

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Guardianship of
the Person and Estate of:

LORETTA POWELL

An Adult Protected Person.

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WILLIAM J POWELL JR,

Appellant,

vs.

LORETTA POWELL,

Respondents.

Supreme Court Case No.: 80210

District Case No.: G-19-052315-A

APPELLANT'S OPENING
BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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.

1. Appellant William Powell has no parent corporation or stock to be held.

2. I. Scott Bogatz, Esq., Kerry E. Kleiman, Esq., and Brad Lipman, Esq., of Reid Rubinstein & Bogatz have appeared on behalf of Appellant in this case.

Dated this 9th day of November 2020.

By: /s/I. Scott Bogatz, Esq.

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I. JURISDICTIONAL STATEMENT

Jurisdiction is proper since this is an appeal of a Nevada district court denial and dismissal of William's petition for Guardianship over his adult mother, Loretta Powell. The Supreme Court has jurisdiction over final judgments entered in actions or proceedings commenced in the court in which the judgment is rendered under NRAP 3A(b)(1). The due date for Appellant's Opening Brief is November 9, 2020.

II. ROUTING STATEMENT

Appellant recognizes that this case is typically assigned by the Supreme Court to the Court of Appeals pursuant to NRAP 17(b)(10)-cases involving family law matters other than termination of parental rights or NRS Chapter 432B proceedings. This case finds itself before the Supreme Court via the Legal Aid Center of Southern Nevada and the Pro Bono Committee's volunteer program. On March 27, 2020, this Court entered an order directing transmission of record to this venue.

III. INTRODUCTION

On October 30, 2019, the Nevada District Court underlying this appeal misapplied Nevada law and dismissed William Powell, Jr.'s petition to gain guardianship of his elderly mother. That court dismissed his petition, stating that he had not supported his petition by "clear and

1 convincing evidence that would get [the court] to where we would need to
2 have an evidentiary hearing.” While this is, on its face, a misapplication
3 of Nevada law, it is also a spotlight on an evidentiary requirement that
4 remains undefined.

5 Under current Nevada guardianship law, courts have discretion in
6 deciding whether an evidentiary hearing will occur prior to a final
7 determination of a petition. This policy is the trap that William Powell, Jr.
8 was placed, and is one that allows Nevada courts to apply Nevada law in
9 uneven and unjust ways. This Court, in Christina O. v. State Dep't of
10 Family Servs. (In re Estate of A.M.) No. 59116, 2013 Nev. Unpub. LEXIS
11 908, at *11 n.7 (May 24, 2013), determined that in circumstances where
12 no evidentiary hearing was requested, the court had not abused their
13 discretion. However, the Court and Nevada law have remained silent on
14 how Nevada courts should proceed in instances where petitioners request
15 an evidentiary hearing. Such a scenario presents itself here.

16 Here, Mr. Powell supported his request for an evidentiary hearing
17 with all of the evidence at his (limited) disposal—some of which *directly*
18 *contradicts* the opposition’s—and despite the questions of material fact,
19 the court held Mr. Powell to a standard of clear and convincing evidence
20 simply to proceed to an evidentiary hearing. It must be clarified over what
21

evidentiary hurdle petitioners must initially jump to exercise their right to request an evidentiary hearing under Nevada law, and the lower court’s decision in this case must be overturned so that this action may proceed to evidentiary hearing.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. William Begins Caring for Loretta

In or about the summer of 2017, Appellant, William Powell, Jr. (“Appellant” or “William”), David Powell informed William that his mother, Loretta Powell (“Loretta”), was in need of caregiving services and suggested to William that he relocate to Las Vegas to provide her with those services. Rec. App. Vol. 1, 68. William agreed to move in with Loretta and to provide her the help she needed. Rec. App. Vol. 1, 68. Upon his arrival, William discovered that Loretta had developed severe short-term memory deficits, significant cognitive decline, and an inability to live independently, manage her own financial affairs, or even drive. Rec. App. Vol. 1, 35.

