IN THE SUPREME COURT OF THE STATE OF ALASKA

FILED

JUL 31 2023

APPELLATE COURT OF THE STATE OF ALASKA

In the Matter of the Protective Proceedings of:	)	
H.T.	)	Supreme Court No. S- 18821

Trial Court Case No.: 3AN-23-00671PR

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify that the font used in this document is Times New Roman 13.

PETITION FOR REVIEW FROM THE SUPERIOR COURT THIRD JUDICIAL DISTRICT AT ANCHORAGE THE HONORABLE HERMAN WALKER

Filed in the Supreme Court
Of the State of Alaska this
____ day of _____, 2023

MEREDITH MONTGOMERY, CLERK
Appellate Courts

By:_____

By: _____

Beth Goldstein, AK Bar No: 0705027
Deputy Director and Public Guardian
Office of Public Advocacy
Public Guardian
900 W. 5th Ave. Suite 525
Anchorage, AK 99501
907-334-5932
Email:
doa.opa.public.guardian.service@alaska.gov

Date by which decision is needed: No date pending

PETITION FOR REVIEW

Petitioner, the Office of Public Advocacy, Public Guardian, as the Public Guardian, by and through counsel, hereby petitions this Court for review of and relief from the Order Denying the Public Guardian's Dismissal of the Petitioner's Motion to Compel, for Lack of Jurisdiction over the Proposed Guardian, issued by the Superior Court on July 24, 2023 and distributed on July 25, 2023.

STATEMENT OF FACTS

On March 20, 2023, Providence Medical Center filed a petition for appointment of a guardian for H.T. and requested expedited consideration. An email was sent by Petitioner to the Public Guardian Service inbox with notification that the Public Guardian was being nominated as the proposed guardian. On April 17, 2023, a hearing was held before the magistrate judge wherein the court visitor also nominated the Public Guardian as the proposed guardian. The petitioner and the respondent requested and received a three-week continuance.

On May 10, 2023, another hearing was held and the Public Guardian through counsel was present merely to inform the court that it was unable to accept the case. Nonetheless, the magistrate judge recommended the Public Guardian be appointed and provided a date by which to file objections. The Public Guardian did not file an acceptance pursuant to AS 13.26.261 nor did it file objections to the order since it was not a party to the matter.

No authority exists in the statutes or the court rules for the proposed guardian to be permitted to file objections. On June 12, 2023, the petitioner filed a motion to compel

the Public Guardian to file an acceptance of the recommended appointment/proposed orders.

On June 29, 2023, the Public Guardian filed a motion and memorandum dismissing the Petitioners' motion to compel due to lack of personal jurisdiction over the proposed guardian/Public Guardian. On July 25, 2023, the superior court issued an order compelling the Public Guardian to sign the guardianship acceptance form. On that same day, the superior court issued an order denying the Public Guardian's motion to dismiss petitioner's motion to compel for lack of personal jurisdiction stating, that because the Public Guardian did not object to the substantive findings related to the guardianship the Public Guardian waived its jurisdictional objection.

I. **Did The Superior Court Violate AS 13.26.261 By Conferring Personal Jurisdiction Over The Proposed Guardian Where No Acceptance Was Filed With The Court?**

II. **If Personal Jurisdiction Attaches Outside Of The Application Of AS 13.26.261, Are The Guardianship Statutes Unconstitutional Because They Deprive The Proposed Guardian Of Due Process While Subjecting Them To Orders Of The Court Without The Right To Be Served With The Petition; The Right To Be Considered A Party; And The Right To Be Formally Heard?**

SCHEDULED TRIAL DATE

No trial date is pending in the underlying matter.

WHY REVIEW SHOULD NOT BE POSTPONED UNTIL AN APPEAL MAY BE TAKEN FROM A FINAL JUDGMENT.

Review should be granted over these issues pursuant to Appellate Rules 402(b)(2), (3) and (4). The issues invoke statutory construction and interpretation of AS

13.26.261, Alaska Probate Rules 14 and 16 and invokes the Due Process Clause of the United States Constitution pursuant to the 14th Amendment and Art. I Sec. 7 of the Alaska Constitution.

