

FILED
Court of Appeals
Division II
State of Washington
7/15/2019 4:00 PM

NO. 53501-7-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MARGARET GARRISON,

Respondent,

v.

DELBERT LEE MCGILL, ET AL.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR THURSTON COUNTY

The Honorable John Skinder, Judge

BRIEF OF APPELLANT

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INTRODUCTION

This Court should reverse the trial court's order to deny appellant's, Delbert Lee McGill's ("Mr. McGill"), Motions to Reconsider or Amend the Findings and vacate the underlying orders, because the orders cannot stand as a matter of law. The trial court misinterpreted the statutes and cases governing guardianships and TEDRA disputes (concerning estates of deceased or incapacitated persons) and misapplied evidentiary rules and standards. This Court should vacate the trial court's restraining order and judgment against Mr. McGill and his counsel, and vacate the judgment for attorney's fees against Mr. McGill in denying his motion to compel, under a *de novo* standard of review for errors of law.

Mr. McGill first assigns error to the trial court's entry of interlocutory orders as final judgments; second, to the trial court's acceptance that a guardian's attorney also represents the incapacitated person; third, to the trial court's lack of evidentiary scrutiny; and finally, to the trial court's lack of findings of fact.

First, the trial court entered interlocutory rulings as final judgments, despite their lack of CR 54(b) finality or guidance on the record. A ruling before a final disposition in a case is interlocutory, but the court directed the clerk to enter judgments in both orders.

Second, the trial court based its ruling on the respondent, Margaret Garrison's ("Ms. Garrison"), allegation that a guardian's counsel also represents the incapacitated person, even though her counsel had previously told the court that he did not represent Vernon Jacob Horst ("Mr. Horst"), and that Mr. Horst was unrepresented. The allegation is also unsupported by guardianship laws or the Washington Rules of Professional Conduct ("RPC's").

Third, the trial court failed to apply the evidentiary standard for probate or guardianship estate contests of "clear, cogent, and convincing evidence" for proving every allegation asserted. The court also failed to follow the due process requirements of RCW 11.92.195, including an evidentiary hearing, before restraining an incapacitated person's freedom of association. Instead, the trial court relied on Ms. Garrison's allegations that were inadmissible as hearsay and barred by the Deadman's Statute.

Finally, the trial court erred as a matter of law by entering judgments and orders without the necessary findings of fact nor any guidance on the record for a reviewing court to consider.

This Court should grant attorney's fees to Mr. McGill for bringing this appeal and underlying motions.

C. ASSIGNMENTS OF ERROR

1. Mr. McGill assigns error as a matter of law to the trial court's misinterpretation and misapplication of the final judgment rule and CR 54 by directing the clerk to enter a judgment for an interlocutory ruling for a restraining order and attorney's fees without a CR 54(b) certification of finality.
2. Mr. McGill assigns error as a matter of law to the trial court's misinterpretation and misapplication of the final judgment rule and CR 54 by directing the clerk to enter a judgment in an interlocutory ruling denying Mr. McGill's motion to compel and awarding attorney's fees without a CR 54(b) certification of finality.
3. Mr. McGill assigns error as a matter of law to the trial court's incorrect analysis of RCW 11.88, by accepting Ms. Garrison's allegation as true that as guardian of an incapacitated person she and her counsel represent Mr. Horst at law.
4. Mr. McGill assigns error as a matter of law to the trial court's incorrect analysis of RCW 11.88 and the RPC's to accept Ms. Garrison's allegation as true that as guardian of an incapacitated person she and her counsel represent Mr. Horst at law.
5. Mr. McGill assigns error as a matter of law to the trial court's consideration of the RPC's to impose civil liability against counsel.
6. Mr. McGill assigns error as a matter of law to the trial court's failure to apply the evidentiary rule against hearsay by allowing out of court statements attributed to Mr. Horst.
7. Mr. McGill assigns error to the trial court's failure to apply the Deadman's Statute by considering the statements of an incapacitated person that were introduced by an interested party to the transaction.
8. Mr. McGill assigns error as a matter of law to the trial court's incorrect interpretation of RCW 11.92.195 by accepting mere allegations of Ms. Garrison as true, without giving notice and an opportunity to be heard.

9. Mr. McGill assigns error as a matter of law to the trial court's failure to apply the correct evidentiary standard of clear, cogent, and convincing to prove every allegation.
10. The trial court erred in issuing a restraining order and award of attorney's fees against Appellant and his counsel without formal findings of fact.
11. The trial court erred in awarding attorney fees to Petitioner in its denial of Appellant's motion to compel without formal findings of fact.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Whether this Court should vacate the trial court's judgments, when the trial court designated interlocutory rulings "judgments" for entry by the clerk of the court, but (1) the court expressly indicated that the restraining order was not a final order; (2) the court did not enter CR 54(b) certifications of finality; (3) the record lacks adequate guidance for a reviewing court? (Assignments of Error 1–2.)
- B. Whether this Court should vacate the trial court's restraining order and judgment because the court erroneously accepted that guardian's counsel represents the incapacitated person, when (1) counsel admitted Mr. Horst was unrepresented; (2) counsel has not petitioned for appointment; (3) representing both guardian and charge is a conflict; and (4) the RPC's are not a basis for civil liability? (Assignments of error 3–5.)
- C. Whether this Court should vacate the restraining order and judgment for evidentiary errors, when (1) Ms. Garrison's allegations are inadmissible hearsay and barred by the Deadman's Statute; (2) the trial court failed to adhere to the due process requirements of RCW 11.92.195; and (3) the trial court failed to apply the evidentiary standard for clear, cogent, and convincing evidence? (Assignment of Error 6–9.)?
- D. Whether this Court should vacate the lower court's judgments and orders when (1) the trial court failed to enter necessary findings of fact, and (2) the trial court declined to provide guidance on the record that a reviewing court could consider on the merits? (Assignments of Error 10–11.)

