

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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IN THE MATTER OF THE
GUARDIANSHIP OF THE
PERSON AND ESTATE OF:

CARMEN GOMEZ WITTLER, AN
ADULT

CARMEN GOMEZ WITTLER,
Appellant,
vs.
ERIC WITTLER,
Respondent

Supreme Court No. 76948

District Court Case No.
18GRD000381B

**ON APPEAL FROM THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

PETITIONER'S REPLY BRIEF TO ORDER TO SHOW

NRAP 26.1 Disclosure: The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

None to identify. Washoe Legal Services is a 501(c)(3) non-profit organization.

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I. SUMMARY OF THE ARGUMENT

The current appeal is an issue of first impression in Nevada. Temporary guardianships are distinguishable from plenary guardianships under Nevada law. Temporary guardianships have separate notice requirements and specific burdens of proof. Due process requires an appellate mechanism to address imposition of temporary guardianships. Since temporary guardianships are separate and distinct entities, they are substantively appealable under NRAP 3A. Even if the court finds that they are not substantively appealable under the rules of appellate procedure, there is a statutory right to appeal guardianship orders pursuant to NRS 159.375. On appeal, the court would conduct a *de novo* review and would only disturb district court rulings for abuse of discretion or if the decision was based on an erroneous legal standard or on clearly erroneous findings of fact.

Excellence Cmty. Mgmt. v. Gilmore, 131 Nev. Adv. Op. 38, 351 P.3d 720 (2015).

II. ARGUMENT

A. Temporary Guardianships are substantively appealable under Nevada law

Under the appellate rules, a final judgment is substantively appealable. NRAP 3A (b)(1). The finality of an order or judgment depends on “what the order or judgment actually *does*, not what it is called.” *Brown v. MHC Stagecoach*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). Nevada law allows for several types of guardianship including temporary, special, and plenary guardianship. *See NRS 159.0487, NRS 159.0523, NRS 159.0525*. Temporary guardianships may precede a plenary guardianship but the two are not mutually exclusive. Temporary guardianships are also subject to heightened pleading standards under NRS 159.0523 and NRS 159.0525. Additionally, temporary guardianships have distinct differences in notice requirements from plenary guardianships. Finally, temporary guardianships exist only for a finite period. Under NRS 159.0523 and NRS 159.0525, courts may extend temporary guardianships with good

cause for “not more than two successive 60-day periods, except that the court shall not cause the temporary guardianship to continue longer than 5 months unless extraordinary circumstances are shown.”

Unlike child custody cases, a temporary guardianship is not subject to periodic review and modification because it contains an automatic sunset date. *Aug. H. v. State*, 105 Nev. 441, 777 P.2d 901 (1989) (Order determining *temporary* custody of the minor children is subject to periodic mandatory review and modification by the district court pursuant to NRS 432B.550; NRS 432B.580; NRS 432B.590). Additionally, unlike child custody cases, a temporary guardianship does not always yield a plenary guardianship

A temporary guardianship over both the person and estate imbues upon the guardian authority for medical decision-making, financial oversight, and placement authority. If anything, a temporary guardianship might be more analogous to a preliminary injunction which is appealable under NRAP 3A. *See NRAP 3A (b)(3)*. Preliminary injunctions are substantively appealable and the Supreme Court reviews questions of law *de novo*. *Excellence Cmty. Mgmt*, 351 P.3d at 722. When seeking a preliminary injunction, “the moving party must

show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm from which there is no adequate remedy at law.” *McGee & McGee Wine Merchants, LLC v. Jam Cellars, Inc.*, 391 P.3d 101 (Nev. 2017). Similarly, temporary guardianships require the moving party to establish substantial and immediate risk of physical harm, need for immediate medical attention, or financial loss. *NRS 159.0523; NRS 159.0525*. The Supreme Court has held that the function and nature of the order is what matters, not the title. *Brown v. MHC Stagecoach*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). In *Hosp. Int'l Grp. v. Gratitude Grp., LLC*, the court allowed an appeal of a “temporary restraining order.” The court reasoned that “[it] functionally operated as preliminary injunction, and therefore Supreme Court had jurisdiction over interlocutory appeal of grant of relief; duration of relief ordered exceeded 15 days temporary restraining order could have lasted, and [the] order was issued on motion for preliminary injunctive relief, after entry of prior order also titled ‘temporary restraining order.’” *Hosp. Int'l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208 (Nev. 2016) (unpublished opinion.)

