FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Vulnerable Adult Petition for ANDRIE LEAF. ANDRIE LEAF, Appellant, v. DUNCAN LEAF, Respondent.	No. 80978-4-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Duncan Leaf petitioned for a vulnerable adult protection order (VAPO), asserting that his mother, Andrie Leaf,[1] was a vulnerable adult being exploited by her husband, Gary Reno. At an initial hearing in March 2019, the trial court appointed a guardian ad litem (GAL) and directed that an evidentiary hearing be held within 90 days. Andrie moved to dismiss the petition, calling it a collateral attack on a dismissal of a prior petition for guardianship. The trial court denied the motion. The court held an evidentiary hearing in November 2019 and entered a VAPO against Reno. Andrie appeals, claiming that the trial court erred by appointing a GAL, by not holding the evidentiary hearing within 14 days of the

[1] As the parties have the same last name, for clarity, we refer to them by their first names. We intend no disrespect.

initial hearing as statutorily required, and by denying her motion to dismiss based on res judicata. We affirm.

I. BACKGROUND

Duncan petitioned for a VAPO to protect his mother Andrie. Duncan contended that she was a vulnerable adult, and requested an order preventing her husband, Reno, from exploiting her.

The trial court held an initial hearing in March 2019. It entered a temporary protection order against Reno, ordered the appointment of a GAL, and said that it wanted an evidentiary hearing to be set within 90 days.

The trial court appointed a GAL. The GAL submitted a report in September 2019 recommending that the court impose a financial protection order against Reno and consider a guardianship of Andrie's person and estate.

Later the same month, Andrie moved to dismiss the VAPO petition. She characterized the petition as a collateral attack on a trial court decision dismissing a petition for guardianship that her children had filed. She noted that the trial court in this case did not set a hearing within 14 days of issuing a temporary protection order as required by RCW 74.34.135. Reno responded, joining Andrie's motion to dismiss. The trial court denied the motion and extended the temporary protection order.

The trial court held an evidentiary hearing in November 2019. On the last day of the hearing, it again extended the temporary protection order and stated that it would issue a final ruling in December 2019.

In December 2019, the trial court found that Andrie was a vulnerable adult and that Reno had exploited and isolated her. It issued an oral ruling imposing a five-year protection order against Reno to prevent him from personally and financially exploiting Andrie. It issued a written order incorporating by reference its oral findings of fact and setting forth the terms of the protection order. The court noted that the petitioner could draft findings of fact and conclusions of law for the trial court to enter at a later date. In March 2020, the trial court entered such written findings of fact and conclusions of law and also set forth a VAPO that tracked the December VAPO but added some new provisions.

II. ANALYSIS

A. Threshold Inquiries

Duncan says that we can affirm the trial court's order without addressing Andrie's arguments for three reasons. We disagree with all three theories.

1. Aggrieved party

Duncan says we should affirm because Reno, not Andrie, should have appealed the order. He contends that this appeal essentially involves Reno asserting his own interests through Andrie and her attorney. Andrie responds that because the VAPO affects her interests, she may appeal. We agree with her.

RAP 3.1 allows an aggrieved party to seek appellate review. Duncan says that, because the VAPO is not against Andrie, she lacks an interest on appeal. But Andrie opposed the VAPO at the trial court level, and the VAPO affects her

ability to make financial decisions. See In re Knight, 178 Wn. App. 929, 939, 317 P.3d 1068 (2014) ("Additionally, just as the legislature recognized that imposing restrictions on the incapacitated person in a contested guardianship case restricts an individual's liberty and autonomy interests, so too does granting a protection order against the vulnerable adult's wishes."). Thus, she is an aggrieved party who may appeal. Duncan presents no evidence that the arguments Andrie advances on appeal are not in fact her own. Nor does he cite law limiting the ability to appeal to VAPO respondents.

2. Failure to appeal March 2020 order

Duncan says we should affirm because Andrie failed to appeal the March 2020 order. He notes that her notice of appeal and briefing mention only the December 2019 order and contends that failure to amend the notice of appeal or include the March 2020 order in her briefing renders her appeal unreviewable and moot. We disagree.

RAP 5.1(f) provides that if "a party wants to seek review of a trial court decision entered pursuant to rule 7.2 after review in the same case has been accepted by the appellate court, the party must initiate a separate review of the decision by timely filing a notice of appeal."

