

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.

BRIEF OF APPELLANT
LOREN STAMM

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by admitting the guardian ad litem's opinion and underlying hearsay.
2. The trial court erred by failing to give a curative instruction as to the guardian ad litem's testimony that she was the "eyes and ears of the court." (TRP 372, lines 12-15).¹
3. Error is assigned to Special Verdict Form A, concluding that Mr. Stamm is incapacitated as to his person.²
4. Error is assigned to Special Verdict Form A, stating that Mr. Stamm's right to possess a license to drive should be restricted.
5. Error is assigned to Special Verdict Form A, stating that Mr. Stamm's right to consent to or refuse medical treatment should be restricted.

¹ There are four volumes of transcripts. The two thicker volumes are from the trial, referenced as "TRP." The two smaller transcripts are from post trial motions, referenced as RP 9/4/02 and RP 9/16/02.

² Verdict Form A is attached infra at A-1 to A-2.

6. Error is assigned to Special Verdict Form A, stating that Mr. Stamm's right to decide who shall provide care and assistance, should be restricted.

7. Error is assigned to Special Verdict Form B, concluding that Mr. Stamm is incapacitated as to his estate.³

8. Error is assigned to Special Verdict Form B, stating that Mr. Stamm's right to manage his financial resources should be restricted.

9. Error is assigned to Special Verdict Form B, stating that Mr. Stamm's right to contract should be restricted.

10. Error is assigned to Special Verdict Form B, stating that Mr. Stamm's right to buy, sell, own mortgage or lease property should be restricted.

11. Error is assigned to Special Verdict Form B, stating that Mr. Stamm's right to appoint someone else to act on his own behalf in financial matters, should be restricted.

12. Error is assigned to Special Verdict Form B,

³ Verdict Form B is attached infra at A-3 to A-4.

stating that Mr. Stamm's right to sue or be sued other than through a guardian, should be restricted.

13. Error is assigned to Special Verdict Form B, stating that Mr. Stamm's right to make decisions about the maintenance of his property, should be restricted.

14. The trial court erred by entering an order on June 25, 2002 appointing a guardian for Mr. Stamm.

15. The trial court erred per the June 25, 2002 order, that Mr. Stamm would be liable for fees.

16. Error is assigned to FF 2.⁴

17. Error is assigned to FF 3.

18. Error is assigned to FF 4.

19. Error is assigned to FF 5.

20. Error is assigned to Conclusion of Law 1.⁵

21. Error is assigned to Conclusion of Law 2.

22. Error is assigned to Conclusion of Law 3.

23. Error is assigned to Conclusion of Law 3A.

⁴ The "findings" are attached infra at A-5.

⁵ The "conclusions of law" are infra at A-5 to A-7.

24. Error is assigned to Conclusion of Law 3B.
25. Error is assigned to Conclusion of Law 3C.
26. Error is assigned to Conclusion of Law 3D.
27. Error is assigned to Conclusion of Law 3E.
28. Error is assigned to Conclusion of Law 3F.
29. Error is assigned to Conclusion of Law 3G.
30. Error is assigned to Conclusion of Law 3H.
31. Error is assigned to Conclusion of Law 3I.
32. Error is assigned to Order ¶1A.⁶
33. Error is assigned to Order ¶1B.
34. Error is assigned to Order ¶1C.
35. Error is assigned to Order ¶1D.
36. Error is assigned to Order ¶1E.
37. Error is assigned to Order ¶1F.
38. Error is assigned to Order ¶1G.
39. Error is assigned to Order ¶1H.
40. Error is assigned to Order ¶1I.
41. Error is assigned to the award of \$21,256.15 in fees and costs to the petitioners' attorney.⁷

⁶ See: infra at A-7 to A-8.

⁷ See: infra at A-9.

42. Error is assigned to the award of \$6,300.00 to the guardian ad litem.

43. The trial court erred on September 4, 2002, by not requiring the other parties to show cause why Mr. Stamm should not be granted termination or stay of the guardianship.

44. The trial court erred on September 4, 2002, by not requiring the petitioners to pay all of Mr. Stamm's fees. (CP 873, 876).

45. The trial court erred on September 16, 2002, by entering an order denying Mr. Stamm's motion for termination or stay.⁸

46. The trial court erred on September 16, 2002, by entering an order "defining" the role of Mr. Stamm's attorney.

47. The trial court erred on September 16, 2002, by making an oral ruling that Mr. Stamm's motion for reconsideration would be denied when he had not yet made a motion for reconsideration.

