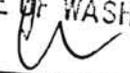


FILED
COURT OF APPEALS
DIVISION II

2012 AUG 29 PM 3:57

STATE OF WASHINGTON

BY  DEPUTY

No. 42868-7-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

In re the Guardianship of BERNADYNE JACOBY,
Deceased,
and
In re the Estate of BERNADYNE JACOBY, Deceased.

RANDAL JACOBY, Petitioner,

and

GARY JACOBY, Respondent.

REPLY BRIEF

Attorney for Petitioner:

Douglas A. Schafer (WSBA No. 8652)
Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134
Tacoma, WA 98401-1134
(253) 431-5156
schafer@pobox.com

TABLE OF CONTENTS

Introduction	1
Standing of New Trustee Johnson	1
Faulty Statement of Facts	2
Law of the Case Doctrine	4
Plenary Power of the Court	6
Notice of Hearing on Motions	8
Consolidation of the Two Proceedings	8
Removal and Appointment of Trustees	9
Improper Communications	10

TABLE OF AUTHORITIES

Cases

<i>Chai v. Kong</i> , 122 Wn. App. 247, 93 P.3d 936 (2004)	8
<i>Folsom v. County of Spokane</i> , 111 Wn.2d 256, 759 P.2d 1196 (1988) ...	4
<i>Greene v. Rothschild</i> , 68 Wn. 2d 1, 414 P.2d 1013 (1966)	2
<i>Henley v. Henley</i> , 95 Wn. App. 91, 974 P.2d 362 (1999)	8
<i>Hough v. Ballard</i> , 108 Wn. App. 272, 31 P.3d 6 (2001)	2
<i>In re Custody of R.</i> , 88 Wn.App. 746, 947 P.2d 745 (1997)	11
<i>In re Murchison</i> , 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)	11
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 113, 829 P.2d 746 (1992), <i>cert. denied</i> , 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993)	4
<i>Mayer v. Rice</i> , 113 Wash. 144, 193 P. 723 (1920)	7
<i>Roberson v. Perez</i> , 156 Wn. 2d 33, 123 P.3d 844 (2005)	4
<i>State ex rel. National Bank of Commerce v. Frater</i> , 18 Wn.2d 546, 140 P.2d 272 (1943)	7, 9
<i>State v. Madry</i> , 8 Wn.App. 61, 504 P.2d 1156 (1972)	11
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992)	11
<i>State v. Romano</i> , 34 Wn. App. 567, 662 P.2d 406 (1983)	10
<i>State v. Trask</i> , 98 Wn. App. 690, 990 P.2d 976 (2000)	4
<i>Studebaker v. Hogen</i> , 104 Wash. 265, 176 P. 339 (1918)	5

Statutes

1917 Laws, Chapter 156, section 219 7

RCW 11.88 .045 5

RCW 11.88.030 5

RCW 11.88.090 5

RCW 11.96A.020 6, 8

Rem.Rev.Stat. § 1589 7

Rules

Code of Judicial Conduct rule 2.9(B) 11

CR 42(a) 8, 9

RAP 10.3(a)(5) 3

RAP 2.5(c)(2) 4

INTRODUCTION

Randal Jacoby, appellant, here replies to “Trustee’s Response to Appellant’s Opening Brief” (Resp. Br.) that Sharon Johnson as newly appointed trustee of the Bernadyne Jacoby Trust (the Trust) and personal representative of the probate estate of Bernadyne Jacoby (the Estate), filed in response to Randal’s “Appellant’s Opening Brief” (App. Br.). Randal is appealing a probate court order that granted motions by his brother, Gary Jacoby, but Gary has declined to participate in this appeal, not filing a responsive brief. Instead, the sole responsive brief is by the professional guardian, Ms. Johnson, that Gary requested be appointed as trustee of the Trust and that the court *sua sponte* appointed as personal representative of the Estate.

STANDING OF NEW TRUSTEE JOHNSON

Randal asserts that trustee-for-hire Johnson lacks standing to participate in this appeal. She was not a party to any of the probate court proceedings that occurred prior to the entry of the order of August 1, 2011, that appointed her and is the subject of this appeal. CP at 185 and 249. Her only interest in this proceeding is to preserve her appointments by Judge Lee in order to be compensated as a trustee and personal representative.

