No. 50836-9-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

IN RE: THE GUARDIANSHIP OF:
LOREN STAMM,

An Alleged Incapacitated Person

Appellant,

v.

KAREN A. CROWLEY
and
MICHAEL R. STAMM,

Respondents.

REPLY BRIEF OF APPELLANT LOREN STAMM

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I. OVERVIEW

The central issue presented is the sufficiency of evidence required to impose a guardianship against a man who is clever with logical and goal directed thinking, who also had good credit, stable assets and essentially no debt.

Under our statutes, case law and constitution, this evidence must be clear, cogent and convincing and sufficient to withstand both *de novo* review and review under the "highly probable" test.

In no case will mere hearsay, speculation or "suspicion" be sufficient. Evidence must also be relevant, i.e., in accordance with statutory standards. A guardianship cannot be imposed or should be dismissed where there is no benefit to the ward.

In the case at bar, the trial court violated these precepts. Mr. Stamm suffers liquidation as opposed to pursuit of his own happiness.

II. ARGUMENT

A. *De novo* Review; The Highly Probable Test

Mr. Stamm's children disagree that this case is subject to *do novo* review. (Resp. Br., p.3). "Incapacity" is, however, a legal standard. RCW 11.88.010(1)(c). In the case at bar, the trial court submitted this standard to the jury including the specific rights that Mr. Stamm would lose or retain. (Special Verdict Forms A and B, CP 146-49).

This procedure was specifically approved in In Re Way, 79 Wn. App. 184, 187, 191, 901 P.2d 349 (1995). For this reason, there is *de novo* review.

In the case at bar, the jury was also correctly instructed that the standard of proof is "clear, cogent and convincing evidence." (CP 155; RCW 11.88.045). This requires that any factual findings be reviewed as "highly probable." In Re Eubank, 50 Wn. App. 611, 618, 749 P.2d 691 (1988).

B. There is No Substantial Evidence

The “facts” described in the children's brief are heavily dosed with innuendo and stretched beyond the actual testimony. The evidence is, regardless, insufficient to sustain the guardianship. See: below.

1. The guardian ad litem's testimony was not admitted as substantive evidence

Mr. Stamm's children concede that the guardian ad litem's testimony was not offered for the truth of the matter asserted. (Resp. Br., p.21). It cannot be substantively considered to uphold the verdict.

2. No one could pass Dr. Olsen's result-oriented testing

Mr. Stamm's children do not directly address Mr. Stamm's arguments concerning Dr. Olsen, that Dr. Olsen's testimony and reports do not comply with statutory standards, and that his testimony is irrelevant. Cf. App. Br., pp.17, 37-38; Resp. Br., pp.10-11, 23.

On further examination, it can also be seen that no one could pass Dr. Olsen's result-oriented testing. The tricks noted in Mr. Stamm's opening brief are but one example.[1] See: below.

a. Judgment

Dr. Olsen presented Mr. Stamm with a series of hypothetical questions on judgment. Mr. Stamm's answers are set forth below. It is difficult to see what, if anything, is wrong with them:

> *What would you do if you found yourself stranded in the Denver airport with only $1.00 in your pocket?* "I'd call Marty. He's a friend of mine who lives in Denver." ...
>
> *What would you do if you found yourself in the Tuscaloosa, Alabama airport with only $1.00 in your pocket?* "I'd wait [un]til morning and take care of it."

Exhibit 4, pp.10-11.

Dr. Olsen, however, found that Mr. Stamm had "failed" the test. Dr. Olsen's report states:

> [E]ven though [Mr. Stamm] was able to come up with an excellent response to

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[1] App. Br., p.17; and infra at A-1 to A-3.