Here, the duration of relief granted in the temporary guardianship ordered exceeded the two successive 60 day terms allowed by statute and denied the protected person due process. Additionally, the merits of the case address the authority of guardianship judges to exercise jurisdiction over non-residents. There is a strong public policy basis to hear the merits of the underlying appeal which address for the first time Nevada's partial adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). In the instance of temporary child custody orders, while the court held that they were not substantively appealable, the court nevertheless treated the appeal as a writ of prohibition and heard the matter on its merits. *Aug. H. v. State*, 105 Nev. 441, 777 P.2d 901 (1989). Therefore, if the court does not find that temporary guardianships are substantively appealable under NRAP 3A, there is a statutory right of appeal under NRS 159.375, or the court may also follow the precedent in *Aug H. v. State*.

B. Temporary Guardianships are appealable per NRS 159.375 (1)

Under NRS 159.375, the Nevada legislature specifically provides that a statutory right of appeal for certain guardianship orders.

Specifically, a notice of entry of order “granting or revoking letters of guardianship” can be appealed within 30 days.¹ Generally, the court looks to the plain meaning of the statute. *In re William S.*, 122 Nev. 432, 437–38, 132 P.3d 1015, 1018–19 (2006). If the language appears to be ambiguous, the court will then review the statute’s terms and context, along with reason and policy. *Id.*

Here, the plain language of the statute does not distinguish between the types of guardianship. In looking to the context of the

¹ **NRS 159.375 Appeals to appellate court of competent jurisdiction.** In addition to any order from which an appeal is expressly authorized pursuant to this chapter, an appeal may be taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to [Section 4 of Article 6](#) of the Nevada Constitution within 30 days after its notice of entry from an order:

1. Granting or revoking letters of guardianship.
2. Directing or authorizing the sale or conveyance, or confirming the sale, of property of the estate of a protected person.
3. Settling an account.
4. Ordering or authorizing a guardian to act pursuant to [NRS 159.113](#).
5. Ordering or authorizing the payment of a debt, claim, devise, guardian’s fees or attorney’s fees.
6. Determining ownership interests in property.
7. Granting or denying a petition to enforce the liability of a surety.
8. Granting or denying a petition for modification or termination of a guardianship.
9. Granting or denying a petition for removal of a guardian or appointment of a successor guardian.

(Added to NRS by [2003, 1769](#); A [2013, 1749](#)) — (Substituted in revision for NRS 159.325)

statute, the Nevada legislature has clarified that certain actions in guardianship are not appealable. For example, in NRS 159.111(4)(b) it provides that, “If the guardian fails to serve the claimant with notice of objection to summary determination or file a copy of the notice with the court, the court shall: (b) Enter an order allowing or rejecting the claim, either in whole or in part. No appeal may be taken from the order.” (Emphasis added). Therefore, it stands to reason that if the legislature had intended to restrict the statutory right of appeal the language would expressly state that.

Finally, the legislative history of NRS 159.375 supports a broad interpretation of the appellate rights of protected persons. NRS 159.375 was added during 2003 legislative session. It was a small part of a large amount of guardianship reform implemented at that time. In turning to the legislative history of NRS 159.375, the testimony of the bills’ co-authors is informative.

JENNIFER HENRY, GUARDIANSHIP-DISCOVERY
COMMISSIONER, EIGHTH JUDICIAL DISTRICT COURT:
“Section 47 of A.B. 365 is an important new section that deals with appeals. A case just came down as part of an ongoing appeal, but the Nevada Supreme Court said an appeal is not timely in a guardianship case, under most circumstances, until the ward dies. Unfortunately, people live under demented or diminished

cognitive capacities for years. People should have the right to an appeal because the court mandates how they will live and where their finances will be used, however, they do not have the right to take their case beyond district court level to obtain a higher opinion. Should a family have a loved one under a guardianship, and family members disagree, the family must wait 20 years until the loved one dies to be able to appeal. The damage has been done by then; consequently, there is a need to have places where appeals can be taken.”