48. The trial court erred on October 4, 2002, by

⁸ See: infra at A-10 to A-11.

entering an order confirming its oral ruling that Mr. Stamm's motion for reconsideration would be denied when he had not yet made a motion for reconsideration.⁹

Issues Pertaining to Assignments of Error

1. Whether the order imposing guardianship against Mr. Stamm must be reversed and vacated because there is no clear cogent and convincing evidence that he is incapacitated per RCW 11.88.010? (*Assignments of Error 1, 3-14, 16-40, 43, 45*).
2. Whether as a matter of law, hearsay and speculation do not constitute clear, cogent and convincing evidence of incapacity? (*Assignments of Error 1, 3-14, 16-40, 43, 45*).
3. Whether as a matter of law, a person who is "clever" with thought processing that is "logical and goal directed" is not incapacitated?

⁹ A copy of this order is attached infra at A-12.

(Assignments of Error 1, 3-14, 16-40, 43, 45).

4. Whether the guardian ad litem's opinions were contrary to law and therefore irrelevant?

(Assignments of Error 1, 3-48).

5. Whether the guardian ad litem's testimony was inadmissible under ER 702 and ER 703? (Assignment of Error 1).

6. Whether the trial court violated Mr. Stamm's rights to equal protection and a fair and impartial jury, by admitting the guardian ad litem's opinion that he was incapacitated and needed a guardian? (Assignments of Error 1-48).

7. Whether the guardian ad litem's testimony in front of the jury that she was a "neutral investigator" and the "eyes and ears of the court" was akin to prosecutorial misconduct and/or an improper comment on the evidence? (Assignments of

Error 1-48).

8. Whether a guardianship must be terminated under RCW 11.88.120, where the "cure" of the guardianship is worse than the "disease"?

(Assignments of Error 43-48).

9. Whether any remand should be to the original trial judge or another superior court judge?

(Assignments of Error 43-48).

10. Whether the fee awards against Mr. Stamm should be reversed and imposed against the petitioners? *(Assignments of Error 1-48).*

11. Whether Mr. Stamm is entitled to reimbursement of his fees and costs at trial?

(Assignment of Error 44).

12. Whether Mr. Stamm is entitled to fees and costs on appeal?

B. STATEMENT OF THE CASE

1. Introduction

This is a guardianship case per RCW 11.88. The appellant is, Loren Stamm, a functional alcoholic.¹⁰

Prior to this proceeding, Mr. Stamm spent his disposable income at JR's Tavern and other like establishments. On occasion, he would spend large amounts of money. For example, in June 2001, he spent \$2,600.00 in a six day period. (CP 836). This was probably for pull tabs. (TRP 357-58).

The respondents are the petitioners below, Karen Crowley and Michael Stamm. They are Mr. Stamm's children. Mr. Stamm's other children are Mark Stamm, Linda Weninger, Sharon Harpole and Steven Stamm. (CP 280).

On June 25, 2002, the King County Superior Court entered an order imposing guardianship over Mr. Stamm's person and estate. (CP 272-81). This order is the central issue on appeal.

¹⁰ TRP 354, line 18; TRP 256, line 1-9; RP 342, lines 3-4; TRP 103, lines 7-11.

2. Factual Background

Mr. Stamm was born on August 17, 1930 in Concordia, Kansas. (TRP 313). He lived in Kansas until he joined the United States Navy in 1949. (Id). Prior thereto, he attended Kansas University. (TRP 313-14).

In the Navy, Mr. Stamm became an aviation store keeper. (TRP 314, lines 23-24). He retired from the Navy in 1974, having attained the rank of senior chief. (TRP 315, lines 21-22).

Following the Navy, Mr. Stamm worked in several responsible positions, e.g., with Carl North RV, Todd Shipyard and the Boeing Company. Mr. Stamm retired in 1985. (TRP 316-18).

3. Mr. Stamm Begins to See Ms. Inderbitzin

In 1996, Mr. Stamm's wife of many years passed away. (TRP 318). Shortly thereafter, Mr. Stamm began seeing Ms. Inderbitzin whom he had known for several years. (CP 318).

Ms. Inderbitzin subsequently moved in with Mr. Stamm. Per their agreement, she took on the

role of a traditional wife, i.e., she did the cooking and cleaning, assisted with bill paying, did the shopping, etc. (CP 441; Exhibit 4, pp. 5-7; TRP 356, lines 10-13). As of the time of trial, Mr. Stamm and Ms. Inderbitzin had lived together for six years. (CP 335, ¶1).

4. Mr. Stamm's Children Did Not React Well to Mr. Stamm's Seeing Ms. Inderbitzin

Mr. Stamm's children did not react well to Mr. Stamm's seeing Ms. Inderbitzin. His sons, Mark and Steven, were especially mean and abusive. In November 2000, Mr. Stamm submitted the following declaration in support of a restraining order against them. Mr. Stamm testified:

Steven Stamm and Mark Stamm have both been verbally and physically abusive to my girlfriend, Wanda Inderbitzin. ...