The trial court entered a standard form VAPO in December 2019. It noted that written findings of fact and conclusions of law would follow. Andrie then appealed, and we accepted review. Duncan moved to stay the appeal pending entry of the findings of fact and conclusions of law below. A commissioner of this

court denied the motion and said the trial court could properly enter findings and conclusions and granted the court permission to enter an order under RAP 7.2(e). The commissioner said that if Andrie wished to appeal any new findings or conclusions, she would have to file an amended notice of appeal.

In March 2020, the trial court entered written findings of fact and conclusions of law and terms of a five-year protection order. The March order was largely the same as the December order, but added some provisions. Nothing in the record indicates that the March order replaced or mooted the December order. Andrie did not file a new notice of appeal or amend her prior notice and her briefing does not mention the March order.

That Andrie did not file a notice of appeal for the March order does not preclude review of her appeal of the December order. Duncan cites no law supporting his contention otherwise. We thus reject his argument.

3. Failure to assign error to findings of fact in either order

Duncan says we should affirm because Andrie failed to assign error to any finding of fact from either the December order or March order.[2] But Andrie's arguments are legal: she argues that the trial court violated RCW 74.34.135's

[2] Because Andrie does not challenge the trial court's factual findings on appeal, they are verities. She claims she challenged the findings below, but that does not matter. See State v. Ross, 141 Wn.2d 304, 309, 4 P.3d 130 (2000) ("As the State asserts, unchallenged findings of fact are verities on appeal and an appellate court 'will review only those facts to which error has been assigned.'" (quoting State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994))). Thus, to the extent that she appears to make any factual arguments at odds with such findings, we disregard those.

statutory requirements and that res judicata bars the VAPO petition. These claims of error do not involve challenges to the trial court's factual findings.

B. Evidentiary Hearing Within 14 Days

Andrie says that the trial court erred by failing to set an evidentiary hearing within 14 days of the initial hearing as required by RCW 74.34.135. Duncan does not respond directly to this contention but relies on his argument outlined above that Andrie cannot appeal on behalf of Reno's interests. We conclude that Andrie has not established reversible error.

"We review questions of statutory interpretation de novo." State v. Smith, 118 Wn. App. 480, 483, 93 P.3d 877 (2003).

RCW 74.34.135 provides:

> (1) When a petition for protection under RCW 74.34.110 is filed by someone other than the vulnerable adult . . . and the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition, then the court may dismiss the petition . . . or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is ordered and the court determines that there is reason to believe that there is a genuine issue about whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition or order, the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.
>
> (2) An evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order, shall be held within fourteen days of entry of the temporary order for protection under subsection (1) of this section. If the court did not enter a temporary order for

> protection, the evidentiary hearing shall be held within fourteen days of the prior hearing on the petition. . . . If timely service cannot be made, the court may set a new hearing date.

At the initial hearing in March 2019, the trial court noted that it recognized that Andrie opposed the VAPO petition but said that it would not dismiss the petition. Instead, the trial court imposed a temporary protection order against Reno and decided that an evidentiary hearing should be set within 90 days. Neither Reno nor Andrie objected to this at that hearing or requested that an evidentiary hearing be held within 14 days under RCW 74.34.135.[3]

During a hearing in May 2019, a different trial judge hearing unrelated motions in the case noted the statutory language requires an evidentiary hearing within 14 days after the imposition of a temporary protection order. Duncan responded that the parties were unable to secure a GAL until early May, which explained the delay in setting an evidentiary hearing.

In September 2019, Andrie mentioned the trial court's failure to set a hearing within 14 days, as required by RCW 74.34.135, in her motion to dismiss the VAPO petition.

At the next hearing, held in October 2019, the trial court addressed the issue in more detail. It said:

> Unfortunately, there doesn't appear to be any case law interpreting the time limit provision. It does use the word "shall" in its statutory construction. It says an evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress to protect his or her person or estate shall be held within 14

[3] Reno requested that a hearing be held within 14 days based on a different statutory provision.

