

No. 42076-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MATTER OF THE GUARDIANSHIP OF
RICHARD B. MORSE

A Partially Incapacitated Person

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY

HON. DIANE M. WOOLARD, JUDGE

CLARK COUNTY SUPERIOR COURT CASE NO. 10-4-00370-4

AMENDED BRIEF OF RESPONDENT

RACHEL A. BROOKS, WSBA #26635
ATTORNEY FOR RESPONDENT VANCOUVER HEALTH
AND REHABILITATION CENTER

1014 Franklin Street, Ste 204
Vancouver, WA 98660

Tel. 360-699-5801
Email rachel@rachelbrookslaw.com

FILED
COURT OF APPEALS
DIVISION II
2013 JAN 22 AM 9:12
STATE OF WASHINGTON
BY  DEPUTY

Plm 1/17/13

TABLE OF CONTENTS

I. RESPONSE TO ASSIGNMENT OF ERROR.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

IV. CONCLUSION9

TABLE OF AUTHORITIES

TABLE OF CASES

In re Guardianship of Matthews, 156 Wn.App. 201, 232 P.3d 1140 (2010).....7,8
Endicott v. Saul, 142 Wn.App. 899, 176 P.3d 560 (2008)7
In re Stamm, 121 Wn.App. 830, 835, 91 P.3d 126 (2004)7
In re Estate of Black, 116 Wn.App. 476, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004)9

TABLE OF STATUTES

RCW 11.88.0907
RCW 11.88.0308
RCW 11.96A.150.....9

TABLE OF COURT RULES

GALR 4.....7
RAP 2.5(a)6
RAP 18.1.....10

I. RESPONSE TO ASSIGNMENT OF ERROR

The trial court had authority to allow the Guardian ad Litem to be represented by counsel at trial.

The trial court had authority to allow the Guardian ad Litem or his counsel to participate at trial.

The appellant objected only that the Guardian ad Litem was represented by counsel. The appellant did not object to the Guardian ad Litem or his counsel conducting direct or cross-examination of witnesses or otherwise participating in the trial. This objection is raised for the first time on appeal and should not be considered.

II. STATEMENT OF THE CASE

The respondent generally concurs with the appellant's statement of the case and adds the following information.

Richard Morse is an intelligent man who has a mental illness which affects his insight. RP 277.

Mr. Morse suffers from delusions, including the belief that his neighbors had the ability to mentally control him through witchcraft. RP 482. His disability led him to live in conditions which were unsafe. He dressed inappropriately in extreme weather. RP 270. He hoarded garbage and cats. RP 83. He did not willingly receive medical care for nearly 30 years. RP 262.

Mr. Morse managed a small Social Security income, but until he qualified for Social Security, he was mostly supported by his family. RP 70-71. His home was owned by his sister, and he did not pay rent, utilities, or for his phone. RP 71; RP 81. He was unable to care for the home, which became filthy and unsafe. His sister and brother-in-law launched a clean-up in 2003, at which time they removed two dumpsters of garbage and roused a nest of rats. RP 78; RP 163. They replaced the toilet in 2009. RP 93. However, they lived in Snohomish, Washington, and they were unable to assist Mr. Morse on a regular basis. RP 65; RP 78.

In early 2010, Mr. Morse's family and a friend from church became concerned about his physical condition. RP 75-76. The friend apparently tricked Mr. Morse into going to the hospital. RP 76.

Mr. Morse was hospitalized with deep, serious wounds on his legs, untreated diabetes, and other medical conditions. RP 418-419. Mr. Morse was hospitalized for approximately one month and was discharged to a skilled nursing facility for rehabilitation. RP 417.

While Mr. Morse was hospitalized, his sister and brother-in-law cleaned up the home. They discovered he had been living with approximately 30 cats. RP 83. The new toilet was non-functional. RP 91-93. The floor was covered with one foot of debris, including layers of

used pizza boxes and the corpses of cats. RP 82. 30 cats were euthanized. RP 83. The kitchen stove was unusable. RP 89. Mr. Morse did not use the wood stove, even though it was winter. RP 85. The odor in the home was nearly unbearable. RP 91-93. Mr. Morse had been cooking on an upturned space heater. RP 471.

Meanwhile, the staff at the skilled nursing center became concerned about Mr. Morse. He hoarded urine and rotting food. RP 264. He could not discuss future plans beyond, "The Lord will provide." RP 428. Nursing staff was concerned about Mr. Morse's ability to follow directions, although he did attend wound therapy. RP 426; RP 236. The center's social worker filed a guardianship petition.

