

Tobey v. Talley

Court of Appeals of Washington, Division One

December 17, 2001, Filed

No. 47739-1-I

Reporter

2001 Wash . App. LEXIS 2734 *

In re the Guardianship of HELEN HAZEL TOBEY, an alleged incapacitated person, Respondent, v. SHARON KAY TALLEY and DAVID JUSTIN LYNCH, husband and wife, Appellants.

Disposition: Affirmed.

Counsel: For Appellant(s): Catherine W. Smith, Edwards Sieh Smith and Goodfriend, Seattle, WA.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

For Respondent(s): John W. Hicks, Schacht & Hicks, Mount Vernon, WA. Charles K. Wiggins, Wiggins Law Office, Bainbridge Is, WA. Kenneth W. Masters, Wiggins Law Office, Bainbridge Is, WA.

Subsequent History: Petition for Review Denied August 7, 2002, Reported at: 2002 Wash. LEXIS 495.

Judges: Authored by H. Joseph Coleman. Concurring: Faye C. Kennedy, Mary K. Becker.

Prior History: Appeal from Superior Court of Skagit County. Docket No: 99-4-00155-9. Date filed: 10/20/2000. Judge signing: Hon. John M. Meyer.

Opinion by: H. Joseph Coleman

Opinion

COLEMAN, J.--Sharon Talley petitioned

the court to appoint a guardian for her mother, Helen Tobey. Talley alleged that her sister, Joy Brown, was controlling her mother's financial affairs and cutting off contact between Talley and her mother. The court appointed a guardian ad litem, who concluded that Tobey, although a little forgetful, was competent to conduct her own personal and financial affairs with the help available to her. The court dismissed the petition as to Tobey's personal affairs and then reviewed Tobey's financial [*2] records *in camera*. The court then dismissed the entire petition, concluding that there was no need to appoint a limited guardian for Tobey with regard to her financial affairs.

On appeal, Talley claims the trial court abused its discretion by denying discovery of Tobey's financial documents, by basing its decision on those documents without making them available to her through discovery, and by ordering Talley to pay a portion of Tobey's attorney fees. We affirm and award attorney fees to Tobey for this appeal.

FACTS

Helen Tobey was born June 18, 1914. She has two daughters--Joy Brown and Sharon Talley. Tobey and Brown live in Anacortes, Washington; Talley lives in California with her husband, David Lynch.

On May 14, 1999, Talley and her husband petitioned the court for the appointment of a guardian for Tobey. According to the petition and supporting affidavits, Talley was concerned about Tobey's ability to manage her own finances based on several conversations and incidents in which Tobey

appeared forgetful.

The declarations of Talley and Lynch also indicated that Tobey's knowledge of her financial affairs had declined. Both stated that she had always known detailed [*3] information about her finances, including current stock prices, as late as 1997. But in 1999, when Talley and Lynch would ask Tobey about her stock on the phone, she would not seem to know how her stock was doing, how much money was in her bank account, her income, or where her checkbook was. Tobey indicated that Talley's sister Brown was taking care of her finances. Talley does not trust Brown and is concerned that she is exercising too much control over Tobey's finances. She is particularly concerned because Brown "refuses to share any information with us as to the details of" transactions Talley believes have occurred, including transferring control of Tobey's finances to Brown.

On the same day the petition was filed, the court appointed a guardian ad litem (GAL). Also on the same day, Talley issued a subpoena for deposition of her sister, calling for disclosure of 47 categories of documents. Tobey's attorney filed a response stating that he had spoken with Tobey in person, and she opposed disclosure of her financial information to anyone, particularly Talley and Lynch. Talley moved to compel disclosure, but the court ordered that the documents be produced only to the GAL and only [*4] if she requested them. Talley then issued subpoenas for the information directly to Tobey's financial institutions. The court

quashed the subpoenas, and reserved ruling on sanctions. Talley then deposed Brown on June 24, 1999. After the deposition, Brown moved for a protective order from further discovery, stating that the deposition attorney inquired into private matters of Tobey and Brown, and that the subject matter of the questions was the same as that sought by the quashed subpoenas. The court again quashed any subpoenas, stayed discovery pending the GAL report, and again reserved ruling on sanctions.

