IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of BERNADYNE E. JACOBY, an Incapacitated Person.	)	DIVISION ONE
	)	No. 63852-1-I
RANDAL JACOBY, Petitioner,	)	UNPUBLISHED OPINION
v.	)	
INGRID CAMERON, Respondent.	)	FILED: December 28, 2009

Dwyer, J. — Randal Jacoby, the purported former acting trustee of a trust benefiting his mother, appeals from numerous superior court orders concerning the trust, including the order appointing Ingrid Cameron as the successor trustee. He also appeals from the superior court's order sealing a document listing his mother's address. We find no error in the challenged orders, except for the order sealing the address. Accordingly, we affirm in part and reverse and remand in part.

I

Bernadyne Jacoby, an octogenarian, has two sons—Randal and Gary.[1] In 1985, Bernadyne created a revocable living trust—the Bernadyne E. Jacoby Trust ("the Trust")—to provide for her care and welfare during her lifetime. She transferred substantially all of her assets to the Trust, including her house and

[1] Because the related parties share the same surname, we refer to them by their first names, consistent with the parties' briefing.

hundreds of savings bonds. Bernadyne is the income and principal beneficiary of the Trust during her lifetime, while Randal and Gary are the primary remainder beneficiaries.

Bernadyne was diagnosed with early stage Alzheimer's.[2] Sometime in March 2006, Randal moved in with his mother. About this time, Randal purportedly became the acting trustee.[3] In September 2006, after Gary learned of confrontations between both Randal and one of Bernadyne's friends and Randal and Bernadyne's doctor, Gary contacted an Adult Protective Services caseworker. Both Gary and the caseworker contacted the sheriff's office and requested that police officers visit Bernadyne to conduct a welfare check. Upon the police officers' arrival at Bernadyne's home, Randal attempted to deny them access to Bernadyne. He was then arrested for obstructing the police officers from carrying out this welfare check. The obstruction charge brought against Randal was later dismissed after a stipulated continuance.

Shortly after these events, Gary filed a petition for guardianship of his mother in the superior court, seeking to have her declared an incapacitated person. The court appointed a guardian ad litem (GAL) to represent

[2] On March 14, 2006, in an amendment to her trust documents, Bernadyne identified her diagnosis of "early stage Alzheimer's" as the reason she was relinquishing management of the Trust to Gary.

[3] Bernadyne was the original trustee. On March 14, 2006, she modified the Trust with Amendment Four in which she resigned as the trustee and designated Gary as the sole trustee while she was living. Six months later, Randal assisted his mother in creating Amendment Five, which designated Randal as the sole acting trustee. All but the last amendment were written with the assistance of Albertson Law Group. The language of Amendment Five is very similar to that of Amendment Four, including the language that Bernadyne was resigning as trustee. Randal and Gary disagree as to whether Amendment Five was a valid amendment to the Trust documents. The superior court did not resolve this question.

Bernadyne's interests. During the course of his investigation, the GAL interviewed or received information from Bernadyne, Randal, Gary, Bernadyne's friends and neighbors, police investigators, and others. Bernadyne informed her GAL that Randal had moved in without being invited, and she reported that Randal often stayed out late at night or was away for long periods of time. She also told the GAL that she believed that Randal had taken some of her money and that she was afraid of Randal.

On November 20, 2006, the superior court adjudicated Bernadyne to be an incapacitated person and appointed Ingrid Cameron, a professional guardian, as full guardian of Bernadyne's person and estate. In the order appointing Cameron as guardian, Randal was identified as a person interested in the guardianship proceeding, and the superior court ordered Cameron to notify Randal of his right to receive copies of pleadings related to the guardianship. The court also ordered Cameron to petition to become the acting trustee. Cameron then petitioned the superior court to remove Randal as acting trustee and to substitute herself as successor trustee. The superior court granted this petition in January 2007.

On March 7, 2007, Randal's attorney entered an appearance on Randal's behalf in the proceeding. Subsequently, Randal actively participated in the litigation. Almost a year after Cameron was appointed as trustee, Randal moved to vacate the order so appointing her, claiming that the superior court lacked

personal jurisdiction over him in his trustee capacity and that Cameron had failed to notify him of the petition to remove him as acting trustee. The superior court granted this motion, vacating the earlier order appointing Cameron as trustee ("Vacating Order"). Cameron did not appeal from the Vacating Order.