On May 15, 2012, Randal filed in this appellate court a “Motion for

Order That Newly Appointed Trustee Lacks Standing,” that included in its appendix the Notice of Appearance that Johnson filed in the probate court on October 14, 2011. A commissioner of this court denied that motion on June 8, 2012. Because Randal did not file a motion to modify within ten days, he recognizes that he is not “entitled to further review *as a matter of right*,” *Hough v. Ballard*, 108 Wn. App. 272, 277, 31 P.3d 6 (2001), of the standing issue, but this appellate court has discretion and a duty to correct that ruling if it agrees that it was erroneous. *Greene v. Rothschild*, 68 Wn. 2d 1, 10, 414 P.2d 1013 (1966) (Appellate court should overrule its own prior ruling if clearly erroneous.)

FAULTY STATEMENT OF FACTS

Johnson makes many false and unsupported statements in her “Introduction” and “Statement of Facts.” Resp. Br. 1 - 4. In her introduction, she references the 2009 unpublished opinion by this court’s Division I and falsely claims that the court “examined many of the same issues present in this case.” The eight issues in this appeal are listed in Randal’s brief. App. Br. 2 - 3. The 2009 unpublished appellate ruling addressed quite different issues, and the facts in 2006 to 2008 (*e.g.*, Bernadyne’s implanted fears of Randal) were quite different than in 2011. That 2009 appeal was filed with this division as case number 38301-2-II, and the appeal brief, response brief, and reply brief remain available on

this division's website at: http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.Div2Home&courtId=A02

Johnson's *ad hominem* attack concluding her brief's introduction, that Randal's appeal is "an obvious attempt to drain Trust assets," is wrong and inappropriate. Resp. Br. 1.

Johnson's four-page "Statement of Facts" is false in many respects and devoid of citations to the record (violating RAP 10.3(a)(5)), except for citations to the defective copy of the unpublished 2009 appellate opinion. Resp. Br. at 1 - 4. In her brief at page 3, Johnson even erred on Bernadyne's date of death (see CP 1), and the time frames described in her third and fourth paragraphs were materially wrong (see App. Br. 7 for correct dates with citations to the record).

At her brief's page 2, Johnson makes several citations to the copy of the unpublished 2009 appellate opinion (CP 6 - 15) that Gary filed on November 17, 2010, with his Petition to Appoint Successor Trustee (CP 2), which copy it appears he obtained from "Leagle, Inc." CP 15. The prefatory matter with that copy (CP 6) lists ten persons, implying that they participated as parties in the appellate proceeding, but the only parties who actually participated in it were Randal and Ingrid Cameron, the then appointed guardian and trustee. The incoherently garbled text at the second paragraph of part II of that copy of the opinion (CP 8) illustrates its defective reproduction.

LAW OF THE CASE DOCTRINE

At page 6 of her brief, Johnson superficially describes the law of the case doctrine and asserts that it applies, repeating her assertion at pages 10, 11, and 12 of her brief. It does not apply here.

The law of the case doctrine “express[es] the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). Further, the law of case doctrine “has been limited by case law and rules of court.” *Id* at 113; *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988) (“the law of the case doctrine is discretionary, not mandatory”). And this division has asserted, citing these cases and RAP 2.5(c)(2), that the law of the case doctrine “is highly discretionary with respect to matters that we did consider.” *State v. Trask*, 98 Wn. App. 690, 695, 990 P.2d 976, 979 (2000).

As note above, the law of the case doctrine may be applied in a case *only* when an appellate court reviewing the case has declared a *rule of law*, not to its rulings concerning the facts in a case. Even then, case law and RAP 2.5(a)(2) provide that an appellate court need not apply the doctrine to an erroneous rule of law previously declared. *Roberson v. Perez*, 156

Wn. 2d 33, 42, 123 P.3d 844 (2005). The only possibly relevant rule of law declared in the 2009 unpublished opinion was the assertion that if an incapacitated person is a beneficiary of a trust, the trust assets become part of the guardianship estate controlled by the guardian. That ruling was clearly erroneous, as conflicting with *Studebaker v. Hogen*, 104 Wash. 265, 176 P. 339 (1918), that ruled directly otherwise, stating at 267:

“The court erred, however, in making the appointment of a guardian of their estates, for the reason that the record discloses no estates in the minors which permits the appointment of a guardian; the law being that a guardian of an estate is not to be appointed until it is shown that the prospective ward ‘has property in the county needing the care and attention of a guardian.’ By his will, Hogen left his property, not to his children, but to the appellants, as trustees, and what remains of the trust property after the terms of the trust have been fulfilled will not come into the possession of the children, by the terms of the will, until after they have become of age.”