The GAL issued her report in March 2000. She met with Tobey in person three times and spoke to her twice on the phone. The GAL also interviewed Talley, Lynch, Brown, staff at the retirement community where Tobey lives, and friends and neighbors who knew the family. In addition, she reviewed various documents, including court documents, and Tobey's checking accounts, savings accounts, her entire stock portfolio, and numerous life insurance policies. She found "no evidence of any misappropriation of funds or malfeasance on anyone's part." She also concluded that Tobey was at times [*5] forgetful, but capable of taking care of herself and her finances with the help available to her.

I do not believe Helen is incapacitated simply because she is forgetful. She has had the foresight to prepare estate planning documents which will protect her if the occasion arises where she becomes incapacitated. I also do not believe Helen is being unduly influenced by Joy [Brown], evidencing incapacity. Any rifts between Helen and Sharon [Talley] are due to circumstances within their own control. I

suspect that Sharon's husband is the cause of Helen shutting Sharon out of her life. . . . No fraud or overreaching is evident here.

The GAL also noted that Tobey had made alternative arrangements that made a guardian unnecessary. She had executed a durable power of attorney appointing Brown as attorney-in-fact in case of Tobey's incapacitation. The GAL deemed this arrangement sufficient to protect Tobey. In addition, Tobey expressed anger at Talley for initiating the guardianship petition and indicated that if any guardian were to be appointed, that Brown should be appointed. The GAL recommended that no guardian was necessary, but if any were appointed, she recommended Tobey's [*6] cousin, Dick Tietz, as a limited guardian only.

After the GAL report was issued, the court dismissed the petition with respect to Tobey's person and denied motions by Talley for another medical exam and to reopen discovery. The court reserved judgment on attorney fees and whether Tobey needed a limited guardian as to her estate. The court ordered Tobey to produce her financial documents for *in camera* review. After reviewing the documents, the trial court granted Tobey's motion to dismiss the petition in full and denied Talley's petition to reopen for further discovery. In its written findings of fact and conclusions of law, the court found that Tobey was "physically able and does care for herself with the assistance of the resources provided at her chosen place of residence[.]" The court also found that Tobey "at times is forgetful, but with the assistance of her daughter, JOY BROWN,

through a Durable Power of Attorney, is quite capable of managing her financial affairs. Her attending physician, . . . guardian ad litem, . . . and her then attorney . . . believed that no guardian is warranted."

The court also found that "[p]etitioner's [*7] manner of pursuing this action impacted . . . TOBEY and her estate more than necessary," and that Tobey had "incurred attorney's fees and costs in the amount of \$ 23,127.10 in defending this guardianship action." The court concluded that Tobey was entitled to recover \$ 8,500 in attorney fees. This appeal followed.

IN CAMERA REVIEW

On appeal, Talley argues that the trial court erred by limiting discovery and by basing its decision on documents reviewed *in camera* without disclosing those documents to her. We disagree. The trial court acted within its discretion when it limited discovery in this matter and when it reviewed Tobey's financial records *in camera*.

Courts in civil matters generally have broad discretion to limit the scope of discovery. *CR 26(b)(1)(C)*. This includes the authority to prevent discovery the court deems unnecessary. *CR 26 (c)(1)* (court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including "that the discovery not be had"). Where the materials to be reviewed are of a private or sensitive nature, courts also have discretion to review documents [*8] *in camera* to determine whether discovery is necessary. *See, e.g.,*

Neel v. Luther Child Ctr., 98 Wn. App. 390, 394, 989 P.2d 600 (1999) (upholding refusal of trial court to disclose child's health care information because court determined after *in camera* review that disclosure not in child's best interest).