> the Denver airport problem, when transposed to Tuscaloosa, he was unable to come up with a parallel solution even though he had just within a minute before come up with a correct response to the Denver problem. (Exhibit 4, p.13, ¶5).

b. Natural heirs

Dr. Olsen also criticized Mr. Stamm's response to the question: "Who are your natural heirs?" (Exh. 4, p.8, ¶5). Mr. Stamm had identified his six children. (Id). Dr. Olsen found fault because Mr. Stamm did not also identify his siblings who were still living. (Exh. 4, p.12, ¶4).

The question requested a legal conclusion beyond the knowledge of many lay persons. Dr. Olsen is also wrong. For a person such as Mr. Stamm with living children, only the children would be "natural heirs," i.e., eligible to take under the law of intestate succession. Cf. RCW 11.04.015(2)(a).

c. Food and nutrition

Dr. Olsen's report also includes a section

titled “Food and Nutrition,” as follows:

> When asked, Mr. Stamm states how he *obtains* food: “Wanda makes it or we cook together.” Other ways of obtaining food would be to “go to a restaurant,” if restaurants were closed he would “find something.” (Exhibit 4, p.5).

Once again Dr. Olsen found that Mr. Stamm had “failed” the test. Dr. Olsen's report states:

> [Mr. Stamm] does not prepare his own food other than toast and coffee. He is dependent on Ms. Inderbitzin for meal preparation. (Exh. 4, p.12, last ¶).

Reliance on a significant other for meal preparation is, however, a common pattern in our society. Indeed, it is a traditional marriage. The presence of a significant other also acts to prevent, not require a guardianship. In Re Hedin, 528 NW.2d 567, 579, ¶2 (Iowa 1995).

d. Usual day

Toward the conclusion of Dr. Olsen's interview with Mr. Stamm, Dr. Olsen asked him about his “usual day.” Dr. Olsen's report states:

> Mr. Stamm's demeanor by now shows annoyance or irritability. He is sitting forward in his chair with his head slightly lowered. His voice tone

> is sharper. He has lost his earlier smile and shows a thin-lipped visage. (Exhibit 4, p.5, ¶1).

Dr. Olsen's report also states that Mr. Stamm's answers had required "several non-directive prompts," and that they were "remarkably vague and imprecise." (Id., and p.12, ¶2). Mr. Stamm's answers are in the footnote below.[2] What exactly was he supposed to say?

Dr. Olsen attributed Mr. Stamm's answers and the need for prompting, to "cognitive impairment," i.e., as opposed to a natural response to three hours of inane questions. (Exhibit 4, p.12, ¶2).

e. Invalid approach

The invalidity of Dr. Olsen's testing is perhaps best illustrated by his description of Mr. Stamm's education. Dr. Olsen's report quotes Mr. Stamm as having attended the University of Korea. (Exhibit 4, p.2, ¶¶3 and 4). Mr. Stamm was making

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[2] [I get] up fairly early, have coffee, maybe a piece of toast...Sometimes go out for breakfast (prompt) I do things around the house...(prompt) It'll be grass cutting season shortly. ... (prompt) Whatever I feel like ...

Exhibit 4, p.5, ¶1.

a joke. (TRP 313-15).

Dr. Olsen's use of tricks and other methodology to push Mr. Stamm is, regardless, a wrong approach to determining whether a guardianship should be imposed. In Re Nelson, 12 Wn.2d 382, 394, 121 P.2d 968 (1942), states:

> Neither is it the law that guardians shall be appointed to take charge of the estates of persons ... who appear to have difficulty in thinking connectedly when excited or hurried, where the mental processes appear otherwise normal.

3. Alcohol

The children argue that Mr. Stamm's drinking justifies the guardianship. (Resp. Br., p.13). Their evidence includes Ms. Crowley's testimony that Mr. Stamm's drinking had increased or become a “serious problem.” (Id., pp.1 & 6). Her testimony, even if true, concerns the period immediately following the death of Mr. Stamm's wife, i.e., a period of high stress six years before trial.

