

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

NO. 40966-6-II

In Re the Guardianship of:
THOMAS ROBINSON

Appellant,

V.

Department of Social and Health
Services, Adult Protective Services,
STATE OF WASHINGTON

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN R. HICKMAN

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR AND SUMMARY OF ISSUES.

1. Assignment of Error(s)

No 1. The trial court erred when it allowed the jury to know that a temporary financial manager had been appointed for Mr. Robinson (*RP at page 185, L's 3 through 17*) and in (*CP 94 at page 5*).

No 2. The trial court erred when it allowed references to Mr. Robinson's being detained and evaluated at Western State Hospital (*RP at page 126, L's 11 through 14*) and at the (*RP at page 127, L's 13 through 19*), and at the (*RP at page 128, L's 15 through 24*).

No 3. The trial court erred when it relied upon an inadequate medical report and testimony to find Mr. Robinson was incapacitated as to his person and estate. (*RP at page 323, L's 2 through 18, and in (CP 108 at page 2)*).

2. Issues Pertaining to Assignment of Error(s):

No. 1 The compromise of the presumption of capacity to which Mr. Robinson was entitled.

No 2 The violation of Mr. Robinson's right to autonomy as guaranteed by RCW 71.05.

No 3. The failure of the medical report and testimony to satisfy the requirements of RCW 11.88.045.

- (1) Does the appointment of a financial manager constitute the appointment of a temporary guardian?
- (2) Do any of the exceptions listed under RCW 71.05 pertain to Mr. Robinson?
- (3) Does the guardian ad litem's testimony about an earlier medical report, combined with the filing of a later medical report, satisfy the requirements of RCW 11.88.045?

B. STATEMENT OF THE CASE

1. Relevant Facts.

This case involves the question of whether Thomas Robinson received a fair trial on the issue of capacity. Mr. Robinson, a septuagenarian, had never been adjudged to be insane, or to lack competency, or to suffer from diminished capacity. He had never been convicted of a felony, nor had he been committed for mental health treatment. Mr. Robinson had been a productive, law-abiding citizen throughout his life.

Therefore, Mr. Robinson was entitled to the presumption of capacity, at every stage of these proceedings. At all times the standard of proof was clear, cogent, and convincing evidence.

2. **Prior Proceedings.**

On June 25, 2009, a petition was filed seeking to establish a guardianship over the person and estate of Thomas Robinson. Julie Weigand Carey was appointed guardian ad litem that same day. When Ms. Carey met with Mr. Robinson, he informed her that he opposed the guardianship and wanted an attorney *CP 3, 5*. On July 15, 2009, Ms. Carey arranged the appointment of Steven Lust as independent counsel for Mr. Robinson *CP 9-10*.

Trial in this matter was originally set for January 5, 2010, but a continuance was ordered *CP 23*. Trial commenced on April 19, 2010, before the honorable John Hickman, in Department 22 of Pierce County Superior Court. On April 22, 2010, the jury returned its verdict saying that Mr. Robinson was incapacitated as to his person and estate *CP 66-67*. Presentation of orders was scheduled for May 12, 2010, before Judge Hickman.

On May 12, 2010, Judge Hickman signed an Order Establishing a Limited Guardianship over the Person and Estate of Thomas Robinson *CP 74*. Attorney Lust filed a CR 59 motion for a new trial which was to be heard on July 16, 2010 *CP 94*. The matter was indeed heard on July 16, 2010, and Judge Hickman denied the motion for a new trial *CP 108*. On that same date of July 16, 2010, a Notice of Appeal to the Court of

Appeals was filed wherein Mr. Robinson seeks to vacate the jury verdict, findings of fact, and conclusions of law entered on May 12, 2010 *CP 106*.