E. Whether this Court should award attorney's fees and costs to Mr. McGill in bringing this appeal?

D. STATEMENT OF THE CASE

This case pertains to a single real property transfer on March 20, 2015. The parties have briefed this Court on the background of this case on Respondent's, Margaret Garrison's ("Ms. Garrison's") motion for discretionary review of the lower court's denial of her motion for summary judgment. *Garrison v. McGill*, Case No. 51836-8-II (Unpublished July 26, 2018) (*rev. denied*).

The subject property is the farm that Vernon Jacob Horst ("Mr. Horst"), transferred by quitclaim deed to Appellant, Delbert Lee McGill ("Mr. McGill") on March 20, 2015. Clerk's Papers 69–71. Mr. Horst retains a life estate on the farm. *Id.* Mr. McGill is therefore the presumptive owner and taxpayer of the farm, where both he and Mr. Horst reside. In 2017, Ms. Garrison brought this matter under the Trust and Estate Dispute Resolution Act ("TEDRA") to invalidate all gifts or transfers since 2012 under a theory of undue influence. CP 2:23–27.

The rulings that are before this Court on appeal:

On appeal is the trial court's denial of Mr. McGill's motions for 1) reconsideration of a judgment and order restraining Mr. McGill and his counsel from communicating with Mr. Horst and holding them jointly and severally liable for attorney's fees; 2) reconsideration of a judgment and

order awarding attorney fees to Ms. Garrison against Mr. McGill in denying his motion to compel discovery; or 3) in the alternative, to amend the trial court's lack of findings of fact. CP 388–9.

The trial court issued an interlocutory ruling, granting a restraining order and joint and several liability for attorney's fees against Mr. McGill and his counsel at hearing on March 22, 2019. The trial court failed to provide guidance for its findings of fact or conclusions of law. RP Vol. 1 26:12–22. In explaining its ruling, the trial court relied on the statutory scheme of RCW 11.92¹ and said, "I am satisfied...under this factual situation that it is appropriate to enter a restraining order." RP v.1 17:17–20. Counsel for Mr. McGill requested an explanation for the court's ruling, to which it responded, "I've done that, Ms. Scott Laukkonen." RP v.1 19:19–21.

At the same March 22, 2019, hearing for the restraining order, the trial court heard argument for Mr. McGill's motion to compel discovery of Mr. Horst's medical records. CP 123–128. The trial court denied the motion to compel discovery at hearing, and awarded attorney fees to Ms. Garrison for responding to the motion. The trial court again failed to offer guidance for its findings of fact or conclusions of law. RP v.1 16:23–

¹ RCW 11.92 describes the powers and duties of a guardian, not the authority of the court.

19:21. It ruled, “I’m denying the motion to compel here for the reasons put forth by [counsel for Ms. Garrison], and there will be an award of attorney fees for Ms. Garrison having to respond to this as well.” *Id.*

At presentation of both rulings on March 29, 2019, counsel for Mr. McGill requested certification of finality of the restraining order under CR 54(b), but the trial court stated, “I don’t believe it’s a final judgment.” RP v.2 8:9–10. Mr. McGill and his counsel requested an evidentiary hearing to make an offer of proof and confront the witnesses against them. RP v.2 4:14–6:26. The trial court ignored the request and signed a judgment and order without entering formal findings of fact, conclusions of law, or a certification of finality under CR 54(b). *See* RP v.2 6:22; CP 260–262.

At the same presentation hearing as the restraining order, the trial court signed a judgment and order that denied Mr. McGill’s motion to compel and awarded attorney fees to Ms. Garrison. Again, the trial court granted the judgment and order without formal findings of fact, conclusions of law, or a certification of finality under CR 54(b). CP 257–259; RP2 3:12–9:35.

The facts and allegations before the trial court in issuing its rulings:

On February 22, 2019, Mr. McGill and his counsel met at the farm regarding a delivery of hay. CP 137–143; *see also* CP 201:12–18. Mr.

Horst approached them and tried to discuss his legal issues. CP 139:10–143:20. Counsel for Mr. McGill refused to discuss the case(s) with Mr. Horst. *Id.* The following day, Mr. McGill received a request from Mr. Horst to ask if Mr. McGill’s counsel knew “any honest lawyers.” CP 141:6–10. In response to her client’s request, counsel for Mr. McGill provided the phone number for the Washington State Bar Association. *Id.*; *see also* CP 11–23.