Current evidence includes Mr. Stamm's medical

records as described in Dr. Olsen's supplemental report. Mr. Stamm is repeatedly described as "alert" with normal functioning, i.e. even with the presence of alcohol. (Infra at A-4 to A-6). The supplemental report states:

> Most significant is the appearance of normal cognitive, verbal and locomotor function with a blood alcohol level of 207 mg percent. (Infra at A-7).

Many people are functional alcoholics or heavy drinkers, e.g., Winston Churchill. We do not put them under guardianship. Nelson, 12 Wn.2d at 394, states:

> [I]t is not the law that, merely because one who suffers from some physical malady may now and then be temporarily mentally disturbed or disabled for a few hours, he should be declared to be mentally incompetent to handle his own affairs and his property placed under the control of a guardian.

Nelson is consistent with modern case law including State v. Mays, 68 P.3d 1114 (Wash. App. Div. I 2003). In Mays, this Court reversed an order committing an alcoholic to involuntary treatment, as unconstitutional. Mays states:

> "[A] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[3]

Applying Mays to the guardianship context, the notion that an alcoholic can be put under involuntary guardianship solely because of his alcoholism, is also unconstitutional.

The children argue that an 1893 case, In Re Wetmore, requires a different result. (Resp. Br., p.13). Wetmore merely holds that guardianship can be imposed against a person "other than an insane or idiotic person." 6 Wash. 271, 277 (1893). Wetmore remanded to determine whether a guardianship should actually be imposed. (Id).

4. Mr. Stamm had a perfect driving record

The children rely on Mr. Edinger's testimony that Mr. Stamm "collided with a Metro bus." Mr. Edinger, however, did not see the accident. Mr.

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[3] Mays, 68 P.3d at 1118, quoting O'Connor v. Donaldson, 422 U.S. 563, at 574, 576, 95 S.Ct. 2486, (1975).

Edinger testified: "I never seen him run into the bus, no." (TRP 231, line 7). There is no evidence that this was anything other than a minor incident. Cf. Resp. Br., p.6 and TRP 231.

The children do not dispute that Mr. Stamm has a perfect driving record, i.e., "no violation convictions or accidents on file." Infra at A-8.

5. Potential, suspected belief cannot support imposition of a guardianship

Mr. Stamm's children argue that the guardianship is appropriate because Mr. Stamm allowed Ms. Inderbitzin to access his funds. Their evidence includes the purported testimony of Mr. Hankins that he had seen Ms. Inderbitzin "write checks for pull tabs many times." (Resp. Br., p.8). Mr. Hankins actually testified:

> I've seen [Ms. Inderbitzin] write a lot of -- well, I don't know whether they're checks or not. (TRP 239, lines 13-14).

The children also ignore that Ms. Inderbitzin had her own money including an inheritance in excess of $100,000.00. (CP 1028-48). She spent

these funds in part on Mr. Stamm and/or their joint purposes. (Infra at A-9 to A-18).[4] On February 21, 2002, Ms. Inderbitzin loaned Mr. Stamm $8,123.23. (Infra at A-14 to A-18). In April 2002, she paid his IRS taxes in the amount of $5058.00. (Infra at A-12).

Mr. Stamm's children do not dispute that per GSS records, Mr. Stamm had assets of $349,304.06 with pre-guardianship debt of less than $5,000.00. (Infra at A-21). All assets were held in Mr. Stamm's name alone. (A-19 to A-21). Ms. Inderbitzin was not in Mr. Stamm's will. (Exh. 4, p.8, ¶ No. 8). She was but a one seventh beneficiary on his investment account. (A-22).

If anything, it was Ms. Inderbitzin who was at financial disadvantage:

> I mean, you can argue that [Ms. Inderbitzin] is the one who is hanging our here. She's been with -- she's in her 50's, she's been with this man now for six or seven years, she has no financial security. (RP 9/4/02, p.26).

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[4] See also: CP 1003-09; 436-40; 335-38, RP 301, lines 6-7; CP 1021-22; CP 1038-48; CP 1020-25; CP 962 and 1069.

