

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 In the Matter of the
3 Guardianship
4 of the Person and Estate of:

5 LORETTA POWELL

6 An Adult Protected Person.

7 _____
8 WILLIAM J. POWELL, JR.,

9 Appellant,

10 vs.

11 LORETTA POWELL,
12 Respondent.

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SUPREME COURT NO. 80210

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

RESPONDENT'S ANSWERING BRIEF

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I.

STATEMENT OF ISSUES

On October 30, 2019, the guardianship Court properly granted the Respondent's Motion to Dismiss William Powell, Jr.'s ("Appellant's") Petition for Guardianship of his mother, Loretta Powell ("Respondent"). The court granted the Motion to Dismiss on the grounds that Appellant's Petition was "not supported by sufficient evidence, by clear and convincing evidence, that would get [the court] to where [it] would need to have an evidentiary hearing." Tr. H'rg, 58.

Pursuant to Nevada guardianship law, the petitioner "has the burden of proving by clear and convincing evidence that the appointment of a guardian of the person, of the estate, or of the person and estate is necessary." NEV. REV. STAT. §159.055(1). Here, the Appellant failed to do so.

Nevada guardianship law does not mandate an evidentiary hearing, and therefore, Appellant was not entitled to one. See NEV. REV. STAT. Chapter 159. If an evidentiary hearing was required, the legislature would have been clear and set forth such a requirement, which it has not. Here, it is clearly in the discretion of the district court to grant an evidentiary hearing, and Appellant did not make a prima facie case as to why a guardianship was needed at that time over his mother.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In 2017, Appellant was in the hospital suffering from a spinal infection. Tr. H'rg, 18. After being discharged, Appellant went to

1 live with his mother in order to save money. Tr. H'rg, 18. After
2 living with his mother, Appellant decided to file a Petition for
3 Appointment of Guardian(s) Over Adult Including Request for
4 Temporary Guardianship on October 2, 2019. Rec. App. Vol. 1, 4.

5 For two years, Appellant resided with his mother so that the
6 she could assist him as he recovered from a surgery so that he
7 could get back on his feet. Rec. App. Vol. 1, 173. Respondent has
8 employment in Las Vegas as a hairdresser, and she transports
9 herself to and from work. Rec. App. Vol. 1, 234. Respondent is not
10 only healthy and capable of taking care of herself, she is happy.
11 Rec. App. Vol. 1, 234.

12 After living with his mother for two years, Appellant
13 threatened his own mother, telling her he would pursue a
14 guardianship to have her placed with a family friend in Long Beach,
15 California. He also threatened that he would take her out of Las
16 Vegas and to Florida with him. Rec. App. Vol. 1, 234. Respondent
17 resisted against these threats, and as a result, Appellant began to
18 terrorize Respondent by taking control of her life: he listened to
19 her voicemails, blocked phone numbers, destroyed her personal
20 property, and made many derogatory remarks about her. Rec. App.
21 Vol. 1, 234. On September 29, 2019, only a few weeks before
22 Appellant filed for guardianship, he sent a message on Facebook to
23 family members calling his own mother "Dementia Aunt Loretta." Rec.
24 App. Vol. 1, 183. In another Facebook post made on September 29,
25 2019, Appellant said that his mother is "bipolar and should be red
26 flagged." Rec. App. Vol. 1, 184. On October 10, 2019, Appellant
27 called his mother a "Demented Alcoholic" who "is sick." Rec. App.
28

1 Vol. 1, 185. On October 13, 2019, Appellant called his mother "Liar
2 Loretta." Rec. App. Vol. 1, 186.

3 After making these derogatory statements against his mother,
4 Appellant filed for Guardianship over her. On October 14, 2019,
5 Appellant filed an Ex Parte Motion for an Order Shortening Time in
6 which he included a form completed by a psychiatrist, Dr. Adekunle
7 Ajayi, MD. on July 11, 2019. This form stated Respondent has a
8 "major neurocognitive disorder, without behavioral disturbances,"
9 also noting that Respondent is "unable to live independently, [and]
10 unable to manage her own financial affairs, unable to drive." Rec.
11 App. Vol. 1, 153. However, on July 12, 2019, Dr. Margaret Sweeney,
12 a physician, completed a Certification Regarding Capacity to
13 Execute Power of Attorney. Rec. App. Vol. 1, 232. Dr. Sweeney noted
14 that it was her opinion that Respondent does have the capacity to
15 execute a power of attorney. Rec. App. Vol. 1, 232. A power of
16 attorney is more in the nature of a contract, which requires a high
17 level of capacity. Tr. H'rg, 11.

