

No. 69450-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

IN RE THE GUADIANSHIP OF ROBERT HAMLIN

AVIS HAMLIN

Petitioner and Appellant

PETITIONER AND APPELLANT'S BRIEF

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1. ASSIGNMENTS OF ERROR.

- A. The Court was in error in denying the Appellant a trial on her Petition for Appointment as Guardian.
- B. The Court was in error in issuing an Order appointing someone other than Appellant as Guardian.
- C. The Court was in error in approving the Final Report of the improperly appointed Guardian.

2. STATEMENT OF THE CASE.

The State of Washington filed a Petition for Guardianship (Clerk's Papers, hereinafter CP, p. 1) and Appellant filed a Petition for Guardianship (CP pp. 188-189). On April 21, 2011 (this cause was filed October 24, 2011) Robert Hamlin (the proposed Ward) executed a Power of Attorney naming Appellant as his Attorney in Fact and nominating her as his Guardian should a Guardian become necessary in the future (CP pp. 71-75).

On February 1, 2012 Court Commissioner Nancy Bradburn-Johnson, after a short hearing, granted the State's petition and appointed Daniel Smerken Guardian of Robert Hamlin (CP 399-416). The order contained Findings of Fact. The Commissioner recognized the Power of Attorney and found as a fact that Appellant, "...does not possess the

requisite qualities to be her husband's decision maker....” The transcript of the hearing is CP pp. 449-523.

Appellant requested a trial (CP 467). The Guardian Ad Litem (hereinafter GAL) said he believed Appellant was incompetent, admitting that he was no expert (CP 471) but that it was just his opinion from being a lawyer for 15 years (CP 471). Appellant objected to the hearsay the GAL based his opinion on and the Commissioner recognized him as an expert (CP 475). The Commissioner denied Appellant's request for a trial (CP 477).

An order approving the final report was entered August 21, 2012 (CP 915-919).

3. ARGUMENT

Appellant, having petitioned for appointment as Guardian, asked for a trial on the issue which was denied by the Court Commissioner to whom the matter was presented. The Commissioner then proceeded to appoint without trial a third party as Guardian. Appellant had an unchallenged Power of Attorney from the Ward issued while the Ward was competent. This Power of Attorney nominated Appellant as Guardian should one be need in the future.

RCW 11.88.010(4) states, “The court shall make its appointment in accordance with the principal’s most recent nomination in a durable power of attorney except for good cause or disqualification.”

RCW 11.94.010 states, “A principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal’s person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal’s most recent nomination in a durable power of attorney except for good cause or disqualification.”

The legislature uses the mandatory “shall” and, as discussed below, Appellant had a right to a trial on the matter. In any event there was insufficient basis to show good cause or disqualification.

No basis was given for preferring a third person over Appellant, who was the spouse of the Ward. While there is a paucity of Washington case law in this area a preference was stated by the Supreme Court in In re Wood, 110 Wash. 630, 188 Pac. 787 (1920). The court stated, at p. 632,

Now to appoint a stranger guardian in this case is to appoint a guardian of property in which Mrs. Wood has a right and interest equal with Mr. Wood. Not only that the property is not capable of being partitioned between them while the marital relation exists, so that she can acquire the independent control over portion thereof.

Good conscience and equity plainly dictate that the courts should be very slow indeed to withhold from the wife, in a case of this kind, control of community property. Were this a question of administration following the death of Mr. Wood, his wife's right to administer upon this property would exist as a matter of legal right, whether the property be community or separate property, save for some plain disqualification on her part, which clearly does not appear here. Laws of 1017, pp. 654, 656, SSSS 49, 61. These sections, of course, are not controlling here; but in view of the fact that the situations are somewhat analogous, we think they are quite persuasive of the equitable right of Mrs. Wood to administer this guardianship, which the courts should be reluctant to deny. Those close to the incompetent by ties of marriage or blood have always been favored by the courts as suitable and proper guardians in such cases.

The spouses preference in such appointments is generally recognized. 65 ALR 3d 991, Appointment of Conservator-Preference, says, at p. 1018,

As is evidenced in the following cases, it appears that even in the absence of any express statutory declaration, the spouse of an incompetent is generally preferred over others as guardian, whether of the person, or of the estate, or both, of the incompetent, or, at least, the spouse is regarded as standing in a particularly preferred status and his or her recommendation is entitled to serious consideration.

Since the proposed Ward's property was community property the Guardian would have control over Appellant's share of the community property. Article 1, Section 3 of the Washington State Constitution states that, "No person shall be deprived of life, liberty, or property without due process of law."

State v. Cater's Motor Freight System, Inc., 27 Wn.2d 661 (1947) states, at p.869, "In its final analysis, if a person has his day in court, he has not been denied due process of law." Appellant was denied this day in court.

The right of access to the courts is a due process right, Nielsen v. Washington State Department of Licensing 177 Wn. App. 45 (Div. I, 2013); Logan v. Zimmerman Brush Co. 455 U. S. 422(1982).

That access to the court is enunciated, in pertinent part, by Article 1, Sec. 21 of the Washington State Constitution which states, "The right to trial by jury shall remain inviolate" Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) addressed this saying,

Finally, the plain language of Article 1, Section 21 provides the most fundamental guidance: "The right of trial by jury shall remain inviolate". The term "inviolate" connotes deserving of the highest protection. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1190 (1976), defines "inviolate" as "free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ..." Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.

Both the Respondent and the Appellant had a statutory right to file a Petition for Guardianship under RCW 11.88.030(1) and both did so. As a statutory right each also had a right to trial by jury.

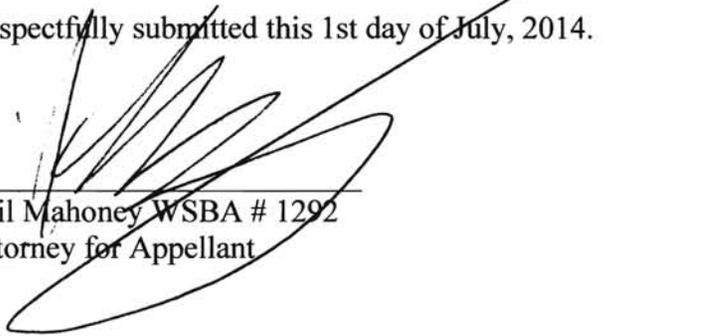
Thus, since there was no trial on the issue of appointment of the guardian, which would have established whether or not Appellant was

qualified to act as Guardian and the statutes required her appointment due to her nomination in the Power of Attorney it was an abuse of discretion on the part of the Commissioner to ignore Appellant's Petition for appointment as Guardian.

4. CONCLUSION.

For the reasons stated above the order appointing someone other than Appellant should be reversed and all expenditures made in the cause should be disgorged and distributed in accordance with the laws of inheritance in this instance.

Respectfully submitted this 1st day of July, 2014.



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Attorney for Appellant

DECLARATION OF MAILING

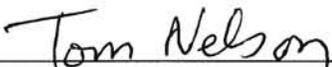
Under penalty of perjury under the laws of the state of Washington, I declare that on this date I mailed by first class US mail, postage prepaid, a copy of Petitioner and Appellant's Brief and Motion for Extension to the following:

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Dated this 1st day of July, 2014 in Seattle, Washington



Tom Nelson