Mr. Stamm's attorney also stated:

> It's the same arrangement that [Mr. Stamm] had with his wife. ... [Ms. Inderbitzin] does the day to day [work]. ... [I]n return he supports her. That's a common, accepted arrangement in our society. And it's been made to sound somehow evil. And they don't have any records, any financial records, that would show that there's anything wrong at all.

RP 9/04/02, p.26, lines 3-16.

At this same hearing, the children filed a pleading describing the issue as "potential" financial exploitation as "suspected" by the petitioners. See: infra at A-23. They also confirmed that the evidence had risen to the level of belief only.[5]

Potential, unproved exploitation cannot support the imposition of a guardianship. "Apprehension in that regard is not to be indulged in." In Re Michelson, 8 Wn.2d 327, 336, 111 P.2d

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[5] The children's attorney stated:

> One of the principal issues that was brought up in this court was the belief ... that [Mr. Stamm] was being subject to exploitation. (RP 9/4/02, p.24, line 25, to p.25, line 5).

1011 (1941). Contrary to the children, this issue provides no support for the guardianship.

6. Mr. Stamm had good credit, stable assets and essentially no debt

From a financial perspective Mr. Stamm was doing well. He was drawing three retirements. (TRP 319-22). He had a house, a car and investments. (Id). He had good credit. (Infra at A-24). The only issue is that he spent his extra money on pull tabs. He could have spent the same amount on a vacation.

Mr. Stamm is not yet dead to be carved up and divided by his children. He was entitled to spend his money as he pleased. For this reason also, his finances do not support imposition of the guardianship.

7. Mr. Stamm's testimony

Mr. Stamm's children quote his testimony in which he had lost track of the years that had passed since his wife's death. (Resp. Br., p.8). This Court can take judicial notice that this type

of thinking is within the realm of normalcy.

The children also quote Mr. Stamm's testimony in which he did not readily admit the extent of his pull tab expenditures. (Resp. Br., pp.8-9). Given the context, i.e., this proceeding, his testimony is rational.

8. Mr. Stamm's November 2000 hospitalization

Mr. Stamm's children also raise issues arising out of his hospitalization in November 2000. (Resp. Br., p.2). The claimed "overdose" on nitroglycerin is innuendo. (Id, and RP 353, line 25 to RP 354, lines 1-2; and Exh. 5, p.3). The timing of Mr. Stamm's hospitalization is also telling, i.e., another period of high stress.

In November 2000, Mr. Stamm had allowed his sons to stay in his home on a temporary basis. (CP 1057; infra at A-25). They were so disruptive that he submitted the declaration quoted in the opening brief. (App. Br., p.11; infra at A-26). Mr. Stamm also testified "I no longer want them to be allowed to come into my residence or on my

property." (infra at A-25 to 26).

C. Mr. Stamm is Entitled to Reversal and Vacation of the Guardianship

Guardianship is a last resort. It cannot be imposed when a person retains decision-making ability and provides himself with "adequate care." (Nelson, at 394, RCW 11.88.005 and RCW 11.88.010).

In the case at bar, Mr. Stamm's children brought the guardianship claiming exploitation. None was proved. Mr. Stamm's responses to Dr. Olsen demonstrate not only Mr. Stamm's competence, but his considerable patience.

The guardian ad litem's testimony was not admitted for the truth of the matter asserted. The other evidence is testimony about events that might happen in any life, i.e., a short hospitalization, a minor traffic accident, etc.

There is also the "positive" evidence. Mr. Stamm was doing well financially. (Infra at A-21 and A-23). He had good credit and a perfect driving record. (Id., and infra at A-8).

Taking the evidence as a whole, it is not

"highly probable" that Mr. Stamm is incapable of adequately handling his affairs. RCW 11.88.010. The order appointing guardian should be immediately reversed and vacated.