On that same date of July 16, 2010, Sarah L. Small Point-Du-Jour was substituted as appellate counsel for Mr. Robinson *CP 107*. She took all measures required for this appeal. However, attorney Point-Du-Jour was hospitalized and could no longer serve. This Court extended the time for filing Appellant's opening brief; and, on November 19, 2010, Stanley D. Bonner was substituted as appellate counsel for Mr. Robinson. Appellant now turns to the first of his three assignments of error. This appeal followed.

D. ARGUMENT OF THE CASE

(1) The order granting the petition to appoint a financial and personal property manager for Mr. Robinson was signed on February 12, 2010. (CP 32, pp. 2, L 9). Mr. Robinson never desired this action. It was the guardian ad litem who filed the petition (CP 32, pp 1, L 1). The order conferred power to receive Mr. Robinson's social security and pension monies; to decide what bills to pay; to take handle Mr. Robinson's mail; to terminate his lease; and, to remove Mr. Robinson's personal property from his apartment and store it. (CP 32, pp 2, L 1-7. The order allowed Mr. Robinson no input in any of these decisions.

This order was signed notwithstanding the language of RCW 11.88.010 and 11.88.045(3). These statutes provide that Mr. Robinson was entitled to the presumption of capacity. He was entitled to a jury trial on the issue of his alleged incapacity, and the standard of proof is clear,

cogent, and convincing evidence. Appellant knows that RCW 11.88.090(9) empowers a guardian ad litem to move for temporary relief to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation.

But, RCW 11.88.090(3) still mandates that Mr. Robinson was entitled to the presumption of competency while guardianship proceedings were ongoing. This presumption could only be overcome by clear, cogent, and convincing evidence per RCW 11.88.045(3). Mr. Robinson was amenable to assistance at his direction. Again, however, the order appointing a temporary financial manager gave Mr. Robinson no voice in dealing with his property and finances. (CP 32, in entirety).

Most crucially, the appointment of a temporary financial manager conveyed to the jury that the court had already determined that Mr. Robinson lacked capacity. The jury knew of the temporary financial manager, Clifton Roy Messerschmidt, because Ms. Robin McPherson, assistant attorney general, called him as a witness. The following exchanges are found on page 185 of the Record of Proceedings (RP pp. 185).

Q. Mr. Messerschmidt, would you please tell us where you work?

A. I work for Able Guardianship Services.

Q. What do you do at Able Guardianship Services?

A. I'm the principal. We provide professional guardianship services to -- court appointed, professional guardianship services for incapacitated persons.

Q. What is your current involvement with Mr. Robinson, the petitioner, (sic) in this matter?

A. I am currently the temporary financial and personal property manager for the alleged incapacitated person. (RP 185).

Appellant will not recite more of Ms. McPherson's examination of Mr. Messerschmidt. Even this brief exchange suggests that Mr. Messerschmidt was, in essence, acting as temporary guardian following his appointment on February 12, 2010. A juror, upon hearing such testimony, would conclude that Mr. Robinson was impaired. This Court has never entertained the notion of a temporary guardian. The jury should never have heard of Mr. Messerschmidt's appointment.

(2) Disclosure of confidential information and records is governed by RCW 71.05.390. The general rule propounded in this section is that Mr. Robinson's admission to and evaluation at Western State Hospital was to be kept confidential unless Mr. Robinson executed a release pursuant to RCW 70.02.030; or, unless an exception was found in subsections (1) through (19) of RCW 71.05.390. Yet, several references to Western State came in at trial. We find this exchange between Ms. McPherson and Dr. Brett Parmenter at page 126 of the Record of Proceedings (RP, pp. 126):

Q. Where do you currently work?

A. I work at Western State Hospital.

Q. What's your position there?

A. I'm a clinical neuropsychologist.

The examination continues at (RP, pp. 127):

Q. And what specifically do you do in your daily work as a neuropsychologist?

A. I see patients at the hospital if there's any concern about a person's ability to think, if there's any concern – if there's been any changes with regard to any sort of cognitive processes such as attention or memory or language.

