

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Guardianship of)	No. 63474-7-I
)	
JOHN ZANDT,)	
)	
An Incapacitated Person,)	
)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, ADULT)	
PROTECTIVE SERVICES,)	
)	
Respondent,)	
)	
and)	
)	
EVANGELINE ZANDT,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 27, 2011
)	

Ellington, J. — Evangeline Zandt appeals the court’s decision to appoint a professional guardian of the person and estate of her husband John Zandt, contending the court considered improper evidence and ignored a conflict of interest, and that the evidence did not support the decision. We affirm.

BACKGROUND

John Zandt was born in 1928. In 1989, he married Evangeline Zandt, who is considerably younger than John.¹ They own a house in Seattle where they lived with

¹ We use first names for clarity. No disrespect is intended.

their four children, ages 9 through 18, and Evangeline's mother, Carolina Lofstedt. John ran his own business until 2007, when he retired because of health concerns. Evangeline helped John manage his chronic medical issues, including diabetes, by attending doctor's appointments and implementing the prescribed treatments.

Sometime in late 2008 or early 2009, a renter in the Zandt's home, Marilyn Taylor, initiated proceedings for vulnerable adult protection orders on behalf of John. Taylor alleged she witnessed Evangeline physically abusing John, and she alleged abuse or exploitation of John by Dirk Mayberry, a family acquaintance. King County Superior Court issued temporary protection orders against Evangeline and Mayberry in January 2009 or early February 2009.²

John went missing shortly thereafter. Police discovered him on February 6, 2009 in a house in Ballard, where he was living with Mayberry and Lofstedt. Registered nurse Diane Craig assessed John there. She found him well cared for and saw no signs of neglect or abuse. When Mayberry saw Craig's report, he asked her to remove his name and address and to delete her observations about John's short term memory deficits. He met with her later and proposed an edited version of her report, explaining the changes were made on the advice of an attorney.

Police took John from the house in Ballard to Northwest Hospital, where he was evaluated at the hospital's geropsychiatric center. He was confused and disorganized, and had a very poor memory of recent events.

That same day, the Washington State Department of Social and Health

² The timing of these orders is unclear. The full records in the vulnerable adult petition order actions involving John are not part of the guardianship record.

Services, Adult Protective Services, filed a guardianship petition naming John an “alleged incapacitated person.” The petition nominated Care Planning Associates (Care) as guardian of John’s person and estate. The court appointed Ellen Barton as guardian ad litem (GAL).

Barton asked John if he had a preference as to what doctor prepared the statutory medical/psychological report. He did not. Barton arranged for Dr. Janice Edwards to prepare the report. Dr. Edwards concluded John suffered moderate dementia, had some severe memory deficits, had severe deficits in reasoning and in forming and carrying out plans, and lacked normal curiosity and initiative. She reported his condition is permanent and progressive and that his abilities will continue to deteriorate. She also reported that when asked who his best friend was, he responded it was Dirk Mayberry.

Dr. Edwards concluded John “needs complete assistance with his financial situation” and has “no idea how to determine if people are taking advantage of him.”³ He is therefore “at extremely high risk for financial exploitation.”⁴ She concluded he is unaware of his serious medical issues or their status, requires complete help with his care, and needs protection for his physical safety.

John later objected to Dr. Edwards as the provider of the official medical/psychological report, and requested that his personal physician from the Department of Veterans Affairs (VA), Dr. Stephanie Wheeler, prepare that document. Dr. Wheeler was not asked to do the evaluation, but the GAL reviewed a January 29,

³ Clerk’s Papers at 346.

⁴ Id.

2009 letter about John from Dr. Wheeler, as well as other VA records.

None of the reports, or any other evidence, supported Taylor's report of physical abuse. Documents filed by Evangeline included about 20 declarations attesting to John and Evangeline's loving relationship and to Evangeline's dedication to John and their children.