There has been a history of assaults by Steven Stamm ...

Declaration of Loren Stamm, November 21, 2000, CP 1058, lines 2-12.

Mr. Stamm concluded: "I do not want Mark or Steven Stamm near my property." (Id., lines 16-7).

As of the time of trial, Mr. Stamm and his children were estranged. The petitioners, Michael Stamm and Karen Crowley, had barely seen Mr. Stamm for several years.¹¹ His daughter, Sharon Harpole, was living in his home with her boyfriend, Richard Edinger, and not paying rent.¹² Mr. Stamm had asked both of them to leave and served them with a notice of eviction.¹³

5. Mr. Stamm's Children Initiate the Guardianship

On October 18, 2001, the petitioners initiated this proceeding. (CP 1). Their petition claimed that Ms. Inderbitzin was abusing Mr. Stamm. (CP 2). It also raised the concern that Mr. Stamm would change his will, i.e., name Ms. Inderbitzin as beneficiary. (CP 3, line 12).

The petitioners did not claim personal knowledge of their allegations. Rather, the

¹¹ TRP 290, lines 14-22; TRP 261, lines 12-13; TRP 262, lines 20-21; TRP 263, lines 12-19.

¹² TRP 234, lines 17-25, lines 9-17; Exhibit 4, p. 12, last sentence.

¹³ TRP 232; TRP 339, lines 1-8; TRP 356, lines 22-24; Exhibit 4, p.12, last sentence.

petition relied on the reported observations of Ms. Harpole and Mr. Edinger, and conversations with unnamed individuals. (CP 2, lines 18-22).

The petition also stated that Adult Protective Services had already investigated the case including a meeting with Ms. Harpole. (CP 4, lines 21-23). The petition stated that Adult Protective Services had decided to close the case, stating that it was simply a matter of "family infighting." (CP 5, lines 1-3).

6. The Guardian ad Litem is Appointed

On that same date, October 18, 2001, the King County Superior Court appointed Victoria Barr guardian ad litem. (CP 17-21). Ms. Barr had been pre-contacted and specifically nominated by the petitioners, i.e., outside the mandatory rotation of RCW 11.88.090(3)(a). (CP 874, lines 6-8 and 21-25). At trial, she would describe her experience as "at least half a dozen cases." (TRP 42, lines 21-22).

The petitioners provided the guardian ad

litem with a copy of the petition and numerous written statements which are not part of this record.¹⁴ The statements apparently describe Mr. Stamm as being at risk and/or exploited by Ms. Inderbitzin. The petitioners also contacted the guardian ad litem directly.¹⁵

The guardian ad litem subsequently met Mr. Stamm. She found him to be "clever, humorous [and] charming." (TRP 65, line 13). At trial, she would testify that he had seemed "completely baffled" by the petitioners' allegations. (TRP 62, lines 4-10).

7. The Guardian ad Litem Publicly Commits Herself to the Petitioners' View of the Case

On October 31, 2001, the guardian ad litem obtained an ex parte order freezing Mr. Stamm's assets. (Trial Exhibit 3). Her declaration recited concerns that Mr. Stamm "has sustained significant financial losses ... due to the

¹⁴ TRP 68, lines 7-8; TRP 47, lines 21-25.

¹⁵ TRP 49, lines 21-25; CP 229; CP 236; and CP 1135, entry for 10/12/01).

influence and actions of Wanda Inderbitz[i]n." (Id, p. 2, lines 32-36). The guardian ad litem had obtained no documentation to verify whether these losses had in fact occurred. (TRP 164, lines 15-19; TRP 175, lines 9-12).

Perhaps most importantly, the guardian ad litem thereby committed herself to the petitioners' theme of the case, i.e., that Mr. Stamm was in need of immediate court protection.

8. Dr. Kent's Evaluation

On November 15, 2001, Mr. Stamm submitted to a competency evaluation by Alan Kent, Ph.D.

Dr. Kent's subsequent report describes Mr. Stamm as "fully competent." (Exhibit 6, p. 2).

His chart note is to a similar effect:

[Mr. Stamm] is casually dressed and well-groomed and related in a friendly and open manner. He frequently made jokes and used humor throughout the interview. [Mr. Stamm] is fully oriented to all spheres.

Trial Exhibit 8, p. 2, ¶3.