As to Rule 402(b)(2), the Order involves an issue that advances an important public interest which may be compromised if the petition is not granted. Guardianship proceedings impose an enormous responsibility and obligation on a proposed guardian without providing for or permitting service of the petition for guardianship on them; without conferring party status on them; and without providing for a formal means for the proposed guardian to be heard. Presumably, the Alaska Legislature recognized and addressed this by explicitly conferring personal jurisdiction over the proposed guardian only after they had filed an acceptance of the guardianship appointment pursuant to AS 13.26.261.

Either the guardianship statutes are correct as explicitly written and personal jurisdiction over the proposed guardian does not attach unless and until they file an acceptance of the appointment with the court as directed by AS 13.26.261, or the guardianship statutes are wholly flawed and unconstitutional because they impose an order of appointment upon a proposed guardian without the protections of due process.

A review by this Court of when personal jurisdiction attaches to the proposed guardian must be determined in order to provide clear direction to the lower courts and all guardianship participants regarding the court's authority over the proposed guardian and flowing from that, the proposed guardian's rights if personal jurisdiction attaches prior to the filing of the acceptance.

As the statutes and rules are currently being interpreted and applied by the lower courts, there is no consistency among the lower courts regarding when personal jurisdiction attaches to the proposed guardian and subsequently the proposed guardian's rights to understand the entirety of the endeavor for which they are being sought and to be heard on their ability and willingness to serve as guardian. This applies equally both to proposed family members and to private guardians who are regularly not being appropriately considered for the appointment by the lower courts, as well as to the Public Guardian, who is regularly being inappropriately being considered for appointment as the guardian by the lower courts.

Applying Appellate Rule 402(b)(3), the Superior Court has so far departed from the accepted and usual course of proceedings that it calls for this Court's review. The superior court's order states that because the Public Guardian did not file an objection to the substantive report and recommendation issued by the magistrate judge appointing a guardian to H.T. it has waived its objection to personal jurisdiction. This ruling wholly contradicts Alaska statutes and rules.

First, AS 13.26.261 specifically states that it is *the acceptance of the appointment* that triggers the attachment of personal jurisdiction over the proposed guardian and the superior court wholly failed to apply that statute. Second, the superior court held the proposed guardian to an obligation – presumably under the Alaska Rules of Civil Procedure to have filed an objection to the magistrate judge's report and recommendation and assert its objection to personal jurisdiction there. However, the proposed guardian is not deemed

a party under the guardianship statutes[1] and Alaska Rule of Civil Procedure 53(d) only permits parties to file objections to a master's [magistrate judge's] report and recommendation. The probate rules do not confer any authorization to proposed guardians that expand rule 53(d) to a non-party in a guardianship proceeding. Therefore, the superior court has so wholly departed from the statutes and court rules in rendering its order an review is required.

Applying Appellate Rule 403(b)(4), the issue is highly likely to evade review. Because this issue is one of personal jurisdiction, it cannot be reviewed in any other way but a petition for review to this Court. If the proposed guardian accepts the appointment, the jurisdiction question is mooted under the application of AS 13.26.261 and evades review. Further, the authority for all other orders issued by the superior court relating to the proposed guardian flow directly from whether personal jurisdiction attached to the proposed guardian and when personal jurisdiction attaches to a proposed guardian.

I. THE SUPERIOR COURT VIOLATED AS 13.26.261 BY CONFERRING PERSONAL JURISDICTION OVER THE PROPOSED GUARDIAN WHERE NO ACCEPTANCE WAS FILED WITH THE COURT

Guardianship is a relationship created by statute whereby a court grants an individual(s) or entity the obligation, responsibility and power to make almost all[2] intimately personal and property decisions for another.[3] Under Alaska's statutes the

[1] AS 13.06.110 and 13.26.021.
[2] Alaska exempts certain powers from a guardian AS 13.26.316(e).
[3] Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 Stetson L. Rev. 143, 147 (2007) and AS 13.26.316(a)-(d).

petition permits the nomination of a proposed guardian[4]. The proposed guardian, however, is not considered a party to the matter but is considered merely an interested person.[5]

