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.	Supreme Court Case No.: 80210 District Case No.: G-19-052315-A
WILLIAM J POWELL JR, Appellant, vs. LORETTA POWELL, Respondents.	**APPELLANT'S REPLY BRIEF**

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I. INTRODUCTION

Appellant, Mr. William Powell, Jr., filed his petition for guardianship (the "Petition") after living with his mother, Loretta, for approximately two years at his brother David's request. Rec. App. Vol. 1, 68. After witnessing concerning behavior, William noted that Loretta had significant problems with her short-term memory and cognitive functioning that negatively affected her ability to live independently. Rec. App. Vol. 1, 35. William thereafter took Loretta for a thorough neurocognitive assessment that was conducted "over a six month period." Tr. Hr'g, 17.

This assessment—completed by Dr. Adekunle Ajayi, MD shortly before William filed the underlying Petition—revealed that Loretta had "major neurocognitive disorder," that included "severe short-term memory deficits [and] significant cognitive decline." Rec. App. Vol. 1, 153. Dr. Ajayi determined that Loretta had a Global Assessment Function ("GAF") Score of 40 and concluded that she was "unable to live independently, unable to manage own financial affairs, [and] unable to drive." *Id.*

In the abridged proceeding below, William raised concerns about the coercive undue influence exerted by his brother, David, over Loretta. *See* Rec. App. Vol. 1, 68–73. Although inarticulate, William's Petition claims that David is interfering with William's ability to care for Loretta and obtain the very medical documentation required to establish the need for

guardianship. *See* Rec. App. Vol. 1, 71 ("David arrived in Las Vegas approx. 10/4/2019 and was moving my mother to some other location till I leave… He refused to tell me where she was going."). Due, in part, to this interference, William sought access to Loretta's medical records so that he could properly present his case to the district court.

Despite that request being denied, William nonetheless provided the district court with Dr. Ajayi's assessment and requested an evidentiary hearing. *See* Rec. App. Vol. 1, 25–33; Tr. Hr'g 17. Loretta rebutted Dr. Ajayi's assessment by providing a one-page certificate of competency pursuant to NRS 162A, which was signed by Dr. Margaret Sweeney, D.O. Rec. App. Vol. 1, 232. Dr. Sweeney's form certification, dated October 21, 2019—nearly three weeks after the Petition had been filed—claims that Loretta had the "capacity to execute a power of attorney" based on an evaluation that took place "on or around July 12, 2019." *Id.*

The district court wholly disregarded Dr. Ajayi's assessment and concluded that Dr. Sweeney's capacity certification was sufficient to conclude that Loretta did not need a guardian. *See* Tr. Hr'g. 59, Rec. App. Vol. 2, 244–45. However, the district court reached this conclusion without holding an evidentiary hearing Rec. App. Vol. 2, 244–45. Because the district court refused to hold an evidentiary hearing, William was unable to question or challenge Dr. Sweeney's capacity certification despite it being

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issued under questionable circumstances (*i.e.* being provided while William's Petition was pending for an examination that allegedly occurred the day after Dr. Ajayi's assessment was completed).

The district court's refusal to hold an evidentiary hearing constitutes both an abuse of discretion and an error of law. Accordingly, William respectfully requests that this Court reverse the Order of dismissal and remand this matter to the district court for an evidentiary hearing.

II. ARGUMENT

It is important to note that William is not asking this Court to determine the ultimate questions of fact at the heart of his Petition. William is not requesting that this Court decide whether Loretta needs a guardian, nor is William requesting that this Court determine whether he is the most appropriate person to be appointed as her guardian. Rather, William is simply asking this Court to require that the district court appropriately apply the law and consider evidence prior to entering a decision on his Petition.

A. NRS 159.044(3) Should Be Read as Requiring and Evidentiary Hearing be Held Prior to Dismissing a Guardianship Petition

NRS 159.044 governs the procedure for petitioning for guardianship. Certainly, as has been noted, NRS 159.044(2)(*i*) requires that a petitioner provide a "summary of the reasons why a guardian is needed and recent documentation demonstrating the need for a guardianship." *Id.* However,

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this subsection must be read in conjunction with NRS 159.044(3), which states that the court **cannot** "make[] a finding pursuant to NRS 159.054" until it has received and reviewed "an assessment of the needs of the proposed protected person completed by a licensed physician which identifies the limitations of capacity of the proposed protected person and how such limitations affect the ability of the proposed protected person to maintain his or her safety and basic needs." NRS 159.044(3). The statute goes on to state that "[t]he court may prescribe the form in which the assessment of the needs of the proposed protected person must be filed." *Id.*

NRS 159.054 is entitled "Finding and order of court upon petition: Dismissal of petition; appointment of special or general guardian." The first of three subsections instructs the court that "[i]f the court finds that the proposed protected person is not incapacitated and is not in need of a guardian, the court shall dismiss the petition." NRS 159.054(1). Subsections 2 and 3, in turn, discuss the appointment of a special or general guardian, respectively.