Mr. Stamm provided a copy of Dr. Kent's report to the guardian ad litem. At trial, she

would testify she was "flabbergasted." (TRP 125, line 14). Rather than contact Dr. Kent to determine the basis for his opinion, she determined that she would get a "better" report. (TRP 125-29). She therefore obtained a court order for a second evaluation by Robert Olsen, M.D. (TRP 127, lines 4-6). She also provided Dr. Olsen with a copy of the petition and other written statements. (TRP 89, lines 12-13).

9. Dr. Olsen's Evaluation

Mr. Stamm submitted to the second evaluation by Dr. Olsen on February 4, 2002.

Dr. Olsen's subsequent report describes a three hour examination in which Mr. Stamm showed many strengths, for example, that his "thought processing was logical and goal directed." (Exhibit 4, p. 2, ¶1; p. 10). Dr. Olsen nonetheless concluded that Mr. Stamm was impaired, citing in part the petition and written statements

provided to him by the guardian ad litem.¹⁶

In his report, Dr. Olsen did not purport to apply the statutory standards for guardianship. (Exhibit 4). His report was also result oriented, i.e., designed to find fault. A more obvious example is a series of mock transactions in which he employed "tricks" to wear Mr. Stamm down until he made a mistake. Dr. Olsen's testimony concerning these transactions is attached infra at A-13 to A-15.

10. Dr. Olsen's Supplemental Report

On March 5, 2002, Dr. Olsen issued a supplemental report purporting to set forth extracts of Mr. Stamm's medical records. (Exhibit 5). The actual records were not provided. (Id).

11. The Trial

Trial in this matter was held before Superior Court Judge Helen Halpert, from April 30, 2002 through May 2, 2002.

¹⁶ Exhibit 4, p. 1 (listing documents reviewed); Exhibit 4, p.4; p. 13, ¶6; p. 14, ¶1; TRP 101, lines 21-25; TRP 89, lines 12-13.

There were eight witnesses: Richard Edinger; the guardian ad litem; Dr. Olsen; Gary Thompson; Benjamin Hankins; Karen Crowley; Michael Stamm; and Mr. Stamm.

a. The testimony of Richard Edinger

Richard Edinger testified as a witness for the petitioners. He testified that he was the boyfriend of Ms. Harpole and that Ms. Inderbitzin was mistreating Mr. Stamm. (TRP 212-13; TRP 220, lines 9-25). Mr. Edinger also testified that he was living in Mr. Stamm's house for free and that he could not afford to move out. (TRP 234, lines 17-25; TRP 235).

b. The guardian ad litem's testimony

The guardian ad litem also testified as a witness for the petitioners. (TRP 34, lines 19-23). She recommended that a guardianship be imposed. (TRP 144, lines 10-13).

With regard to the guardianship of the person, she stated that Mr. Stamm delegated to Ms. Inderbitzin who in turn, was not doing a "good

job." The guardian ad litem testified:

It's great that he has someone that is caring for him and that he loves being with. They have, apparently, a very full and active intimate relationship and that is great ...

But the drawback is that [Mr. Stamm] has a pattern of delegating. ... [I]t appears that [Ms. Inderbitzin] is managing things for him. The problem is that she's not doing a good job.

Victoria Barr, TRP 137, line 20 to TRP 138.

With regard to the guardianship of the estate, the guardian ad litem's reasoning was that there "may" be exploitation.¹⁷

The guardian ad litem conceded that she had only met Mr. Stamm the one time, and that she did not actually know his financial situation.¹⁸ Her testimony in this regard is attached infra at A-16 to A-22.

c. Hearsay and special status

The guardian ad litem also testified that she was relying on the out-of-court statements of

¹⁷ TRP 198, lines 11-14; TRP 173, lines 3-8; and TRP 178, lines 15-16.

¹⁸ TRP 180, lines 6-8; TRP 181, lines 11-12.

others, i.e., hearsay. See, e.g., TRP 139, lines 2-6. For this reason, the trial court instructed the jury that it was not to consider her testimony as substantive evidence. The court stated:

[A]nything that is coming to the jury from Ms. Barr's mouth, testimony, is admissible only to show you where she arrived at her opinion. It is not being admitted to establish its truth, because those people aren't in court to testify.

Judge Halpert, TRP 143, lines 9-16.

The guardian ad litem also referred to herself as a "neutral investigator" and the "eyes and ears of the court."¹⁹ Mr. Stamm requested a curative instruction, that she was "not the eyes and ears of the court." (TRP 372, lines 12-15). This was denied. (Id).

d. The testimony of Robert Olsen

Dr. Olsen also testified as a witness for the petitioners. (TRP 83, line 21). His most strongly stated opinion was that Mr. Stamm had significant deficits which if left unremedied, would put his life "in jeopardy." (TRP 93, lines

¹⁹ TRP 71, lines 5-6; TRP 139, line 18; CP 478.