DARA GOLDSMITH, ATTORNEY - “At the present time, in an unpublished opinion, the Nevada Supreme Court stated it would not hear matters in a guardianship until final order of the court. Should a child be victimized or exploited by a guardian, and he or she goes to court, under present statute a judgment cannot be appealed or denied for 40 years or until the person dies. Is that justice? It is the present opinion of the Nevada Supreme Court. The appellate provision needs to be specifically put into the guardianship statutes. Previously we relied upon chapter 155 of NRS which provided provisions for appeal, but were not specifically incorporated into the guardianship statutes. However, judges at the district court level felt they were applicable because the two code sections grew from one. We were advised by the Nevada Supreme Court this is no longer the case. Therefore, in order to ensure justice will continue throughout the State, it is important the provisions be included.”

72nd Legislative Session, [Minutes of the Senate Judiciary Committee, May 1, 2003](#). (emphasis added).

Therefore, the provisions of NRS 159.375 should apply to all types of guardianships, unless amended by the Nevada legislature.

**1. Is the Order appealed in this case sufficient per
NRS 159.375 (1)**

In addition to addressing whether NRS 159.375 applies to temporary guardianships, the court next raises a question as to whether the challenged Order is appealable under this provision. This concern touches upon the larger issue on appeal, which is the denial of due process and a meaningful opportunity to be heard. Therefore, a brief procedural history and discussion of temporary guardianship orders is appropriate.

In this case, letters of guardianship issued based upon an ex parte Order Granting Temporary Guardianship entered on May 9, 2018. A due process hearing to address the temporary guardianship was not held until 13 days later on May 22, 2018. A notice of entry of order was entered on May 24, 2018. A trial date memo was issued by the court on June 5, 2018 setting a hearing on August 10, 2018.

Established practice in other jurisdictions is to include in the Order Granting Temporary guardianship the applicable timeline for the temporary guardianship. The letters of guardianship themselves, prescribed by a suggested format under NRS 159.075, do not include

expiration dates. The order entered on August 23, 2018 simply states that the guardianship is “hereby extended.” While not issuing new letters of temporary guardianship, the Order grants temporary guardianship and impliedly reauthorizes the letters issued on May 9th. It is the Order granting guardianship, which gives judicial force and effect to the letters. The appealed order in this case is also problematic because it extends the temporary guardianship past the two successive 60-day terms permitted under the temporary guardianship provisions without making the necessary judicial findings. *NRS 159.0523*; *NRS 159.0525* (“except that the court shall not cause the temporary guardianship to continue longer than 5 months unless extraordinary circumstances are shown.”) The improper language and inadequacy of the findings is part of the underlying basis for appeal. The inconsistent practices in other jurisdictions has led to varying standards and procedures in temporary guardianship.

Mandamus is available only when no plain, speedy, and adequate legal remedy exists. *NRS 34.170*. Since there a statutory right of appeal under Nevada law, this case is appropriate for appellate review. In an unpublished opinion, the court denied a petition for writ of

mandamus on a temporary guardianship, instructing the parties to appeal under NRS 159.325, which is now codified under NRS 159.375. *Mixer v. Second Judicial Dist. Court of State ex rel. County*, 281 P.3d 1202 (2009). Conversely, the court heard an appeal of a district court order granting temporary guardianship for minors in *Matter of Guardianship of L.S.& H.S*, 120 Nev. 157 (2004). The statutory right of appeal in minor guardianships, NRS 159A.375, contains the same language as that in NRS 159.375.

As more people move to Nevada, our population ages, and more guardianships are filed, it is imperative that protected persons have an adequate path to appellate review. This is essential for a myriad of reasons including jurisdiction or placement in a locked facility against their wishes. Therefore, the court should find that sufficient cause has been demonstrated for this appeal to proceed.