The examination continues at (RP, pp. 128):

Q. So have you – are you familiar with Mr. Robinson, who's the respondent in this matter?

A. Yes.

Q. And how are you familiar with him?

A. I did a neuropsychological evaluation with Mr. Robinson.

Q. When was that?

A. I saw him on five different occasions starting March 10th of this year. I saw him again on March 17th, March 23rd, March 26th, and April 2nd.

Let us examine the first paragraph of RCW 71.05.390, which states as follows:

Except as provided in this section, RCW 71.05.445, 71.05.630, 70.96A.150, or pursuant to a valid release under RCW 70.02.030, the fact of admission and all information and records compiled, obtained, or maintained in the course of providing services to either voluntary or involuntary recipients of services at public or private agencies shall be confidential.

Dr. Parmenter clearly testified to seeing Mr. Robinson at Western State Hospital. Mr. Robinson, in fact, had never executed a release permitting references to his detention at Western State. So, we must turn

to the exceptions which are found beginning on page 148 of RCW Chapter 71, and see if any apply herein.

None of them do. Subsection (1) allows disclosure of information and records between qualified professional persons under strict conditions. Subsection (4) allows disclosure of information and records to facilitate claims for insurance and medical assistance. Subsections (8), (9), and (10), allow disclosure to defense attorneys, prosecutors, and law enforcement agencies, respectively.

Subsection (14) allows disclosure of information and records upon the death of the detained person; but, this disclosure is restricted to next of kin, personal representatives, guardians, and conservators. Subsection (16) allows disclosure to mark headstones or otherwise memorialize patients interred at hospital cemeteries.

Appellant refrained from enumerating all 19 subsections for the sake of brevity. However, one examines them in vain to find any applicable to Appellant's situation. Mr. Robinson was an allegedly incapacitated person, undergoing a civil trial on the issue of his alleged incapacity, in accordance with RCW 11.88, the guardianship chapter. No provision of RCW 71.05.390 permits references to Western State in this setting.

This Court is well aware that no person shall be presumed incompetent as a result of receiving an evaluation or voluntary or involuntary treatment for a mental disorder, pursuant to RCW 71.05.360(1)(b). Everyone knows that Western State is a mental hospital, and the jurors heard that Mr. Robinson was detained there.

It is highly unlikely a juror could disassociate Mr. Robinson's admission to Western State Hospital and be free from any presumption of incapacity. Permitting references to Western State Hospital was error, and it cannot be assumed to be harmless.

(3) Julie Weigand Carey, guardian ad litem for Mr. Thomas Robinson, was sworn in to testify at trial on April 21, 2010. (RP, page 232, L 1-3). Assistant Attorney General Margaret Kennedy conducted the questioning. After some preliminary questioning Ms. Kennedy honed in on the issue of a medical report (RP, pp. 245, L 16, through pp. 248, L 1):

Q. Thank you. After reviewing the medical records, what was your next step in this investigation?

A. Next step was to have the doctor complete the blank report. At that time his regular physician was a Dr. Karanam who was seeing him on a regular basis at Roo-Lan [nursing facility]. So it was Dr. Karanam that provided that report for me.

Q. When was that report completed?

A. Actually, he had just been at the facility when I was there, so we faxed it. We -- the staff there and I -- faxed it directly to Dr. Karanam, and he completed it, actually, on July 14th. Because the statute requires that they complete the report within 30 days of the last time they saw the patient, and he had seen the patient most recently on June 14th, so he very quickly completed it so it would be within the 30 days because he couldn't turn around and come right back out to the facility.

THE COURT: That was of '09?

THE WITNESS: '09, yes, I'm sorry.

THE COURT: Thank you.

MRS. KENNEDY: Thank you.

Q. That medical report, did it provide any additional information other than what you've previously testified to, with respect to Mr. Robinson's medical conditions?

A. Yes.

Q. What?

A. The doctor provided in his findings that -- and I'm going to read his wording, so it's not my wording: "incapacitated due to alcoholism, medical noncompliance, and multiple cerebral infarcts leading to safety issues, falls, cognitive decline leading to" -- I'm not sure what it says -- "A," something, "S involved, April '09."