On March 8, 2019, Ms. Garrison filed a declaration and obtained an order for Mr. McGill to show cause why an order should not be entered to restrain him from coming within 50’ of Mr. Horst. CP 32–35; CP 25–31. Ms. Garrison argued that, as guardian, she and her attorney represent the alleged/adjudged incapacitated person (“AIP”), Mr. Horst. CP 28:16–21. Therefore, she argued, Mr. Horst is a represented party. *Id.* Therefore, she concluded, Mr. McGill and his counsel had violated RPC 4.2 for communications with a represented party. CP 28:26–29:28. Ms. Garrison said in her declaration that Mr. Horst told her he had a “‘very nice’ conversation” with Mr. McGill and Mr. McGill’s counsel. CP 32:23–26. She stated that neither she nor her attorney “were given notice or asked permission for Mr. McGill and his attorney to have a private meeting with [Mr. Horst].” *Id.* She said that Mr. Horst had told her that Mr. McGill and his counsel had “opened his eyes” that she was trying to take the farm for

herself. CP 32:28–33:2. She further stated that she “was not present during this conversation,” she [did] not know if these statements [were] true”, and she could “only assume” the motive for the conversation was “to get [Mr. Horst] to divulge privilege [sic] information...and/or get [Mr. Horst] to undermine [her] ability to act on his behalf.” CP 32:2-9. In her motion for a restraining order, she implied that Mr. McGill and his counsel “had a meeting” with Mr. Horst (CP 27:20); gave him papers to obtain a free attorney to resist Ms. Garrison as his guardian(CP 27:27–28); and that Mr. McGill and his counsel are having secret meetings with Mr. Horst to undermine Ms. Garrison (CP 30:18–23).

In Ms. Garrison’s Motion for an Order to Show Cause for a Restraining Order, she insinuated that Mr. McGill or his counsel had given Mr. Horst papers to get a free attorney to resist her efforts. CP 27:28.

Procedural history that is relevant to this appeal:

On February 8, 2017, Mr. McGill filed a complaint for injunctive and declaratory relief against Mr. Horst, alleging waste and conversion of farm property. CP 52–59. Ms. Garrison, Mr. Horst’s daughter, responded by filing a petition for guardianship over her father’s estate, concurrent with this TEDRA petition. CP 1–10. Ms. Garrison’s TEDRA petition seeks declaratory relief that “any estate planning documents, deeds, contracts or other documents, executed by [Mr. Horst] in the past 5 years

are invalid, as being procured through fraud, undue influence and/or lack of capacity.” CP 2:23–27. The petition also sought a specific finding that Mr. McGill “has engaged in financial exploitation of a vulnerable adult.” CP 3:2–5. The evidence Ms. Garrison relied on to support the petition was her declaration that Mr. Horst wanted her and/or her daughter to inherit the farm. CP 3:16–21; CP 23:12–28.

The probate and guardianship commissioner appointed Ms. Garrison full guardian of Mr. Horst’s person and estate on July 14, 2017. CP 39–50. The guardianship order specifically retained for Mr. Horst his right “to make decisions regarding social aspects of his life.” CP 39–50 at 44:15–24.

Counsel for Ms. Garrison advised the trial court in this TEDRA action on March 2, 2018, that since Mr. Kee’s withdrawal in the guardianship matter, Mr. Horst was unrepresented by counsel. CP 268:6–23. Neither the court nor the parties have moved for appointment of counsel for Mr. Horst in either the guardianship or the TEDRA.

On March 22, 2019, on Mr. McGill’s voluntary motion, the trial court dismissed, without prejudice, Mr. McGill’s civil lawsuit for injunctive and declaratory relief against Mr. Horst.

Trial in this matter has been re-noted for March 20, 2020.

E. ARGUMENT

Statement of the Argument

This Court should reverse and vacate the lower court's rulings for misinterpreting and misapplying the relevant legal authority. A) the trial court entered interlocutory rulings as judgments, contrary to CR 54. B) The trial court misinterpreted guardianship laws designed to protect the rights of an incapacitated person and accepted the assertion that a guardian's counsel necessarily represents an incapacitated person, contrary to RCW 11.88 and the RPC's. C) The trial court accepted inadmissible evidence in reaching its rulings. D) The trial court failed to enter findings of fact in rulings that it designated "judgments" for a reviewing court to review.

Standard of Review

In reviewing errors of law, the appellate court reviews *de novo*. See, e.g., *Lyster v. Metzger*, 68 Wn.2d 216, 226, 412 P.2d 340 (1966); *Sdorra v. Dickinson*, 80 Wn. App. 695, 701, 910 P.2d 1328 (1996). The interpretation of an evidentiary rule is reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

When a trial court makes its ruling based on documentary evidence and not live testimony, the appellate court will generally review *de novo*. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154

(1997) (citing *Bering v. SHARE*, 106 Wn.2d 212, 220-21, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987)). Contra *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (discussed in *Eussen v. Parker*, No. 49722-1-II (Div. 2, Jan. 9, 2018) (unpub.) (when trial court’s decision is based on a written record that requires the trial court to consider “competing documentary evidence [that] must be weighed and issues of credibility resolved, the appropriate standard of review is for substantial evidence”). However, when the findings of fact are missing or are defective, the proper remedy is remand for entry of adequate ones unless the appellate court is persuaded that sufficient basis for review is present in the record. *Little v. King*, 160 Wn.2d 696, 699, 161 P.3d 345 (2007).

