that after the disbursement of charitable bequests, the Trust assets are divided into equal shares for the two sons, then disbursed to them one-third initially, another one-third after five years, and the final one-third

after ten years. The trustee has no discretion to make other disbursements to a son from his share except “in the event of an emergency arising out of sickness or accident to a son.” Section B.2.9. CP at 357.

Accordingly, it was an abuse of discretion for Judge Lee to remove Randal as trustee of the Trust by merely asserting there was bad will between him and Gary.

5. The superior court did not have grounds to reject Bernadyne’s two named alternate successor trustees and appoint Johnson as trustee.

Judge Lee acknowledged in the Amended Order (CP at 257 lines 4-6) that Bernadyne appointed as trustee of the Trust, if Randal could not serve, her long-time friends Marie Jurlin and her daughter Camille Hutchison, but with superficial analysis Judge Lee asserted grounds to reject them. In *In re Powell*, 68 Wn.2d 38, 411 P.2d 162 (1966), the court recognized that a trustor’s right to chose their trustee is a fundamental right, stating at 40:

“This suggestion, that the trustee be changed, seems to us sheer effrontery. *Mary A. Powell had as much right to choose her trustee as she did her beneficiaries.* If she had wanted a corporate trustee, she could have named one; instead, she named her nephew, Charles O. Powell an elementary school principal, in whom she obviously place confidence. There is not the slightest suggestion of any lack of fidelity to this trust or incompetence in the performance of it. The lone objector says, in effect, that a corporate trustee would do it ‘cheaper and better.’ If that be true, the fact remains that Mary A. Powell had the unquestioned right

to select an individual to be the trustee, even if an individual administration of the estate would be more expensive and less efficient than an administration by a corporate trustee. The request for a change of the trustee was properly denied.” [Emphasis added.]

Judge Lee asserted two grounds to reject Bernadyne’s chosen friends. First, she wrote, “the court questions Bernadyne Jacoby’s capacity at the time she executed Amendment Five on September 16, 2006.” Simply “questioning” one’s testamentary capacity is a far cry from what Washington law requires, namely that a challenger present clear, cogent, and convincing evidence of one’s lack of testamentary capacity. *See, e.g., In re Estate of Bussler*, 160 Wn. App. 449, 461, 466, 247 P.3d 821 (2011), a copy of which Schafer provided to Judge Lee on June 13, 2011. CP at 151-57.

The other basis asserted by Judge Lee for her rejection of Bernadyne’s named alternate trustees was that their submitting declarations and letters to the guardianship court vouching for Randal’s good character and his good relationship with Bernadyne “evidences a conflict of interest based on their relationship with Randal Jacoby.” CP at 257 lines 11-12. Considering the analysis, *supra*, of disqualifying conflicts of interest and bad will, Judge Lee’s assertion of this basis for rejecting Bernadyne’s named friends as alternate trustees is unsupportable.

It most likely was precisely because Marie Jurlin and Camille Hutchison had a long personal history with Bernadyne’s family that she

named them. In *In re Estate of Vance*, 11 Wn. App. 375, 522 P.2d 1172 (1974), the court recognized the right of a trustor or testator to choose a fiduciary familiar with or involved in their family conflicts, stating at 382:

“A decedent has the right to designate who will administer an estate and is not inhibited by an actual or potential conflict of interest, but can designate someone to act in circumstances that will involve the conflict relationship, and that is within the right of the decedent. There can be a conflict situation which is not sufficient to justify removing executors unless there is also misconduct involved. An apparent or alleged conflict of interest situation is not sufficient to grant the remedy sought by the Petition herein.”

Judge Lee implies in a footnote that her arbitrary rejection of Bernadyne’s alternate trustees was warranted because “neither party has argued to have either Marie Jurlin or Camille Hutchison appointed as Successor Trustee.” CP at 258 line 25. The obvious reason for the lack of such argument is that the sole motion properly set for adjudication by Judge Lee did not raise the issue of those appointees’ eligibility to serve as successor trustees.

6. The superior court was not justified in appointing Johnson as personal representative of the estate.

The only petition filed in the Estate case seeking appointment of a personal representative was that pleading filed, but not yet noted for hearing, by Randal on November 24, 2010, requesting his own appointment. No party’s pleading requested the appointment of Sharon

Johnson as personal representative of the Estate. Judge Lee's irregular appointment of Johnson ignores the requirements of applicable probate law: Must she request her appointment? File an oath? Post a bond? Serve a notice of opening of probate? File an inventory? Publish a notice to creditors? Pursue any just claims on behalf of the Estate?

The Declaration of Proposed Guardian that Lofton mailed to Judge Lee on May 3, 2011, (CP at 237-41) asserts that Johnson is the president and apparent owner of a corporation named Sunrise Guardianship Services, which business is guardian for 82 wards, is bonded for \$25,000, and reports the total value of all assets under its management is \$148,000. That Judge Lee could view these as qualifications for appointment to manage an Estate and Trust of roughly \$600,000 certainly raises questions about the Judge's judgment.

7. It appears that the superior court's Department 19 considered improper communications from Department 20.

As noted above, it appears from filed documents that Judge Lee's Department 19 and Judge van Doorninck's Department 20 communicated with each other concerning the guardianship and Estate cases.

