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No. 63474-7

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

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

EVANGELINE ZANDT, *appellant*

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

PETITIONER'S REPLY BRIEF

Evangeline Zandt
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INTRODUCTION

This brief is in response to the opening brief filed by the respondent Department of Social and Health Services, Adult Protective Services hereinafter referred to as “the Department”. In its brief, the Department re-characterizes the issues of this case but does not fully address the issues raised by the appellant. The appellant respectfully requests the court to reverse the findings of the trial court and remand for a new hearing on the issue of appointing a guardianship.

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, WHICH IS A MANDATORY PREREQUISITE TO A GUARDIAN BEING APPOINTED

The Department attempts to justify its actions by ignoring the clear fact that a statute was violated in the decision to appoint a guardian. In its first sentence in argument addressing this issue, the Department boldly proclaims that “the written report of Dr. Janice Edwards ... meets all the requirements of RCW 11.88.045.(4).” How the Department reaches this conclusion is beyond comprehension. Clearly the written report did not

meet the requirement because the very first sentence of the statutory provision was violated:

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. (*Emphasis added*)

When an individual's rights depend upon giving the word "shall" an imperative construction, "shall" is presumed to have been used in reference to that right or benefit and it receives a mandatory interpretation.

Scannell v. City of Seattle, 97 Wash. 2d 701, 648 P.2d 435 (Wa. 07/29/1982).

Furthermore, according to the straightforward language of the statute, this is a mandatory prerequisite to any guardianship being appointed.

The court shall not enter an order appointing a guardian or limited guardian until a medical or mental status report meeting the above requirements is filed.

As before, the use of the word shall means the language is mandatory.

The Department attempts to avoid application of the plain straightforward language of the statute by ignoring it and attempting to argue it could have used the report anyway, since the court can consider a number of sources including non-experts. It cites no authority for the proposition that it can use, in a supplementary report, a report that the alleged incapacitated person has explicitly rejected. The cases cited by the Department have nothing to do with this issue. The appellant argues that the intent of the statute to allow an alleged incapacitated person control whether a certain expert's opinion could be used against him. This intent would be thwarted if the Department could just bring in the expert in a supplemental report.

The Department makes much of the fact that the alleged incapacitated adult did not object until after the report was written. There is nothing in the statute that states the objection must be made before the report is written. At that time he was unrepresented and RCW 11.88.045 (1) anticipates that the alleged vulnerable adult will be present at all critical phases.

Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person. Counsel shall be provided as soon as practicable after a petition is filed and long enough before any final hearing to allow adequate time for consultation and preparation. Absent a convincing showing in the record to the contrary, a period of less than three weeks shall be presumed by a reviewing court to be inadequate time for consultation and preparation..

The Department complains that Dr. Wheeler did not submit a report as required by the statute. The reason for this is clear. He was never retained to do so since the Department was only requiring the doctor it selected.

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

The Department does not address the argument made by the petitioner. It only cites to cases where sources other than experts were used as a basis of a decision, but in those cases the testimony was trustworthy because it was under oath. Here, there is nothing in the record that shows that Marilyn Taylor was ever put under oath nor was subject to cross examination.

It is axiomatic that the right to call and examine witnesses is fundamental to the due process required by the Fourteenth Amendment and by Article I Section 3 of the Washington State Constitution. **Flory v. Dept. of Motor Vehicles**, (1974) 84 Wash. 2d. 568, 571, 527 P. 2d. 1318 citing **Goldberg v. Kelly**, (1970) 397 U. S. 254, 25 L. Ed. 2d. 287, 90 S. Ct. 1011, the minimum requirements of a due process hearing include the right to confront adverse witnesses, to present evidence, and to representation by counsel. **Goldberg** at 397 U.S. 268 found: . . . and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

As it is similar to the language of the Sixth Amendment, “confronting adverse witnesses” clearly means to cross exam such witnesses in the presence of the trier of fact. Please see Crawford v. Washington, (2004) 541 U.S. 36, 158 L. Ed. 2d. 177, 124 S. Ct. 1354. “[P]resenting his own . . . evidence orally” clearly means to call witnesses and to direct and cross examine them in the presence of the trier of fact.

Absence of such opportunity to cross examine adverse witnesses and to present own witnesses is fatal to the Constitutional adequacy of such procedures, Goldberg, at 397 U.S. 268. Goldberg involved an administrative termination of welfare benefits. The same analysis should be used here. The court should not have relied on the allegations of Marilyn Taylor for any purpose because it was unsworn and not subject to cross examination.

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.

The Department only cites to Deheer v. Seattle Post Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) for the proposition that the court will not give consideration to an argument unless it is apparent without

further research. That is the case here. The conflict is straightforward. The Department is claiming that John Zandt was taken advantage of by Start Corporation of America meaning that it will have to compete with the Wells' Guardianship over enforcing judgments against the Start Corporation of America. It doesn't take a rocket scientist (nor recent case law) to figure out what the conflict is.

The Department attempts to justify the court's action by claiming this was a "potential" conflict. This doesn't make any difference.