18 On October 9, 2019, Attorney Katie Anderson filed a Statement
19 of Legal Aid Representation. On October 14, 2019, the District
20 Court appointed the Legal Aid Center of Southern Nevada as counsel
21 for the Respondent. Nevada law in NEV. REV. STAT. 159.328, under the
22 Protected Persons' Bill of Rights, sets forth that a proposed
23 protected person has the right to an attorney before a guardianship
24 is imposed. Not only does the Bill of Rights provide for an
25 attorney, the Bill of Rights ensures that a proposed protected
26 person receives "due consideration given to his or her current and
27 previously stated personal desires," that a proposed protected
28

1 person "remain as independent as possible," and that a proposed
2 protected person "be granted the greatest degree of freedom
3 possible." NEV. REV. STAT. §§ 159.328(1)(g)-(i). The District Court
4 must consider and apply the Protected Person's Bill of Rights in
5 all cases.

6 On October 30, 2019, a hearing was held regarding Appellant's
7 Petition for Guardianship. The Court noted that Dr. Sweeney's
8 certificate was a large hurdle for the Appellant to overcome, as it
9 states that Respondent is competent to sign estate planning
10 documents. Tr. H'rg, 5. The Court emphasized that the capacity that
11 one must have to execute a power of attorney is closer to the
12 capacity needed to contract, reaching a higher level of capacity,
13 a contractual level. Tr. H'rg, 5. This level of capacity means that
14 one understands what they are doing, why they are doing it, and the
15 results of what they are doing. Tr. H'rg, 19.

16 During the October 30th hearing, the Appellant submitted to the
17 court a disability certification. Rec. App. Vol 1, 25-33¹. Tr.
18 H'rg, 17. The District Court noted that the certification that the
19 Appellant handed to the Court was already part of the documents
20 filed on October 2, 2019. Tr. H'rg, 17. The Court noted that this
21 certification presented by the Appellant, was still not enough to
22 constitute a physician certificate. Tr. H'rg, 40. The
23 certification given by Appellant and the certificate completed by
24

25
26 ¹Goldsmith & Guymon was unable to obtain the sealed records
27 from the District Court; however, we were able to obtain the
28 underlying documents through prior counsel, Attorney Anderson. We
have tried to match the documents we received with the record's
numbers based on the document title, the number of pages in the
document, and the date the document was filed.

1 Dr. Sweeney are not close enough to contradict each other as they
2 have different meanings: the Court notes that "a disability
3 certificate...is not a physician certificate to support
4 guardianship." Tr. H'rg, 17. The Court again notes that the only
5 physician certificate it has is the one provided by the
6 Respondent's counsel at the time that says "she's competent to sign
7 a contract" and "if she can sign a contract she can deal with this
8 with powers of attorney." Tr. H'rg, 48. The court emphasized how
9 important it is to always choose the "least restrictive means." Tr.
10 H'rg, 40. The "least restrictive means" is a reference to the
11 Guardianship Bill of Rights which provides that a proposed
12 protected person has the right to "remain as independent as
13 possible," and be "granted the greatest degree of freedom
14 possible." Nev. Rev. Stat. §§ 159.328(h)-(i). Per the only
15 physician's certificate before the court, the Respondent has the
16 requisite capacity/competency to sign powers of attorney, which
17 provides an alternative to guardianship.

18
19 During the hearing, the Court inquired about a mini mental
20 status exam that Respondent participated in with Dr. Mahajan from
21 the Las Vegas Neurlogy Center. Tr. H'rg, 15. During this mental
22 exam, Respondent scored a 28 out of 30. Tr. H'rg, 15. This mental
23 exam did suggest that Respondent continue to take medication and
24 continue in therapy, but there were no suggestions that Respondent
25 is incompetent. Tr. H'rg, 15. Although the Appellant argues to the
26 quality of the exams performed for Respondent (Tr. H'rg, 36), the
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28 . . .

1 physician's certificate was provided for by Dr. Sweeney, a
2 physician, and the mini-mental exam was performed by a neurologist.
3 Tr. H'rg, 41.