The 2009 unpublished ruling also conflicted with 1996 legislation (RCW 11.88.030(1)(i), .045(5), .090(5)(e), .090(5)(f)(iv), and .090(9)) that was enacted specifically to spare citizens costly guardianship court supervision of their living trusts and other guardianship alternatives.

In Division I’s 2009 unpublished opinion, it found in a 2006 guardian ad litem’s report a sufficient basis (*i.e.*, Bernadyne’s fears implanted by Gary and others) to uphold Judge van Doorninck’s 2008 removal of Randal as trustee (CP 10) even though that judge had expressly declined to consider the past accusations of misconduct by Randal in making her

ruling, that she asserted was based on her view that trust assets constitute part of a guardianship estate that should be controlled by the guardian. CP 92, 95.

The law of the case doctrine simply is inapplicable to the issues in this appeal.

PLENARY POWER OF THE COURT

At pages 7 - 8 of her brief, Johnson argues that broadly permissive statutory language in the legislature's 1999 adoption of the Trust and Estate Dispute Resolution Act (TEDRA) gave the probate court plenary power to consolidate the guardianship and probate estate proceedings and appoint her as trustee and personal representative. At page 7, she quotes from and paraphrases RCW 11.96A.020, that provides:

- (1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:
 - (a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and
 - (b) All trusts and trust matters.
- (2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

But that “plenary power” statutory language—that has been substantially unchanged since the 1917 probate code—does not empower a probate court to ignore established case law or statutory law in its administration of probate court cases. In *Mayer v. Rice*, 113 Wash. 144, 193 P. 723 (1920), the court rejected an argument that such “plenary power” statutory language empowered the guardianship court to ignore applicable law, quoting section 219 of 1917 Laws, Chapter 156, as follows:

“It is the intention of this act that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. If the provisions of this [act] with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled.”

In *State ex rel. National Bank of Commerce v. Frater*, 18 Wn.2d 546, 140 P.2d 272 (1943), the supreme court rejected an argument that the foregoing broad statutory language, that it quoted at 552-53 from Rem.Rev.Stat. § 1589, empowered the probate court to continue a guardianship proceeding after the ward’s death notwithstanding contrary case law that it applied, stating at 554:

“On the death of the ward or his restoration to competency, the guardian must account concerning his trust, and turn the ward’s property over to the person entitled to receive the same, and the guardianship continues for that purpose and that purpose only.”

And in *Henley v. Henley*, 95 Wn. App. 91, 974 P.2d 362 (1999), this division held, at 97, that the “plenary power” language of RCW 11.96A.020 does not give a court power to ignore applicable law.

NOTICE OF HEARING ON MOTIONS

Johnson in her brief at 8 - 9, counters Randal’s arguments (App. Br. 13 - 15) that Judge Lee should not have ruled on motions that were not noted for hearing. Johnson insultingly states, “As he tends to do, Randal once again misinterprets the case law he cites.” Randal opening brief had stated at 13, “In *Chai v. Kong*, 122 Wn. App. 247, 93 P.3d 936 (2004), the appellate court vacated a superior court judgment because the appealing party had not been notified of the motion for it *and* of the time and place of the hearing on the motion.” Johnson claims this is a “misinterpretation.” But that opinion states at 253, “A number of errors occurred in Chai’s attempted service on Kong.... Finally, the motion papers contained no notice of any time or place for the hearing.”

CONSOLIDATION OF THE TWO PROCEEDINGS

Johnson argues at 9 - 10 that CR 42(a) and the *plenary power* provision of TEDRA empowered Judge Lee to consolidate the new probate estate proceeding with the ongoing guardianship proceeding. She fails to recognize that the argument that the *plenary power* probate code

statutory language was expressly rejected by the state supreme court as a basis for continuing a guardianship proceeding after the ward's death in *State ex rel. National Bank of Commerce v. Frater, supra*. And since that 1943 ruling and subsequent case law require termination of a guardianship proceeding following the guardian's final accounting, there remains no guardianship proceeding to which the CR 42(a) consolidation provision could apply.