D. An Alternate Ground for Reversal: The Guardian ad Litem's Testimony was Inadmissible Speculation

Mr. Stamm's children argue that admission of the guardian ad litem's testimony was proper per RCW 11.88.090(5)(f). (Resp. Br., p.17). Evidence may, however, always be excluded in the discretion of the court.

In the case at bar, the guardian ad litem's testimony was rank speculation and therefore too unreliable to be admitted. (App. Br. pp.44-47, infra at A-27 to A-30). Even the children do not attempt to defend it directly.

With this testimony being "the crux of the case," its admission was not only an abuse of discretion, but cause for reversal. (Id., p.33).

E. An Alternate Ground for Reversal: The Guardian ad Litem's Testimony Violated Mr. Stamm's Right to a Fair and Impartial Jury

The essence of the right to a fair and impartial jury is that it is not proper for an official person to tell the jury how to vote: A detective cannot tell the jury that the defendant is guilty; a judge cannot comment on the evidence; and a prosecutor cannot exceed his role by taking on a "cloak of righteousness" that the defendant must be convicted. (App. Br., pp.40-44).

In the case at bar, the guardian ad litem was an all-encompassing official person who told the jury to impose the guardianship. She was the "neutral investigator," the recommending party to "prosecute" Mr. Stamm, and "the eyes and ears of the court."[6] With the admission of her recommendation that the guardianship be imposed, Mr. Stamm's right to a fair and impartial jury was violated.

Mr. Stamm's children disagree offering factual distinctions between the role of

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[6] Cf. Lidman and Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, George Mason L. Rev., Vol. 6:2, (1998), p.263 et. seq. and CP 714-37.

prosecutor, judge and guardian ad litem. (Resp. Br., p.22). These distinctions are immaterial to the end result, i.e., an official person cloaked with super status in front of the jury telling it what to do. This is constitutionally impermissible.

With the right to a fair and impartial jury violated, the remedy is reversal. (App. Br., p.42, ¶1). For this reason also, the guardianship should be reversed and vacated.

F. Mr. Stamm is Similarly Situated to a Criminal Defendant

Mr. Stamm's children disagree that he is "similarly situated" to a criminal defendant. Cf. Resp. Br., p.23; and App. Br., p.40. On close examination, Mr. Stamm is in a similar position or in some ways, a worse position. See: below.

A criminal defendant is confined for a specified period of time. His property may be forfeited as part of his sentence, i.e., liquidated. If a criminal defendant owns other property, e.g., a second home, he retains control

of that property. He also retains the right to refuse or consent to medical treatment.

Mr. Stamm, by contrast, is under an indeterminate restriction or life sentence. Hedin, 528 N.W. 2d. at 573, ¶3. All of his property has been forfeited, i.e., it is subject to liquidation to pay for the guardianship. (CP 906-8). He does not have the right to refuse or consent to medical treatment. (CP 275). That right has been taken over by GSS. (Id). Commentator Paul Stravis states:

> Individuals ... subject to guardianship typically retain fewer rights than are retained by convicted felons.[7]

Contrary to Mr. Stamm's children, he is similarly situated to a criminal defendant. Mr. Stamm is therefore entitled to the same or similar rights. With the admission of the guardian ad

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[7] Paul F. Stravis, *Guardianship: the Problem or a Solution*, Quality of Care Newsletter, Issue 40, May-June 1989, CP 941. See also: Denise M. Topolnicki, *The Gulag of Guardianship*, Money Magazine, March 1989 CP 1151-52; Diane G. Armstrong, The Nightmare Retirement: How to Save Yourself From Your Heirs and Protectors, Prometheus Books, 2000, (www.retirementnightmare.com); *Guardianship & Alternatives*, The Center for Social Gerontology, www.tcsg.org/guard.htm, and www.victimsofguardians.net.

litem's recommendation that the guardianship be imposed, this did not occur.