B. William Attempts to Relocate

William provided caregiving services for Loretta in nearly every facet of Loretta’s life. Rec. App. Vol. 1, 70. However, having lived with Loretta for two years, William concluded that relocating out of Las Vegas was in both of their best interests. Despite Loretta’s codependent state, Loretta

1 rejected relocating so that William could continue her care in a better
2 environment. Rec. App. Vol. 1, 234.

3 **C. William Files his Petition for Appointment of Guardian**

4 Being without the legal authority to best care for Loretta, William
5 filed his Petition for Appointment of Guardian Over an Adult on October 2,
6 2019. Rec. App. Vol. 1, 4. Subsequently and unbeknownst to William, his
7 brother David Powell, travelled to Las Vegas and removed Loretta from her
8 and William's home. Rec. App. Vol. 1, 146.

9 On October 14, 2019, the court appointed Legal Aid Center of
10 Southern Nevada as Loretta's counsel, and provided them with full access
11 to Loretta's medical and financial records. Rec. App. Vol. 1, 156.

12 Also on October 14, 2019, William filed an Ex Parte Motion for an
13 Order Shortening Time to move up the Guardianship Hearing from October
14 30, 2019. Rec. App. Vol. 1, 142. William included in that Ex Parte Motion
15 a physician certification from July 2019 that states "[Loretta is] unable to
16 live independently, unable to manage own financials affairs, [and] unable to
17 drive." Rec. App. Vol. 1, 153. A few days later, on October 21, 2019,
18 William filed an Ex Parte Motion for Release of Medical Records to obtain
19 the physician's certification necessary to establish Loretta's need for a
20 guardian. Rec. App. Vol. 1, 164.

On October 29, 2019, Loretta filed an opposition to William’s petition, and included with it an exhibit purported to be certification of her capacity to execute a power of attorney. Rec. App. Vol. 1, 236. The court heard all pending motions on October 30, 2019. Rec. App. Vol. 1, 19–20; Tr. Hr’g, 1.

D. The October 30, 2019 Hearing

At the October 30, 2019 hearing, William submitted to the court a July 11, 2019, physician’s certification detailing Loretta’s mental incapacity—the very reason she is unable to live independently. Rec. App. Vol. 1, 25–33; Tr. Hr’g, 17. William argued to the court that an evidentiary hearing was necessary to determine Loretta’s need for a guardian because the certificates submitted by Loretta and William directly contradicted one another. Tr. Hr’g, 27.

The court turned its attention on Loretta’s most recent certification, and questioned Loretta’s counsel regarding the neurological exam Loretta underwent. Tr. Hr’g, 27. Ms. Anderson relayed that Loretta underwent a “mini-mental status exam” and the neurologist awarded her 28 of 30 points. Tr. Hr’g, 41. At this, William proffered arguments that Loretta’s certification was inadequate as a result of the examination’s duration and thoroughness. Tr. Hr’g, 36.

Ultimately, the court determined that William had not supported his petition by “clear and convincing evidence that would get us to where we would need to have an evidentiary hearing.” Tr. Hr’g, 58. The court found there was a suggestion that Loretta possessed the capacity to exercise power of contract and that there appeared to be a less restrictive alternative than guardianship. Tr. Hr’g, 59. As such, the court dismissed William’s petition without an evidentiary hearing. Rec. App. Vol. 2, 244–45.

V. ARGUMENT

A. The Nevada District Court Erred in Denying William’s Request for an Evidentiary Hearing.

Nevada law is well-settled that evidentiary hearings are not required under NRS Chapter 159, but that it is under the district court’s discretion to determine when a hearing is necessary. See McKay v. Bd. of Cty. Comm’r, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987); see also Christina O. v. State Dep’t of Family Servs. (In re Estate of A.M.), No. 59116, 2013 Nev. Unpub. LEXIS 908, at *11 n.7 (May 24, 2013). In an unpublished case from 2013, this Court held the following:

[E]ven if the statue [sic] did contemplate an evidentiary hearing, [petitioner] did not request one nor did she present any additional information showing that an evidentiary hearing was warranted. Thus, we conclude that the district court was not required to hold a separate

1 evidentiary hearing and therefore did not abuse its
2 discretion in this regard.