Instead, on March 5, 2008, Cameron again petitioned the superior court to remove Randal from the position of acting trustee and to appoint her as successor trustee. After a hearing, the superior court granted Cameron's motion and reappointed her as trustee on April 25, 2008. In the same order, the superior court also ordered that Cameron "file the current address of Bernadyne Jacoby under seal."

Cameron then filed the Guardian and Trustee's First Annual Report ("Annual Report"), as required by RCW 11.92.043(2), which the court approved. Subsequently, Cameron petitioned the superior court to confirm the orders that had been made between Cameron's initial appointment as trustee and the Vacating Order.[4] The superior court entered an order confirming these earlier orders, finding that Cameron had been acting as a de facto trustee since her initial appointment and that her activities as de facto trustee had been "reasonable and proper."

Randal appeals.[5]

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[4] Prior to Cameron's petition to confirm these orders, Randal moved for the superior court to vacate these orders because, he asserted, they were dependent on the order initially appointing Cameron trustee that had been vacated.

[5] Randal appeals from, among other orders, the April 25, 2008 order titled "Order Approving Guardian and Trustee's First Annual Report," which appointed Cameron as successor trustee and ordered that Bernadyne's address be filed under seal. This order was filed April 25,

II

Randal first contends that the superior court lacked personal jurisdiction over him in his trustee capacity and was, therefore, without authority to remove him as trustee. Although Randal entered an appearance and participated in the litigation for over a year prior to the superior court's appointment of Cameron as successor trustee, Randal contends that it was necessary for Cameron to serve him with a summons in order for the trial court to properly rule on the petition for a change in trustee. We disagree.

We review de novo a court's ruling on personal jurisdiction. Subcontractors & Suppliers Collection Servs. v. McConnachie, 106 Wn. App. 738, 741, 24 P.3d 1112 (2001). Generally, in order for the superior court to have personal jurisdiction to remove a trustee under the Trust and Estate Dispute Resolution Act ("TEDRA"), chapter 11.96A RCW, a summons must be served on all parties, as defined by the statute.[6] RCW 11.96A.090.[7] Randal

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2008, but was vacated and re-entered on August 15, 2008 in order to facilitate Randal's appeal. Therefore, the actual date of the order appealed from is August 15, 2008.

[6] RCW 11.96A.030(5) defines "party" or "parties" as:

> [E]ach of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:
> (a) The trustor if living;
> (b) The trustee;
> (c) The personal representative;
> (d) An heir;
> (e) A beneficiary, including devisees, legatees, and trust beneficiaries.

[7] RCW 11.96A.090 states:

> (1) A judicial proceeding under this title is a special proceeding under the civil rules of court. The provisions of this title governing such actions control over any inconsistent provision of the civil rules.
> (2) A judicial proceeding under this title may be commenced as a new

contends that the superior court could not obtain personal jurisdiction over him unless Cameron served him with a summons. Cameron responds that no service of a summons was required because, pursuant to RCW 11.96A.100(2),[8] service of a summons is not required when issues relating to the relevant trust are already at issue in the existing proceeding.

Randal argues in his reply brief that, as a matter of law, proceedings related to a trust estate can never be incidental to proceedings related to a guardianship estate. In so doing, he mischaracterizes the question before us. This appeal does not involve a superior court ruling on the legal propriety of bringing the petition for appointment of a substitute trustee in the same cause as the guardianship proceeding. It does not present a legal question.

To the contrary, the determination of whether this action is incidental to the existing proceeding such that service of a summons upon Randal was not required involves the resolution of two factual questions. The first is whether the

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action or as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset.

(3) Once commenced, the action may be consolidated with an existing proceeding or converted to a separate action upon the motion of a party for good cause shown, or by the court on its own motion.

(4) The procedural rules of court apply to judicial proceedings under this title only to the extent that they are consistent with this title, unless otherwise provided by statute or ordered by the court under RCW 11.96A.020 or 11.96A.050, or other applicable rules of court.

[8] RCW 11.96A.100 states:

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise: . . . (2) A summons must be served in accordance with this chapter and, where not inconsistent with these rules, the procedural rules of court, however, if the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset, notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceeding."

guardianship proceeding involved issues related to the Trust. The second is whether Randal was a party to the guardianship proceeding.