G. <u>An Alternate Basis for Reversal: Denial of the Motion to Terminate</u>

There is no case law interpreting Washington's termination statute, RCW 11.88.120. Nationwide, the seminal case to address termination appears to be Hedin, supra. It states:

> [W]here the ward petitions to terminate the guardianship, the ward must make a prima facie showing that the ward has some decision making capacity. Once this prima facie showing is made, the guardian has the burden to go forward and prove by clear and convincing evidence the ward's incompetency, if any. (Hedin, 528 NW.2d at 583).

In the case at bar, Mr. Stamm's motion for termination was supported by evidence of his decision making capacity, i.e., his good credit, his stable assets and lack of debt. He also argued that the guardianship would cause him harm. (App. Br., p.27).

With Mr. Stamm's having obtained the order to show cause, there was a judicial determination

that this evidence was sufficient to go forward with a hearing. (Id., pp.27-28). The burden of proof had shifted to the children to show cause why the guardianship should not be terminated.

As described in the opening brief, there was, however, no hearing. (App. Br. p.28-29). The commissioner did not require the other parties to comply with the show cause order. (Id).

With this situation, Mr. Stamm was denied his right to access the court per RCW 11.88.120 and basic due process. With the order to show cause and the weight of his evidence, this was reversible error.

Mr. Stamm had also sought relief via CR 60 which also gives a right to hearing. CR 60(e). For this reason also, there was reversible error.

H. The Appearance of Fairness Requires Remand to a Different Judicial Officer

In Custody of R, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997), the appellate court remanded to a different judge to promote the appearance of fairness. Therein, the trial judge had denied the

appellant a continuance under circumstances suggesting bias. Custody of R made no finding of bias, but nonetheless remanded to another judge. It stated: the "judiciary should avoid even mere suspicion of bias." Id. at 763.

In the case at bar, the commissioner not only denied Mr. Stamm his right to hearing, she also denied his right to reconsideration. (App. Br. pp.30-31). Mr. Stamm was denied all semblance of due process. For this reason also, Mr. Stamm has requested that any remand be to the trial judge or another superior court judge. (App. Br. p.49).

I. Mr. Stamm is Entitled to Fees

Mr. Stamm's children agree that the fee issues are governed by RCW 11.88.090(10) and RCW 11.96A.150, providing that fees be allocated on such terms as are "just" or "equitable." In the case at bar, it is just or equitable to award fees to Mr. Stamm.

In the case at bar, the children verified and filed an unfounded petition. (CP 12, CP 873).

They then took steps to discourage the development of actual evidence. (CP 873-75).

They specifically named and requested the appointment of an inexperienced guardian ad litem whom they contacted prior to appointment. (CP 874-75; infra at A-31). At trial, they called the guardian ad litem as their own witness. From her, they elicited speculation and multiple level hearsay, including that there "may be" exploitation. (Infra at A-27).

The result, Mr. Stamm has spent the last year under the control of a company. His assets have been liquidated. (CP 906-08). He endures the stigma, humiliation and indignity of being labeled a ward. Cf. Hedin, 528 NW. 2d. at 574.

The children-petitioners received an inheritance prior to initiating this proceeding. (TRP 270-71). Both testified to employment. (TRP 265, lines 10-16; TRP 273). Mr. Stamm, by contrast, is liquidating everything he worked for. The petitioners started this proceeding. They

should pay for it.

III. CONCLUSION

After a successful career, Mr. Stamm had sufficient income and assets to do what he pleased. He lived with Ms. Inderbitzin whom he loved and with whom he talked of marriage. (TRP 336). As of the time of trial, they had been together for six years. Mr. Stamm had good credit, stable assets and essentially no debt. He had a perfect driving record.

Family in-fighting or a child's concern that he will not get his inheritance is not a basis to impose a guardianship. Adult Protective Services closed the case. (CP 5, line 1) This Court should now reverse and vacate.

The fee awards against Mr. Stamm should be reversed. He should be awarded fees on appeal.

Respectfully submitted this _____ day of September, 2003.

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Loren Stamm