4 The Court noted that in order for the Court to dismiss a
5 petition, the Court would need to find that the proposed protected
6 person is not in need of a guardian. Tr. H'rg, 27. If the petition
7 is not dismissed, an evidentiary hearing would be needed. Tr. H'rg,
8 27. Attorney Anderson noted that the initial requirements for
9 filing a Petition for Appointment of a Guardian are to "include a
10 certificate signed by a physician" and the Appellant did not
11 include this in his Petition. Tr. H'rg, 42. The Court agreed that
12 the Appellant did not support his Petition by "clear and convincing
13 evidence that would get us to where we would need to have an
14 evidentiary hearing." Tr. H'rg, 58. Because the Appellant did not
15 meet the necessary burden as the Petitioner, the Court dismissed
16 the Petition without an evidentiary hearing, as a less restrictive
17 guardianship alternative was available. Rec. App. Vol. 2, 244-45
18 and Rec. App. Vol. 1, 232.

20 III.

21 ARGUMENT

22 A. The Nevada District Court did not Err in Denying Appellant's 23 Request for an Evidentiary Hearing.

24 Appellant claims that the District Court erred by denying his
25 request for an evidentiary hearing. Although Appellant's desire was
26 to have an evidentiary hearing, it is neither the Appellant's
27 right, nor decision, to be set for an evidentiary hearing. As
28 Appellant stated in his opening brief, "Nevada law is well-settled

1 that evidentiary hearings are not required under [NEV. REV. STAT.]
2 Chapter 159," and that it is "under the district court's discretion
3 to determine when a hearing is necessary." (Opening Brief, 6). The
4 District Court used its discretion to determine that Appellant's
5 Petition did not meet the necessary standards governed by NEV. REV.
6 STAT. Chapter 159. For that reason, the District Court ordered that
7 there would be no evidentiary hearing needed- a decision that is
8 properly within its discretion.

9 In an unpublished case from 2013, cited by the Appellant, the
10 Court held that "if the statute [sic] did contemplate an
11 evidentiary hearing, [petitioner] did not request one nor did she
12 present any additional information showing that an evidentiary
13 hearing was warranted." *Christina O. V. State Dep't of Family*
14 *Servs. (In re Estate of A.M.)*, No. 59116, 2013 Nev. Unpub. LEXIS
15 908, at *11 n.7 (May 24, 2013). This Court specifically provides
16 "if the statute did contemplate an evidentiary hearing" before it
17 continues.

18
19 NEV. REV. STAT. Chapter 159, which governs the guardianship of
20 adults, does not require an evidentiary hearing, and therefore, the
21 guardianship statutes do not contemplate an evidentiary hearing. As
22 such, it is legally irrelevant that an evidentiary hearing was
23 requested. *In re Estate A.M.*, the grandmother argued that the
24 district court had failed to hold an evidentiary hearing, in which

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1 the Court states that it disagrees as "the legislature did not
2 specify in NEV. REV. STAT. 159.1905² that an evidentiary hearing is
3 required, which supports the proposition that the district court
4 has discretion to determine when a hearing is necessary." *Id.* at
5 *11-12 n.7. The court concluded that "the district court was not
6 required to hold a separate evidentiary hearing and therefore did
7 not abuse its discretion." *Id.* In this case, the Proposed Protected
8 Person is an adult, not a minor; however, at that time both minors
9 and adults were subject to NEV. REV. STAT. Chapter 159, in which *In*
10 *re Estate of A.M.* found that NEV. REV. STAT. § 159.1905 does not
11 mandate an evidentiary hearing. Therefore, the district court in
12 the present case did not err in not having an evidentiary hearing.

13
14 When a statute is clear on its face, the court must give
15 effect to the statute's plain language. *Okada v. Eighth Judicial*
16 *Dist. Court of Nev.*, 408 P.3d 566, 570 (Nev. 2018). There is not a
17 single instance in NEV. REV. STAT. Chapter 159 that requires an
18 evidentiary hearing. If the legislature had intended to ensure an
19 evidentiary hearing on all petitions to establish guardianship, it
20 would have or could have done just that. It is not the business of
21 the court "to fill in alleged legislative omissions based on
22 conjecture as to what the legislature would or should have done."
23 *McKay v. Bd. of Cty. Comm'rs*, 103 Nev. 490, 492, 746 P.2d 124, 125
24 (1987). If one of the legislature's purposes in NEV. REV. STAT.
25 . . .

26
27 ² NEV. REV. STAT. Chapter 159A was enacted in 2019 carving out
28 minor guardianships from NEV. REV. STAT. Chapter 159. Prior to the
enactment of NEV. REV. STAT. Chapter 159A, minors and adults were
addressed in NEV. REV. STAT. Chapter 159.