On December 10, 2010, Judge van Doorninck approved Cameron's final accounting and discharge order, but indicated she would enter it after Judge Lee enters an order on the Trust. RP1 at 12, CP at 44-46. There

apparently were some communications between Judge van Doorninck or her staff and Judge Lee or her staff, because the clerk's Memo of Journal Entry from that hearing, entered on the day of that hearing in the guardianship case court file (CP at 45-46), was entered five days later in the Estate case court file with a cover sheet bearing a stamp reading "FILED DEPT 19 IN OPEN COURT DEC 15, 2010". CP at 310-12.

And it appears that on or before April 21, 2011, Judge van Doorninck's Department 20, before which Randal's motion was set for hearing the very next day, communicated with Judge Lee's Department 19 about transferring the guardianship case because on that date Department 20's judicial assistant completed a "Request for Reassignment" to transfer the case to Department 19, writing by hand on it "to run w/ Judge Lee's probate matter under same name. Motion 4/29/11 at 9:00 Dept. 19." CP at 141.

The Code of Judicial Conduct ("CJC") at its Rule 2.9(A)(3) states:

"A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, *provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record*, and does not abrogate the responsibility personally to decide the matter." [Emphasis added.]

In *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946 (2001), the court referred to its prior unpublished ruling that judge-to-judge communications in the case had violated the appearance of fairness

doctrine, stating at 639:

“By unpublished opinion dated June 28, 1996, we held that the failure of the trial court to inform Kauzlarich of the communication between two judges violated the appearance of fairness doctrine. “

In the hearing before Judge van Doorninck on December 19, 2010, at which the issue of Randal’s succession as trustee of the Trust was discussed, the Judge recognized that he was entitled to have the issue addressed by a judge untainted by the accusations made against him in the guardianship case, stating (RP1 at 10), “Mr. Schafer’s client is entitled I think to have a new judge hear, you know, whether he would be an appropriate person or not.” But her subsequent assignment of the guardianship case to Judge Lee is inconsistent with that recognition.

The assignment of both cases to Judge Lee appears intended to thwart the rule that a judge may not consider records and information from one case when deciding a separate case. Washington case law establishes that a court adjudicating a proceeding ought not be influenced by information from a separate proceeding, even if it had involved the same parties. In *Swak v. Dept. of Labor and Ind.*, 40 Wn.2d 51, 240 P.2d 560 (1952), the court stated at 54:

[C]ourts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties. The record, though public, must be proved. [Citations omitted.]

The reason for the rule is apparent. The decision of a cause

must depend upon the evidence introduced. If a court should take judicial notice of facts adjudicated in a different case, even between the same parties, it would make those facts, unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced, they might have been controverted and overcome.

In *Vandercook v. Reese*, 120 Wn. App. 647, 86 P.3d 206 (2004), the trial court in a probate estate proceeding was found to have wrongly taken into account testimony that had been presented before the same trial judge in a prior dissolution proceeding.

Judge van Doorninck's assignment of the guardianship case to Judge Lee so that she could consider the records from both cases, effectively consolidating them even before the Judge Lee formally (but wrongly) ordered that they be consolidated, was improper considering the foregoing Washington law.

8. It appears that the superior court considered improper unfiled communications from Gary's counsel.

At the hearing on April 29, 2011, it appeared that Judge Lee did not possess working papers of filed pleadings that Lofton, Gary's counsel, reported that he has submitted, so Judge Lee invited counsel to "resubmit what you want me to review." RP2 at 25 line 17. Within a week, Lofton mailed to Judge Lee, but did not file, two argumentative letters with documents that had not previously been filed in the case. CP at 203-41, 242-48.

CJC Rule 2.9(A) states:

“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge’s court except as follows:[listing exceptions not applicable here.]”

Loftons argumentative letters and previously unfiled documents must be viewed as communications that Judge Lee should not have considered, but it appears that she did.

The general remedy when a judge has been tainted by improper communications is removal of that judge from the case. In *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), the State Supreme Court addressed and applied that general rule, stating at 205-06:

“The remaining inquiry is whether this ex parte communication requires recusal. Dr. Sherman argues that recusal was unwarranted because Appellants suffered no prejudice on account of the ex parte communication. However, in deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating. The CJC provides in relevant part: ‘Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned....’ CJC Canon 3(D)(1) (1995). The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the relevant facts.’

Under the circumstances, we consider the safest course to be remand of the matter to another judge.”

Based on the foregoing and other irregularities in this case, Judge Lee’s order should be vacated and the Estate cases should be assigned to

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STATE OF WASHINGTON

BY _____
DEPUTY

**In the Court of Appeals for the State of Washington
Division II**

**In re Guardianship of
BERNADYNE E. JACOBY,
an incapacitated person.**

No. 42868-7-II

**Proof of Service of
Appellant's Opening Brief
and related papers.**

I declare under penalty of perjury under Washington state law that today I served a copy of Appellant's Opening Brief, being filed today, on each of the below-named parties both by e-mail and USPS mail or personal delivery* at the addresses indicated below, along with this Proof of Service and the 2nd Supplemental Designation of Clerk's Papers that I also am filing in this court today.

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