3-8).

When asked to give examples, Dr. Olsen focused on an incident a year and a half before trial, i.e., in November 2000, as described in Mr. Stamm's medical records.²⁰

Pursuant thereto, Dr. Olsen testified that Ms. Inderbitzin had called Medic One in connection with Mr. Stamm's suffering chest pain. (TRP 93, lines 17-20). Dr. Olsen was critical of Mr. Stamm, because when Medic One arrived, Mr. Stamm had insisted that he was fine and had been reluctant to go to the emergency room. (Id.). Mr. Stamm then agreed to go after being "prevailed upon" by Medic One and Ms. Inderbitzin. (Id., lines 21-24; Exhibit 5, p. 3, ¶4).

Dr. Olsen also related that per Mr. Stamm's medical record, Mr. Stamm had allowed his high blood pressure medication to run out in the prior month. (TRP 94, lines 7-9; Exhibit 5, p. 2, ¶3).

²⁰ TRP 93, line 9 and lines 17-21; TRP 99, lines 23-25; TRP 114, lines 3-12; and Exhibit 5, pp. 2-3 (regarding November 2000).

Per Trial Exhibit 5, which is Dr. Olsen's summary of these same records, this was an isolated incident.²¹

With regard to guardianship of the estate, Dr. Olsen testified to his "impression" that Mr. Stamm would not be capable of managing his financial affairs alone. (TRP 98, lines 15-19).

e. The testimony of Gary Thompson

Gary Thompson testified that he is a retired chiropractor who had known Mr. Stamm and Ms. Inderbitzin for four or five years. (TRP 294). He testified to their "deep commitment" and that Mr. Stamm had "expressed his love" for Ms. Inderbitzin. (TRP 301, lines 20-24).

f. The testimony of Benjamin Hankins

Benjamin Hankins testified that he knew Mr. Stamm from JR's Tavern and other like establishments. (TRP 237, lines 5-10). He

²¹ See: Exhibit 5, p. 2, ¶2 ("[d]oes have a history of hypertension for which he has been compliant with his medications"). (Emphasis in original). See also: Exhibit 5, p. 2, ¶1 ("[h]is blood pressure is well controlled").

testified to an incident in which Mr. Stamm fell down. (TRP 241-45).

Mr. Hankins conceded that a police officer who had come to the scene had assumed that he, i.e., Mr. Hankins, was drunk. (TRP 245, lines 11-16).

g. The testimony of Karen Crowley and Michael Stamm

The petitioners, Ms. Crowley and Michael Stamm, testified that they were estranged from Mr. Stamm and that they had little contact with him for several years.²²

h. The testimony of Mr. Stamm

Mr. Stamm was the last witness to testify. His testimony was logical and coherent with a touch of his trademark sense of humor. He also testified in the big picture, i.e., he did not provide precise exact dates and amounts.

Mr. Stamm admitted that he has been a heavy drinker for 40 years and that he suffers from

²² TRP 284, line 14; TRP 290, lines 14-22; TRP 261, lines 12-13; TRP 262, lines 20-21; TRP 263, lines 12-13.

heart disease and osteoporosis.²³ He also testified that he loves Ms. Inderbitzin. (TRP 336, lines 1-8). He said that they had talked about marriage. (Id).

Mr. Stamm also testified that he owned his home free and clear and that his bills were paid. (TRP 319, lines 18-23; TRP 325, lines 9-11). He confirmed that Ms. Inderbitzin assisted him and that he was assisted by a financial advisor, Grace Tjoia.²⁴ Mr. Stamm's testimony also included the following:

Q. Why do you think [the petitioners are] doing this?

A. Because they don't want [Ms. Inderbitzin], they want her out of my life.

Testimony of Loren Stamm, TRP 362, lines 7-9.

12. The Jury Verdicts

On May 2, 2002, the jury returned its verdicts, that Mr. Stamm was incapacitated as to

²³ TRP 330 lines 20-25; TRP 352, lines 15-18; TRP 353, lines 4-10; TRP 354, line 18.

²⁴ TRP 356, lines 8-12; TRP 323, lines 22-24.

his person and his estate. (Infra at A-1 to A-4).

Pursuant thereto Mr. Stamm retained his right to see Ms. Inderbitzin. The verdicts state that his right to make decisions regarding social aspects of his life should not be restricted.

(Infra at A-2, lines 8-10).

Mr. Stamm also retained the right to marry Mr. Inderbitzin and the right to make a new will.

(Infra at A-1 to A-4).

