

FILED

SEP 13 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290522-III

**STATE OF WASHINGTON
COURT OF APPEALS
DIVISION III**

**IN RE THE GUARDIANSHIP OF JOHANNA LEE,
APPELLANT**

**APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY**

RESPONDENTS' BRIEF

**David A. Thompson (WSBA 13336)
Attorney for Respondent Meg Irwin
and also Respondent Pro Se
P.O. Box 797
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(509) 575-8322/509-575-3901 (fax)**

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I. INTRODUCTION

Although captioned only as a guardianship proceeding, this case also involved elements of three pre-existing cases filed in the first few days of October, 2009 under the Abuse of Vulnerable Adults Act, RCW Chapter 74.34. The alleged “vulnerable adult” for whom protection was sought in those three proceedings was the same person as the alleged incapacitated person (AIP) in this guardianship proceeding: Johanna H. Lee (Ms. Lee). The Respondents in those three proceedings who were thereby restrained from contacting or attempting to contact Ms. Lee were: (1) her son, Joe Lee, and his wife; (2) Ms. Lee’s close friend of many years, Lew Derrey; and (3) Brian Frederickson, a Yakama Nation Police Officer and friend of Joe Lee. With the exception of the restraining orders, (which were consolidated with the guardianship proceeding such that the Guardian Ad Litem (GAL) could investigate the need for perpetuating same), those three “Vulnerable Adult” proceedings were dismissed by Judge Gibson at the hearing of November 5, 2009.

The elderly Ms. Lee and her late husband had over several decades assembled an extensive collection of dolls, Native American artifacts, jewelry, and antiques. Plagued with numerous health problems in recent years, and living alone in her modest Toppenish

home, she began to attract the attention of opportunists seeking to acquire possession and/or control over her valuable collections. After a serious fall and injury which hospitalized her in early September, 2009, her only son Joe Lee, a career U. S. Army non-commissioned officer stationed at Fort Lewis, Washington, with her consent and approval, moved her to Nisqually Valley Medical Center west of the Cascades, where he and his family could more readily visit and assist her. Thereafter, following her directions, Joe moved the more valuable portions of her extensive collections from her Toppenish home to two storage units in Pierce County for safe-keeping.

These moves alarmed the opportunists who sought to acquire Ms. Lee's valuable collections, and after locating her, they increased their efforts to influence her. By the last week of September, they succeeded, and surreptitiously brought Ms. Lee back to her Toppenish home, where she was guarded and incoming calls were monitored. The Vulnerable Adult proceedings were initiated soon thereafter by one Adrian Malo, ostensibly on behalf of Ms. Lee, but more realistically in the effort to isolate her from family and friends. These events prompted the filing of the guardianship proceeding.

However, after the GAL filed his report to the Court with the conclusion that Ms. Lee was competent and not in need of a

guardianship, dismissal of the request to establish a guardianship seemed the appropriate thing to do.

The GAL's report expressly found that Meg Irwin, the figurehead Guardianship Petitioner and Ms. Lee's long-time friend, Ms. Lee's son Joe, and all the others supporting the establishment of a guardianship over Ms. Lee, were in each instance acting in good faith out of genuine concern for Ms. Lee's health and safety, and for the protection of her valuable collections. Said report also expressed the GAL's opinion that Ms. Lee was not the victim of manipulation, but in fact "the manipulator", whose obsessive goal was to stay in her own home and preserve her collections at all costs.

II. ISSUES RAISED ON APPEAL

Ms. Lee raises three issues in her Brief, each of which is reviewed under the abuse of discretion standard:

1. Did the Superior Court err in ruling that Ms. Lee should be responsible for the GAL's fees and costs without first conducting an evidentiary hearing to determine whether the imposition of that burden would result in "substantial hardship" to her, thus warranting making Yakima County responsible for same?

2. Did the Superior Court err in imposing the fees and costs of all parties upon Ms. Lee when the guardianship petition was voluntarily withdrawn?

