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COURT OF APPEALS DIVISION ONE
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE**

In re the Guardianship of
JOHN ZANDT, *Alleged Incapacitated Person*

EVANGELINE ZANDT, *appellant*

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

PETITIONER'S OPENING BRIEF

John Scannell
P.O. Box 3254
Seattle, Wash., 98114

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**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. ASSIGNMENTS OF ERROR

1. The Trial Court erred in admitting a doctor's examination conducted over the objection of the alleged victim

2. The Trial Court erred in drawing conclusions about the alleged victim using the unsworn testimony of Marilyn Taylor.

3. The Trial Court ignored the conflict of interest in appointing both a guardian and an attorney who also represents another alleged incapacitated who holds a judgment against the Start Corporation and may need other funds from Start Corporation

4. The Trial Court erred in appointing a guardian for John Zandt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does RCW 11.88.045(40) require the court to consider the opinion of the alleged incapacitated person's primary physician when the alleged victim objects to the selection of the Guardian Ad Litem

2. Can the court base findings of concern over the physical safety of the alleged victim when the only evidence before the court is the unsworn testimony of someone who has a motive to deceive and has done

so in the past, over the credible findings of the GAL who based her conclusion on credible evidence.

3. Did the trial court adequately address the conflict of interest that existed for both the proposed guardian and their attorney?

4. Did the court base its decision to appoint a guardian on clear cogent and convincing evidence?

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

A Guardianship petition was filed on behalf of John Zandt on February 6, 2009 (CP 1-4). On February 25, an order was entered appointing an attorney for the Alleged Incapacitated Person (hereinafter referred to as AIP (CP 7-8). On February 27, an order was entered appointing an attorney for Guardian Ad Litem (hereinafter referred to as GAL. (CP 7-8).

An order granting GAL additional hours was signed on March 11, 2009 (CP 45-46). Care Planning Associates (hereinafter referred to as CPA) submitted their qualifications on March 13, 2009 (CP 47-50). Also on that date a Response was filed by John Zandt (CP 51-53) asking the court to dismiss the petition and dismiss the GAL. The GAL filed a

Response on March 17, (CP 54-60) and on March 18, 2009 (CP 353-505). The report was supplemented by a report signed by Dr. Jarvis Edward's on March 25, (CP 81-84). John Zandt's wife Evangeline entered an appearance on March 25, 2009 (CP 85). John Zandt filed an objection to the GAL Report on AIP on March 26, (CP 86-91). A declaration in opposition to the appointment of a guardian was filed by Evangeline Zandt, Marja Starczewski and James L. Sorenson on March 30, (CP 102-130).

A Response to the Cross Petition of Evangeline Zandt was filed on March 30, 2009 (CP 131-137). An emergency Temporary Order was signed on April 1, 2009, freezing some accounts and appointing Gregory Lawless to investigate the financial situation.

Also, an order was entered to continue the hearing until April 15, 2009 at 10:30 AM (CP 165-166). A motion and alleged "Affidavit" and "Declaration" were submitted by Marilyn Taylor on April 7, (CP 168-197). A declaration by Diane Craig was filed April 8, 2009 (CP 198-202). A Real Estate Report was filed by Lawless on April 9, (CP 203-256). A supplemental report was filed by the GAL on April 10, CP 506-555).

An objection to the Supplemental Report was filed by John Zandt on April 14, 2009 (CP 319-326). Declarations by Dr. Wheeler and Diane Craig were also filed on that date.(CP 319-326).

An order appointing a Guardian was entered on 4-15-2009 from which this appeal is taken. (CP 327-340).

B SUBSTATIVE FACTS

This petition is brought by Evangeline Zandt, the wife of the alleged incapacitated adult in this case. She has been happily married to John A. Zandt since June 19, 1989. He is 81 years old. The Zandt's have four children, aged 18, 16, 14, and 9. (CP 102)

The Zandt's own a family house located at 5963 Rainier Ave. S. Seattle, WA, assessed at \$363,000. This property is encumbered with a reverse mortgage of 544,000.00 that was taken out in October 1, 2008. They also own the vacant lot next door located at 6100, Rainier Ave. S. The vacant lot is owned and has less than \$50,000 indebtedness and is valued at \$215,000.

