IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Guardianship of FAYE E. SAALFELD, An Incapacitated Person.	No. 42272-7-II UNPUBLISHED OPINION

Bridgewater, J.P.T.[1] – David Saalfeld appeals the dismissal of his motion to modify his wife's guardianship, arguing that the trial court violated the governing statute by dismissing his motion before holding a trial on the merits. He also appeals the trial court's imposition of guardian ad litem and attorney fees. Finding no reversible error, we affirm.

Facts

Faye Saalfeld is an incapacitated person subject to the jurisdiction of the Clark County Superior Court by an established guardianship of her finances and her person. Represented by counsel, her 87-year-old husband David[2] filed a motion for an order to show cause why his wife's guardianship should not be modified by replacing her current guardians, and he requested the appointment of a guardian ad litem to investigate his concerns about her care and welfare. The respondents, Faye's personal and financial guardians, agreed to the appointment of a guardian ad litem.

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[1] Judge C. C. Bridgewater is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

[2] We use the Saalfelds' first names for clarity of reference.

After David's attorney filed a notice to set the matter for trial, a trial date was assigned. The guardian ad litem conducted a lengthy investigation and issued a sealed report that defended the actions of both the personal and financial guardians and recommended against any modifications. The guardians then moved to dismiss David's proposed modification. Following a hearing, the trial court dismissed David's motion to modify the guardianship and granted the guardian ad litem's request for fees, ordering them paid by Faye's estate. David appeals the dismissal of his motion as well as the "order of attorney fees and guardian ad litem fees ordered against him." Br. of Appellant at 1.

Discussion

I. RCW 11.88.120

David contends that the trial court misapplied the statute governing the procedures by which a guardianship may be modified when it set a trial date, appointed a guardian ad litem, and then dismissed the matter without holding a trial. The statute at issue, RCW 11.88.120, provides as follows:

> Modification or termination of guardianship--Procedure
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> (1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.
>
> (2) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. If applicants are represented by counsel, counsel shall move for an order to show cause why the relief requested should not be granted. If applicants are not represented by counsel, they may move for an order to show cause, or they may deliver a written request to the clerk of the court.
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> (3) By the next judicial day after receipt of an unrepresented person's request to

> modify or terminate a guardianship order, or to replace a guardian or limited guardian, the clerk shall deliver the request to the court. The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. . . .
>
> (4) In a hearing on an application to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may grant such relief as it deems just and in the best interest of the incapacitated person.
> . . . .

RCW 11.88.120 (emphasis added).

David's claims of error are based on the trial court's alleged failure to comply with RCW 11.88.120(3). But this provision of the statute applies only to unrepresented persons, and David was represented by counsel throughout the proceedings at issue.

The trial court had the authority to appoint a guardian ad litem regardless of the procedures outlined in RCW 11.88.120. *See* RCW 11.88.090(1) (nothing in RCW 11.88.120 affects the power of any court to appoint a guardian ad litem). And, following that appointment, the trial court had the authority to consider and to grant the motion to dismiss David's motion without holding a trial on the matter and without finding his motion frivolous under RCW 11.88.120(3)(c). RCW 11.88.120(4).

A trial court has the power to remove a guardian for good and sufficient reasons, but a court may not arbitrarily remove a guardian and appoint someone else in his stead. *In re Guardianship of Robinson*, 9 Wn.2d 525, 534, 115 P.2d 734 (1941); *see also In re Guardianship of Spiecker*, 69 Wn.2d 32, 33, 416 P.2d 465 (1966) (evidence "fell far short" of justifying removal of guardian). The court must consider the incapacitated person's best interests before modifying

a guardianship. RCW 11.88.120(4). In an unchallenged finding of fact, the trial court stated that there was insufficient evidence to demonstrate that the guardians' replacement was in Faye's best interests. Although this unchallenged finding is a verity on appeal, we briefly describe some of the supporting evidence. *State v. Hill*, 123 Wn.2d 641, 644, 87 P.3d 313 (1994).

In support of his motion, David submitted a declaration from a psychologist who concluded, after evaluating David, that there was a "desperate need" to manage him in addition to his wife to avoid further confrontations between David and his wife's caregivers and guardians. The psychologist never met with Faye and never opined that changing her guardians would be in her best interests. David's own supporting declaration focused on his conflict with his wife's personal guardian and caregivers and his complaints about the estate guardian's liquidation of an annuity that had designated him as the beneficiary. After an exhaustive investigation, the guardian ad litem submitted a report upholding the decisions of both guardians and stating that a change of caregivers would be harmful to Faye. This report was supplemented by declarations from Faye's son, daughter-in-law, caregiver, and primary care physician, all of whom opposed modification.

In short, although the trial court erroneously relied on the standard set forth in RCW 11.08.120(3)(c) in granting the guardians' motion to dismiss, it came to the correct conclusion. We affirm the trial court's order dismissing the show cause action.

II. Guardian Ad Litem and Attorney Fees

In his brief's opening statement, David asserts that he is appealing the imposition of the guardian ad litem's fees and attorney fees against him. He does not support this claim of error with argument. Furthermore, the order imposing attorney fees is not part of the record, and the

trial court ordered the estate, rather than David, to pay the guardian ad litem fees. We will not address the trial court's fee awards further. RAP 10.3(a)(6).

The guardians request attorney fees on appeal under RCW 11.88.090 and RAP 18.9(a). Washington courts do not award attorney fees unless expressly authorized by contract, statute, or recognized equitable exception. *Pierce County v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). RCW 11.88.090, which addresses guardian ad litem appointments, authorizes a trial court to assess fees for frivolous motions to remove a guardian ad litem. RCW 11.88.090(3); *In re Guardianship of Matthews*, 156 Wn. App. 201, 213 n.7, 232 P.3d 1140 (2010). Because no such motion is at issue here, the statute does not authorize an award of attorney fees on appeal.

The guardians also request fees under RAP 18.9(a), which allows us to impose sanctions against a party who files a frivolous appeal. An appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 443, 730 P.2d 653 (1986).

We find an award of fees justified under RAP 18.9(a). David's appeal rests on a statutory subsection that, by its terms, does not apply to him. Even if it did, we would find no basis in law to conclude that a court lacks authority to consider and grant a pretrial motion to dismiss a requested guardianship modification in the face of overwhelming evidence supporting the status quo.

We affirm the trial court's order granting the guardians' motion to dismiss, and we grant

their request for attorney fees on appeal. We deny David's request for fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bridgewater, J.P.T.

We concur:

Hunt, J.

Van Deren, J.