The intent and purpose of NRS 159.044(3) is clear: the court must not make any finding pursuant to NRS 159.054 without first obtaining and considering a thorough assessment of the proposed protected person's ability to live and function independently. One of the three possible findings under NRS 159.054 is that the proposed protected person is not

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incapacitated and is, therefore, not in need of guardianship. The plain language of NRS 159.044(3) requires that the court consider an assessment of the needs of the proposed protected person **before** making that finding. Failure to do so is reversible error.

Here, William provided the district court with a disability assessment from Dr. Ajayi that determined Loretta was "unable to live independently, unable to manage own financial affairs, [and] unable to drive." Rec. App. Vol. 1, 153. However, based on the transcript, it does not appear that the district court here considered Dr. Ajayi's assessment at all. Tr. Hr'g, 27. Rather, the district court relied solely on "something saying that [Loretta] was competent on the day she was examined" to execute estate planning documents. Tr. Hr'g, 40.

The certification of competency to execute estate planning documents does not provide the information required by NRS 159.044(3) because it provides no information about Loretta's ability to function independently and safely. Dr. Ajayi's assessment, however, noted Loretta's functional limitations, impaired GAF score, and the adverse impact that her neurocognitive conditions would have on her safety and independence. If the district court did not believe that Dr. Ajayi's assessment contained the information or level of detail required by NRS 159.044(2), the appropriate remedy would have been to "prescribe the form in which the assessment of

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the needs of the proposed protected person must be filed" as provided for by NRS 159.044(3) and allow William to obtain that form.

William requested an evidentiary hearing and sought to conduct discovery prior to that hearing so that he could provide the district court with a thorough evaluation. William informed the district court about the difficulties he had encountered in trying to obtain appropriate pre-Petition documentation—both from the alleged interference from William's brother and from William's lack of standing to obtain medical records and services for Loretta. The district court erred by dismissing William's Petition without holding an evidentiary hearing and making specific factual findings to support the order of dismissal. Therefore, William respectfully requests that this Court vacate the order of dismissal and remand this matter for an evidentiary hearing.

B. Dr. Ajayi's Assessment Sufficiently Contradicts the Capacity Form Signed by Dr. Sweeney, Therefore, an Evidentiary Hearing is Warranted

Loretta's Answering Brief (the "Opposition"), like the district court's Order, heavily emphasizes Dr. Sweeney's NRS 162A form. *See, e.g.*, Ans. Br. 4–5, 10, 12–13; Tr. Hr'g, 25, 48. Similarly, both the Opposition and the Order disregard Dr. Ajayi's assessment claiming it is not a "physician certificate" sufficient to show that Loretta "needs a guardian." Ans. Br. 4; Tr. Hr'g, 40, 57. The record is replete with assertions from both Loretta and

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the district court that the *only* physician's statement before the court was the competency form filled out by Dr. Sweeney pursuant to NRS 162A.220 as well as the results of a neurological mini-mental status exam as reported by Loretta's counsel. *See, e.g.*, Tr. Hr'g 40–41; Ans. Brf. 12.

These statements are based on the fundamentally mistaken assertion that a psychiatrist is somehow not a physician. As expressed by the district court: "only a physician licensed to practice medicine in the State of Nevada – is competent to [provide a certification required by NRS 159.044], a physician. . . . Physician – not a psychiatrist – a physician." Tr. Hr'g. 38. Psychiatrists, like Dr. Ajayi, are necessarily also physicians. According to the Nevada State Board of Medical Examiners, Dr. Ajayi is a board-certified psychiatrist who has been licensed to practice medicine in Nevada since 2003. *See* NV State Board of Medical Examiners, License #10724.

Eventually, the district court looked at Dr. Ajayi's certification and discussed its contents with Loretta's counsel:

> THE COURT: And so severe short term memory. Is short term memory grounds for a person to be placed under guardianship?
>
> MS. ANDERSON: Not unless it can be proven that that short term memory results in her inability to perform her daily routines and take care of herself.
>
> THE COURT: Okay. Significant cognitive decline.
>
> MS. ANDERSON: Again, unless that interferes with her ability to care for herself –

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THE COURT: Okay.