At the time the guardian was appointed, the Zandt's had a joint account at Bank of America with less than \$1000 and the Union Bank of

California, with less than \$2,500, after paying John Zandt's debts and housing when he was forced by the court to relocate at a nursing home.

He has life insurance, which he owes \$40,000 because he borrowed money from the policy several years ago.

His retirement income is \$710.00 per month. He also should have had income from tenants that would have brought in another \$700.00 per month.

John Zandt had his own business, which he used to do gutter work until 2007, when his health began to fail him and made it difficult to go up and down the ladders. John gave his wife durable power of attorney at that point. (CP 102-113).

The Zandt's problems began in February of 2008 when one of their tenants, Marilyn Taylor, began refusing to pay rent. When Mrs. Zandt issued an eviction notice, Ms. Taylor initiated the present action, in which she alleged Mrs. Zandt abused her husband. However, there are no statements under oath in this case where Marilyn stated the allegations under the penalty of perjury. (CP 17-23, 168-197).

Through misuse of restraining orders and the present action, Marilyn Taylor was successful in obtaining complete control of the family

home, rent free. (CP 110). She changed the locks, and soon, sealed court files apparently intended for Mrs. Zandt, began showing up in related court filings by Ms. Taylor. (CP 117, 118). Since she would not have a right to these filings, she apparently obtained them by using her control of the house to tamper with mail intended for Mrs. Zandt.

According to an elder law attorney, Jim Sorenson, he represented John Zandt in August, 2007. He states that Mr. Zandt was “definitely competent”(CP 128).

Likewise a letter written in January 29, 2009 by Stephanie Wheeler, MD, MPH, stated that John Zandt was in fairly good health and his chronic medical problems were currently “well managed”. He was examined by Wheeler’s colleague Dana Tell, who found no evidence of physical abuse. (CP 320).

Over the strenuous objections of John Zandt’s counsel, filed on April 14, 2009, the court accepted the report of Janice B Edward’s, who examined the AIP on one occasion and then apparently accepted her analysis over John Zandt’s physician, who had been the treating physician since 2001.

Furthermore, there does not appear to be any objective basis for the findings of the doctor. For example, the doctor faults him for not knowing his net worth, even though he stated that his wife handles the finances. Under this logic, John McCain, who recently ran for president of the United States would have to be ruled as to have dementia because he didn't even know how many houses he owned. He faults Mr. Zandt for not understanding the reasoning behind the treatment for diabetes. Mr. Zandt's trade is of installing gutters, not that of being a doctor. The doctor faults Mr. Zandt for not being able to "remember" that he was with Mr. Mayberry the previous month, attributing it to dementia while overlooking the obvious explanation that Mr. Zandt was simply trying to cover for his friend Mr. Mayberry, who was trying to help him avoid that which eventually occurred, being shipped off to a nursing home, instead of being allowed to stay with his family and being cared for by his loving wife.

Most significantly, while Ms. Edward's claims that Mr. Zandt could be subject to financial exploitation, there has been no finding by the court that such has occurred. There has been no summary judgment finding that financial exploitation has occurred, only that some principles

in Mr. Zandt's affairs have not responded to discovery requests in a timely fashion.

ARGUMENT

1. THE COURT AND THE GUARDIAN AD LITEM IGNORED MR. ZANDT'S OPPOSITION TO THE HEALTHCARE PROVIDER HE SELECTED, CONTRARY TO THE STATUTORY MANDATE.

There is nothing in the orders issued by the court that addresses the objection of Mr. Zandt to the selection of Dr. Edwards as the healthcare professional who drafted the report to the court. RCW 11.88.045(40), clearly states that Mr. Zandt's decision is controlling:

If the alleged incapacitated person opposes the healthcare professional selected by the guardian ad litem to prepare the medical report then the guardian ad litem SHALL use the healthcare professional selected by the alleged incapacitated person.

