

Case No. 80210

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,

WILLIAM J. POWELL JR.
Appellant,
vs.
LORETTA POWELL
Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable WILLIAM POTTER, District Judge
District Court Case No. G-19-052315-A

AMICUS CURIAE BRIEF

of Attorney for the Rights of Older Persons and Persons with a Physical
Disability, an Intellectual Disability, or a Related Condition under NRS
427A

IN SUPPORT OF RESPONDENT

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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. The Aging and Disability Services Division (ADSD) is a governmental entity under the Department of Health and Human Services for the State of Nevada. No publicly traded company owns or has any interest in this governmental entity or appointed office.

Dated this 12/14/2020.

By: /s/ Jennifer M. Richards
JENNIFER M. RICHARDS, ESQ.
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INTEREST OF AMICUS CURIAE

The Office of Attorney for the Rights of Older Persons and Persons with a Physical Disability, an Intellectual Disability, or a Related Condition was established in 1989 under NRS 427A.123. In 2017, the Nevada Legislature broadened the scope of the position to include all persons served by the Aging and Disability Services Division.

The NRS 427A.123 Attorney's Office works to advance systemic improvement throughout the aging and disability services network through legal and policy advocacy to ensure that Nevadans can live independent, meaningful, and dignified lives. In addition, the Office acts as the designated Legal Assistance Developer under the Older Americans Act. *See 42 U.S.C. § 3058j*. NRS 427A.1234(2)(g) permits the Attorney to “[a]pppear as amicus curiae on behalf of older persons, person with a physical disability, persons with an intellectual disability or persons with a related condition in any court in this state.”

Under NRAP 29(a), as an Officer of the State of Nevada, this brief is submitted without the consent of the parties or leave of court.

ARGUMENT

Guardianship is a shield, offered by our state's laws to help protect and support those who need it. However, some litigants intend to use the guardianship process as a sword to further their abuse or control over others purportedly in need of protection. Loretta Powell is a vigorous 76-year-old who lives independently in a studio apartment and works in downtown Las Vegas as a hairdresser. (RA 1:173.)¹ She is actively involved in the community and regularly attends church and bible study. (RA 1:222.) The summer of 2017, her eldest son William Powell moved into her studio apartment. (RA1:68.) The relationship became controlling, in part, because her son did not approve of her lifestyle choices. (RA1:15, 154, 185, 186, 234.) There were extensive allegations of undue influence, isolation, control, abuse, and financial exploitation. (RA 1:174–75, 234.) In an objection to guardianship, a church friend observed that “based on his behavior, it is difficult to believe this case is about Loretta’s welfare.” (RA 1:223.) In 2019,

¹ Because the parties to this appeal have not prepared either a joint appendix or separate appendixes, Amicus cites to the Record on Appeal as “RA” followed by volume and page number.

Loretta was thrust into court with a plan to move her to California, gain control of her estate, and remove her personal autonomy. (RA1:145.)

This is a case where guardianship has been wielded as a blade to cut Ms. Powell from her independent life. Respondent argues, and this Court should uphold, that insufficient pleadings and threadbare medical documentation cannot sustain a guardianship action. Amicus files this brief to clarify a point of law addressed in the parties' briefs and ask this Court to determine that a proposed protected person holds an unequivocal right to an evidentiary hearing.

Standard of Review

The Supreme Court reviews the district court's factual determinations under an abuse of discretion standard. *In re Guardianship of N.M.*, 131 Nev. 751, 754 (2015). The lower court must apply the correct legal standard and no regard is given to legal error. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, (2010); *United States v. Silva*, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998). Statutory interpretations are given *de novo* review. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87 (2003). Here, Appellant asserts the district

court abused its discretion by failing to hold an evidentiary hearing and misapplied NRS 159.055.

The District Court did not abuse its discretion because the petition did not meet the minimum pleading standards and therefore an evidentiary hearing was not warranted

Guardianship of an adult affects the most fundamental rights of an individual and a state may not deprive a person of these rights without notice and a meaningful opportunity to be heard. *U.S. Const. Amends. 5, 14; Mathews v. Eldridge*, 424 U.S. 319 (1976).

Guardianship has been recognized as the “most punitive civil penalty that can be levied against an American citizen.” Susan G. Haines, Esq., John J. Campbell, Esq., *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*,¹⁴ Quinnipiac Prob. L.J. 57, 59 (1999) (citing House Subcomm. on Health & Long-Term Care, House Spec. Comm. on Aging, H.R. Doc. No. 100-641, at 4 (1987)).