> days of entry. Use of the word "shall" in statutory construction typically means that it must happen. It's a mandate.
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> Because vulnerable adult protection orders are a creature of common law, it seems to me then that the Court's jurisdiction wholly exists because of the statute,
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> . . .
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> However, and I'm going to give you a case reference here, it's articulated and I think it's well established in Washington law, the case that I'm looking at right now is *Swan v. Landgren*, L-A-N-D-G-R-E-N, the common spelling of Swan, *6 Wn. App. 713* at 715 to 716. Trial courts have plenary authority to control their own calendars.
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> I also note that the sweeping clause of this particular statute, 74.34.130, would appear to include that one of the aspects of relief that the court can grant is to appoint the guardian ad litem, and if the court chooses to do that, necessary time will be required for that guardian ad litem to perform her function, and that would necessarily then go beyond 14 days, it seems to me.
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> Finally, while I think it's true that the petitioner has the obligation of timely getting the matter to trial, I would also note that until the matter is brought before the court on the issue of we are outside of the timing framework of this statute, therefore, you should dismiss, you have to come and you have to make that argument. You have to say I want my trial in 14 days.

After the GAL submitted her report, in November 2019, the trial court held a three-day evidentiary hearing.

In a different statutory context, our Supreme Court held that dismissal was not required where the trial court did not hold a juvenile disposition hearing within the statutory time period. State v. Martin, 137 Wn.2d 149, 159, 969 P.2d 450 (1999). The statute at issue, RCW 13.40.130(8),[4] provided that a "disposition hearing shall be held" within a certain number of days. Id. at 153. The trial court held the hearing outside the statutory time period. Id. The Supreme Court

[4] RCW 13.40.130(8) did allow for delay of the hearing based on good cause, but the Supreme Court did not address good cause in Martin.

determined that the statute's time period was mandatory. Id. at 155. But it decided that the trial court was not deprived of the authority to enter a disposition although the hearing was late. Id. at 157–58. The court quoted this reasoning from the United States Supreme Court from yet another context, the Bail Reform Act:

> "A prompt hearing is necessary, and the time limitations of the Act must be followed with care and precision. But the Act is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained."

Id. at 157 (quoting United States v. Montalvo-Murillo, 495 U.S. 711, 716–17, 110 S. Ct. 2072, 109 L. Ed. 2d 720 (1990)). The court also noted that "'had the Legislature intended strict compliance or dismissal with respect to RCW 13.40.130(8) . . . the Legislature presumably would have so provided.'" Id. at 158–59 (quoting State v. Carlson, 65 Wn. App. 153, 164 n.17, 828 P.2d 235 (1992)). The court concluded that because Martin did "not claim he was prejudiced by the delay," dismissal was not required. Id. at 159.

The statute here requires the trial court to hold an evidentiary hearing within 14 days of entering a temporary protection order or holding an initial hearing. The trial court held an evidentiary hearing several months later, in November 2019. Nothing in the VAPO statute provides for any sort of relief or remedy for violating the time limit. And as the trial court noted, scant authority interprets the VAPO statute. Andrie does not cite law requiring reversal in similar cases. Moreover, nothing in the VAPO statute purports to strip the trial court of

its authority to enter a VAPO if it holds a hearing after the 14 days. And Andrie does not contend that she was prejudiced by the trial court's failure to hold an evidentiary hearing within 14 days. Thus, we do not see a basis for reversal on this ground.

C. Appointment of a GAL

Andrie says that the trial court erred by appointing a GAL. She says that the VAPO statute does not authorize such an appointment, that such an appointment may occur only after the court has considered evidence presented at the initial or evidentiary hearing, and that the action had the effect of transforming the petition for VAPO into a petition for guardianship. We disagree.

"We review questions of statutory interpretation de novo." Smith, 118 Wn. App. at 483.

During the initial hearing in March, the trial court decided to appoint a GAL. In doing so, the trial court reasoned:

> I also find that although the statute doesn't specifically mention the authority of the court, it does mention that the court—I'm going to read it here to you—the court may order relief as it deems necessary for the protection of the vulnerable adult, including but not limited to the following—including but not limited is a sweeping clause—I think that it is appropriate to have a guardian ad litem appointed in this matter.

The statute provides, "The court may order relief as it deems necessary for the protection of the vulnerable adult, *including, but not limited to* the following." RCW 74.34.130 (emphasis added). The statute then lists remedies such as restraining the respondent from committing abuse, having contact with

the vulnerable adult, and transferring the vulnerable adult's property. RCW 74.34.130.

The VAPO statute does not explicitly authorize appointment of a GAL; but RCW 74.34.130 grants the trial court broad authority to "order relief as it deems necessary for the protection of the vulnerable adult" and provides merely a non-exhaustive list of potential remedies. And Andrie cites no law requiring the trial court to review evidence before appointing a GAL, nor does she establish that the trial court did not do so. RCW 74.34.130 contains no such requirement. Finally, because we reject Andrie's arguments that the trial court improperly appointed a GAL, we do not see how such appointment transformed the VAPO petition into one for guardianship.