It is disingenuous to state Mr. Zandt had no objection to the use of Dr. Edward's when the question was no doubt posed to Mr. Zandt during a time he was unrepresented. The GAL did not disclose until after the issue had been raised by his counsel, that Mr. Zandt was allegedly asked whether he wished any particular physician to perform the medical/psychological evaluation, when he was unrepresented. At that

time, Mr. Zandt's eventual choice, Dr. Wheeler had already provided a letter dated January 30, 2009, which addressed the allegations that Mrs. Zandt abused her husband. The Guardian Ad Litem had the benefit of significant medical records from Northwest Gero Psych, Helping Hands, and Dr. Wheeler. In none of those, is there any indication of neglect or physical abuse. In fact, Marjorie Gillespy, M.D. dictating physician at Northwest Gero Psych, indicates "It does not appear that the patient is malnourished by clinical criteria or lab work". Helping Hands Assessment, done in February, 2009, indicates Mr. Zandt was:

Pleasant, clean, well dressed and well nourished...the physical assessment found no bruising, swelling or discoloration of the skin. The integrity of the skin is intact over total body, with no tenderness found. The only swelling found is his feet. Nothing in my assessment would indicate neglect or abuse... in my professional opinion, there appears to be no evidence of neglect or abuse.

The failure of the court to allow Mrs. Wheeler to provide the primary medical report caused the court to fail to consider alternatives that were in the best interest of Mr. Zandt.

Dr. Wheeler has provided to me a letter which goes into some detail about Mr. Zandt's condition. The letter, however, doesn't say anything about cognitive limitations. It is rather a physical type discussion about whether or not he was abused or

not. And that's really what the letter goes to. There is no evidence that I've heard that tells me that John Zandt is capable of taking care of his finances or his personal care without assistance. I have looked for it and I can't find it. (RP 25-26)

2. THE COURT IMPROPERLY CONSIDERED THE TESTIMONY OF MARILYN TAYLOR.

Only one of the documents in this case submitted by Marilyn Taylor were under the penalty of perjury and that declaration only outlines in the form of vague conclusory allegations . While the court refers to other cases, there was no authentication of these documents in the file.

There was only one place in the record where there were allegations of physical abuse against the alleged incapacitated person, and that is through the following unsworn argument of Ms. Taylor:

I have been living there on the premises with Evangeline Zandt and with John Zandt, and yes I have observed Evangeline Zandt hit her husband on several occasions. She has yelled at her husband. (RP 16)

This argument was strongly rejected by the conclusions of the Guardian

Ad Litem:

But I did that because I, I came to that conclusion because I did come to the conclusion that there is no evidence of physical abuse or neglect by Mrs. Zandt against Mr. Zandt. The medical records that I have reviewed as well as Dr. Wheeler's report and the nurse, Craig, do indicate that he is in good physical condition and he was in good physical condition back in January. And the

records from Dr. Wheeler from the VA indicate that Mrs. Zandt had been caring for him appropriately for a period of time.

In the court's decision to not allow Mrs. Zandt to become guardian, the court obviously took into consideration the allegations of Ms. Taylor:

I'm also not ordering a guardian of person to be Ms. Zandt today and the reason for that is because I'm concerned about two things. One, the evidence that Ms. Taylor has provided here about eye witness observations of hitting which is of substantial concern, but the bigger issue is Mrs. Zandt's ability to protect and make sure Mr. Zandt's personal care is taken care of without influences from other people. So that's why I'm not going with Mrs. Zandt.(RP 30)

3. THE COURT DID NOT ADEQUATELY ANALYZE THE CONFLICT THAT EXISTS IN HAVING THE PRESENT GUARDIAN AND ATTORNEY REPRESENT MR. ZANDT, WHEN BOTH REPRESENTED ANOTHER CLIENT WHO ALSO HAS A JUDGMENT AGAINST START CORPORATION OF AMERICA.

John Zandt objected to the appointment of Care Planning Associates and Henry Judson as the attorney, since both represented the alleged incapacitated victim in the Wells case and that victim also had a judgment against Start Corporation of America. The GAL only deals with this conflict by relying on a "conversation with counsel for Care Planning Associates." There is no analysis of the conflict that occurred between Judson and as attorney, and it is questionable the advice given by the

“counsel for Care Planning” as the counsel most able to provide that advice would be Judson, who could hardly be considered neutral or disinterested as he has a conflict himself. Left unresolved were issues such as exactly how the judgment against Start could be resolved without impacting Mr. Zandt, and whether there were still outstanding actions that Wells could take against Start. An anonymous vague and conclusory hearsay statement by someone who probably has a conflict themselves is not enough to resolve this conflict.