Dr. Meharg, a licensed psychologist, evaluated Mr. Morse in the course of the guardianship case. He diagnosed Mr. Morse with a psychotic-type illness which affected his insight. RP 288; RP 294. Dr. Meharg testified that Mr. Morse's hoarding behavior would prove especially "persistent and stubborn." RP 292.

Family and neighbors described the symptoms of Mr. Morse's mental illness as persistent and worsening over time. RP 290. When he was younger and more functional, he was able to complete a Bachelor's Degree. RP 271. He also bought some raw land in Yacolt, Washington. RP 80. However, until he started receiving Social Security income, he had

allowed his property taxes to become in arrears. RP 166. This non-residential property asset affected Mr. Morse's ability to qualify for Medicaid benefits. RP 80.

Mr. Morse was found to be partially incapacitated after a jury trial.

III. ARGUMENT

Mr. Morse objected at trial to the Guardian ad Litem having counsel at trial. RP 22. He did not object to the Guardian ad Litem or his attorney examining witnesses, nor did he object to the Guardian ad Litem offering or objecting to evidence. Id. The exact language of the objection is this:

And then the last motion that I would just like to make on behalf of Mr. Morse is that – and it kind of goes with the overall prejudicial nature of the Guardian ad Litem having counsel.

At least in this case, we believe that the Guardian ad Litem is more than capable of serving as a witness for the Court, and we would object or oppose to him having counsel, which unfairly paints the Guardian ad Litem's opinion as greater than another witness. And we would – are going to hope that the jury will be instructed accordingly to cure that, but just for purposes of the record, are opposing to – it has nothing to do with the sufficiency of counsel, the abilities of counsel and Guardian ad Litem, just from a procedural standpoint, I need to make a record, Your Honor.

RP 22-23.

The trial court ruled on that objection as follows:

[I]t is customary with the courts to occasionally appoint the Guardian ad Litem counsel. Some courts don't allow the Guardian ad Litem to ask witnesses questions. And the Guardian ad Litem is

appointed as a – by the court as an instrument of the court, needs to know the best way possible to evaluate the information that the Guardian ad Litem may have. And they're the one neutral character – person and territory in all these proceedings. And so it will be an aid to the court that he has an attorney.

RP 24.

Mr. Morse did not further object to the Guardian ad Litem's participation in the trial until later, after the testimony of the Guardian ad Litem and several other witnesses. RP 253. Here is the exact objection:

I'm not going to object to counsel sitting at table with petitioner. I mean, we can – we're adults and I think the jury can understand that – but I do object to Ms. Greenen questioning or – on cross or direct – of other witnesses other than Dr. Meharg or Mr. Deutsch. And that happened yesterday with Mr. Majerus. We kind of just let it go.

RP 253.

All of the parties and the trial court agreed to those limitations on the participation of the Guardian ad Litem, and the Guardian ad Litem's attorney did not participate in the examination of any additional witnesses, other than Dr. Meharg, nor did she participate in closing arguments. RP 254.

a. **The error is raised for the first time on review and should not be considered.**

The appellant did not object to the Guardian ad Litem or his attorney examining the Guardian ad Litem or Dr. Meharg and did not object to the cross-examination of Mr. Majerus or Dr. Guthrie. This error

is raised for the first time on appeal, and the Appellate Court may refuse to consider it. RAP 2.5(a) provides:

(a) Errors Raised for the First Time on Review.

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 2.5(a).

The appellant does not argue that the alleged error meets any of the exceptions under RAP 2.5(a). The Court of Appeals may therefore decline to consider the error.

b. It is within the court's authority to allow the Guardian ad Litem to be represented by counsel.

As noted by the trial court, it is "customary" for the courts to appoint counsel for Guardians ad Litem in RCW 11.88 guardianship cases.

In fact, in the only case cited by appellant, In re the Guardianship of Matthews, the Guardian ad Litem had an attorney. In re the Guardianship

of Matthews, 156 Wn.App. 201, 208, 232 P.3d 1140 (2010). See also, Endicott v. Saul, 142 Wn.App. 899, 176 P.3d 560 (2008).

c. **It is within the court's authority to allow the Guardian ad Litem to participate at trial.**

If the Appellate Court does decide to consider the argument that the Guardian ad Litem's attorney should not have been allowed to examine witnesses, the respondent offers this argument.

The appellant is accurate in his statement that RCW 11.88.090, which lists the duties of the Guardian ad Litem, does not include the duty to have an attorney appointed or to examine or cross-examine witnesses. However, the Guardian ad Litem does have the authority to "participate in all proceedings." GALR 4(e). Additionally, the Superior Court Guardian ad Litem rules give the trial court authority to grant additional authority to the Guardian ad Litem. GALR 4(i).