The Zandts' relationship with Dirk Mayberry became a focal point of the guardianship investigation. In 1989, Mayberry was convicted in federal court on numerous counts of fraud arising out of real estate transactions.⁵ The GAL noted that Mayberry "is involved in numerous financial transactions that may involve fraud or manipulation of other elderly persons."⁶ Nonetheless, the Zandts relied heavily on Mayberry for help managing their finances and properties. The Zandts' house and a parcel of vacant property were encumbered by liens totaling about \$578,100 resulting from transactions in which Mayberry was involved, including a reverse mortgage on the family home. But Mayberry could not, or would not, account for the loan proceeds.⁷ Evangeline reported that some of the money went to reimburse Mayberry for previous loans. She also said she did not believe Mayberry had taken advantage of John, and that they were relying on Mayberry to pursue an unlawful detainer action against Marylin Taylor.⁸

In light of Mayberry's involvement in the Zandts' finances and property, the court

⁵ See United States v. Mayberry, 913 F.2d 719 (1990).

⁶ Clerk's Papers at 358.

⁷ The lien on the vacant land was enforceable by Start Corporation, which is also a named defendant in at least one of the fraud cases involving Mayberry. Mayberry was also involved in the sale of a Zandt property in Renton.

⁸ Zandt v. Taylor, noted at 159 Wn. App. 1018 (2011).

appointed Gregory Lawless to investigate their financial situation. He reported that the proceeds of the reverse mortgage remained unaccounted for and that either Evangeline or Mayberry was likely in control of the missing funds.

At the time of the GAL's interview with Evangeline, she was living in a house owned by Mayberry's sister, did not believe Mayberry had taken advantage of them, and would not consider legal action against him. She still did not account for the loan funds.

The GAL concluded John is incapacitated and needs a guardian of both his person and his estate. She concluded Evangeline was not a proper guardian of the estate because she took the loan proceeds but provided no accounting and is "either complicit with, or being manipulated by" Mayberry.⁹

The GAL's report included an analysis of possible conflicts of interest. The GAL's law firm, Hertog & Coster, PLLC, provides legal advice and assistance to Care, the guardian nominated by Adult Protective Services. Care is also guardian of the estate for Louise Wells, an incapacitated person with whom Mayberry was also involved. At the time of the guardianship investigation concerning John, Care was attempting to recover a 2007 judgment on Wells' behalf against Mayberry and Start Corporation of America in which Mayberry is involved.¹⁰ The GAL determined there was no conflict in this matter because the Wells judgment is expected to be satisfied from sources unrelated to the Zandts' transactions, and her firm has not provided

⁹ Clerk's Papers at 361.

¹⁰ Mayberry provided no service address and service by mail was authorized. A warrant was issued for his arrest.

advice to Care in this proceeding.

The guardianship hearing was held on April 15, 2009. The court found John in need of a full guardianship and appointed Care to that role.

Evangeline appeals. She assigns error to (1) the court's admission of Dr. Edwards' medical/psychological report over John's objection; (2) any conclusions drawn by the court from Taylor's unsworn testimony; (3) the court's alleged disregard of the possible conflict of interest involving the GAL; and (4) the absence of clear and convincing evidence to support the appointment of a guardian for the person and estate of John.

DISCUSSION

A person is incapacitated as to his or her person when there is a significant risk of personal harm resulting from a demonstrated inability to provide for adequate nutrition, health, housing, or physical safety.¹¹ A person is incapacitated as to his or her estate when there is a significant risk of financial harm as a result of a demonstrated inability to manage property or financial affairs.¹² In such cases, a petition may be filed under chapter 11.88 RCW alleging that an alleged incapacitated person (AIP) needs a court appointed guardian. If the court finds adequate justification, it appoints a GAL to investigate and make recommendations to the court.¹³

The guardianship statute requires that the court receive a written medical report from a licensed physician.¹⁴ If the AIP opposes the physician nominated by the GAL,

¹¹ RCW 11.88.010(1)(a).

¹² RCW 11.88.010(1)(b).

¹³ RCW 11.88.010(2).

¹⁴ RCW 11.88.045(4).

the GAL must use the physician selected by the AIP.¹⁵

Evangeline first argues the court should not have considered Dr. Edwards' report because John objected. But John did not oppose Dr. Edwards' selection and did not express a preference for Dr. Wheeler until after Dr. Edwards' report was submitted to the court.¹⁶ His objection therefore came too late. The court did not err in considering Dr. Edwards' report.