4. THE TRIAL COURT ERRED IN APPOINTING A GUARDIAN FOR JOHN ZANDT AS IT DID NOT MEET THE STATUTORY REQUIREMENTS FOR DOING SO.

The purpose of the guardianship statute is to protect the liberty and autonomy of persons consistent with their capacity. RCW 11.88.005. **In re Atkins**, 57 Wa. App. 771, 777, 790 P.2d 210 (1990). Incapacity is a legal decision based upon a demonstration of management insufficiencies over time in an area or estate. RCW 11.88.010(1)(g). A person is incapacitated as to his estate when the court determines the individual is at significant risk of person based on a demonstrated inability to adequately provide for his nutrition, health, housing, or physical safety. RCW 11.88.010(1)(a). A person is incapacitated as to his estate when the court

determines the individual is at significant risk of financial harm based upon a demonstrated inability to manage his property or financial affairs. RCW 11.88.010(1)(b).

As the petitioner, the Department has the burden to prove John Zandt's incapacity by clear cogent and convincing evidence. RCW 11.88.045(3). This standard of proof is met when substantial evidence is provided to persuade the court that John Zandt's incapacity is "highly probable." **Endicott v. Saul**, 142 Wa.App. 899, 910, 176 P.3d 560(2008); **In re Sego**, 82 Wa.2d 736, 739, 513 P.2d 831 (1973).

In making its determination, the Court may consider evidence from all sources. **Endicott**, 142 Wa. App. 899, 910, 176 P.3d 560 (2008); **In re Guardianship of Stamm v. Crowley**, 121 Wa.App. 830, 841, 91 P.3d 126 (2004).

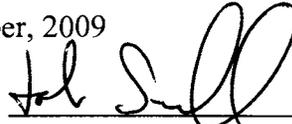
In this case there was no clear, cogent and convincing evidence that Mr. Zandt had a demonstrated inability to adequately provide for his nutrition, health, housing, or physical safety. The record only alludes to unsworn testimony of Marilyn Taylor who was contradicted by the sworn testimony of seventeen witnesses submitted by the petitioner, as well as the conclusions of the GAL, who concluded there was no evidence to

support the allegation that Mr. Zandt had been physically abused. The fact that Ms. Taylor had ulterior motives in wanting to live rent free, as well as the fact she had earlier misled the court in the Lofstdt case and had been sanctioned, is hardly “clear, cogent and convincing” evidence. The court appeared to rule that Mr. Zandt was incapacitated as to his estate by determining the individual is at significant risk of financial harm based upon a demonstrated inability to manage his property or financial affairs. However, just because he delegated his financial affairs to others, is not evidence of incapacity, and there still has not been any finding by the court that he has been harmed by any delegation so far. The court apparently believed that there was clear evidence because it could find no evidence in the record that indicated he could manage his affairs. However, this finding was biased as the court made no effort to instruct the GAL to consider the opinion of the primary care provider on this issue as required by statute.

CONCLUSION

For the reasons given in this brief, the order appointing a guardian for the alleged incapacitated person should be reversed and sent back to the trial court for another determination.

Dated this 23 day of November, 2009



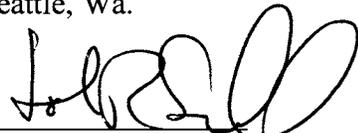
John Scannell, WSBA #31035

I hereby certify that on November 23rd, 2009, I caused to be served a copy of this document by first class mail, postage prepaid

Henry H. Judson III
1218 Third Ave. Suite 512
Seattle, WA. 98101

Jean L. Gompf
720 Third Ave. Suite 1400
Seattle, WA. 98104

Marilyn Taylor
General Delivery
Seattle, Wa.



John R. Scannell, WSBA #31035
Attorney For Evangeline Zandt

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COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

JOHN ZANDT,

Alleged Incapacitated Person

vs.

EVANGELINE ZANDT,

Appellant

No. 63474-7

NOTICE OF FILING VERBATIM
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and provided a copy to the party who arranged for transcription



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Henry H. Judson III
1218 Third Ave. Suite 512
Seattle, WA. 98101

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Jean L. Gomph
720 third Ave. Suite 1400
Seattle, WA. 98104

Marilyn Taylor
General Delivery
Seattle, WA. 98104

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Judith Calhoun