3. Did the Superior Court err in entering a judgment against Ms. Lee for her own counsel's fees and costs when no motion for such was filed or made, and no cost bill was filed by said counsel?

This Respondent contends that the answer to each of these three questions presented must be in the negative, as there was no abuse of discretion below, and no error warranting reversal.

III. STATEMENT OF THE CASE

Despite an incomplete record¹, the Appellant's rendition of certain selected facts is accurate, as far as it goes. This guardianship proceeding was filed, the GAL appointed, Ms. Lee and various witnesses were interviewed, and the GAL's report was filed as stated in Appellant's Brief.

¹ The record on appeal does not include any of the pleadings and affidavits contained in the three "Vulnerable Adult" proceedings except the Declaration of Johann E. Lee filed October 14, 2009 which is an attachment to his Declaration filed in the guardianship case in March 5, 2010. See CP 53-73. Also missing from this record are the GAL's Motion for Reconsideration and any affidavits in support thereof filed after the March 12, 2010 entry of the Order On Guardianship Petition. (CP 14-20), but before the March 25, 2010 filing of the Response To Motion For Reconsideration. (CP 12-14) It is apparent from the Reports of Proceedings that these missing documents were reviewed and considered by the trial judge before making his decision.

In his report, the GAL concluded that Meg Irwin was a “very credible witness”, and that she filed the guardianship petition on October 14, 2009 “in absolute good faith in fear for the safety of her good friend”, the AIP. CP 122, 130. The GAL also concluded that the AIP was not the victim of manipulation, but was herself “the manipulator”. CP 129. He also had the “distinct impression” that she could be “deceitful to get what she wants”. CP 124.

There is ample support in the record for the conclusion that the AIP was duplicitous. On September 13, 2009, she told Yakima County Sheriff’s Deputy McIlrath that her son Joe Lee was “in charge of all of her affairs” and that Adrian Malo, Del Mathews, and their associate were trespassing and had no right to be on her property in Toppenish. CP 107. Less than two weeks later, her allegiance had shifted in favor of Del Mathews and his friends, and against her son, Joe. CP 112. However, at the time, such a radical change of heart appeared to her son and long-time friends to be strong evidence of her vulnerability to undue influence. CP 58, 101.

There is also ample support in the record for the conclusion that Ms. Lee was not destitute, despite her purportedly modest income. The guardianship petition estimated her net worth at over one million dollars. CP 101, 102. Ms. Lee herself placed the value of

her collections alone at “about 1 million dollars”, exclusive of her home, her going business, and her bank accounts. CP 112. Ms. Lee also stated to the GAL that she had paid “a \$10,000 retainer” to Attorney Kevin Kirkevold for his representation of her interests in the guardianship proceeding.² CP 123.

The transcript of the hearing conducted November 5, 2009 contains numerous references by Judge Gibson to the three separate “Vulnerable Adult” proceedings then pending against Joe and Michelle Lee, Lew Derrey, and Brian Frederickson, indicating that he had reviewed those files as well as the guardianship file before taking the bench. RP 3, 6, 13, 17, 19, 20, 32, 34, 35, 37. (Nov. 5, 2009) However, no part of those three separate files has been made a part of this record on appeal.

That same transcript contains at least five episodes of colloquy between Judge Gibson and Adrian Malo, the Petitioner in all of the related “Vulnerable Adult” proceedings, thus providing him with some perception of that person’s credibility. RP 9-12, 19, 22-25, 26, 33 (Nov. 5, 2009) During one of those episodes, Mr. Malo even agreed

² If indeed Mr. Kirkevold received a \$10,000 retainer from Ms. Lee, then she should be entitled to a credit for same in partial satisfaction of the \$11,906.50 judgment award to Mr. Kirkevold.

to submit to the jurisdiction of the court, thus arguably making him a “party” to this proceeding. RP 26 (Nov. 5, 2009).