Our Supreme Court has ruled in **In re Disciplinary Proceeding Against Marshall**, 160 Wn.2d 317, 343, 157 P.3d 859 (2007) that a written conflict statement is required by the Rules of Professional Conduct in Washington State over a "potential" conflict of interest. There is nothing in the record that suggests that anything like that was done here either by Care Planning Associates nor their counsel Henry Judson. Without a written conflict statement that demonstrates that all parties including the principals in the Zandt Guardianship and the Wells' Guardianship, were notified, signed off, and agreed to the representation in spite of the potential conflict, there was no basis for the representation.

Petitioner argues this without conceding that this was a potential as opposed to an actual conflict. Petitioner argues that the conflict was obvious and even with the assurances from Care Planning Associates Counsel, the Zandt Guardianship should not have been put in the hands of either Care Planning Associates nor Henry Judson because this was a direct conflict that a signed conflict statement could not cure.

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

The Department has reiterated the accepted standards for appointing a guardianship, but still has not justified the conclusions of the court.

The Department correctly concludes that the court must make credibility determinations and evaluate the evidence, citing **Bland v. Mentor**, 63 Wn.2d 150, 154, 385 P.2d 727(1963). However, in **Bland** there were many more credibility determinations than were made here. **Bland** followed a ten day trial with live testimony. Here, there was no live testimony, so the court reviewed the same information that is before the Court of Appeals with no ability to make findings based upon demeanor of the witnesses.

A guardianship limits a person's autonomy and should not be based on unreliable evidence. **In re Guardianship of Stamm**, 121 Wash. App. 830, 91 P.3d 126 (Wash.App.Div.1 06/01/2004).

Here, the judge gave weight to the “testimony” of Marilyn Taylor, when such testimony lacked even the most basic circumstantial guarantee of trustworthiness, that is being made under oath. There was no opportunity to cross-examine and therefore the use of this contested “testimony” denied the undersigned due process.

Other than that, the court appeared to give weight to the report of the GAL. While the GAL may consider hearsay when forming her opinion, the GAL's testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay. **State v. Martinez**, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995).

Here, the Department points to a specific finding by the court that Mrs. Zandt took proceeds from the loan on the family home and had not provided a full accounting to the court. This finding is ambiguous at best. It makes no findings as to what money was taken, for what alleged purpose and makes no finding as to why she could not provide a full accounting to the court. Mrs. Zandt admits that in one sense she “took” the money, since

she and her husband signed the \$100,000 check over to Start Corporation of America. The court made no findings at all as to whether this act constituted any kind of misconduct. Mrs. Zandt admits that a remodel was made with a little over \$50,000. The court made no findings with respect to that. The court made a finding that Mrs Zandt could not account for much of the funds. Mrs. Zandt contended that the records were stolen by the tenant and she couldn't obtain them from the bank. There were no findings with respect to that claim. In short, the reviewing court is left with insufficient findings to determine what acts committed by Mrs. Zandt would preclude her from being assigned as guardian.

Finally, the Department claims that that Mrs. Zandt was unsuitable because of her participation in a reverse mortgage and because she could not account for the funds¹. There is no finding that states this.

In general, a trial court must make findings of fact and conclusions of law sufficient to suggest the factual basis for its ultimate conclusion.

Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 40, 395 P.2d 633

(1964). The degree of particularity required in these findings 'depends on the circumstances of the particular case, the basic requirement being that

the findings must be sufficiently specific to permit meaningful review.' **In re Dependency of C.B.**, 61 Wn. App. 280, 287, 810 P.2d 518 (1991), (citing **In the Detention of Labelle**, 107 Wn.2d 196, 218, 728 P.2d 138 (1986)). The purpose of the requirement of findings and conclusions is to insure the trial judge 'has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.' **Labelle**, 107 Wn.2d at 218-19 (quoting **State v. Agee**, 89 Wn.2d 416, 421, 573 P.2d 355 (1977)).

Here, we are left wondering what actions by Mrs. Zandt made her unqualified to be a guardian. Was there something wrong with the reverse mortgage? Was there something wrong with the remodel? Was there something wrong with the decision of the community to transfer Evangeline's share over to property in the Philippines? Should Mrs. Zandt be held responsible for the theft of papers by Marilyn Taylor? Had something occurred that should have alerted Mrs. Zandt that \$100,000 should not have been turned over to the financial advisor? If so what?

¹ The Department claims that this finding was made on page 328.

Without specific findings, the superior court has not justified any of its conclusions because there is no way for the Court of Appeals to review this decision except to guess.

The Department then argues that the guardian made several conclusions in its report. For example, the GAL concluded that Mrs. Zandt was either complicit or was manipulated by another in the financial exploitation of her husband. The GAL concluded that Mrs. Zandt was complicit in, or was manipulated by another in concealing Mr. Zandt. The GAL concluded that Mrs. Zandt did not participate in the initial stages of the investigation but did so at the end.

The problem with this argument is that none of these findings were adopted by the court. Again, the Court of Appeals can only guess at the reasoning of the court as there is nothing in the findings that justify the action of the court, of not appointing Mrs. Zandt as a guardian.

CONCLUSION

For the reasons given in both the opening brief and in this reply 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 30th day of March, 2010

/s/ *Evangelina Zandt*
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I hereby certify that on March 31st, I caused to be served a copy of this document by first class mail, postage prepaid

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