However, in the event this Court agrees with Mr. McGill that the trial court erred as a matter of law by designating interlocutory rulings as final judgments, then this appeal is not properly before the reviewing court under the Rules of Appellate procedure. RAP 2.2(a). This Court is directed to generally review only final judgments. *Id.* If this Court holds the decision incorrectly designated a notice of appeal, the notice will be given the same effect as a notice for discretionary review. RAP 5.1(c).

The standard of review for discretionary review is obvious error. RAP 2.3(b)(1). Appellate courts have found obvious error in cases where

a trial court has obviously misapplied the relevant law, or failed to take relevant law into account. For example: in *In re P.P.T.*, the Court of Appeals granted a motion for discretionary review in a parental rights termination case based on the trial court's obvious misapplication of one of the six factors of RCW 13.34.180(1)(f) (statute establishing the circumstances under which it is appropriate for a court to order termination of parental rights). *In re P.P.T.*, 155 Wn. App. 257 (2010). The Court of Appeals found that the trial court erred in basing its conclusion on what the court believed constituted a permanent and stable home for the involved children, rather than on the Supreme Court's holding that the relevant factor was "mainly concerned with the continued effect of the legal relationship between parent and child." *Id.* at 268. The obvious error lay in the trial court's failure to apply the Supreme Court's holding to its analysis.

A. This Court should vacate the trial court's judgments, because the trial court designated the interlocutory rulings "judgments" for entry by the clerk of the court, but (1) the court expressly indicated that the restraining order was not a final order; (2) the court did not enter certifications of finality under CR 54(b); and (3) the record lacks adequate guidance for a reviewing court. (Argument of Assignments of Error 1-2.)

A.1. This Court should vacate the trial court's judgments, because the trial court designated the interlocutory rulings "judgments" for entry by the clerk of the court.

A judgment is the “final determination of the rights of the parties in the action.” CR 54(a)(1). Any other written direction of a court, “however designated,” is an order. CR 54(a)(2). When more than one claim for relief is presented in an action, “the court may direct the entry of a final judgment [of a claim] only upon an express determination, supported by written findings, that there is no just reason for delay. CR 54(b). In absence of certification, an order remains subject to revision at any time before final disposition of the case. *Id.*

The purpose for this final judgment rule is well-expressed in *Loeffelholz v. C.L.E.A.N.*, 82 P.3d 1199, 119 Wn. App. 665 (2004). The court set forth three policy reasons: “(1) to offset judgments favorable to each side before any enforcement activity takes place; (2) to preclude the disruptive effects of enforcement and appellate activity while trial court proceedings are still ongoing; and (3) to avoid a multiplicity of appeals.” *Id.*

Division 1 of the Washington Court of Appeal applied the final judgment rule to be explicit that a reviewable order is not final and enforceable. *Fluor Enterprises, Inc. v. Walter Const.*, 141 Wn. App. 761, ¶17, 172 P.3d 368, (2007) (trial court generally must resolve all claims in a case before a final and enforceable judgment is entered on any part of the case) (discussed, *Angelo v. Angelo*, 175 P.3d 1096, 1103, 142 Wn.

App. 622 (2008) (noting that although federal courts are split regarding 54(b) certification, the lack of 54(b) certification did not prevent an appeal of the order).

A.2. This Court should reverse and vacate the judgments under either a *de novo* standard of review of final orders for legal error or a review of interlocutory rulings for obvious error, when the orders are interlocutory under a plain language reading of CR 54.

This court should reverse and vacate the trial court’s judgments for lack of finality for either legal error or obvious error. Although the obvious error standard for reviewing an interlocutory order differs from the *de novo* standard of review for a final order, in this case, the analysis will be the same.

In this case, this Court should reverse and vacate the judgments under a *de novo* standard of review for legal error, or in the alternative, give this appeal the same effect as a discretionary review and reverse and vacate the judgments for obvious error. Under a plain language reading of CR 54, the orders are interlocutory for three reasons. First, counsel for Mr. McGill specifically inquired as to the finality of the restraining order and attorney’s fee award, to which the trial court responded, “I do not think it is a final order.” RP v.2: 8:9–10. Second, the trial court declined to enter a certification of finality under 54(b). *See* RP v.2 6:22; CP 260–

262. Third, the trial court provided insufficient guidance on the record for the appellate court to review its findings of fact. *See id.*

A.3. This Court should reverse and vacate the judgments under either a *de novo* standard of review of final orders for legal error or a review of interlocutory rulings for obvious error, when the orders are interlocutory under the policy guidance of *Loeffelholz*.