IV. ARGUMENT

A. Standard of Review.

There is no dispute that the “abuse of discretion” standard applies to this appeal, as the legislature in RCW 11.96A.150 expressly grants the courts discretion to shift fees and costs from one party to another in all cases governed by Title 11 of the Revised Code. *See In re Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966) (citing *In re Estate of Leslie*, 137 Wash. 20, 241 P. 301 (1925)). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court’s decision to award attorney fees will not be disturbed by an appellate court absent a clear showing of abuse out of deference to the trial court’s personal and sometimes exhaustive contact with the case. *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004); *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349, review denied 155 Wn.2d 1005, 120 P.3d 578 (Div. III-2004).

The predecessor fee shifting statute was RCW 11.96.140, under which the scope of the court’s discretion was defined with the words “as justice may require”. RCW 11.96A.150 was enacted in 1999 with the more broad phrase: “[I]n such amount and in such manner as the court determines to be equitable”. Then in 2007, the legislature broadened the scope of the discretion granted even further with the addition of what is now the final sentence of subsection (1) of the statute:

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.

Clearly, the legislative intent with respect to this particular statute was to raise the bar for a finding of abuse of discretion.

B. The Superior Court Did Not Err In Assessing The GAL’s Fees To The AIP.

Relying upon *In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997), Ms. Lee contends that an evidentiary hearing should have been conducted below to determine whether the assessment of the GAL’s fees to her would result in the imposition of “substantial hardship” upon her, and if so, thus warranting the alternative

assessment of said fees to Yakima County pursuant to RCW 11.88.090(10).

But *Tolson* is factually distinguishable. Over \$21,000 in GAL fees were requested in that case; an amount which was “two-thirds of the value of the estate”. *Id* at 38. Hence, the entire estate in *Tolson* was only worth about \$31,500, and the AIP’s interest therein under the California holographic Will was only 2%, or roughly \$630. *Id* at 25. Clearly, the shifting of fees and costs from the AIP to the County were warranted under those facts.

In contrast, here we have an AIP with a net worth of approximately \$1,000,000, and a very modest GAL fee request of only \$4,421.72. Clearly, Ms. Lee will not suffer “substantial hardship” in bearing the modest GAL fees sought by Mr. Mellotte, particularly in view of her voluntary payment of a \$10,000 retainer to her own counsel, Kevin Kirkevold, for representation below. CP 123.

Furthermore, in this case Judge Gibson expressly inquired of all counsel present, including the GAL and Ms. Lee’s then attorney, Kevin Kirkevold, as to whether or not he could rule on the issue of attorney fees and GAL fees based upon the written record then before him, or whether anyone contended that there was any requirement that he take live testimony from anybody. RP 14-19 (March 12, 2010)

No such assertion was made by either the GAL or Mr. Kirkevold, and Ms. Lee is now estopped from asserting this claim of error on appeal, having had the distinct opportunity at the court's own invitation to raise the issue below, but having failed to do so.

Under the facts of this case, no evidentiary hearing was necessary, and no error was committed in assessing the GAL's fees to the AIP in this case.

C. Despite Withdrawal Of The Guardianship Petition, Assessment Of Fees To The AIP Was Not Error.

Mr. Lee contends that a "miscarriage of justice" resulted when all fees and costs incurred in this case (and also incurred for the undersigned's representation of the Respondents in the related "Vulnerable Adult" proceedings) were assessed against her even though Meg Irwin after reviewing the GAL report voluntarily withdrew her petition to have a professional guardian appointed for the protection of her long-time friend. However, had Ms. Irwin not withdrawn her petition, a contested hearing on the merits would have been set and more attorney fees and costs incurred all around.

The evidence against the imposition of a guardianship was not "overwhelming" as argued by Ms. Lee. (App. Brief at p. 7) To the contrary, when the guardianship petition was filed in mid-October,

2009, the evidence was compelling to her son and her close friends that Ms. Lee was very vulnerable to undue influence by relative strangers more interested in her valuable collections than her health and safety, and that she had succumbed to that influence.

D. The Claimed Error Over The Inclusion Of The AIP's Own Attorney Fees And Costs In The Judgment Is An Issue Not Raised Below.