C. The appeal is not moot, and dismissal on such grounds would result in repetition of cases that evade judicial review

Finally, the court has raised a concern that an appeal on the temporary guardianship may be moot. Nevada law has long recognized

that in certain cases, however, the Supreme Court may find exceptions to the mootness doctrine. *See, e.g., Personhood Nevada*, 126 Nev. at — —, 245 P.3d at 574. The most widely recognized exception to the mootness doctrine is for “cases which are capable of repetition yet evade review.” *Id.* The court has continued to utilize this exception for “mootness in cases involving matters of widespread importance that ‘could never be decided because of the nature of [their] timing.’” *Bldg. & Const. Trades Council of N. Nevada v. Carson City Sch. Dist.*, 128 Nev. 883, 381 P.3d 595 (2012) citing *State v. Washoe Co. Public Defender*, 105 Nev. 299, 301, 775 P.2d 217, 218 (1989); *see also Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171–72, 87 P.3d 1054, 1057 (2004) (recognizing that the exception applies when the duration of the challenged action is “relatively short,” and there is a “likelihood that a similar issue will arise in the future”); *Matter of Guardianship of L.S. & H.S.*, 120 Nev. 157 (2004) (stating a matter is justiciable “where an issue is capable of repetition, yet will evade review because of the nature of its timing”).

Due to the nature of guardianship (also known as conservatorship in other jurisdictions), many states do not stay guardianship

proceedings pending appeal.² Guardianship law in Nevada has undergone sweeping changes in the last several years. A 2007 U.S. Senate Special Committee on Aging report noted, “emergency appointments, by their nature, immediately deny prospective wards their rights to due process.” Gandy, Angela, *“Emergency Guardianship Statutes: An Analysis of Legislative Due Process Reforms Since Grant v. Johnson” BiFocal Vol 30 No. 2 (2008)*. Nevada’s population continues to grow. Among those moving here are older Americans and vulnerable adults. Due to concerns of increasing population mobility and jurisdiction conflicts the Uniform Law Commission developed the UAGPPJA in 2007. *UAGPPJA §2-201* (amended 2007). The Nevada legislature recognized these issues and adopted a majority of the UAGPPJA in 2009. *See NV S.B. 313 (2009); NRS 159.018*.

One of the goals of the act is to reduce elder abuse. *Steigel, L. & Wood, E.*, “Nine Ways to Reduce Elder Abuse through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act” ABA Commission on Law and Aging, *Bifocal Vol. 30, No. 3* (Feb

²See, e.g., *ABA Chart of Guardianship Appeals (2013)* accessed at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_Chart_of_Guardianship_Appeals_091213.pdf.

2009). The American Bar Association Commission on Law and Aging has compiled a survey of cases involving multi-state guardianship jurisdiction issues, which identify specific reported cases wherein the UAGPPJA could have been utilized to streamline the process and better serve persons involved in the guardianship system. *A.B.A. Comm'n on Law and Aging*, “[Reported Cases on Multi-state Guardianship Jurisdiction Issues Supporting Need for, or Concerning, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act \(UAGPPJA\), Sorted by Issue](#)” (Amended 2014).

District courts will continue to face complex cases. A lack of case law regarding home state issues and the overall use of temporary guardianship has produced inconsistent outcomes across districts. It is a matter of important public policy for the court to provide guidance on these issues. Improper use of temporary guardianship without the necessary factual findings and conclusions of law will continue to occur and evade judicial review. A decision on the merits of this case will have widespread importance shaping the nature of temporary guardianships and safeguarding the due process rights of protected persons.

III. CONCLUSION

The court should find that good cause exists for this case to proceed to briefing on the merits. Temporary guardianships are substantively appealable under the rules of appellate procedure. Even if the court finds that they are not, there is a statutory right of appeal under NRS 159.375. The issues raised in this case constitute an issue of first impression and fall into a recognized exception under the mootness doctrine. Alternatively, the court could treat the appeal as a writ. *Aug. H.*, 105 at 443.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the requirements for “other papers” pursuant to NRAP 32(9)(c)(2).:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook size 14.

2. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

Dated this 20th day of February 2019,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of Washoe Legal Services, over the age of 21 years, and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the Supreme Court of Nevada by the using the ECF System. Electronic service of the foregoing document shall be made in accordance with the Court's service list as follows:

Joel Locke, Esq.

Dated this 20th day of February, 2019.

/s/ Gwenn DeLorme
Gwenn DeLorme