This Court should reverse and vacate the judgments as either legal error or obvious error under the three policy reasons set forth in *Loeffelholz*. First, as to the offset of judgments, there is no indication in the record that between now and trial in March 2020, there will not be another award of fees or monetary sanctions against any party. The policy reasons for final judgment rule would favor waiting until final disposition to offset any and all awards against the parties. Second, as to the disruptive effects of appeal and enforcement activity, the very existence of this appeal reflects that. The underlying motions here have little to do with the case in chief, which is about a quitclaim transfer in 2015. Third, as to the piecemeal approach of appeals, only time will tell. It is likely that, if this Court affirms the motions, the parties will spend more time in the Court of Appeals than the trial court.

B. This Court should vacate the trial court's restraining order and judgment because the court erroneously accepted that an incapacitated person is represented by his guardian's counsel, when (1) counsel admitted Mr. Horst was unrepresented; (2) counsel has not petitioned for appointment; (3) representing both guardian and ward is a conflict;

and (4) the RPC's are not a basis for civil liability. (Argument of Assignments of error 3–5.)

B.1. This Court should vacate the restraining order and judgment because the trial court erred in considering of Ms. Garrison's contradicting statements whether her counsel does or does not represent Mr. Horst.

The Washington Rules of Professional Conduct (“RPC”) guides attorneys to not knowingly make false statements of a material fact or law to the tribunal or fail to correct a false statement of a material fact. RPC 3.3(a). The RPC goes on to guard against a lawyer offering evidence he knows to be false. RPC 3.3(a)(4). Comment [3] to the rule makes clear that an attorney may not make a statement in open court that he knows is untrue. RPC 3.3, C.3.

In this case, this Court should reverse and vacate the restraining order and judgments because either (1) Ms. Garrison's counsel made a knowingly false statement in open court; or (2) Ms. Garrison made a false allegation in her declaration and motion for a restraining order. Given the contradiction, the trial court did not properly exclude the allegation. Her counsel advised the court that he has never represented Mr. Horst and that Mr. Horst is unrepresented. CP 268:6–23. However, Ms. Garrison's declaration and motion rely on the premise that Ms. Garrison's counsel represents Mr. Horst. CP 28:16–21. If the original statement to the court was false and her counsel does represent Mr. Horst, her counsel violated

his responsibility for candor to the tribunal for failing to correct that error.

However, as discussed below, her counsel cannot represent Mr. Horst.

B.2. This Court should vacate the trial court’s restraining order and judgment because counsel for Ms. Garrison has not been appointed by the court as Mr. Horst’s counsel.

An attorney who purports to represent an alleged or adjudged incapacitated person (“AIP”) must petition to be appointed, and if AIP is adjudged incapacitated, attorney fees are subject to court approval. RCW 11.88.045(2); compare *In re Guardianship of Decker*, 188 Wn. App. 429, 441–443, 353 P.3d 669 (2015) (review denied) (counsel petitioned and was appointed counsel for AIP, appellate court held court oversight appropriate if guardian appointed), with *In re Guardianship of Beecher*, 130 Wn. App. 66, 121 P.3d 743 (2005) (AIP hired attorney who petitioned and received order of appointment, then guardianship dismissed, so trial court no longer had oversight).

Considering the analogous cases, this Court should reverse and vacate the courts restraining order and judgment, because counsel for Ms. Garrison does not also represent Mr. Horst, as a matter of law. In both *Decker* and *Beecher*, the attorney purporting to represent the alleged incapacitated person properly petitioned the court for appointment under RCW 11.88.045(1)–(2).

In this case, counsel for Ms. Garrison purports to represent Mr. Horst, an incapacitated person, without petitioning for appointment. In *Decker*, the court retained oversight authority over counsel's representation of the incapacitated person because, as with Mr. Horst, the court established a guardianship. That oversight is distinguishable from *Beecher*, where the court did not retain authority over counsel's representation of the alleged incapacitated person, because the court disposed the case without finding she was incapacitated.

B.3. This Court should vacate the trial court's restraining order and judgment because it would be a conflict of interest for Ms. Garrison's counsel to represent both her as guardian and Mr. Horst as the person subject to guardianship.

When the court appoints a guardian of an individual's person or estate, the court adjudges that person incapacitated and revokes certain rights. *See e.g.* RCW 11.88.030(5) (notice to AIP of rights that may be revoked and rights that will be retained, including independent counsel). A person alleged or adjudged incapacitated retains the right to willing counsel of their choosing. RCW 11.88.045(1).

A lawyer may not represent a client if the representation of one client is directly adverse to the representation of another client. RPC 1.7(a)(1). It is a conflict of interest for the attorney for a guardian to also represent the incapacitated person. *See* Advisory Opinion 2107,

Washington Ethics Opinions (2006); RPC 1.2(a), RPC 1.7(b), RPC 1.8(a). The inherent conflict of interest of representing both guardian and incapacitated person is that “[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client.” RPC 4.4 , Comment 1.