RAP 2.5(a) provides as follows:

(a) *Errors raised for 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.

Ms. Lee's final claim of error on the part of the trial court regarding the inclusion of her own attorney's fees and costs in the Judgment is an issue not raised below. None of the exceptions set

forth in the section quoted above apply, and hence the general rule governs this issue.

The Notice of Presentation of the form of Judgment that was eventually signed by the trial judge was filed and served March 24, 2010, a full 23 days prior to the presentation hearing on April 16, 2010. CP 15-18 Ms. Lee's then counsel and the GAL were both copied on that notice, and each also provided with an attached advance copy of the proposed Judgment, yet no objection was filed on the ground now being asserted. Ms. Lee's then counsel even participated in the presentation hearing of April 16, 2010, but never raised this issue or verbally objected on the record to the inclusion in the Judgment of his own fees and costs.

Even before that, the undersigned on March 5, 2010 filed a motion on behalf of Meg Irwin, the guardianship petitioner; and the "Vulnerable Adult" Respondents: Joe and Michelle Lee, and Lew Derrey; seeking an order lifting the restraints previously imposed, and awarding fees. That motion had attached to it a proposed "Order on Guardianship Petition" providing for the award of fees and costs to the GAL, Ms. Lee's then counsel, and the undersigned, but with the fee amounts left blank, and the party responsible for paying same left blank. CP 84-87 Both the GAL and Ms. Lee's then counsel

participated in the hearing of March 12, 2010 on that motion, and no objection was then asserted over the inclusion of Ms. Lee's own fees in the order as signed and entered. In fact, both of them signed that order as "Approved as to form and content". CP 19-20 The amount inserted in the blank for the amount to be awarded to Mr. Kirkevold had to come from some source – most likely Mr. Kirkevold himself!

There is a long string of appellate decisions where RAP 2.5(a) has been invoked in civil litigation, with the finding that the potential argument for reversal had been waived by the appellant, including *DOT Foods, Inc. v. Dept. of Revenue*, 141 Wn. App. 874, 173 P.3d 309 (2007); and *Lang v. Dental Quality Assurance Comm'n*, 138 Wn. App. 235, 156 P.3d 919 (2007). The same rationale should be applied here with the same result. Clearly Ms. Lee has waived this issue as grounds for reversal.

V. CONCLUSION

Of the three issues asserted by the Appellate Ms. Lee, the first and last have been waived by her failure to object or to effectively raise the issue in front of the trial judge. As for the second issue, there simply has been no showing of established prejudice resulting to the Appellant from the withdrawal of the guardianship petition before a

hearing on the merits. In each instance, there is ample evidence in this record, incomplete as it is, to support the trial judge's rulings.

The decisions made by the Yakima County Superior Court in was this case were not "manifestly unreasonable", nor were they "based on untenable grounds", nor were "untenable reasons" relied upon to support those decisions. There has been no abuse of discretion, and no error committed on the part of the trial judge.

The decision below should be affirmed.

DATED: September 9, 2010.



DAVID A. THOMPSON (WSBA 13336)
Attorney for Respondent Meg Irwin and
also Respondent Pro Se

CERTIFICATE OF SERVICE

I, Marilyn Sandall, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the legal assistant to David A. Thompson, attorney for Respondent Meg Irwin and also Respondent Pro Se, and am competent to be a witness herein.

On the 10th day of September, 2010, I caused to be served via the method indicated below, a copy of RESPONDENTS' BRIEF and this Certificate of Service to:

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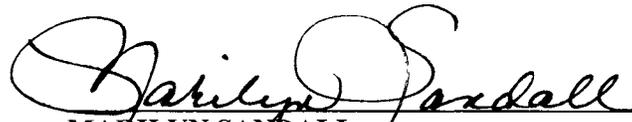
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DATED at Yakima, Washington this 10th day of September, 2010.


MARILYN SANDALL
Legal Assistant to David A. Thompson