It is noteworthy that the Guardian ad Litem always testifies in the event of a trial in RCW 11.88 guardianship cases, even though this duty is not specified in RCW 11.88.090. See, e.g., In re Stamm, 121 Wn.App. 830, 835, 91 P.3d 126 (2004).

The recent decision in the Matthews case indicates that the Guardian ad Litem's role should be far greater than that of the petitioner:

A guardianship petitioner's duties and responsibilities in these proceedings are extremely limited. * * * The guardianship

petitioner's role is essentially to alert the trial court of the potential need and reasons for a guardianship of an incapacitated person and to respond to any inquiries from the trial court. * * * Once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends.

The real party at interest in a guardianship proceeding is the alleged incapacitated person and it is the trial court's duty to ensure that his interests are protected; the trial court frequently appoints a GAL to assist it in performing this duty.

In re Guardianship of Matthews, 156 Wn.App. 201, 209-210, 232, P.3d 1140 (2010).

The ruling in Matthews seems consistent with RCW 11.88.030, which allows "any person or entity" to petition for appointment of a guardian. The petitioner may be a neighbor, a creditor, or a health care provider, who has little actual interest in the alleged incapacitated person but who has a good faith basis to believe he or she needs help. Public policy would encourage the filing of good faith petitions, and it is consistent with this policy that the court could direct the Guardian ad Litem to carry forward the petition if necessary.

Finally, the appellant does not show any finding of prejudice from having Guardian ad Litem's attorney elicit certain testimony, as opposed to the respondent's attorney or the court eliciting the same testimony.

/// /// ///

IV. ATTORNEY FEE REQUEST

In a guardianship matter, the attorney fees of any party may be awarded in the discretion of the appellate court.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any part: (a) From any part to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is subject of the proceedings the court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving * * * guardianship matters. * * *

RCW 11.96A.150.

There is no "firm rule" regarding whether attorney fees should be awarded under this statute.

The touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate. * * * This does *not* mean that attorney fees may never be appropriately awarded against an estate if the estate is not substantially benefited.

In re Estate of Black, 116 Wn.App. 476, 490, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004) (*further citations omitted*).

In this case, respondent (petitioner at trial) reasonable attorney fees should be awarded. The respondent's actions benefited the estate; there would be no guardianship estate without the respondent's actions. Additionally, the Court of Appeals directed the respondent to file a responsive brief. See order dated May 8, 2012, filed herein.

V. CONCLUSION

The trial court had authority to appoint counsel for the Guardian ad Litem.

The Appellant failed to preserve an objection to the Guardian ad Litem or counsel examining or cross-examining witnesses, and this argument should not be considered for the first time on appeal. However, if this argument is considered on appeal, the trial court did have authority to conduct the trial and to allow such participation under case law and GALR 4.

Respondent requests that the jury verdict be upheld.

Pursuant to RAP 18.1, respondent requests an award of its reasonable attorney fees on appeal.

RESPECTFULLY SUBMITTED THIS 17TH DAY OF
JANUARY, 2013.



RACHEL A. BROOKS WSBA #26635
Attorney for Respondent

No. 42076-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
GUARDIANSHIP OF RICHARD
MORSE,

An Incapacitated Person.

Clark County Superior
Court Case No: 10-4-00370-4
Hon. Diane M. Woolard, Trial Judge

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of
Washington that on January 17, 2013, I mailed the following documents
via first class mail, postage prepaid:

AMENDED BRIEF OR RESPONDENT
DECLARATION OF MAILING

To the following persons:

Clerk of the Court of Appeals
Division II
950 Broadway, Ste 300
Tacoma, WA 98402

Julie L. Payne
1409 Franklin Street
Ste 209
Vancouver, WA 98660

Therese A. Greenen
1104 Main Street, Ste 400

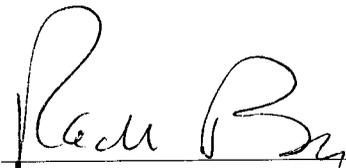
Vancouver, WA 98660

Suzan L. Clark
1101 Broadway, Ste 250
Vancouver, WA 98660

Charles Isely
PO Box 61983
Vancouver, WA 98666-1983

Louise Guthrie
7102 77th Avenue SE
Snohomish, WA 98290

Dated this 17th day of January, 2013.



RACHEL A. BROOKS
Attorney for Respondent

WSBA #26635