To determine the answer to the first question, we examine the superior court's November 20, 2006 order appointing the guardian. The order explicitly identifies the Trust assets as part of Bernadyne's estate, specifying:

> NATURE AND VALUE OF THE ESTATE. Bernadyne Jacoby's estate consist[s] of approximately $800,000.00 in real property and liquid assets, and a monthly Social Security income of $800.00 per month. Some or all of Ms. Jacoby's assets are held by the trustee of the Bernadyne Jacoby Living Trust, established February 19, 1985, as amended.

Clerk's Papers (CP) at 3 (Finding of Fact 7). The order's conclusions of law provide similarly:

> INCAPACITY. Bernadyne Jacoby is an incapacitated person within the meaning of RCW 11.88. A full guardianship of the person and *estate* should be ordered. Ms. Jacoby should not retain the right to vote.

CP at 3 (Conclusion of Law 1) (emphasis added). The court's order was consistent:

> 2. This guardianship is a full guardianship as to both the person and the *estate* of Bernadyne Jacoby. The term of this guardianship is indefinite, until further order by the Court.

CP at 4 (Court Order 2) (emphasis added).

Taking these three provisions together, it is apparent that the superior court identified the Trust assets as constituting part of the estate, which was at issue in the guardianship. This is consistent with the fact that Bernadyne was

the sole principal and income beneficiary of these assets. This was the subject of a finding of fact, a conclusion of law, and the court's ultimate order. Thus, as a factual matter, questions relating to the Trust and Trust assets were at issue in the guardianship proceeding, within the meaning of RCW 11.96A.100. Hence, the later-filed petition to change the trustee, filed in the same cause, was brought incidental to the guardianship proceeding.

The second factual question is also properly answered in the affirmative. Randal was a party to the guardianship proceeding. In the November 20, 2006 order appointing a guardian, Randal was identified as a person interested in the guardianship proceeding, and the superior court ordered the guardian to notify Randal of his right to receive copies of pleadings related to the guardianship. Subsequently, on March 7, 2007, Randal entered an appearance in the guardianship proceeding. This was more than a year before entry of the court's April 25, 2008 order appointing Cameron as trustee. After entering his appearance, Randal actively litigated issues related to the guardianship and the Trust for more than a year.

Because the petition to change the trustee was brought incidental to the guardianship proceeding and Randal was a party to that proceeding prior to the petition being filed, it was not necessary to serve him with a summons in order for the superior court to acquire personal jurisdiction. The superior court had personal jurisdiction over Randal and, therefore, had authority to remove him as

trustee.

III

Randal next contends that the superior court lacked reasonable cause to remove him as acting trustee. He argues that the evidence in the record regarding his misconduct was both unpersuasive and inadmissible hearsay. We disagree.

Upon petition of a trustor, trustee, or beneficiary, the superior court may remove a trustee for reasonable cause. RCW 11.98.039(4)(c). Breach of the trustee's fiduciary duty, a conflict of interest between the trustee and the trust beneficiaries, or bad will generated by litigation, among other things, may provide a superior court with reasonable cause to remove a trustee. In re Estate of Ehlers, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996) (citing Waits v. Hamlin, 55 Wn. App. 193, 198, 776 P.2d 1003 (1989)). The superior court has wide latitude in exercising its discretion to remove a trustee "'when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries.'" In re Marriage of Petrie, 105 Wn. App. 268, 274-75, 19 P.3d 443 (2001) (quoting In re Estate of Cooper, 81 Wn. App. 79, 94-95, 913 P.2d 393 (1996)). A superior court's decision to remove a trustee will not be reversed absent an abuse of discretion. Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 716, 732 P.2d 974 (1987); Petrie, 105 Wn. App. at 275. A court does not abuse its discretion unless its exercise of discretion is manifestly unreasonable or

based upon untenable grounds or untenable reasons. Petrie, 105 Wn. App. at 275 (citing Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

The superior court's decision herein was supported by substantial evidence. We will not second guess the superior court's determinations of credibility or the persuasiveness of the evidence. Simpson v. Thorslund, 151 Wn. App. 276, 287, 211 P.3d 469 (2009). The superior court reviewed the reports of the GAL, whom the court had appointed to represent Bernadyne's interests. The GAL reported that Bernadyne was afraid of Randal, that there were conflicts between Bernadyne's two sons, and that there was confusion over who was in fact the acting trustee. Bernadyne's GAL recommended in multiple reports that Cameron be appointed as trustee. The court may recognize a GAL as "an expert on the status of the alleged incapacitated person and the dynamics of [her] circumstances" and may consider the GAL's testimony in guardianship proceedings even where the GAL's conclusions, based on the statements of others, might be otherwise objectionable as hearsay. In re Guardianship of Stamm v. Crowley, 121 Wn. App. 830, 837, 91 P.3d 126 (2004). In light of the GAL's reports and recommendations, the superior court had reasonable cause to appoint Cameron as trustee.