3 In re Estate of A.M., at *11 n.7.

4 William, acting as a pro se litigant¹, began his argument to the court
5 that an evidentiary hearing was necessary because of a physician's
6 certification that was "*done over a six month period*" and which was "*not a*
7 *one-time thing, not a one day ---- process.*" Tr. Hr'g, 17 (emphasis added).
8 While William could have more directly and articulately made his points,
9 two exist. First is the argument that Loretta is mentally incapable, and
10 second, is the argument that Loretta's certification of her capacity to execute
11 a power of attorney was improperly conducted. Each of these arguments
12 posits a contested and unresolved issue of fact ripe for an evidentiary
13 hearing, each of which was also supported by contradictory evidence
14 presented in conjunction with the petition. William both requested an
15 evidentiary hearing and supported the need for one by presenting additional
16 information showing its merit. See In re Estate of A.M., at *11 n.7.

17 Though, as discussed above, Nevada law remains largely
18 uninterpreted regarding a guardianship petitioner's right to request an
19

20 ¹ "[D]istrict courts should assist pro se litigants as much as reasonably possible"
21 Kahn v. Orme, 108 Nev. 510, 515, 835 P.2d 790, 794 (1992).

1 evidentiary hearing, California courts have consistently held that it is abuse
2 of discretion to dismiss similar petitions without an evidentiary hearing
3 where an evidentiary hearing is requested. See, e.g., Conservatorship of the
4 Pers. & Estate of Galera v. Ramirez, No. B272328, 2017 Cal. App. Unpub.
5 LEXIS 5762 (Aug. 22, 2017); Guardianship of Olivia J., 84 Cal. App. 4th
6 1146, 1149, 101 Cal. Rptr. 2d 364, 365 (2000). This Court should adopt a
7 similar approach concerning requested evidentiary hearings to promote
8 justice and ensure due process is met.

9 **B. The Nevada District Court Erroneously Applied the Clear**
10 **and Convincing Standard of Proof to William’s Request**
11 **for an Evidentiary Hearing.**

12 NRS 159.055(1) provides that a petitioner under NRS Chapter 159
13 “has the burden of proving by clear and convincing evidence that the
14 appointment of a guardian of the person . . . is necessary.” As discussed
15 above, Nevada law calls for the district court’s discretion in determining
16 when an evidentiary hearing is necessary. See McKay 103 Nev. at 492, 746
17 P.2d at 125 (1987); see also In re Estate of A.M., 2013 Nev. Unpub. LEXIS
18 908, at *11 n.7.

19 The underlying court determined that William had not supported his
20 petition by “clear and convincing evidence that would get us to where we
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would need to have an evidentiary hearing.” Tr. Hr’g, 58. The court’s application of a clear and convincing burden of proof as a barrier of entry to the evidentiary hearing—where a petitioner is expected to prove by clear and convincing evidence that appointment of a guardian is necessary—is, on its face, a misapplication of Nevada law. The evidentiary standard cannot be identical at the preliminary, evidentiary hearing request stage as it is during the petitioner’s subsequent presentation of his/her case in chief. The court’s utilization of the clear and convincing standard in determining whether William’s evidentiary hearing request is reversible error,

Rather than rendering NRS Chapter 159 evidentiary hearings obsolete, this Court should resolve this uncertain area of Nevada law by imposing a standard that promotes justice and ensures due process is met.

VI. CONCLUSION

For the aforementioned reasons, the lower court’s order dismissing Appellant’s petition should be overturned, and this case should be remanded to complete the requisite evidentiary hearing.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2794 words; or

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

1 the event that the accompanying Brief is not in conformity with the
2 requirements of the Nevada Rules of Appellate Procedure.

3 Dated this 9th day of November 2020.

4 By: /s/I. Scott Bogatz, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2020, my office served a copy of the foregoing **APPELLANT’S OPENING BRIEF** upon each of the following parties electronically, through the Nevada Supreme Court’s e-filing system, or by United States Mail, first class:

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