REMOVAL AND APPOINTMENT OF TRUSTEES

At pages 10 - 13 of her brief, Johnson justifies Judge Lee's removal of Randal and appointment of her as trustee and personal representative, relying on bald claims that lack support in the record. Johnson makes the following unsupported false claims:

- "Randal's interests are clearly in conflict with the other beneficiaries."
- "In the previous appeal, the appellate court already held that Randal was not an appropriate Trustee."
- "Here the parties have been engaged in almost constant litigation that has been contentious and emotionally charged."
- "The two alternate named trustees in this matter were also involved in the litigation that created the ill will."

Johnson simply fails to address the extensive analysis of applicable

law concerning removal of a trustee in Randal's brief, including the case law limiting the "conflict" and "ill will" grounds, and case law that a trustee's removal must be necessary to save the trust. App. Br. 19 - 28.

IMPROPER COMMUNICATIONS

At pages 13 - 15 of her brief, Johnson responds to Randal's argument about the apparently improper communications described at pages 29 - 34 of Randal's brief by arguing that Randal must "demonstrate how he was injured by any such communications." She states at 14, "Nothing in the communications cited by Randal prejudiced him in any way and, in fact nowhere does Randal even allege that he was prejudiced." And concerning the improper letters to Judge Lee from Gary's attorney, Johnson there states, "Even if it as an error, Randal has failed to demonstrate that the outcome of the hearing ... and order ... would have been different."

When events, such as improper communications with a judge, occur that may lead a reasonable person to question the fairness and impartiality of a judge, that person is not further required to demonstrate *actual* prejudice and unfairness by the jurist. Instead, the proceeding is vacated based upon the lack of an *appearance* of fairness. In *State v. Romano*, 34 Wn.. App. 567, 569, 662 P.2d 406 (1983), this division vacated an order and remanded the matter for assignment of a different trial judge over a party's objections that no judicial prejudice had been shown, saying at

569:

“The State asserts that defendant was in no way prejudiced in that the judge’s inquiries merely verified information provided by defendant himself. However, even where there is no actual bias, justice must satisfy the appearance of fairness. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised.”

“The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)); see *In re Custody of R.*, 88 Wn.App. 746, 762-63, 947 P.2d 745 (1997) (justice must satisfy the appearance of impartiality).

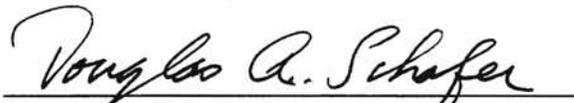
Concerning the responsibility to reveal improper communications, the Code of Judicial Conduct, at rule 2.9(B) states:

“If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

Judge Lee did not inform the parties of any improper communications. In Randal’s motion for reconsideration filed August 11, 2012, he requested that Judge Lee “disclose and include in the court’s file as much detail as can be provided” about any improper communications. CP 197. At the

September 23, 2011, hearing (that has not been transcribed, but to the best recollection of the undersigned) on that motion, Judge Lee generally denied receiving improper communications. But the objective facts leave Randal with reasonable suspicions that she was tainted by improper communications.

Respectfully submitted this 29th day of August, 2012.



Douglas A. Schafer, Attorney for Appellant
WSBA No. 8652

FILED
COURT OF APPEALS
DIVISION II

2012 AUG 29 PM 3: 56

STATE OF WASHINGTON

BY _____
DEPUTY

**In the Court of Appeals for the State of Washington
Division II**

**In re Guardianship of
BERNADYNE E. JACOBY,
an incapacitated person.**

No. 42868-7-II

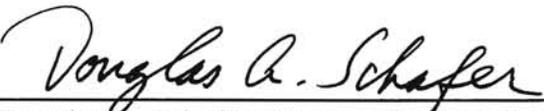
**Proof of Service of
Appellant's Reply Brief
and related papers.**

I declare under penalty of perjury under Washington state law that today I served a copy of Appellant's Reply Brief, being filed today, on Mr.Rehmke and Ms.Flynn by personal delivery and upon Mr. Lofton by USPS mail at the addresses indicated below, along with this Proof of Service.

Jonete W. Rehmke, Attorney
Sean Flynn, Attorney
Rehmke & Flynn, PLLC
917 Pacific Ave., Suite 407
Tacoma, WA 98402
jonete@rehmkeandflynn.com
sean@rehmkeandflynn.com

Thomas D. Lofton, Attorney
Brislawn Lofton, PLLC
5555 Lakeview Dr. Ste 201
Kirkland, WA 98033-7444
thomas.lofton@brislawnlofton.com

August 29, 2012



Douglas A. Schafer, Attorney for Appellant.
WSBA No. 8652