Liberty interests implicated in guardianship include “the right to choose where to live and with whom to associate; the right to make medical decisions regarding one’s body; the right to marry and associate freely, the right to travel or pursue in privacy the activities of daily

living, and the right to be free from unwanted constraints or incarceration.” *Id* at 70. In guardianship cases, it is critically important to recognize that “a person is no less incarcerated in a locked nursing home ward than in a psychiatric hospital or juvenile detention center.” *Id* at 86.

Nevada law requires a petitioner in a guardianship case to meet certain minimum pleading requirements. Among those requirements a petitioner must attach a physician’s certificate or, in emergent circumstances, a letter from an investigative agency such as Adult Protective Services. *NRS 159.044(2)(i)(1); NRS 159.0523(1)(a); NRS 159.0525(1)(a)*. Once aA petitioner meets the minimum pleading requirements, the petitioner must then establish by clear and convincing evidence that an individual is incapacitated and that a guardianship is necessary. *NRS 159.019; NRS 159.044*. Most states, including Nevada, have adopted use of the “higher clear and convincing evidence standard when determining an individual’s capacity level.” Alexandra Wallin, *Living in the Gray: Why Today's Supported Decision-Making-Type Models Eliminate Binary Solutions to Court-Ordered Guardianships*, 57 San Diego L. Rev. 433, 447 (2020). According to a

survey by the American Bar Association, forty states require a clear and convincing standard,”; New Hampshire requires beyond a reasonable doubt,” Wyoming requires a preponderance,” and the remaining states have not indicated the standard of proof in statute. Am. Bar Ass’n, *Conduct and Findings of Guardianship Proceedings* (Dec. 6, 2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.pdf. Finally, the requirement that guardianship is “necessary” contemplates that other less restrictive options, such as powers of attorney or supported decision-making, have been explored. A myriad of state programs are offered in Nevada to help individuals age in place.

Here, there was an insufficiency of pleading because a physician’s certificate was not filed with the petition. (RA1:233–39.) Due to the substantial liberties at risk of being taken away or curtailed with respect to a proposed protected person in guardianship matters, a petitioner in a guardianship case must meet minimum pleading requirements to allege the person is in need of protection. These pleading standards serve to guard against individuals being dragged into guardianship court and subjected to lengthy and expensive legal

battles based upon scant allegations. In this case, in an email, Loretta's son David stated it succinctly:

Guardianship will completely strip mom of all her rights. I am begging you, please do not do this to mom. It is wrong, immoral and inhumane. Additionally, it will be extremely time consuming and end up draining us both financially There will be no winners in this battle.

(RA1: 148.)

Guardianship cases consume precious judicial resources and can have significant deleterious effects on the emotional and physical wellbeing of a proposed protected person. *See, e.g., Rachel Aviv, "How the Elderly Lose their Rights," The New Yorker, Oct. 9, 2017.* Therefore, it is incumbent upon the court to dismiss petitions that do not meet the minimum pleading standards.

In support of his position, Appellant offers an unpublished Nevada minor guardianship case and a California child custody opinion. *In re Guardianship of Olivia J.*, 84 Cal. App. 4th 1146, 1160–61 (2000) (former domestic partner of biological mother was entitled to evidentiary hearing in guardianship to address custody dispute). Under NRAP 36(3), only unpublished opinions after 2016 may be cited for their persuasive authority. Even if permissible to cite, this case is

distinguishable and unpersuasive for this appeal. A.M. was a minor child with a case under NRS 432B and the ruling addressed the ability of the district attorney to intervene and request termination of the guardianship in order to safeguard the child from abuse. *In re Guardianship of A.M.*, 129 Nev. 1126 (2013).

In addition, as argued by the proposed protected person's counsel in the district court below and reiterated on appeal, less restrictive alternatives to guardianship were presented—specifically, a recent power of attorney with a certificate of competency completed by a physician. (RA1:236.) Therefore, the district court did not abuse its discretion in ordering dismissal of the petition and protecting Ms. Powell from the time, expense, and stress of fending off a continued and unnecessary intrusion in her life.