MS, VALENCIA: – take care of her daily needs and take care of her finances.

MR. POWELL: I think that's defined.

THE COURT: Unable to live independently.

MS. ANDERSON: Same, same there, Judge.

THE COURT: Uh-huh.

Tr. Hr'g, 43:6–20.

In this exchange, Loretta's counsel and the district court acknowledge that the neurocognitive impairments identified by Dr. Ajayi could form the basis for placing a person under guardianship. William was denied the opportunity to, in the words of Loretta's counsel, "prove [that Loretta] is unable to care for her own affairs." *Id.* at 43:25–44:1. That denial was erroneous and should be reversed and remanded for hearing.

C. The Burden of Proof to Obtain an Evidentiary Hearing Must Necessarily be Lower than the Burden of Proof to Ultimately Obtain a Guardianship Order

Current Nevada case law indicates that an evidentiary hearing for a guardianship petition is not held as a matter of right, but is instead left to the district court judge's discretion. See 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) (noting that NRS Chapter 159 does not explicitly contemplate an evidentiary hearing and that, even if it did, the petitioner had

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not expressly requested one). However, this case law is premised on the fact that NRS 159.0535 references only a "hearing" without specifying whether this is a full evidentiary hearing or a routine court appearance.[1] See id. As discussed above, the district court cannot dispose of any petition pursuant to NRS 159.054 without first considering an assessment of the proposed protected person's functional abilities to live independently. See NRS 159.044(3).

Importantly, NRS 159.054 states that a guardianship petition shall be dismissed only "**if the court finds** that the protected person is not incapacitated and **is not in need of a guardian**." (emphasis added). Since this finding cannot properly be made without considering an assessment of the proposed protected person's functional capabilities, the legislature clearly intended for the court to accept and weigh evidence and then make a factual determination based on that evidence.

This Court has routinely held that application of the incorrect standard of proof is reversible error. Lucia A.A. v. Maria M.R. (In re B.A.A.R.), 2020 Nev. App. LEXIS 7, *9, 474 P.3d 838, 136 Nev. Adv. Rep. 57; Mack v. Ashlock, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996). The ultimate

[1] Counsel for Appellant believes that the NRAP 28(c) precludes a direct response or opposition to the Amicus Brief filed in this matter. However, counsel believes it appropriate to note that the Amicus referred to this provision of the NRS on page 14 of its brief.

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finding—whether and to what extent a guardianship is necessary—must be based on clear and convincing evidence. However, it would be absurd to require a petitioner to prove by clear and convincing evidence that guardianship is necessary before being able to obtain an evidentiary hearing to determine whether guardianship is necessary.

Loretta's Answering Brief itself shows the flaw with the current state of the law: in order to obtain an evidentiary hearing, William "needed to show that his mother needed a guardian by clear and convincing evidence." Ans. Br. 12. Shortly thereafter, Loretta asserts that "the clear and convincing standard is not a threshold for an evidentiary hearing, but it is a threshold to establish why a guardianship is necessary." Id. at 13–14. That analysis—applied by both Loretta and the district court—shows that under current precedent, a petitioner must meet the ultimate burden of proof to simply get to an evidentiary hearing. That cannot reasonably be what the legislature intended. Accordingly, William requests that the order of dismissal be reversed and remanded for an evidentiary hearing to determine whether guardianship is necessary in accordance with NRS 159.054.

III. CONCLUSION

This is not a case where a guardianship petition was brought without any possible foundation. William has been concerned about Loretta's cognitive state and decision-making capabilities for quite some time. He

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obtained an assessment—performed by a duly-licensed medical doctor—that stated Loretta had severe neurocognitive and memory issues, was unable to manage her finances, was unable to drive, and was unable to live independently. It was reversible error for the district court to simply discount that assessment based on the argument of Loretta's counsel.

As stated by Loretta's counsel to the district court: the question is whether the impairments documented by Dr. Ajayi result in Loretta's "inability to perform her daily routines and take care of herself." That is a question of fact that must be resolved after an evidentiary hearing. Therefore, William respectfully requests that this Court REVERSE the order dismissing his guardianship petition and REMAND for further proceedings.

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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 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:

[X] Contains no more than 7,000 words. Specifically, the portions not exempted by NRAP 32(a)(7)(C) contain 2383 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 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

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

Dated this 22nd day of January, 2021.

By: */s/ Kerry E. Kleiman, Esq.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2021, our office served a copy of the foregoing **APPELLANT'S REPLY BRIEF** upon the following parties electronically, through the Nevada Supreme Court's e-filing system, or by United States Mail, first class:

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