This interested person status does not confer the right or the permission to be served with the petition for guardianship[6]. It confers upon them only the right to notice of the hearing on the guardianship petition by the petitioner and no right to service of the petition—the document which sets forth the needs and information of the person for whom they have been nominated to make the most personal and financial decisions.[7]

Finally, neither the guardianship statutes nor the Alaska civil or probate rules provide any authority or formal means for a proposed guardian to be heard regarding either their nomination or to support or provide evidence about their willingness and ability to serve.[8] AS 13.26.311 provides no right or process to the proposed guardian to address the standard the court is to employ when considering the appointment of the guardian for the respondent.[9]

Therefore, the proposed guardian is provided no notice of the claims (basis for the petition for guardianship). The proposed guardian has no right 1) to file pleadings, 2) to seek discovery, or 3) to conduct any action a party has the right to conduct in the matter. And the proposed guardian has no right to be heard regarding their position, ability or

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[4] AS 13.26.221(c).
[5] AS 13.06.050(26); AS 13.06.010.
[6] AS 13.26.021 and Alaska Probate Rules 14(d), 16(b) and (c), and 17(b) and (c).
[7] Id.
[8] AS 13.26.251 set out the respondent's rights and AS 13.26.311 only provides for the court's authority to appoint and the priority statute.
[9] AS 13.26.311.

willingness to undertake the enormous obligations and responsibilities of being the respondent's guardian. This is the purpose of AS 13.26.261.

AS 13.26.261 addresses the proposed guardian's lack of due process rights during the proceedings by explicitly stating that it is specifically upon the proposed guardian's acceptance of the appointment that personal jurisdiction attaches and thereby makes them subject to both the guardianship orders and any other orders issued by the court.[10] The Alaska Probate Rules also accept that this is when personal jurisdiction of the court attaches to the proposed guardian. Alaska Probate Rule 14(d) specifically directs that Letters of guardianship (the orders authorizing the appointed guardian to act for the respondent) may not issue until after the written acceptance of the person to be named guardian has been received by the court.[11]

In the case at bar, the Public Guardian was the nominated proposed guardian. The magistrate judge recommended the Public Guardian; however, because the Public Guardian did not believe it could meet the statutory requirements, i.e., it was not able to ethically, diligently and in good faith carry out the specific duties and powers it was being nominated for,[12] it did not sign and file an acceptance in the matter.

Subsequently, the petitioner filed a motion to compel the proposed guardian to file an acceptance and the Public Guardian formally raised the lack of personal jurisdiction of the superior court to issue such an order pursuant to AS 13.26.261.

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[10] AS 13.26.261.
[11] Alaska Probate Rule 14 (d).
[12] AS 13.26.316(a) and AS 13.26.001.

The superior court ignored AS 13.26.261 and held that personal jurisdiction attached because the proposed guardian was required to file objections to the magistrate judge's report and recommendation and raise the jurisdictional objection there. However, because the proposed guardian is not a party to the matter, no authority exists under Alaska Civil Rule 53(d) for it to file objections. Therefore, because no authority exists for such a filing by a non-party, no obligation to assert the jurisdictional argument in that manner can attach.

Without review and direction from this Court regarding when personal jurisdiction attaches to the proposed guardian, and subsequently what rights the proposed guardian has, the lower courts and participants in guardianship proceedings will be subject to inconsistent rulings depending solely upon whichever judicial officer is assigned to a matter and which Alaska guardianship statues will be ignored.

II. IF PERSONAL JURISDICTION ATTACHES OUTSIDE OF THE APPLICATION OF AS 13.26.261, THE GUARDIANSHIP STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY DEPRIVE THE PROPOSED GUARDIAN DUE PROCESS WHILE SUBJECTING THEM TO ORDERS OF THE COURT WITHOUT THE RIGHT TO BE SERVED THE PETITION; THE RIGHT TO BE CONSIDERED A PARTY; AND THE RIGHT TO BE FORMALLY HEARD.

Under Alaska's statutes the proposed guardian, is not a party to the matter and has merely an interested person status, with no right to be served with the petition—essentially the claims of the matter—and is provided with no formal means to be heard.[13] The objective of service of the claims is to provide notice that is reasonably calculated to inform the

[13] AS 13.06.050(26); 13.06.010; AS 13.26.021 and Alaska Probate Rules 14(d), 16(b) and (c), 17(b) and (c).