Further, the Legislature has mandated that courts in guardianship proceedings protect, as much as possible, the autonomy of allegedly incapacitated persons:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. *However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.*

*RCW 11.88.005 [*9]* (emphasis added). Accordingly, the Legislature has granted courts broad discretion in the procedures they use in guardianship proceedings. *See, e.g., RCW 11.96A.020, 060.*

Talley nevertheless argues that even if the court could review documents *in camera* to determine their relevance, the court erred by basing its decision on undisclosed evidence. Talley cites several cases in which decisions on the merits based on *in camera* review were held to be inappropriate. *See In re*

Dependency of H.W., 70 Wn. App. 552, 559, 854 P.2d 1100 (1993) (in camera review of police reports in shelter care hearing violated due process, given parental rights at stake, where State's attorneys allowed to argue merits); *Vining v. Runyon*, 99 F.3d 1056 (11th Cir. 1996) (reversing summary judgment dismissing discrimination claim based on *ex parte* examination of personnel files of co-employees). In these cases, the courts made decisions impacting the rights of the individuals seeking discovery. Accordingly, the litigants had a right to know the evidence relevant to decisions that adversely affected those rights.

But in this [*10] guardianship proceeding, only Tobey's rights were at issue. The court's duty was not to balance the competing rights of litigants in an adversary proceeding, but to weigh Tobey's rights to privacy and autonomy against the State's interest in determining her capacity to care for herself. We therefore find the above cases inapplicable.

Further, given the special nature of guardianship proceedings, we conclude that the trial court not only acted within its discretion, but exercised its discretion in a commendable manner. The court appointed a GAL who conducted an extensive investigation. The GAL spoke with Tobey on several occasions and reported to the court that Tobey "very much resents the entire guardianship proceeding and resents people prying into her private life." The report and supporting documents also indicated that Tobey did not trust Talley or Lynch and feared they would attempt to move her to California. According to her

attorney's declaration, Tobey directed him to "oppose any effort by anyone to review her financial records," especially Talley and Lynch. The GAL report concluded that Tobey was forgetful but not in need of any guardian. The court would have been justified [*11] in dismissing the petition based solely on the GAL report. Taking the additional, cautionary step of reviewing Tobey's financial information *in camera* before dismissing the guardianship petition did not constitute an abuse of discretion, but was instead a thoughtful approach aimed at minimizing the invasion of the proceeding into Tobey's autonomy and privacy while at the same time thoroughly examining the need for a guardianship.

MEDICAL AND GAL REPORTS

Talley also argues that we must reverse because the GAL report and medical report did not meet all the statutory criteria those documents must meet in order to support a finding of incapacity. This argument also fails. *RCW 11.88.045(4)* provides that "[t]he court shall not enter an order *appointing a guardian or limited guardian* until a medical or psychological report meeting [nine] requirements is filed. . . ." (Emphasis added.). This provision ensures that a person's autonomy will not be taken away without a proper medical determination of incapacity. It does not, however, prevent dismissal of a guardianship petition where a more cursory medical [*12] report is sufficient to determine that no guardianship is needed. Likewise, although *RCW 11.88.090(5)* requires the GAL report to be filed within 45 days of appointment of the GAL, nothing

in the guardianship statute prohibits the court from dismissing a petition merely because the GAL report is filed late.¹ The trial court did not err by relying on these reports in dismissing Talley's petition.

[*13] MEDIATION

Talley further argues that the court erred in failing to order mediation. Talley allegedly asked the GAL to facilitate mediation, but never made that request in a separate motion to the court. Such a request does not comply with the notice procedures set forth in [RCW 11.96A.300\(1\)](#). The court, therefore, did not abuse its discretion by failing to order mediation.²

DURABLE POWER OF ATTORNEY DESIGNATION

Talley next claims that the durable power of attorney Tobey signed designating Brown as attorney-in-fact was an inappropriate basis [*14] for the court's dismissal because it was signed after Talley filed the guardianship petition. Talley's

reliance on [RCW 11.88.045\(5\)](#)³ [*15] and [RCW 11.94.010](#)⁴ for this argument is misplaced. [RCW 11.88.045\(5\)](#) requires a court entering a temporary injunction in a guardianship action to maintain any alternative arrangements "executed before filing the petition for guardianship." [RCW 11.94.010](#) allows a person to designate a guardian in advance in case any guardianship proceedings are thereafter commenced and requires the court to honor that choice of guardian absent good cause for disqualification.