1 Chapter 159 was to allow evidentiary hearings upon request, the
2 statute would state that.

3 Appellant cites to two (2) California cases and asks that this
4 Court adopt a similar approach concerning requested evidentiary
5 hearings. While Appellant argues that California courts have held
6 that it is an abuse of discretion to dismiss similar petitions
7 without an evidentiary hearing, these holdings should not be
8 applied here as the facts stray too far from the facts in the case
9 in question.

10 In the first California case cited by the Appellant, the facts
11 concern a woman with progressive dementia being appointed a
12 conservator, and contentions relating to who should serve as the
13 conservator. *Conservatorship of the Pers. & Estate of Galera v.*
14 *Ramirez*, No. B272328, 2017 Cal. App. Unpub. LEXIS 5762, at *2 (Aug.
15 22, 2017). The man who brought the appeal argued that an
16 evidentiary hearing needed to be held because there were contested
17 facts that he appropriately brought to the attention of the probate
18 court. *Id.* At *9. The Court stated that "if the probate proceeding
19 is contested, a party has a right to an evidentiary hearing." *Id.*
20 However, the facts for the case in question are very different from
21 those in *Galera* as Respondent is a competent woman, not a woman
22 with progressive dementia, as demonstrated through the certificate
23 presented by Respondent. In *Galera*, the woman was receiving care 24
24 hours a day, seven days a week, and the conservatorship was
25 requested months after she was diagnosed with progressive dementia.
26 *Id.* at *2, *4. In *Galera*, the intermediate appellate court stated
27 that "an order denying a request for an evidentiary hearing is
28

1 reviewed for an abuse of discretion." *Id.* at *8-9. The court
2 further stated that in making the determination for abuse of
3 discretion, "the appropriate test is whether the trial court
4 exceeded the bounds of reason." *Id.* at *9.

5 Here, the district court clearly did not exceed the bounds of
6 reason. The Appellant failed to fulfill the requirements in his
7 Petition to establish a guardianship, as the court concluded
8 multiple times that he had not filed a correct physician's
9 certificate (Tr. H'rg, 37, 39, 40, 42) and that the issue was more
10 about a family disagreement and not "a legal issue" (Tr. H'rg, 53).
11 The district court did not exceed the bounds of reason, and
12 therefore, there was no abuse of discretion.

13 In *Jason S. v. Valley Hosp. Med. Ctr (In re L.S.)*, the court
14 concluded that "absent a showing of abuse" it would "not disturb
15 the district court's exercise of discretion concerning guardianship
16 determinations." 120 Nev. 157, 163, 87 P.3d 521, 525 (2004). The
17 court further states that it needed to "be satisfied that the
18 district court's decision was based upon appropriate reasons." *Id.*
19 Here, the district court's decision was clearly based on
20 appropriate reasons as Appellant did not establish a prima facie
21 case that guardianship was necessary for his mother, as he did not
22 meet the standard that is required, and the only physician's
23 certificate before the court opined that the proposed protected
24 person has the requisite capacity to execute a power of attorney,
25 a less restrictive alternative to Guardianship.

26 In the second California case cited by Appellant, the facts
27 center around a nonparent petitioning for guardianship.
28

1 *Guardianship of Olivia J.*, 84 Cal. App. 4th 1146, 1161, 101 Cal.
2 Rptr. 2d 364, 365 (2000). The Court focuses on how the loss of a
3 relationship with a nonparent may be detrimental for a minor child.
4 *Olivia J.*, 84 Cal. App. 4th 1146, 1159, 101 Cal. Rptr. 2d 364, 373
5 (2000). In that case, the intermediate appellate court stated that
6 the Appellant should have the opportunity to present relevant
7 evidence to the trial court because the "issue of detriment is
8 factual" and that "it cannot be said on the face of the pleadings
9 that appellant is not entitled to any relief." *Olivia J.*, 84 Cal.
10 App. 4th 1146, 1161, 101 Cal. Rptr. 2d 364, 374 (2000). In this
11 case, the Respondent is an adult, not a minor child, and the facts
12 here do not center around the relationship of a nonparent with a
13 minor child. Here, it can be said that on the face of the
14 pleadings, a guardianship is not necessary as the main issue is
15 that the Appellant simply did not meet the threshold required by
16 law. He failed to file the necessary paperwork to make a prima
17 facie case that a guardianship was necessary, and the Respondent
18 filed a Physician's Certificate that found to the contrary.
19

20 It is in the district court's discretion to decide whether an
21 evidentiary hearing is needed. NEV. REV. STAT. Chapter 159 does not
22 specifically contemplate an evidentiary hearing. Nevada law on this
23 issue should not apply Appellant's attempted reliance on California
24 case law, as the cases are easily distinguishable from the facts in
25 this case. The District Court clearly did not abuse its discretion,
26 and it did not err by denying Appellant an evidentiary hearing.