IV

Randal also contends that various provisions of chapter 11.88 RCW

precluded the superior court from appointing Cameron as trustee because, in his opinion, our legislature intended to maintain trusts as alternative arrangements independent from guardianships. However, Randal misreads these provisions. RCW 11.88.090(9) states: "Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless, . . . following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective." The other provisions Randal cites contain similar language.

Randal, however, does not explain how appointing Cameron as trustee renders the Trust *ineffective*. Indeed, there is no dispute that the Trust remains in effect for Bernadyne's benefit. Nothing in chapter 11.88 RCW precluded the superior court from changing the trustee pursuant to RCW 11.98.039(4).

V

Randal next asserts that the superior court erred by retroactively confirming actions taken by Cameron as trustee during the time between her initial appointment and the later issuance of the order vacating that appointment. In so contending, Randal avers that Cameron could not properly be considered to have been acting as a de facto trustee. He is wrong.

A de facto trustee is a person who (1) assumed the office under a color of right or title and (2) exercised the duties of the office. In re Irrevocable Trust of McKean, 144 Wn. App. 333, 341, 183 P.3d 317 (2008). A person assumed the

office under color of right or title where the person asserts "'an authority that was derived from an election or appointment, no matter how irregular the election or appointment might be.'" McKean, 144 Wn. App. at 341 (quoting Allen Trust Co. v. Cowlitz Bank, 210 Or. App. 648, 657, 660, 152 P.3d 974, clarified by 212 Or. App. 572, 159 P.3d 319 (2007)). A de facto trustee's good faith actions are binding on third persons. McKean, 144 Wn. App. at 341 (citing In re Banker's Trust, 403 F.2d 16, 21 (7th Cir. 1968)).

Cameron became trustee by virtue of the superior court's appointment. Cameron reasonably believed that the court had the authority to appoint her as trustee. See McKean, 144 Wn. App. at 342 (holding that it was reasonable for the professional trustee to believe it was trustee when appointed as such by the superior court). She thereafter exercised the duties of the trustee, taking actions such as selling Bernadyne's house and distributing funds for Bernadyne's care. The superior court properly determined that Cameron had acted as a de facto trustee during the relevant period. McKean, 144 Wn. App. at 342.

Randal, however, argues that Cameron could not properly be found to be a de facto trustee, contending that she did not accept the position in good faith. He bases this claim on Cameron's knowledge that he had not been served with a summons in conjunction with the petition to appoint her as trustee. The superior court declined to find that Cameron had acted in bad faith, instead finding that her actions had been "reasonable and proper." We defer to such a

factual determination.[9] Absent a demonstration of bad faith, a mere irregularity in the appointment does not preclude a later finding of de facto trustee status. McKean, 144 Wn. App. at 341. The superior court did not err in concluding that Cameron acted as a de facto trustee and in confirming her administration of the trust.[10]

VI

Randal next contends that the superior court erred in approving the fees requested by Cameron and her attorney for providing guardian and trustee services. We disagree.

"The guardian's fees and the fees of the attorney for the guardian are largely within the discretion of the superior court." In re Guardianship of Spiecker, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1996). A decision approving such fees is manifestly unreasonable only where it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997); Ryan v. State, 112 Wn. App. 896, 899-900, 51 P.3d 175 (2002).

The superior court approved the fees after reviewing lengthy submissions by Cameron and her attorney providing detailed time sheets and explaining

[9] Similarly without merit are those other of Randal's assertions of bad faith on Cameron's part that were also not adopted as being factually proved by the trial court.

[10] Without citations to any pertinent authority, Randal also argues that because the order first appointing Cameron as trustee was vacated, all subsequent court orders approving Cameron's actions as trustee must be void and that, therefore, the superior court essentially ignored the Vacating Order in confirming the earlier court orders. This argument misapprehends the import of the superior court's designation of Cameron as a de facto trustee.

administrative fees. Moreover, the superior court requested additional information about particular fee requests. Because the court's action herein was not outside the range of acceptable choices, there was no abuse of discretion.