13. Referral to the Commissioner's Department

On May 3, 2002, an order was entered referring the case from the trial judge, Judge Halpert, to the Commissioner's Department. (CP 172, ¶2). The order stated that it was for the purpose of appointing a specific guardian, "and for all other proceedings." (Id).

14. The Order Appointing Guardian

On June 25, 2002, a commissioner entered an order appointing Guardianship Services of Seattle (GSS) as "limited" guardian. (CP 272). The order, however, is anything but limited. Pursuant

thereto, Mr. Stamm loses his rights: to drive; to provide informed consent; to choose who will assist or care for him; to contract; to buy, sell, own, mortgage or lease property; to appoint someone else to act on his behalf; to sue or be sued; and to make decisions about the maintenance of his property. (CP 275-76).

The order also required Mr. Stamm to pay the fees of the other parties, i.e., \$21,256.15 to the petitioners and \$6,300.00 to the guardian ad litem. (CP 279).

15. Mr. Stamm Appeals

On July 23, 2002, Mr. Stamm appealed the order appointing guardian and "all other orders."

16. The Guardian's Verified Inventory and Proposed Budget

On August 16, 2002, GSS submitted its initial "Verified Inventory." This document substantiated Mr. Stamm's financial stability. It listed assets of \$349,304.06, with pre-guardianship debt of less than \$5,000.00. (CP 1000; infra at A-26).

On this same date, GSS submitted its initial budget, projecting a shortfall of \$4,227.65 per month, i.e., \$50,731.80 per year. (Infra at A-27). Pursuant thereto, Mr. Stamm's assets would be liquidated to pay for the guardianship.

GSS suggested that a reverse mortgage could be obtained on Mr. Stamm's home. (CP 417, 1st ¶). It also proposed that Mr. Stamm's allowance be set at \$300.00 a week.²⁵

17. Mr. Stamm Obtains an Order to Show Cause

On August 28, 2002, Mr. Stamm moved for termination or stay of the guardianship per RCW 11.88.120. (CP 474).

In support thereof, Mr. Stamm submitted his credit report (no collection accounts and no accounts past due), his driving record ("no violation convictions or accidents") and his financial records (stable historical spending).²⁶

²⁵ The proposed monthly budget lists allowance of \$1,300.00, i.e., \$300.00 per week. (CP 423).

²⁶ CP 333-34; CP 764; CP 451; CP 948, lines 18-25; CP 1075; CP 1081-1103; CP 1013; CP 1015.

On this same date, Mr. Stamm obtained an order from a commissioner requiring the other parties to show cause why the guardianship should not be terminated. (CP 431).

18. The Hearing on the Show Cause Order

On September 4, 2002, the hearing on the show cause order was held before a different commissioner.

This commissioner did not require the other parties to comply with the order. She did not allow Mr. Stamm to present his prepared argument. (RP 9/4/02, p. 11). She instead took the position that as a commissioner, she had no power to grant the relief requested. (Id., p. 10).

In response, Mr. Stamm suggested that the matter should be set before Judge Halpert. (Id., p. 11, lines 10-13). This suggestion was declined, that Judge Halpert had said that it could be heard by the commissioner.²⁷ Mr. Stamm's

²⁷ RP 9/4/02, p. 11, lines 19-21 (Judge Halpert said "it was fine for it to come here").

motions were denied. (CP 909, line 25; CP 910).

19. Ms. Inderbitzin Provides
"Valuable In-Kind Services"

At the hearing, the commissioner also ruled that Ms. Inderbitzin provided "valuable in-kind services" to Mr. Stamm.²⁸ The commissioner also acknowledged that the jury had made no finding against Ms. Inderbitzin. The commissioner stated:

I think we need to get this issue laid to rest one way or the other as to whether there's any overreaching or whether this is a normal relationship as indicated, a loving relationship, where they both -- there's give-and-take on both sides.

RP 9/4/02, p. 36, lines 5-9.

20. Mr. Stamm and his Attorney are
Restricted

On September 16, 2002, the commissioner entered her order from the prior hearing. (CP 904). The order stated that there was "no basis in law" for Mr. Stamm's motions to terminate or stay. (CP 905, line 15-22; CP 906, lines 1-3). The order also restricted the role of Mr. Stamm's

²⁸ RP 9/4/02, p. 35, line 25; p. 36, lines 1-2.

attorney. It stated that his attorney would have to file a petition for instructions before "perform[ing] any additional services for [Mr.] Stamm." (CP 909, lines 11-12, infra. at A-10).

During the hearing, the commissioner also ruled that Mr. Stamm would not be allowed to move for reconsideration regarding his motions to terminate or stay. (RP 9/16/02, p. 5, lines 21-25). This prompted his attorney to respond:

[F]or the record, I would just raise the due-process issue that I haven't even made the motion for reconsideration, and I don't even know what I'm going to write yet, and I'm being restricted when we're concerned with a fundamental liberty interest.