And he adds: "In his opinion, would need 24-hour supervision for multiple complex medications, ADLs," which are activities of daily living, "household chores, driving, shopping, monitoring alcohol use."

Q. The monitoring-alcohol-use statement, are you aware of any medical conditions that Mr. Robinson has that would be impacted by his use of alcohol?

A. His heart conditions and also his diabetes.

Q. You obtained this medical report, which you testified was statutorily required, and then who did you talk to after that?

A. After that?

Q. After you obtained the medical report. Let me rephrase. Who did you next speak with during the course of your investigation?

A. I also spoke with two of the staff members at Roo-Lan. One Karen Ponton, who is the social worker; and also Julie Chase, who was the nurse case manager.

Q. Did you obtain additional information from them that was relevant to your report?

A. Well, I simply discussed the medical diagnoses, and the fact that he was exhibiting lack of self-care, and that it was very important for him to keep up with his medications.

Q. Did that complete your part of the investigation at Roo-Lan?

A. At that time, yes. (RP, pp. 248, L 1).

The guardian ad litem's testimony concerning Dr. Karanam's report is clearly hearsay. However, Appellant recognizes that a guardian ad litem has some leeway to rely on hearsay as the basis for her opinions. See *IN RE THE GUARDIANSHIP OF STAMM*, 121 Wn. App. 830, 837, 91 P.3d 126 (2004).

Assuming arguendo that the guardian ad litem's testimony is admissible, this Court must still determine if said testimony satisfies statutory requirements. Medical reports in guardianship matters are governed by RCW 11.88.045 (4), which is reproduced below in its entirety.

In all proceedings for appointment of a guardian or limited guardian, the court must be presented with a written report from a physician licensed to practice under Chapter 18.71 or 18.57 RCW, psychologist licensed under 18.83 RCW, or advanced registered nurse practitioner licensed under chapter 18.79 RCW, selected by the guardian ad litem. If the alleged incapacitated person opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the alleged incapacitated person.

The guardian ad litem may also obtain a supplemental examination. The physician, psychologist, or advanced registered nurse practitioner shall have personally examined and interviewed the alleged incapacitated person within thirty days of preparation of the report to the court and shall have expertise in the type of disorder or incapacity the person alleged incapacitated is believed to have. The report shall contain the following information and shall be set forth substantially in the following format:

- (a) The name and address of the examining physician, psychologist, or advanced registered nurse practitioner.
- (b) The education and experience of the physician, psychologist, or advanced registered nurse practitioner pertinent to the case.
- (c) The dates of examination of the alleged incapacitated person.
- (d) A summary of the relevant medical, functional, neurological, or mental health history of the alleged incapacitated person as known to the examining physician, psychologist, or advanced registered nurse practitioner;
- (e) The findings of the examining physician, psychologist, or advanced registered nurse practitioner as the condition of the alleged incapacitated person;
- (f) Current medications;
- (g) The effect of current medications on the alleged incapacitated person's ability to understand or participate in guardianship proceedings;
- (h) Opinions on the specific assistance the alleged incapacitated person needs;
- (i) Identification of persons with whom the physician, psychologist, or advanced registered nurse practitioner has met or spoken regarding the alleged incapacitated person;

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.

The requirement of filing a medical report is waived if the basis of the guardianship is minority. (End of section 4 of RCW 11.88.045).

To the best of Appellant's knowledge, Dr. Karanam's report was never filed in this proceeding. Mere testimony from the guardian ad litem regarding Dr. Karanam's report is insufficient. The statute clearly reads

that “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.”

Dr. Karanam’s report evidently was never filed. However, another medical report was filed. Appellant cites to (RP pp. 257, L3 - 25), as Ms. Kennedy continues her questioning of Ms. Julie Weigand Carey:

Q. Did your recommendation change between your first report that you filed in September of ’09 and the second report that you filed in April of 2010?