VII

Randal next contends that the superior court erred in approving the Guardian and Trustee's First Annual Report, which was submitted in March 2008, asserting that it did not adequately separate the Trust assets and guardianship estate. Once again, we disagree.

The guardian has a duty to report annually on the incapacitated person's status. RCW 11.92.043(2). A guardian must keep proper accounts to prevent funds from becoming commingled or confused. See In re Carlson's Guardianship, 162 Wash. 20, 28-29, 297 P. 764 (1931); In re Guardianship of Hill's Heirs v. Smith, 8 Wash. 330, 331, 35 P. 1071 (1894). "If a guardian be trustee of two accounts, he has no right to commingle the assets, for they are independent, and he owes separate and several duties as to each." Carlson, 162 Wash. at 29.

While Cameron may have failed to observe the distinction between the Trust assets and the guardianship estate in earlier reports, she corrected these errors in the annual report that was ultimately approved. Accordingly, the superior court properly approved the annual report.

VIII

Finally, Randal contends that the superior court did not "comply with [General Rule] 15 and 22 and RCW 11.92.043(2)(a) and (3) when ordering that the current residential address of [Bernadyne] be filed under seal."[11] We disagree that the court did not comply with GR 22 and RCW 11.92.043(2) and .043(3). However, because the superior court failed to make written findings articulating the compelling privacy or safety concerns justifying the sealing of documents containing Bernadyne's address, we agree that the superior court's order did not comply with GR 15.[12]

We review a superior court's decision to seal or redact records for an abuse of discretion. Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 946, 215 P.3d 977 (2009).

RCW 11.92.043(2) requires that the guardian provide the court with an annual report on the status of the incapacitated person, which must include the incapacitated person's residential address. RCW 11.92.043(2)(a). RCW 11.92.043(3) requires the guardian to report to the court any change in the incapacitated person's residence. Neither of these statutory provisions requires that the information be contained in an open record available to the public. The superior court's order that Bernadyne's address be filed under seal did not relieve Cameron of her duty to file the information with the court and, therefore,

[11] Appellant's Brief at 3, 29.

[12] Randal does not claim that the court's order requiring Bernadyne's address to be filed under seal violated constitutional prohibitions. Therefore, it is unnecessary to discuss whether the factors discussed in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), were met.

this order did not contravene either of these statutory provisions.

GR 15 establishes a uniform procedure for destroying, sealing, or redacting court records. GR 15; Rousey, 151 Wn. App. at 946. GR 22 "adds specific provisions for family law" and guardianship cases. In re Marriage of R.E., 144 Wn. App. 393, 401, 183 P.3d 339 (2008). GR 22 provides that "the protected person in a guardianship case shall not be required to provide restricted personal identifiers in any document filed with the court." GR 22(d). The official comment to GR 22(b)(6) includes a party's residential address within the definition of "restricted personal identifiers" that do not have to be provided in documents filed with the court. Therefore, the superior court's order that Bernadyne's residential address be filed in a document under seal did not violate GR 22.

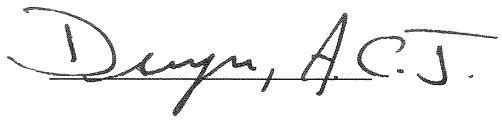
GR 15(c)(2)(E) provides that when a record contains only restricted personal identifiers, including party's residential addresses, as defined in GR 22(b)(6), sufficient privacy or safety concerns may exist to outweigh the public interest in having access to the records. Therefore, it may well be appropriate for the superior court to order the annual report containing Bernadyne's address to be sealed or redacted. However, GR 15 also requires that the superior court "make[] and enter[] written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2) (emphasis omitted).

Therefore, reversal and remand is required for the superior court to either enter necessary findings or vacate or modify this portion of its order.

IX

Both Cameron and Randal request attorney fees on appeal. RAP 18.1(a) allows recovery of attorney fees and costs on appeal if applicable law grants the right to recover reasonable attorney fees or expenses. Under RCW 11.96A.150, the appellate court may exercise its discretion to assess attorney fees and costs against any party to a trust proceeding from any party or from the assets of the trust involved. As RCW 11.96A.150 does not provide that an award of attorney fees is a right or an entitlement, we decline to award attorney fees to either party.

Affirmed in part and reversed and remanded in part.



We concur: