

The *Stamm* Case and Guardians ad Litem

by Margaret K. Dore, Esq.¹ © 2004

On June 1, 2004, the Washington State Court of Appeals issued *In re Guardianship of Stamm v. Crowley*, 121 Wash. App. 830, 91 P.3d 126 (2004). *Stamm* is the first Washington State case to address the admissibility of guardian ad litem testimony in a guardianship case. It limits the admissibility of such testimony.

Stamm is part of a national trend by courts to define the proper role of guardians ad litem and also parenting evaluators who perform similar functions. This article discusses *Stamm* as well as this trend and the situation in other states. The article concludes with a discussion of implications for guardianship practice.

A. Stamm Limits Admissibility

With the issuance of *Stamm*, the Washington State Court of Appeals limits its prior guardian ad litem case, *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997). *Fernando*, a child custody case, seemed to state that a guardian ad litem's recommendations and testimony are always admissible. *Id.* at 107-08. *Stamm*, by contrast, limits admissibility to testimony which is helpful to the trier of fact under ER 702. A guardian ad litem is not to be a mere vehicle for hearsay. *Stamm* states:

We ... hold that the trial court has discretion under ER 702 to permit a [guardian ad litem] to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may ... state the basis for those opinions, including hearsay.

This is not to suggest, however, that all information relied upon by a [guardian ad litem] should automatically be recounted at trial. The [guardian ad litem's] testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay. ...

The testimony of a [guardian ad litem] must be carefully evaluated to ensure it is indeed helpful to the fact finder. An opinion formed on inadequate or unreliable grounds cannot be helpful. (Footnotes omitted).

Stamm, 121 Wn. App. at 837-8.

Stamm also limits admissibility by providing that a guardian ad litem is not to testify as to his or her assessments of credibility. *Stamm* states:

[A guardian ad litem's] subjective assessments of credibility are irrelevant. Questions of credibility and the weight to be given to evidence are matters solely within the province of the fact finder.

Stamm, 121 Wn. App. at 839.

B. Reversible Error

In *Stamm*, the guardian ad litem had testified that her recommendations "depended upon her assessment of credibility" and that her role was to act as the "eyes and ears" of the court. *Id.* at 840. The jury followed her recommendations "almost to the letter" so that a guardianship was imposed. *Id.* at 843. *Stamm* reversed due to the "substantial likelihood" that her testimony had encroached on the jury as fact finder. *Stamm* states:

[W]e must conclude the [guardian ad litem's] improper description of her role was prejudicial and there is a substantial likelihood that [her] improper testimony [on credibility] affected the jury's verdicts.

Id. at 844.

C. A National Trend

Stamm is part of a national effort to increase the reliability of outcomes in cases involving guardians ad litem and parenting evaluators. There is also a small, but growing, movement urging the elimination of such persons from court proceedings.² Even supporters concede there can be problems. For example, Meredith Lynn Hardy and Nancy Bradburn-Johnson, state:

[A]necdotes were given of [guardian ad litem] abuses ... which centered on the futility of challenging a [guardian ad litem] once appointed and of the difficulties in challenging [their] recommendations in court. ...

Many of the concerns voiced have a legitimate factual foundation. (footnotes omitted)³

Since publication of this commentary, the Washington State Supreme Court has adopted new court rules, the "GALRs."

In other states, it appears that Tennessee has imposed the most stringent restrictions on guardians ad litem. For child custody abuse and neglect cases, Tennessee no longer has guardian ad litem reports and recommendations. The reasoning for this change is described below:

Those who have supported the continuation of this practice ... have asserted that allowing the [guardian ad litem] to gather and synthesize evidence and make recommendations enables the judge to dispose of the case more efficiently because the judge can rely on the [guardian ad litem] as a kind of expert witness/special master.

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In adopting the guidelines, the Supreme Court has embraced a contrary position: that judicial decision-making should be based on evidence presented in court, subject to cross examination and to the rules regarding admissibility that are designed to ensure a fair and accurate decision-making process.⁴

Tennessee also restricts the admissibility of guardian ad litem testimony generally. See e.g., *Toms v. Toms*, 98 S.W.3d 140, 144 (Tenn. 2003):

We conclude that the guardian ad litem's reports were hearsay and that the trial court erred in relying upon the reports as the basis for its custody determination.

Additional caselaw from other states is listed in the endnote below.⁵

D. Implications for Practice

Per *Stamm*, its limitations on admissibility are more significant when the guardian ad litem testifies before a jury. *Stamm* states:

[W]hat might be appropriate in a written report and testimony to the court is not necessarily appropriate in testimony before a jury ...