D. Res Judicata

Andrie says that the trial court erred by denying her motion to dismiss the VAPO petition because the doctrine of res judicata barred the petition. She contends that the trial court's dismissal of the prior petition for guardianship, based on a finding that Andrie was not incapacitated, barred re-litigation of what she asserts is the same claim. Duncan says that she waived her res judicata argument, but if she did not, res judicata does not bar the VAPO petition. We conclude that res judicata does not apply here.[5]

"Whether res judicata bars an action is a question of law we review de novo." Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009).

[5] Because we conclude that res judicata does not apply here, we do not address Duncan's waiver argument.

Andrie moved to dismiss the VAPO petition based on this argument:

> The *Petition for a Vulnerable Adult Protection Order* was filed after the *Petition for Guardianship* was dismissed, based upon the Court's finding that there was "insufficient evidence to conclude that Andrie Leaf is an incapacitated person who is at risk of harm." The relief the petitioner seeks in this proceeding is exactly what was denied to him and his sister in the guardianship proceeding, which is the deprivation of Ms. Leaf's constitutionally protected fundamental right to possess and manage her own property (and she has chosen to allow her husband, whom she loves and trusts, to help her manage her property). If the Court signs a protective order, it essentially will be a reversal of Judge Montoya-Lewis's decision. Reversal of Superior Court decisions is the role of the appellate courts, and Judge Montoya-Lewis's decision was not appealed.
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> . . .
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> The Court should dismiss this collateral attack on Judge Montoya-Lewis's decision and require the petitioner to pay all the fees and costs, including his mother's attorney's fees.

The doctrine of res judicata requires the dismissal of a case if "it is identical with the first action in the following respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). And our Supreme Court has "held that the same subject matter is not necessarily implicated in cases involving the same facts." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 866, 93 P.3d 108 (2004).

The VAPO petition and the prior petition for guardianship are not identical in all four respects. At least two elements are not met here. While overlap exists, the two petitions have different subject matter; the petition for guardianship was focused solely on whether Andrie was incapacitated, while the

VAPO petition is partially about her vulnerability because of incapacity and partially about whether Reno was exploiting her. And because Reno was not a party to the petition for guardianship, the "persons and parties" are also not identical in the two cases.

E. Attorney Fees

Both parties request attorney fees. We decline to award them to either.

1. Andrie's request

Without citing law, Andrie requests that she be awarded attorney fees and costs. Under RAP 18.1(b) a "party must devote a section of its opening brief to the request for the fees or expenses." Andrie did not do so; she made her unsupported request only in the conclusions of her briefs. We deny her request.[6] See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

b. Duncan's request

Duncan requests attorney fees against Andrie's counsel under RAP 18.1(a), RCW 74.34.200, CR 11, and RAP 18.9. He emphasizes that he does not want to recover fees from his mother. We address each authority in turn and deny the request.

[6] We also note that "[t]here is no statutory provision in the vulnerable adult protection order action for attorney fees against the petitioner." 21 SCOTT J. HORENSTEIN, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 58:30 (2d ed. 2015).

RAP 18.1(a) merely provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule."

RCW 74.34.200 allows a vulnerable adult to sue a VAPO respondent for damages. It provides in pertinent part, "[i]n an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee." RCW 74.34.200. This does not apply to Duncan, who is not a "vulnerable adult" suing for damages.

CR 11 does not apply in appellate courts. See Right-Price Recreation, LLC v. Connells Prairie County Council, 146 Wn.2d 370, 384–85, 46 P.3d 789 (2002). Thus, we disregard Duncan's request to the extent it rests on this rule.

RAP 18.9(a) permits an appellate court to impose sanctions on counsel who files a frivolous appeal. Samra v. Singh, 15 Wn. App. 2d 823, 840, 479 P.3d 713 (2020). "An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ; i.e., it is so devoid of merit that no reasonable possibility of reversal exists." In re Marriage of Meredith, 148 Wn. App. 887, 906, 201 P.3d 1056 (2009).

Duncan says the appeal is frivolous because it has no legal or factual basis and is an inappropriate attempt "to protect Reno from his misconduct." But

reasonable minds could differ on issues Andrie raises. Thus, we deny Duncan's request.

We affirm.

Chun, J.

WE CONCUR:

Brennan, J

Mann, C.J.