

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
NO. 44340-6-II

LARRY D. CHRISTENSEN, Respondent

Vs.

JENNIFER ROACH, Appellant

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

- I. The trial court erred in making a finding that Jennifer Roach financially exploited Larry Christensen (a vulnerable adult) based primarily on the uncontroverted evidence that Ms. Roach agreed to work for Mr. Christensen as a caregiver at the rate of \$100 a day and the unsubstantiated finding by the trial judge that a rate of \$100 a day was exorbitant.
- II. The trial court erred in making a finding that Jennifer Roach exploited/neglected Larry Christensen based primarily on unsubstantiated hearsay statements submitted by the petitioner despite sworn statements from medical providers that document that Ms. Roach was appropriately caring for Mr. Christensen.

ISSUES PERTAINING TO ASSIGMENTS OF ERROR

- I. Is a trial court able to make a finding that a rate of \$100 a day for a caregiver is exorbitant and therefore substantiates a finding of financial exploitation, without any independent evidence pertaining to the rates of caregivers or other factual basis being presented to the court. **Assignment of Error I.**
- II. Is a trial court able to make a finding of exploitation/neglect (in a Vulnerable Adult Protection Order hearing) based primarily on unsubstantiated and unsworn hearsay statements submitted by the petitioner. **Assignment of Error II.**

STATEMENT OF THE CASE

On November 2, 2012 a Petition for Vulnerable Adult Protection Order was filed on Richard Sutherland on behalf of Larry D. Christensen. (CP 1) A temporary order of protection was entered on that same day and a date was set for November 16, 2012 for a full hearing on the matter. On November 16, 2012 the matter was set over by the court until November 30, 2012. (CP 16)

On November 30, 2012, a full hearing was held on the Petition for Vulnerable Adult Protection Order. (CP 71) At that hearing, subsequent to a review of the records and pleadings and having heard oral argument, the trial judge found that Jennifer Roach committed an act of financial exploitation against Larry Christensen by “agreeing to work for Mr. Christensen at the exorbitant amount of \$100 a day and then to have the wherewithal to insist that she get paid for that.” (RP p.29) The trial judge also found “by clear and convincing evidence that Ms. Roach neglected Mr. Christensen”. (RP p. 35)

On December 28, 2012, Jennifer Roach filed the Notice of Appeal. (CP 74)

LEGAL ARGUMENT

Under RCW 74.34.110(1)

a vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order of protection in superior court.

By statute “financial exploitation” is means

the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person’s or entity’s profit or advantage. “Financial exploitation” includes, but is not limited to:

- (a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;
- (b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or
- (c) Obtaining or using a vulnerable adult’s property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.

RCW 74.34.020(6).

As applied to the present case, subparagraph (b) is not relevant because it is not alleged that Ms. Roach held a position relative to Mr. Christensen that created a fiduciary duty that she owed to Mr. Christensen (she had no Power of Attorney, there was no trust or guardianship appointment). Subparagraph (c) is not relevant because it is not alleged that Ms. Roach was using property, income, resources or funds without lawful authority, nor was there any evidence presented that Ms. Roach knew or should have known that Mr. Christensen lacked the capacity to consent to the release or use of his property, income, resources or trust funds. Therefore the only relevant subparagraph would be (a).

In applying subparagraph (a) to the case at hand, there is no question that the evidence supports a conclusion that Ms. Roach was in a position of trust and confidence with respect to Mr. Christensen. The issue for this appeal revolves around the question of whether an agreement on the part of Ms. Roach to work for Mr. Christensen at the rate of \$100 a day and then accepting payment based on that agreement rises to the level of deception, intimidation or undue influence exerted on Mr. Christensen by Ms. Roach so as to justify a finding by the trial judge of financial exploitation.

The argument on behalf of Ms. Roach is that the agreement referenced by the trial judge does not rise to the level of deception, intimidation or undue influence that would justify a finding of financial exploitation. It is important to note that while the trial judge specifically stated that payment of \$100 a day for a caregiver was an exorbitant amount, there was no independent evidence to validate this conclusion. Additionally, the uncontroverted was that Ms. Roach was a full time caregiver for Mr. Christensen (essentially 24/7) and even if calculating pay at only 8 hours a day that would amount to \$12.50/hr, which would not be an exorbitant rate for a caregiver. As such the simple fact that there was an agreement for Ms. Roach to be paid \$100 a

day does not rise to a level that would support a finding of financial exploitation as defined in the statute.

By statute “neglect” means

(a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

RCW 74.34.020(12)

The trial judge found that Ms. Roach’s pattern of overexercising, not making sure that Mr. Christensen took his Flomax, not making sure that he attended to his medical care, removing him from the hospital against medical advice, was, in fact a pattern of action and inaction that did fail to provide services to maintain his physical and mental health. This was one of the primary factors that contributed to the trial judge finding that Ms. Roach has exploited and neglected Mr. Christensen.

However, taken separately, it can be shown that there was no independent evidence presented to validate the overall finding.

First, in regards to the reference to Ms. Roach not making sure that Mr. Christensen took his Flomax, there was no evidence before the trial judge that demonstrated that Mr. Christensen

had been prescribed Flomax while in Ms. Roach's care (there was reference in the petition to an allegation that Ms. Roach failed to fill a Doctor's prescription for Flomax about a year prior, but the prescription was not submitted as evidence, there was also reference in an examination service note dated November 12, 2012 to Mr. Christensen was not getting the medications that were prescribed including Flomax and simvastatin (despite his prior caregiver's help—Ms. Roach) but no allegation in that service note that Ms. Roach failed to make sure that Flomax was being taken). There was evidence provided by Ms. Roach (CP 10) a declaration from Dr. Ali Naini that spoke specifically to the issue of the urinary urgency, and the injury in the fall of 2012 that required hospitalization of Mr. Christensen and surgery. The observations of Dr. Naini were that Ms. Roach was caring for Mr. Christensen appropriately (and specifically that there was reference to removal of Mr. Christensen from rehab on October 3 but there was no concern about leaving early).

Secondly, although there were the allegations that Ms. Roach was overexercising Mr. Christensen but there was no independent documentation before the trial judge to support the allegation that the exercise regimen that Ms. Roach had Mr. Christensen on was excessive or detrimental to his health (there were statements made by the petitioner that paramedics had commented during a visit to the house to treat that the non-responsive behavior of Mr. Christensen at this time was attributable to Ms. Roach overexercising Mr. Christensen).

Finally on this issue, in regards to the allegation that Ms. Roach failed to attend to Mr. Christensen's medical needs (apart from the aforementioned instances) there is no specificity as to instances in which it is alleged that this occurred.

The conclusion to be drawn from this argument is that the evidence before the trial judge did not support a finding that there was a pattern of conduct or inaction by a person with a duty of care that failed to provide the goods and services that maintain physical or mental health.

CONCLUSION

The argument presented above supports the conclusion that the trial judge erred in finding that Ms. Roach financially exploited Mr. Christensen and also erred in finding that Ms. Roach exploited and neglected Mr. Christensen. Therefore the entry of the Vulnerable Adult Protection Order against Ms. Roach was not appropriate. Ms. Roach respectfully requests that this Court reverse the trial judge's ruling.

SUBMITTED on this 9th day of July, 2013

BISHOP, CUNNINGHAM & ANDREWS, INC., P.S.

By: 

DAVID B. GATES, WSBA#28952

BISHOP CUNNINGHAM & ANDREWS INC PS

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