Further, the court did consider both a letter from Dr. Wheeler and John's records from the VA. These did not conflict with Dr. Edwards' report, and supported the conclusion that John showed no signs of physical abuse but suffered from dementia. For example, one entry in the VA records reads as follows: "[D]ementia: stable, no changes. Wife is providing full care, without which he would certainly require nursing home placement."¹⁷

Evangeline asserts the court's failure to allow Dr. Wheeler to provide the primary medical report "caused the court to fail to consider alternatives that were in the best interest of Mr. Zandt."¹⁸ But Evangeline does not explain how Dr. Edwards' report had such an effect on the court, nor does she demonstrate prejudice from the alleged error in appointing Dr. Edwards. As discussed above, there was no error.

Further, the court's oral ruling clearly shows it considered alternatives to full guardianship. These included guardianship for the limited purpose of protecting John's

¹⁵ Id.

¹⁶ Evangeline points out that at the time the GAL asked John whether he had a preference regarding physicians, John was unrepresented by counsel. Evangeline does not explain why this point is legally significant.

¹⁷ Clerk's Papers at 532.

¹⁸ Br. of Appellant at 9.

family home and finances,¹⁹ or appointing Evangeline as guardian of John's person, given her demonstrated ability to care for his medical and physical needs. The court deemed those alternatives insufficient:

So the real issue here isn't whether or not Mr. Zandt needs a guardian . . . [but rather] who should be [that] guardian. . . . I believe that a husband and wife ought to be together, and take care of each other. And that's clearly Mr. Zandt's desire and that's Mrs. Zandt's desire as well.^[20]

[T]here's also good medical information that Ms. Zandt has provided quite adequate medical care for his medical care, so perhaps she's the day-to-day caretaker that should be installed back. . . . I'm also not ordering a guardian of person to be Ms. Zandt today and the reason for that is because I'm concerned about two things. One, the evidence that Miss Taylor provided here about eyewitness observations of hitting which of substantial concern, but the bigger issue is Mrs. Zandt's ability to protect and make sure Mr. Zandt's personal care is taken care of without influences from other people.^[21]

The court's decision was clearly predicated upon Mayberry's influence over Evangeline, which remained unabated despite his history of fraud and other unlawful conduct and his involvement in the Zandts' financial affairs.

Evangeline complains that the court should not have considered the unsworn allegations of Marilyn Taylor, to which the court made reference in its ruling. A court making a determination regarding incapacity considers the information before it from all sources, not just experts.²² Taylor alleged she witnessed Evangeline physically abuse John. The court could not reasonably ignore such an allegation. But Taylor's

¹⁹ See RCW 4.08.060.

²⁰ Report of Proceedings (Apr. 15, 2009) at 28.

²¹ Id. at 29-30 (emphasis added).

²² RCW 11.88.010(2); Endicott v. Saul, 142 Wn. App. 899, 911, 176 P.3d 560 (2008).

allegations were uncorroborated, and there is no indication the court accepted them as true or gave them undue weight. To the contrary, the court opined that John should be allowed to return home and Evangeline should provide his day-to-day care. There was no error.

Evangeline next contends the court did not adequately analyze the potential conflict of interest disclosed by the GAL. Whether a conflict of interest exists is a question of law reviewed de novo.²³

A lawyer shall not represent a client where the representation of one client will be directly adverse to another.²⁴ Here, Mayberry's involvement in both Start Corporation and John's land transactions created a possibility that John's funds might be vulnerable to collection actions against Start. The GAL concluded there was no conflict because the attorney for Care believed the Wells judgment would be satisfied with sources unrelated to John's property. The GAL also concluded that, because neither the GAL nor her firm had provided legal advice to Care in the Zandt guardianship matter, there was no conflict. Evangeline presents no evidence to the contrary and no authority for her position that a conflict warranted action by the court.²⁵

Lastly, Evangeline complains that the need for a guardianship was not supported by clear, cogent and convincing evidence as required by statute.²⁶ Her

²³ State v. Orozco, 144 Wn. App. 17, 19–20, 186 P.3d 1078 (2008).

²⁴ Rules of Professional Conduct 1.7(a)(1).

²⁵ See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.”).

argument centers on the fact there was no proof John was physically abused. But that was not the basis for the guardianship. Evangeline overlooks the overwhelming evidence that John is incapacitated and in need of a guardian of his person and estate.

The trial court is affirmed in all respects.

Elevington, J.

WE CONCUR:

Leach, a.c.j.

Cox, J.

²⁶ RCW 11.88.045(3).