In this case, this Court should vacate the trial court’s restraining order and judgment, because there is a fundamental conflict of interest between representing a guardian and the person subject to guardianship. Ms. Garrison is not only the guardian of Mr. Horst’s person and estate, she specifically petitioned the court to revoke his rights. See CP 39–50. Therefore, her attorney has a responsibility to advocate on Ms. Garrison’s behalf to revoke Mr. Horst’s rights and subordinate any interest Mr. Horst may have in preserving or regaining those rights. Pursuant to statute, Mr. Horst has the right to independent legal counsel to advocate on his behalf. If Mr. Frawley has been representing both Ms. Garrison and Mr. Horst, he may have a duty to withdraw from representation of both.

B.4. This Court should vacate the trial court’s restraining order and judgment for improperly imposing civil liability for alleged RPC violations.

In Comment [20] to the Preamble to the Washington Rules of Professional Conduct (“RPC”), the Washington Supreme Court set forth unequivocally that the RPCs are not designed to impose civil liability.

RPC, Preamble and Scope, C.20. An “antagonist in a collateral proceeding” lacks standing to seek enforcement of the RPC’s. Comment [20] cites the Washington Supreme Court Case *Hizey v. Carpenter* for a thoughtful analysis of the principle that the RPC’s are not designed to impose civil liability, discussing numerous policy reasons, including distraction from the case-in-chief. *See Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992); *see also LK Operating, LLC v. Collection Grp., LLC*, 168 Wn. App. 862, 872, 279 P.3d 448 (2012)

In this case, this Court should reverse and vacate the trial court’s restraining order and judgment, because the court erred in using allegations of an RPC violation as the basis for a restraining order and fee award. The trial court granted a restraining order against Mr. McGill and his counsel, referring only to Respondent’s unsupported and inconsistent allegation that Mr. McGill’s counsel violated RPC 4.2 by speaking to Mr. Horst. CP 30-32. However, the RPC’s are clear that they are not designed to impose civil liability for policy reasons such as distraction from the case-in-chief, which is clearly present here.

C. This Court should vacate the restraining order and judgment for evidentiary errors, when (1) Ms. Garrison’s allegations are inadmissible hearsay and barred by the Deadman’s Statute;. (2) the trial court failed to adhere to the due process requirements of RCW 11.92.195; and (3) the trial court failed to apply the evidentiary standard for clear, cogent, and convincing evidence. (Argument of Assignments of Error 6–9.)

The interpretation of an evidentiary rule is reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

In this case, this Court should vacate the lower court's judgments and orders under a *de novo* standard of review for errors of law in interpreting evidentiary rules and standards. The trial court failed to apply the correct evidentiary standards in issuing its ruling.

C.1. This Court should reverse and vacate the restraining order and judgments for failing to exclude evidence that is inadmissible for lack of personal knowledge and hearsay and is otherwise barred by the Deadman's Statute.

Under ER 602, a witness may not testify to evidence not within their personal knowledge. Further, under ER 802, hearsay is generally inadmissible. There are exceptions for hearsay statements shown to be reliable. *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 136, 130 P.3d 865 (2006), ER 802, 803, 804. This court applies *de novo* review regarding whether a statement is inadmissible hearsay. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201, 207 (2006). In this case, no ER 803 exceptions to the rule against hearsay apply.

“Washington does not have any special rules that govern hearsay statements made by allegedly incapacitated elders.” *Warner v. Regent Assisted*, 132 Wn. App. 126, 136, 130 P.3d 865 (2006). In *Warner*, the court examined hearsay statements made by a person with dementia. The

Warner court looked to *State v. Chapin*, 118 Wn.2d 681, 685, 826 P.2d 194 (1992) for guidance, and determined that mental incapacity did not preclude admission. *Warner* at 138. “A declarant's mental incapacity does not render his or her hearsay statements per se inadmissible. If...the circumstances surrounding the making of the statement provide a guaranty of trustworthiness, the statement is still admissible.” *Id.* In this case, given the inconsistencies on the record and lack of corroboration or cross-examination, there were no indications of trustworthiness.

The “Deadman’s Statute” bars a party in interest to a transaction from testifying to statements made by a decedent or incompetent person about that transaction. Incompetence (unlike incapacity) is a question of fact for the trial court to determine at the time the testimony is given. RCW 5.6.050; *In re Estate of Bottger*, 14 Wash.2d 676, 685, 129 P.2d 518, 522 (1942). An interested party is one who stands to gain or lose in the action. *In re Estate of Shaughnessy*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982). The statute is inapplicable to testimony offered in favor of the estate of a decedent. *In re Estate of Davis*, 23 Wn. App 384, 385, 597 P.2d 404 (1979), (citing *Fies v. Storey*, 21 Wn. App. 413, 585 P.2d 190 (1978) (overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, n.2, 676 P.2d 431 (1984)).

In this case, this Court should reverse and vacate the restraining order and fee awards because the trial court committed legal error by failing to apply the evidentiary rules. Ms. Garrison's burden of proof is clear, cogent, and convincing evidence. The trial court failed to exclude Ms. Garrison's declaration of events and intents to which she lacked personal knowledge; that were hearsay statements; and that were statements barred by the Deadman's Statute.

Ms. Garrison's motion for a restraining order was supported only by her own declaration in which she admits she "was not present," did "not know if the statements are true," and she could "only assume." CP33:2-9. Without any personal knowledge, she made a declaration to the trial court of events she did not witness. *See e.g.* CP 32:2-9. Her motion then expanded the scope by attributing her lack of personal knowledge of to the ill intentions of Mr. McGill and his counsel. CP 18-19. Her arguments on the motion were inconsistent with the out-of-court statements she attributed to Mr. Horst in her declaration. The trial accepted as true all these allegations, which "apparently" had an impact. RP v.1, 18:8-10.

Ms. Garrison's declaration attributed statements to Mr. Horst, which are inadmissible as out-of-court statements offered to prove the truth of the matter asserted. Further, when she filed this petition, Ms.

Garrison declared under penalty of perjury that her interest in the present litigation is to acquire the farm for herself or her daughter. *See e.g.* CP 3:16–21; CP 23:12–28. As such, Ms. Garrison is a party in interest to the transaction under the Deadman Statute, and any statements she attributes to Mr. Horst are barred from evidence.

C.2. This Court should vacate the restraining order and judgment, because the trial court failed to adhere to the due process requirements of RCW 11.92.195.

The Court’s oral ruling indicated the restraining order was supported by RCW Chapter 11.92. However, an entire section of that chapter is devoted to preventing these very restraints on a vulnerable adult’s freedom of association. RCW 11.92.195. An incapacitated person’s freedom of association “includes, but is not limited to, the right to freely communicate and interact with other persons.” *Id.*

The only exceptions to an incapacitated person’s freedom of association are if 1) specifically authorized by the guardianship court at a hearing to establish or modify the guardianship; or 2) pursuant to RCW 74.34 for protection of a vulnerable adult. RCW 11.92.195. Obtaining a protection order for a vulnerable adult requires, at minimum, a petition; notice to the incapacitated person, Department of Social and Health Services, and the respondent; and an evidentiary hearing. RCW 74.34.120–150. The standard of review at that hearing is dependent on

whether the vulnerable adult supports or objects the restrains to his freedom of association. If he objects, the evidentiary standard is clear, cogent, and convincing. *In re Knight*, 178 Wn. App. 929, 940, 317 P.3d 2068 (2 2014). “[B]ecause a contested vulnerable adult protection order case implicates the vulnerable adult's liberty and autonomy interests like a guardianship does, the standard of proof for a vulnerable adult protection order contested by the alleged vulnerable adult is clear, cogent, and convincing evidence, as it is with a guardianship.” *Id.*

C.3. This Court should vacate the restraining order and judgment, because the trial court failed to apply the evidentiary standard for clear, cogent, and convincing evidence.

In a challenge to an *inter vivos* gift, the contestant must prove "every material fact alleged" by clear, cogent, and convincing evidence. *Dean v. Jordan*, 194 Wash. 661, 669, 79 P.2d 331 (1938).

In this case, this Court should vacate the restraining order and judgment, because the trial court failed to apply the correct evidentiary standard of clear, cogent, and convincing evidence. The court did not conduct any fact-finding. The court did not conduct an evidentiary hearing under RCW 11.92.195 to allow Mr. McGill to cross-examine the witness; to allow Ms. Garrison to prove her evidence; to allow the Department of Social and Health Services an opportunity to be heard; or even to give Mr. Horst notice and an opportunity to be heard. The trial court failed to justify

its reliance on evidence that fell far short of the clear, cogent, and convincing standard.

- D. This Court should vacate the lower court's judgments and orders as a matter of law, because (1) the trial court failed to enter necessary findings of fact, and (2) the trial court declined to provide guidance on the record that a reviewing court could consider on the merits? (Argument of Assignments of Error 10–11.)

Findings of fact and conclusions of law ensure the decisionmaker "has dealt fully and properly with all the issues in the case and the appellate court will be fully informed. In re LaBelle, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986). "The process used by the decisionmaker should be revealed by findings of fact and conclusions of law." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (affirmed that conclusory statements were inadequate findings that denied Respondent's rights of confrontation and due process).

The absence of a finding of fact on a material issue is presumptively a negative finding against the party with the burden of proof on that issue. *Eggert v. Vincent*, 44 Wn. App. 851, 856, 723 P.2d 527 (1986) (review denied (1987)); see *Car Wash Enters, v. Kampanos*, 74 Wn. App. 537, 546, 874 P.2d 868 (1994).

Although a trial court's order may be valid without findings of fact and conclusions of law, they are mandatory in two relevant circumstances.

First, a restraining order must be supported by justifying reasons in language sufficiently clear so that an ordinary person can understand its scope. *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, No. 48781-1-II, at ANALYSIS, II.A (Div. 2 2017). Second, findings and conclusions are necessary in an award of attorney’s fees. *Mahler v. Szucs*, 135 Wn.2d 398 , 435, 957P.2d632 (1998) (overruled on other grounds by *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 658–59, 272 P.3d 802 (2012)). Although the trial court has inherent power in equity to award fees, (see e.g., *State v. Gassman*, 175 Wn.2d. 208, 211, 283 P.3d 1113 (2012); *Cowles Pub’g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)), the trial court’s discretion must be based on written, articulable grounds. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 774, 115 P.3d 349 (2005).

In this case, the Court of Appeals must vacate the trial court’s judgments and orders for failing to establish facts on which relief can be granted. The trial court granted a restraining order and attorney fees without findings of fact, and it awarded attorney fees in its denial of Mr. McGill’s Motion to Compel without entering formal findings of fact. The trial court also failed to provide guidance for either ruling, other than being “satisfied...under this factual situation” to grant the restraining order itself.

Without written findings of fact or guidance in its oral ruling, this Court must presume negative findings against the Petitioner, who bears the burden of proving every allegation by clear, cogent, and convincing evidence. When presumed in the negative, Ms. Garrison’s allegations should be viewed as evidence that Mr. Horst is unrepresented—in particular, he is not represented by counsel for Ms. Garrison. Any conversation Mr. McGill and his counsel had with Mr. Horst was unrelated to the case and was without intent to interfere with Ms. Garrison’s role as his guardian. If she is having a greater challenge managing Mr. Horst’s affairs, the evidence fails to show how that relates to Mr. McGill and his counsel.

- E. This Court should award reasonable attorney’s fees and costs to Mr. McGill for this appeal and in bringing his motions for reconsideration or to amend findings for the trial court’s legal error.

A prevailing party is entitled upon judgment to costs and statutory attorney’s fees. RCW 4.84.010. The court on appeal “may, at its discretion, order costs, including reasonable attorney’s fees, to be awarded to any party...[f]rom any party to the proceedings...in such amount and in such manner as the court determines to be equitable.” RCW 11.96A.150. The Court may consider “any and all factors that it deems to be relevant and appropriate” in granting this award. *See Sloans v. Berry*, 189 Wn. App. 368, 379, 358 P.3d 426 (2015) (reversing trial court

dismissal of action improperly brought under the Trust and Estate Dispute Resolution Act (TEDRA) and preserving on remand the right of the court to decide if an award under RCW 11.96A.150 is equitable.) The statute grants courts great discretion in awarding attorney fees both at trial and on appeal. *In re Estate of Fitzgerald*, 172 Wn. App. 437, 453 294 P.3d 720 (2012).

Cases accepted on a *pro bono* basis are not exempt from awards of statutory attorney's fees. RPC 6.1 (comment 4). In the absence of a statutory mandate to the contrary, the law actively favors awarding attorney's fees in pro bono cases: "[U]nless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees." *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006) (internal citations omitted). There is no such statutory prohibition in this case.

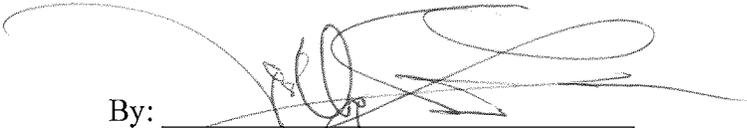
In light of the broad statutory allowance for a grant of attorney's fees in matters involving guardianships and trust proceedings, the courts' support for awarding attorney's fees in pro bono cases and the lack of any statutory reason to prohibit the award of attorney's fees and costs in this matter, it would be equitable for this Court to award McGill attorney's fees and costs for the expenses he has incurred.

F. CONCLUSION

Mr. McGill respectfully asks the court to reverse the trial court's denial of his motion for reconsideration. Mr. McGill respectfully asks the Court to vacate the restraining order and judgment against him and his counsel for legal error. Mr. McGill further respectfully asks the Court to vacate the judgment against him in the trial court's denial of his Motion to Compel Discovery for legal error

Mr. McGill respectfully asks the Court for an award of attorney's fees incurred in this appeal and the underlying motions and orders, and he respectfully asks the Court order any and all other such remedies as the interest of justice requires.

Respectfully submitted this 15 day of July, 2019.

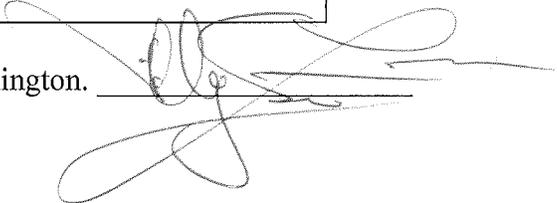
By: 

Holly Scott Laukkonen, WSBA #46705
Attorney for Appellant, Delbert Lee McGill

CERTIFICATE OF SERVICE

I, Holly Scott Laukkonen, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on July 15, 2019, I caused the respondent's Answer to Motion for Discretionary Review to be served on the following in the manner indicated:

Joe Frawley Attorney for Petitioner Shefter & Frawley 1415 College Street SE Lacey, WA 98503 joedfrawley@gmail.com (360) 491-6666	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) X E-mail <input checked="" type="checkbox"/> E-Service
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DATED July 15, 2019, in Olympia, Washington. 

LAUKKONEN LAW, PLLC

July 15, 2019 - 4:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53501-7
Appellate Court Case Title: Margaret Garrison, Respondent v. Delbert Lee McGill, et al., Appellant
Superior Court Case Number: 17-4-00122-2

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