27 . . .

28 . . .

1 B. The Nevada District Court did not Erroneously Apply the Clear
2 and Convincing Standard of Proof to Appellant's Request for an
3 Evidentiary Hearing.

4 NEV. REV. STAT. §159.044(1) states that a petitioner "has the
5 burden of proving by clear and convincing evidence that the
6 appointment of a guardian of the person, of the estate, or of the
7 person and the estate is necessary." The only medical documentation
8 that was sufficient in this case set forth that the proposed
9 protected person had the requisite capacity to make a power of
10 attorney. Additionally, Appellant could not overcome this hurdle as
11 he did not present medical documentation that was sufficient to
12 show that Respondent needed a guardian, as having a disability
13 "doesn't mean she needs a guardian." Tr. H'rg, 57. NEV. REV. STAT.
14 §159.044(2)(i)(1) states that the documentation to demonstrate the
15 need for a guardianship must include "a certificate signed by a
16 physician." The District Court made it clear multiple times that
17 the Court was "lacking a physician certificate," when addressing
18 the Appellant. Tr. H'rg. 40.

19 The clear and convincing standard of proof is simply the
20 threshold to evidence that an appointment of a guardian is
21 necessary, and is not a barrier of entry to an evidentiary hearing.
22 Petitioners in guardianship proceedings, "must demonstrate that the
23 guardianship itself is necessary by clear and convincing evidence."
24 *Lucia A.A. v. Maria M.R. (In re B.A.A.R.)*, 2020 Nev. App. LEXIS 7,
25 *11, 474 P.3d 838, 136 Nev. Adv. Rep. 57). Appellant's Petition
26 needed to show that his mother needed a guardian by clear and
27 convincing evidence, which he simply could not demonstrate. He
28 failed to establish a prima facie case as he lacked a Physician's

1 Certificate and Respondent had one to the contrary. While Appellant
2 could not provide that evidence, Respondent did demonstrate that
3 she is competent, in fact she established that her competency level
4 was that of possessing contractual capacity, the highest level. Tr
5 H'rg 25. Before a guardianship is deemed necessary, the least
6 restrictive alternative should be considered. Respondent has the
7 capacity to sign a power of attorney, which means that there is a
8 less restrictive alternative available. Appellant failed to meet
9 the threshold to establish guardianship, there is a less
10 restrictive alternative to guardianship available, and Respondent
11 demonstrated her competence; therefore, an evidentiary hearing was
12 never needed and dismissal was appropriate.

13
14 If this Court changed Nevada law to ensure that each person
15 who requested an evidentiary hearing received one, the time and
16 resources of the justice system would be greatly strained.
17 Evidentiary hearings are not obsolete, as they are granted if there
18 is a necessary reason for one. Here, there simply was no reason for
19 the Court to hold an evidentiary hearing.

20 IV.

21 CONCLUSION

22 The District Court did not err by not setting an evidentiary
23 hearing. An evidentiary hearing is in the district court's
24 discretion and is not required or promised by the statute governing
25 guardianship over adults. Furthermore, the district court did not
26 abuse its discretion by denying an evidentiary hearing and
27 therefore, the District Court did not err by not providing
28 Appellant with an evidentiary hearing. The clear and convincing

1 standard is not a threshold for an evidentiary hearing, but it is
2 a threshold to establish why a guardianship is necessary. Appellant
3 could not meet the first hurdle to establish guardianship as his
4 Petition did not meet the necessary requirements, and therefore,
5 there was no reason to continue to an evidentiary hearing. However,
6 had the proposed protected person not had a physician's
7 certificate, despite the insufficiency of Appellant's medical
8 evidence, an evidentiary hearing may have been appropriate.

9 Finally, and most importantly, in applying the Guardianship
10 Bill of Rights, a less restrictive alternative was available as the
11 Proposed Protected Person had the requisite capacity to execute a
12 power of attorney, if she so chose.
13
14

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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 Word Perfect X5 in Courier New 12-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] Proportionally spaced, has a typeface of 12 points or more and contains 4,617 words;

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 this 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.

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. . .

. . .

1 I understand that I may be subject to sanctions in the event that
2 the accompanying Brief is not in conformity with the requirements
3 of the Nevada Rules of Appellate Procedure.

4 Dated this 9th day of December 2020.

6 By: 

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CERTIFICATE OF SERVICE

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

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