[T]he judge can cast a skeptical eye when called for. But a jury has no basis for such discernment. (Spacing changed).

Stamm, 121 Wn. App. at 838-9, and 841.

With this situation, counsel for a proposed ward who finds himself opposing a guardian ad litem recommendation for guardianship should ask for a jury. Through *voir dire* of the guardian ad litem, he may be able to exclude the guardian ad litem's testimony in its entirety. Specific issues would include:

- * Is the proffered testimony "helpful" under ER 702?
- * Is the recommendation based on the guardian ad litem's assessment of credibility?

Counsel for the proposed ward should also be certain to object. In *Stamm*, there was a standing objection to hearsay and also a request for a corrective instruction that the guardian ad litem was not the "eyes and ears" of the court.⁶ Without these objections, Mr. Stamm's appeal might not have been successful.

E. Other Potential Challenges

The imposition of a guardianship is a severe loss of liberty akin to involuntary commitment or incarceration. *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 573-74

(Iowa 1995). Counsel for the proposed ward should therefore also consider the possibility of Constitutional arguments. For example, if Mr. Stamm had been a criminal defendant, admission of the guardian ad litem's opinion as to capacity, i.e., his "guilt," would have been inadmissible on Constitutional grounds.⁷ This argument did not prevail in *Stamm*, but could prevail with a different factual scenario or additional briefing.⁸

Counsel for a proposed ward should also consider a challenge to the idea that guardianship is a "benefit."⁹ For example, if stress from the guardianship proceeding is causing the proposed ward to have high blood pressure, the argument can be made that imposition of the guardianship will be harmful and should be denied.¹⁰ The fact finder should also be informed of the guardianship's cost, that the fees to pay for the guardianship may cause the proposed ward to be spent down. The fact finder could also be informed of the increasing reports of guardianship abuse, for example, per the recent hearings of U.S. Senator Craig.¹¹

F. Conclusion

Stamm is an important case for guardianship practitioners, especially for those who represent proposed wards. Future case law may provide yet additional changes.

1 Margaret Dore is a former law clerk to both the Washington State Supreme Court and the Washington State Court of Appeals. Her published decisions include *Stamm* and *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001), which was nationally recognized. See: Wendy N. Davis, *Family Values in Flux*, 87 ABA Journal 26 (October 2001) (discussing *Lawrence*). Ms. Dore is a graduate of the University of Washington School of Law. She has an M.B.A. in Finance and a B.A. in Accounting. She passed the C.P.A. examination in 1982.

Loren Stamm, the appellant in *Stamm*, is retired from a successful career in the United States Navy. He is now free of guardianship and living in Kenmore, Washington, with his wife.

Further information about Ms. Dore and the *Stamm* case can be viewed at www.margaretdore.com and <http://www.margaretdore.com/briefs.htm>.

2 Cf. Raven Lidman and Betsy 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); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, *Loyola Journal of Public Interest Law*, Vol. 3, Spring 2002, No. 2, p.106-151; and Dana Royce Baerger, et al, *A Methodology for Reviewing the Reliability, and Relevance of Child Custody Evaluations*, 18 *Journal of the American Academy of Matrimonial Lawyers*, 35, p. 36 ("Concern regarding the generally poor quality of [child custody evaluations] has prompted some commentators to suggest an end to the use of [evaluations] in divorce proceedings").

3 Meredith Lynn Hardy & Nancy Bradburn-Johnson, *Guardians ad Litem Face the 1996 Statute Changes*, *Washington State Bar News*, (December 1997) at <http://www.wsba.org/media/publications/barnews/archives/dec-97-adjusting1.htm>.

4 Andy Shookhoff and Susan L. Brooks, *Protecting our Most Vulnerable Citizens (New Guidelines Clarify, Strengthen Mission for Guardians ad Litem)*, 38-June Tenn. B.J. 13, 16-17, 2002.

5 Cf. *C.W. v. K.A.W.*, 774 A.2d 745, 749 (Pa. Super. 2001) (the trial court's reliance on the guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a nonjudicial officer"); *Patel v. Patel*, 347 S.C. 281, 555 S.E.2d (2001) (the guardian ad litem so tainted the family court decision, the wife was denied due process of law); *S v. S*, 571 N.W.2d 801, 809 (Neb. App. 1997), overruled on other grounds (no merit in giving credence to guardian ad litem opinion based on hearsay); *In Re B.S. and J.S.*, 829 P.2d 939, 940 (Mont. 1992) (hearsay elicited from the guardian ad litem should not have been considered); *Gilbert v. Gilbert*, 664 A.2d 239, 243 (Vt. 1995) (error to rely on

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Having the original will secured in the Repository avoids the pitfalls inherent in these old concepts.