A. No.

Q. Did you obtain any additional medical reports?

A. I did, yes.

Q. What was the nature of those?

A. The updated medical report was from Dr. Brett Parmenter, to be able to update myself and update the Court on Mr. Robinson’s current mental capacity.

Q. Was Dr. Parmenter’s report significantly different than the initial report you received from the primary care physician for Mr. Robinson back in September of 2009?

A. Significantly, no.

Q. What were the major differences, in your opinion?

A. In my opinion, she went into much more detail. She is a trained neuropsychologist, so she was actually doing testing. The professionals in the hospital that are currently working with Mr. Robinson had updated

evaluations that they had done, so she was able to see the updates versus what had occurred last fall. And they clearly indicated that there had been some declines in Mr. Robinson's ability to live independently outside of a facility. (End at RP pp. 258, L – 1).

Dr. Parmenter did indeed file a medical report, and she testified about it under questioning by Ms. McPherson (RP pp. 150, L 11-21). However, the report did not meet the requirements of RCW 11.88.045 (4), (f) and (g). This is revealed at (RP ppg. 151, L-24 through pp.152, L-4):

Q. When you reviewed the medical records, were you able to determine what medications were prescribed for Mr. Robinson?

A. He had been on several different medications throughout the course of those years, and I don't know all of them.

Dr. Parmenter's report did not identify all of Mr. Robinson's medications. And, of course, one cannot describe the effect of current medications without knowing what the current medications are. Our courts are well aware of the requirements of RCW 11.88.045(4). See IN RE GUARDIANSHIP OF HEALEY, 140 wash app. 1020 (Division II).

In HEALEY, appellants had alleged that Dr. Gendo's medical report was defective. This Court rejected that contention, saying that "...the report contained Dr. Gendo's evaluation of the effects of Ms. Healey's medications. RCW 11.88.045(4)(g) required nothing more...". However, if Appellant is reading the decision correctly, this Court believes RCW 11.88.045(4)(g) to require nothing less, either. A list of current

medications and their effect on the alleged incapacitated person is to be included in the medical report.

Dr. Parmenter's report did not contain the requisite information. As for the earlier report of Dr. Karanam, which was testified to by the guardian ad litem—well, that report was never even filed. Once more, Appellant points to the statutory language: 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.

Steven Lust, trial counsel for Mr. Robinson, ably preserved this issue in his Motion for New Trial (CP 94, pp. 4 and 5, L 13-2). Attorney Lust made the point again in his Reply to Department's Response to Motion for New Trial (CP 103, pp. 2 and 3, L 21-13). The combination of the guardian ad litem's testimony, and Dr. Brett Parmenter's medical report, does not meet the requirements of RCW 11.88.045 (4).

E. CONCLUSION

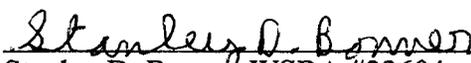
The Appointment of a Temporary Financial Manager constituted the appointment of a temporary guardian, which has never been countenanced in this state. The jury's knowledge of said appointment compromised the presumption of capacity to which Mr. Robinson was entitled. The admission of multiple references to Western State violated Mr. Robinson's

right to autonomy as provided in RCW 71.05. The medical report filed by Dr. Brett Parmenter, combined with the testimony of guardian ad litem Julie Weigand Carey, did not fulfill the requirements of RCW 11.88.045.

In the light of these errors, Appellant Thomas Robinson respectfully asks this Court to vacate the jury verdict, findings of fact, and conclusions of law entered in Pierce County Superior Court on May 12, 2010.

DATED this 11 day of ~~February~~, 2011.

Respectfully submitted,
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STATE OF WASHINGTON

BY la
DEPUTY

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court of Appeals, Division II, and served via U.S. mail, postage prepaid, a copy of the foregoing Brief of Appellant, on the following parties of record:

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Signed at Tacoma, Washington on the 11 day of February, 2011.

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