RP 9/16/02, p. 6, line 25; p. 7, lines 1-5.

21. Mr. Stamm's Petition for Instructions

On September 25, 2002, Mr. Stamm filed a petition for instructions asserting his right to move for reconsideration and seeking other relief. (CP 923-24). His argument included that he was also entitled to relief under CR 60. (CP 929-934).

On October 4, 2002, the commissioner responded via order stating in part:

Motion for reconsideration and request to make such motion was denied on 9/16/02.

Order, 10/4/02, infra at A-12, lines 19-20.

22. Mr. Stamm Files an Amended Notice of Appeal; The Record is Supplemented

On October 9, 2002, Mr. Stamm filed an amended notice of appeal to include the commissioner's orders. On December 6, 2002, this Court granted his motion to supplement the record with these materials.

23. Relief Requested

Mr. Stamm requests reversal of the order appointing guardian. He requests that the fee awards against him be reversed, and that the petitioners be required to pay his fees. He also requests fees and costs on appeal.

C. **SUMMARY OF ARGUMENT**

A guardianship is not to be imposed unless the person's decision-making process is so

impaired that he is unable to care for his own personal safety and provide himself with the necessities of life. A person may not be deemed incapacitated, i.e., incompetent and subject to guardianship, unless he has a demonstrated inability to "adequately" manage his affairs.

In the case at bar, Mr. Stamm is clever with logical and goal directed thinking. He was also adequately handling his affairs. He had good credit, a home and a significant other who assisted him. When he had an incident requiring a trip to the emergency room, he went, his initial reluctance notwithstanding.

With these circumstances, the order appointing guardian cannot be sustained and must be reversed.

In the alternative, the order must be reversed due to the erroneous admission of the guardian ad litem's testimony. Per the trial judge's assessment, this issue was the "crux of the case" and possibly error. The trial judge

stated:

I think this is the complete crux of this case, is whether her opinion comes in. ...

[Y]ou think I am wrong, and the truth is I would not be shocked were the Court of Appeals to find I am wrong, ...

TRP 309, lines 19-21, and TRP 310, lines 6-8.

For both these reasons, the order appointing guardian should be immediately vacated and Mr. Stamm's rights restored. He should also be awarded fees.

D. ARGUMENT

1. De Novo Review

Incapacity is a legal issue. RCW 11.88.010(1)(c). Review of the jury's verdicts and the order appointing guardian is therefore de novo as a matter of law. Rasmussen v. Bendotti, 107 Wn. App. 947, 954, 29 P.3d 56 (2001). See also: Akers v. Sinclair, 37 Wn.2d 693, 701, 226 P.2d 225 (1950).

2. The Law of Guardianship

Per RCW 11.88.010, a person can only be

deemed "incapacitated," i.e., incompetent and subject to guardianship, if he is unable to "adequately" handle his affairs. This determination requires a demonstration of "management insufficiencies over time." RCW 11.88.010(1)(c). The standard of proof is "clear, cogent and convincing evidence." RCW 11.88.045(3).

There is apparently no case law applying these provisions. Prior caselaw is, however, clear that the burden of proof is extremely high. For example, In Re Nelson, 12 Wn.2d 382, 397, 121 P.2d 968 (1942), a guardianship was terminated although the ward was "physically weak," "nervous" and with a mind less keen or quick than "years ago."

Similarly, In Re Michelson, 8 Wn.2d 327, 329, 111 P.2d 1011 (1941), a guardianship was terminated although the ward could not read or write in English and required the assistance of her children. Michelson states:

Guardians should not be appointed either of the person or of the property of one simply because he is aged or infirm, or because his mind is, to some extent, impaired by age or disease.

Michelson, 8 Wn.2d at 335-36.

3. There is No Clear, Cogent and Convincing Evidence that Mr. Stamm was Incapacitated

A guardianship can only be imposed if the proposed ward's decision-making process is so impaired that he is "not able to care for his or her own personal safety and is not able to provide necessities of life." In Re Teeter, 537 NW.2d 808, 810 (Iowa 1995).

In the case at bar, Mr. Stamm's decision-making process was intact. He was "clever" with thought processing that was "logical and goal directed."²⁹ He was also adequately handling his affairs. Indeed, he was doing better than many people. He had a home, a car and a significant other.

With this situation, there is no

²⁹ TRP 65, line 13; Exhibit 4, p. 10, p. 2, ¶1.

"incapacity." The order appointing guardian is not sustainable.