Nothing in these statutes prohibited the court from considering Tobey's designation of durable power of attorney as a factor in its guardianship decision. As Talley points out, the above statutes do not apply to a power of attorney or guardianship designation made after a guardianship proceeding commences. Thus, if the court had determined that a guardian was necessary, it could have appointed someone

¹In addition, Talley did not complain of the delay below. The GAL report indicated that Tobey went on vacation and suffered a broken hip during the period in which the GAL was conducting her investigation. The guardianship statute contains provisions allowing for extensions of the time to file the GAL report and allows a petitioner to ask that a new GAL be appointed. [RCW 11.88.090\(5\)\(f\), \(7\)](#). By failing to object below, Talley did not give the court the opportunity to decide whether an extension should be granted or new GAL appointed. We cannot say the trial court erred by accepting a late report where no party asked for a speedier process.

²We also note that [RCW 11.88.090\(2\)](#) does not allow the court to entertain a motion for mediation by the guardianship petitioner until *after* a guardian has been appointed. Prior to the appointment of a guardian, only the GAL or the allegedly incapacitated person is authorized to move for mediation under this subsection. Neither party cites [RCW 11.88.090\(2\)](#).

³"During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary [injunctive] relief . . . to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation . . . or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed *before filing the petition for guardianship* shall remain effective unless the court grants the [injunctive] relief requested . . . or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective."

[RCW 11.88.045\(5\)](#) (emphasis added).

⁴[RCW 11.94.010](#) states in relevant part:

"A principal may nominate, by durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are *thereafter commenced*. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification." (Emphasis added.)

other than Joy Brown without finding good cause for disqualification. But the court was still allowed to--in fact was required to--consider Tobey's express wishes in making its decision. *See*, [*16] *e.g.*, *RCW 11.88.045(1)(b)* (giving alleged incapacitated person right to counsel, who advocates for her expressed interests). The trial court, therefore, did not err by considering alternative arrangements Tobey made after the guardianship petition was filed in deciding whether to dismiss the petition.

ATTORNEY FEES

Finally, Talley argues that the trial court erred by ordering her to pay a portion of Tobey's attorney fees. *RCW 11.96A.150* gives trial and appellate courts discretion to award attorney fees in guardianship proceedings. This authority is not limited, as Talley argues, by *RCW 11.88.030*.

Our goal in construing statutes is to give force to legislative intent. Accordingly, "[t]o resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute." *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920, 149 L. Ed. 2d 286, 121 S. Ct. 1356 (2001). *RCW 11.88.030(1)* provides that "[*17] [n]o liability for filing a petition for guardianship . . . shall attach to a petitioner acting in good faith and upon reasonable basis. . . ." Attorney fees and costs are not mentioned in that statute. Nevertheless, Talley argues that the court was required to find that the petition was filed in bad faith or without basis before awarding fees. But

RCW 11.96A.150, enacted after *RCW 11.88.030*,⁵ authorizes the court, "in its discretion," to grant fees and costs in guardianship matters. Further, *RCW 11.96A.150(2)* states that the section "shall not be construed as being limited by any other specific statutory provision providing for the payment of costs . . . unless such statute specifically provides otherwise." Thus, we hold that *RCW 11.96A.150*, a latter-enacted grant of discretion to the court to award attorney fees, is not limited by the general limitation on "liability" expressed in *RCW 11.88.030 (1)*.

[*18] Talley also argues that to the extent the trial court relied on its *in camera* review of documents that were never made available to her, its imposition of attorney fees violated her rights to procedural due process. Because we have determined that the court's *in camera* review was appropriate, we need not address this argument. The court was within its discretion to award fees given its well-supported finding that Talley's "manner of pursuing this action impacted . . . TOBEY and her estate more than necessary." We likewise determine that Tobey and her estate should not be further impacted by the cost of this appeal. We grant Tobey's request for attorney fees and costs on appeal pursuant to *RAP 18.1* and *RCW 11.96A.150*.

Affirmed.

WE CONCUR:

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⁵ See Laws of 1999, ch. 42, § 308; Laws of 1990, ch. 122, § 4.