

NO: 44340-6-II

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 20 PM 12:55
STATE OF WASHINGTON
BY _____
DEPUTY

LARRY D. CHRISTENSEN, Respondent

vs.

JENNIFER ROACH, Appellant

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

F. Michael Misner

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

Attorney for Ms. Roach (Appellant)

3007 Judson Street
Gig Harbor, WA 98335
(253) 858-5222
WSBA # 5742

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REAFFIRMED ASSIGNMENTS OF ERROR	iii
REVIEW OF RESPONDENTS BRIEF	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

Daughtry v. Jet Aeration Co., 91 Wn. 2d 704, 707, 592 P.2d 631 (1979).....1
Judd v. Bernard, 49 Wn.2d 182, 304 P.2d 1047 (1956)2
Lambert v. Lambert, 66 Wn.2d 503, 403 P.2d 664 (1965).

Statutes

RCW 74.34. 135 (3)2
Washington State Constitution, Art 4 § 163

I. REVIEW OF RESPONDENT'S BRIEF

A. **The trial court erred by not entering Findings of Fact and Conclusions of Law**

The Respondent's brief from page one through eight contains numerous allegedly factual statements and occurrences by references to the Clerk's Papers and Verbatim Report on file herein.

However, there are no Findings of Fact or Conclusions of Law based upon any of these references as the court failed to make any Findings of Fact and Conclusions of Law. By providing this court with eight pages of its version of events, counsel for the respondent has, in essence, made his own Findings of Fact and Conclusions of Law as a substitute for the trial court's.

Judge Dalton's failure to enter Findings of Fact and Conclusions of Law has created chaos on review as this court and the parties are speculating as to which facts the trial court relied upon when she made her decision. The trial court is required to make findings that are sufficient "to inform the appellate court on material issues what questions the trial court decided and the manner in which they were decided." *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979).

Trial courts require presentation and entry of Findings of Fact and Conclusions of Law in all cases tried without a jury. *Lambert v. Lambert*, 66 Wn.2d 503, 403 P.2d 664 (1965).

It is precisely to avoid situations such as before this court that Findings of Fact and Conclusions of Law are required.

If a party is to assign error to a court's decision, there have to be Findings of Fact and Conclusions of Law entered by the trial court to make the Assignment of Error understandable.

Without the court making Findings of Fact and Conclusions of Law, the assignment of error is based solely on this court's speculation as to what the trial court may or may not have considered in coming to its decision. *Judd v. Bernard*, 49 Wn. 2d 182, 304 P.2d 1046 (1956).

In the absence of Findings of Fact and Conclusions of Law, there can be no determination by this court of whether or not there was substantial evidence upon which a decision can be based without an itemization entered by the trial court the evidence used in making its ruling?

Because of Judge Dalton's failure, this court should consider remanding this proceeding back to her so that Findings of Fact and Conclusion of Law can be entered.

In so doing, should either party wish to appeal those determinations, then this court would have a clear understanding of the factual and legal bases for the trial court's determination.

Judge Dalton failed to conduct a trial in contravention of RCW 74.34

The Vulnerable Adult Protection Act ("VAPA") found at RCW 74.34.135(3) provides that Ms. Roach should have had the opportunity to testify in response to the petition:'

At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner and in the court's

discretion other interested persons, the opportunity to testify and to submit relevant evidence.

Thus, by the terms of the state constitution and by the statutory language of VAPA, Ms. Roach, as well as Mr. Christensen had a right to testify at a trial. This right was never made known to either of them by Judge Dalton. Instead, Judge Dalton advised them at the beginning of the proceeding that the case would only be heard on declarations and that each side only had 10 minutes in which to state its case.

B. The Court erred by make reference to her personal knowledge regarding Ms. Roach's rate of pay in caring for Mr. Christensen

The Respondent states in its brief that "Judge Dalton properly weighed Ms. Roach's compensation against the work Ms. Roach performed and employed her own knowledge of caregiver rates to judge the fairness of the compensation." Respondent's Brief, p. 8.