The Supreme Court should hold that only the proposed protected person has a right to an evidentiary hearing

Finally, Appellant argues that the district court imposed a clear and convincing standard when considering the request for an evidentiary hearing, which was a misapplication of the law. Appellant urges this Court to “impose a standard that promotes justice and ensures due process is met.” *Opening Br. 13, 14*. Both parties assert

that “Nevada law is well settled that evidentiary hearings are not required under NRS 159.” *Id.* at 6; Ans. Br. 6. To the contrary, this is the first case to address evidentiary hearings in guardianship, and Nevada law is unsettled in this area.

Statutory interpretations are given *de novo* review and, thus, this Court should hold that a protected person possesses an unequivocal right to demand an evidentiary hearing. Such a pronouncement is necessary to recognize the constitutional rights of proposed protected persons, but also prevent abuse of the judicial process.

Nationwide, twenty-six states include a statutory right for the proposed protected person to demand a jury trial in guardianship. Am. Bar Ass’n, *Conduct and Findings of Guardianship Proceedings*. Nevada’s statute only indicates that a “hearing” will be held. *NRS 159.0535*. Recently, this Court recognized the right to a jury trial in misdemeanor domestic violence cases, in part because a conviction would trigger a prohibition of the right to control or possess a firearm. *Andersen v. Eighth Jud. Dist. Ct.*, 135 Nev. 321, 322 (2019). A decorated wartime Veteran suffering from dementia should have the same due

process rights afforded a person alleged to have committed domestic violence.

The Supreme Court should clarify that, to comport with constitutional due process, the hearing contemplated by the Nevada Legislature is an evidentiary hearing or bench trial. Respondent argues that an evidentiary hearing deciding whether to hold one issolutely within the discretion of the trial judge. Ans. Br. 7. But it is incorrect to argue that an evidentiary hearing is not contemplated at all under Chapter 159 of NRS.

It is worth noting that an evidentiary hearing is not required in some situations in which liberty interests are affected, particularly when the deprivation of liberty is temporary. A person can be arrested on a warrant issued upon an affidavit setting forth probable cause, NRS 171.106; a judicial officer can set bail for a criminal defendant, NRS 178.484; a person can be involuntarily committed to a mental institution for up to three days, NRS 433A.145–.150; and putative parents and their children can be required to undergo blood testing, NRS 126.121.

Guardianship is not a temporary circumstance and, as previously argued, implicates fundamental constitutional rights. Therefore, the proposed protected person is entitled to a hearing wherein the person may make evidentiary objections, testify on his or her own behalf, subpoena witnesses, and cross-examine witnesses.

California, along with numerous other jurisdictions, has recognized the right to confront and cross examine the recommending medical physician. *Conservatorship of Tian L.*, 149 Cal. App. 4th 1022 (2007); *see also Matter of Guardianship of R.S.*, 470 N.W.2d 260, 265 (Wis. 1991) (right to present evidence and to cross-examine witnesses, including the physician or psychologist reporting to the court).

Because there is now a statutory right to counsel in Nevada, trial strategies may result in stipulations or waiver of objections as permitted under the Statewide Rules for Guardianship and the Nevada Rules of Professional Conduct. SRG 9; NRPC 1.2, 1.14, 2.1. As noted in a California opinion, “where the parties do not object to the use of affidavits in evidence, and where both parties adopt that means of supporting their positions the parties cannot question the propriety of

the procedure on appeal.” *Estate of Nicholas*, 177 Cal. App. 3d 1071, 1088 (1986).

Therefore, Appellant’s argument that the district court misapplied the law in this case fails under *de novo* review because a petitioner in guardianship has no right to an evidentiary hearing where a petition fails for meeting the threshold pleading standards, as occurred here.

CONCLUSION

The Nevada Supreme Court should affirm the district court dismissal because Appellant failed to meet the minimum pleadings standards. Additionally, the law in Nevada regarding “hearings” and the right to an evidentiary hearing is unsettled and needs to be clarified. Thus, the Court should hold that only the proposed protected person has an unequivocal right to demand an 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,997 words.

3. 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. 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 the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of
Appellate Procedure.

Dated this this 12/14/2020,

By: 

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AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, and that on the 14th day of December, 2020, served a true and correct copy of the foregoing: BRIEF OF AMICUS CURIAE

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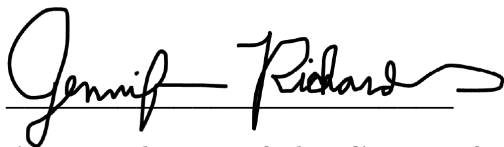
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A handwritten signature in black ink, reading "Jennifer Richard", with a horizontal line underneath.

An employee of the State of Nevada