"party" of the pendency of the action so she may have the opportunity to present her objections.[14] Due process at a minimum requires notice and a meaningful opportunity to be heard.[15]

There is no dispute that, the proposed guardian has a strong interest in being heard regarding their willingness and ability to be appointed as a respondent's guardian. Despite that interest and the fiduciary duties imposed upon them once appointed, a proposed guardian has no right to be served with the petition[16]. This lack of service deprives the proposed guardian of the right to properly assess and assert their ability and their willingness to take on the role of guardian, based upon the respondent's specific needs and situation. Yet, under the current process, the court and the court visitor make these determinations—who should be appointed guardian if one is required – without providing the proposed guardian the right to review the petition and speak to the needs for which that guardian will be responsible.

The probate process provides no proccdurc or rules that permit the proposed guardian to be heard on their ability and willingness to be appointed. It is merely at the whim of each judicial officer as to whether the proposed guardian can speak in a proceeding, file a pleading, participate through counsel, or have any formal input. This application results in depriving family members who are the proposed guardians of the right to formally be heard or present evidence regarding their ability and willingness to care for their loved ones. It also serves to hold a proposed guardian to an appointment it

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[14] Alaska Rule of Civil Procedure 4.
[15] *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.3d.2d 556 (1972).
[16] AS 13.26.021 and Alaska Probate Rules 14(d) and 16(b) and (c).

does not believe it can ethically and diligently carry out, requiring it to formally accept the guardianship appointment in order to obtain party status to be formally heard. This ultimately harms the appointed guardian by requiring them to take on an obligation that cannot meet in order to be heard. And contrary to protecting the respondent with the appointment, it serves to harm the respondent as well as other wards to whom the proposed guardian has accepted appointments by dissipating the resources of the guardian for all.

In the absence of AS 13.26.261 serving to delay the attachment of personal jurisdiction over the proposed guardian until they have formally accepted the appointment, the guardianship statutes fail to trigger or provide the proposed guardian with the right to appear and defend their interests. Such an absence of process violates the strictures of due process that both the United States and Alaska Constitutions provide.

It is imperative that this Court review the constitutionality of the probate statutes with respect to this lack of due process afforded to a proposed guardian in light of the enormous obligation and responsibility an appointed guardian is required to undertake upon its appointment if this Court finds that personal jurisdiction over the proposed guardian is not dictated by AS 13.26.261. Failure to do so prevents proposed guardians of all types—family, private and public, to be treated differently with respect to input and participation solely depending on which judicial office is assigned to the matter in which they are proposed. This does a disservice to the protective intent of the guardianship statutes and ultimately fails to protect the respondents.

CONCLUSION

Review is appropriate and necessary in this matter to address the superior court's error related to when personal jurisdiction attaches to a proposed guardian and to assess whether AS 13.26.261 was expressly enacted in order to address the lack of due process provided to a proposed guardian. Given the enormous responsibility and obligations appointed guardians are required to undertake and the protective intent of the statutes the guardianship statutes must provide adequate due process to proposed guardians before obligating them to those responsibilities by court order. For all of the reasons set forth above, the Public Guardian respectfully requests that the Petition for Review be granted.

STATEMENT OF PRECISE RELIEF SOUGHT

The Public Guardian seeks an order determining that the superior court does not have personal jurisdiction over it as the proposed guardian in the above-captioned matter because the Public Guardian has not filed an acceptance of the appointment pursuant to AS 13.26.261. If the Court finds that AS 13.26.261 was not enacted to address the absence of due process for a proposed guardian under the guardianship statutes, to declare the guardianship statutes unconstitutional as applied to proposed guardians and provide all necessary and proper relief to the Public Guardian.

Respectfully submitted this 31st day of July, 2023, at Anchorage, Alaska.

OFFICE OF PUBLIC ADVOCACY
PUBLIC GUARDIAN

Beth Goldstein
Deputy Director & Public Guardian
Alaska Bar No. 0705027