The use of the judge's personal knowledge is a violation of ER 605 which holds that "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

While Judge Dalton did not testify in the capacity as a sworn witness, she nevertheless became a witness *de facto* by rebutting Ms. Roach's claim for compensation with her own personal experiences.

In jury trials, the Washington state Constitution expressly prohibits a judge from commenting on the evidence. Art. 4, Section 16. While this case was not a jury trial, the significance of Judge Dalton relying on her own personal experiences outside the courtroom cannot be minimized in this context.

Had Ms. Roach been told by the court that she was going to use her own personal experience to determine the proper rate of pay, then Ms. Roach would have been able to rebut that testimony had she been permitted to testify regarding financial documents submitted to Judge Dalton on February 1, 2013 and February 15, 2013.

These records showed that even before meeting Ms. Roach, Mr. Christensen was spending \$222.23 per day for personal expenditures and \$217.79 per day in 2010 just as Ms. Roach was coming to work for him.

In 2011 and 2012 during the period that Ms. Roach was working for Mr. Christensen, the daily personal expenditures totaled \$218.95 in 2011 and \$217.86 in 2012.

In other words, the amounts Mr. Christensen spent on himself on a daily basis while he was living alone, was almost identical to the amounts being spent by Mr. Christensen while Ms. Roach was caring for him.

Mr. Christensen's living expenses, while in the care of Mr. Sutherland, totaled \$75.32 per day on average over the course of 2013 and 2014. These expenditures were made during a time when Mr. Sutherland was in the capacity of Mr. Christensen's guardian and "protecting" his financial resources.

Judge Dalton looked past what Mr. Sutherland was doing in his capacity as Mr. Christensen's guardian and focused only on Ms. Roach's rate of compensation which was far below that amount being spent for Mr. Christensen after she had her care for him terminated.

However, rather than review the records that were submitted by Ms. Roach, Judge Dalton used her own personal experiences to conclude that Ms. Roach's charges were excessive and that she was financially exploiting a vulnerable adult.

II. CONCLUSION

Ms. Roach stands by the Assignments of Error that she set forth in her first Appellant's brief and her Supplemental brief filed herein. In addition, this brief addresses various points raised by the Respondent in their Responsive brief.

Throughout the Respondent's brief there are multiple factual statements that are claimed to have occurred. These statements pertain to matters of Mr. Christensen's personal hygiene, the management of his finances and his personal safety.

However, in the absence of the entry of Findings of Fact and Conclusions of Law by Judge Dalton, it is not possible to determine which if any facts the judge relied upon. Had counsel for the Respondent filed proposed Findings of Fact and Conclusions of Law, he would had to have itemized the very incidents he recites in his brief. At the hearing for presenting those proposed Findings and Conclusions, Ms. Roach would have had the opportunity to challenge them so that a complete record could be established.

RCW 74.34 provides that both Mr. Christensen and Ms. Roach had the right to have this case heard in a trial.

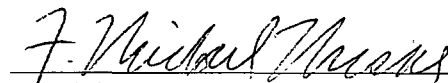
The ten minute presentation supplemented by the admission of various declarations that Judge Dalton allowed, was not a proper way to make a finding that an adult is vulnerable.

In this is particularly the case, Mr. Christensen asked whether he should hire an attorney so he could continue to see Ms. Roach. At that time, Judge Dalton was under a duty to appoint independent counsel for him and to conduct a full trial on the merits.

Finally, Judge Dalton cannot comment on the evidence. Unfortunately she did. When the judge used her own personal knowledge to calculate Ms. Roach's rate of compensation, she became a part of Mr. Sutherland's "team" by providing him, on her own, the evidence of rate of pay that she would find acceptable.

Because of this improper use of her position as a trial judge, it is requested that upon remand for further proceedings that Judge Dalton be disqualified from further participation herein.

DATED this 21st day of January, 2015.



F. Michael Misner, WSBA #5742
Attorney for Appellant