5. Safe Deposit Box

The Repository also saves clients the ongoing expense of a safe deposit box and saves the family the expense and nuisance of drilling a box after death.

6. Practice Tip

Clients should fill out the Will Repository Clerk's form when they execute their wills and be offered the option to file their wills under seal following execution. This legislation was sponsored by the WSBA Real Property, Probate and Trust Section, ably lead by Barbara Sherland and by the Washington Chapter of the National Academy of Elder Law Attorneys.

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guardian ad litem report based on hearsay); *Pirayesh v. Pirayesh*, 359 S.C. 284, 596 S.E.2d 205 (2004) (reversing because the guardian ad litem's recommendation was not the product of an independent, balanced and impartial investigation); *Hastings v. Rigsbee*, 875 So.2d 772, 777 (Fla.2d DCA 2004) (reversing because the trial court delegated its authority to the "parenting coordinator" who improperly acted as finder of fact); and *In Re Schiavo*, 780 S.2d 176, 179 (Fl. App. 2001) (affirming decision to proceed without a guardian ad litem because "a guardian ad litem ... might cause the process to be influenced by hearsay").

6 *Stamm*, 121 Wn. App. at 835 and 840, footnote 21.

7 See: Mr. Stamm's Opening Brief, §D.5.a. at: http://www.margaretdore.com/images/Stamm_Opening_Brief.pdf.

8 See: *Id.*; *Stamm*, 121 Wn. App. 835, footnote 3 (rejecting Mr. Stamm's argument due to the status of guardianship as a "civil" proceeding); *Quesnell v. State*, 83 Wn. 2d 224, 228-30, 517 P.2d 568 (1974) (describing *Gault*'s rejection of the civil model of juvenile commitment in which the child was placed in a "school," but in substance incarcerated); and *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996) (rejecting the State's description of "community placement" as a "reward" when it is in substance, punishment). See also: Mark Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75 (Spring 1997).

9 Cf. *Matter of Guardianship of Atkins*, 57 Wn. App. 771, 777, 790 P.2d 210 (1990) (The purpose of the guardianship statute is to benefit the alleged incompetent).

10 *Id.*

11 See: www.aging.senate.gov. See also: Barry Yeoman, *Stolen Lives*, AARP Magazine, January-February 2004 (<http://www.aarpmagazine.org/people/Articles/a2003-11-19-stolenlives.html>); Diane G. Armstrong, Ph.D., *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors*, Prometheus Books, (2000) (www.retirementnightmare.com); www.justiceforfloridaseniors.org/; and www.victimsofguardians.net.

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qualifying a trust as a designated beneficiary. However, the beneficiary designations in both of these examples become less and less appropriate as the size of the IRA increases.

- E. **Strike a Proper Balance.** Combinations of the various estate planning and tax planning factors are far too numerous for discussion here. The facts and circumstances of the client, as well as the client's desires, make each situation unique. Sometimes it may be possible to balance the various estate planning and tax planning considerations. Unfortunately, there will be other times that it is necessary for the client to decide among competing considerations.

II. Naming an Individual as Beneficiary

Naming an individual as the beneficiary of the client's IRA is the simplest form of beneficiary designation. Absent any special estate planning considerations, many planners also consider it the preferred form of beneficiary designation. An individual qualifies as a designated beneficiary, so he/she has the opportunity to benefit from continued tax-deferred growth of the account by receiving distributions over his/her life expectancy. The reason it may be the preferred form of beneficiary designation is that there is probably less chance for the client or planner to inadvertently cost the beneficiary the tax deferral opportunity. While a trust may be drafted in a manner to qualify as a designated beneficiary, the likelihood of inadvertently losing the tax deferral opportunity increases due to the complex rules of trust qualification as a designated beneficiary. (Those rules are discussed later in the outline.)

III. Naming a Spouse as a Beneficiary

- A. **Selecting a Spouse.** For most married people, the spouse is usually the first choice as beneficiary. While this is often the result of factors not involving estate planning or tax planning, such a choice has certain tax planning advantages.
- B. **Required Minimum Distribution (RMD) Calculation.** If the client has selected his/her spouse as the designated beneficiary, the spouse may choose to begin distributions from the IRA by December 31 of the year following the year of the client's death, just like any other designated beneficiary. If the spouse is the sole beneficiary, the spouse may use the more advantageous

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