The specific evidence against Mr. Stamm is discussed below.

a. The guardian ad litem's testimony

As set forth above, the guardian ad litem opined that there "may" be exploitation. (TRP 198, lines 11-14). This testimony was not only speculation, but irrelevant. Michelson states:

So far as we are informed, there are no authorities holding that, when one group of children are of the view that a parent will not deal fairly with them in his disposition of his property, in the absence of overreaching or fraud, that furnishes any basis for the appointment of a guardian ... Apprehension in that regard is not to be indulged in.

Michelson, 8 Wn.2d at 336.

The guardian ad litem's opinion that Ms. Inderbitzin was not doing a "good job" is also irrelevant. (TRP 138, lines 1-5). The question is not whether Ms. Inderbitzin was doing a "good job," but whether Mr. Stamm was adequately handling his affairs. RCW 11.88.010.

The guardian ad litem also testified as to the hearsay underlying her opinion. As set forth above, this testimony was not admitted as substantive evidence but only to show the basis for her opinion. It cannot be substantively considered to uphold the verdict.

b. Dr. Olsen's testimony

Dr. Olsen's "impression" that Mr. Stamm was incapable of handling his financial affairs alone, is irrelevant. (TRP 98, lines 15-19). Mr. Stamm was not handling his affairs alone. He was assisted by Ms. Inderbitzin and Ms. Tjoia.³⁰ An "impression" is also insufficient to sustain a verdict. Cf. Morse v. Antonellis, 112 Wn. App. 941, 946 (2002) (a verdict "cannot be founded on mere theory or speculation").

Dr. Olsen's testimony that Mr. Stamm had failed to renew his medication a year and a half before trial, is also of little or no relevance. Per Dr. Olsen's own exhibit, it was an isolated

³⁰ TRP 356, lines 8-12; TRP 323, lines 22-25).

incident. (Exhibit 5, p. 2, ¶3). Mr. Stamm's reluctance to go to the emergency room would also seem a normal tendency. (Id., p. 3, ¶4). He had, regardless, agreed to go. (Id.).

Dr. Olsen's opinion provides little or no support for the conclusion of incapacity.

c. Other witnesses

The testimony of Mr. Edinger, that Mr. Stamm was mistreated by Ms. Inderbitzin, was given no weight by the jury. As set forth above, the jury determined that Mr. Stamm should retain his right to see Ms. Inderbitzin. He also retained the right to marry her and make a will. (A-1 to A-4).

Viewing the evidence as a whole, the verdicts of incapacity cannot be sustained. The order appointing guardian should be immediately reversed and vacated.

4. The "Cure" of the Guardianship is Worse Than the Disease

11.88.120(1) allows a ward to move for termination of guardianship "[a]t any time." The standards for granting relief are that there be a

"good reason" and that relief be "just and in the best interest of the incapacitated person." RCW 11.88.120(1) and (4).

In the case at bar, Mr. Stamm had stable spending and assets. With the guardianship, his assets are instead being liquidated. He also lives on an allowance doled out by a company. His rights are otherwise curtailed. Perhaps most obviously, he has a perfect driving record, but is no longer allowed to drive. (CP 334).

With this circumstance and as a matter of law, it is "just and in the best interest" of Mr. Stamm, that the guardianship be terminated. For this reason also, the order imposing guardianship should be reversed and vacated.

5. The Alternate Ground for Reversal: the Erroneous Admission of the Guardian ad Litem's Testimony.

In the event this Court does not reverse and vacate for the reasons set forth above, it will be necessary to reach the alternate ground for reversal, i.e., the erroneous admission of the

guardian ad litem's testimony.

The legal analysis demonstrating this error is set forth below.

a. Admission of the guardian ad litem's opinion violated Mr. Stamm's right to trial by a fair and impartial jury

In a criminal case, the defendant's physical liberty is at stake. In a guardianship case, there is a similar situation." In Re Hedin, 528 NW.2d 567, 573-74 (Iowa 1995), states:

Although the determination of incompetency is in no way a criminal proceeding, the result in terms of the defendant's liberty interests may be very similar. He may be deprived of control over his residence, his associations, his property, his diet, and his ability to go where he wishes.³¹

Equal protection "requires similar treatment under the law for similarly situated people."

Miquel v. Guess, 112 Wn. App. 536, 552, 51 P.3d 89

³¹ See also: Paul F. Stravis, Counsel to the NY Commission on Quality Care, Guardianship: the Problem or a Solution, Quality of Care Newsletter, Issue 40, May-June 1989, CP 941 ("[i]ndividuals ... subject to guardianship typically retain fewer rights than are retained by convicted felons"); and Denise M. Topolnicki, The Gulag of Guardianship, Money Magazine, March 1989, CP 1152-53.