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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 24-0494

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. OP _____

THE OFFICE OF THE STATE PUBLIC DEFENDER,
Petitioner,
vs.

THE HONORABLE DAN WILSON,
Montana Eleventh Judicial District Court Judge,
Respondent.

PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE STAY

Original Proceedings Arising from the
Montana Eleventh Judicial District Court, Flathead County,
In re the Matter of the Guardianship and Conservatorship
of T.B., Cause No. DG-24-48 (D)
The Honorable Dan Wilson Presiding Judge

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I. RELIEF SOUGHT

COMES NOW the Petitioner, the Office of the State Public Defender (OPD), and pursuant to Montana Rule of Appellate Procedure 14, hereby applies for a writ of mandamus to compel the Honorable Dan Wilson of the Eleventh Judicial District Court to appoint OPD to represent T.B. in District Court cause number DG-24-48 (D), a guardianship and conservatorship proceeding. Pursuant to M.R.App.P. 14(7)(c), Petitioner also requests a stay of future proceedings in the District Court, pending this Court's disposition.

The Judge erred when he appointed private counsel to represent T.B. and made her a guardian ad litem as well as the defense attorney instead of appointing OPD. This action was in direct contravention to the procedural statutes governing the appointment of OPD in guardianship and conservatorship proceedings, §47-1-104(4)(b)(vii), §72-5-315 and §72-5-408, MCA, and there is no plain, speedy or adequate remedy for this in the ordinary course of law.

II. INTRODUCTION AND BACKGROUND FACTS

This action arises out of the Petition for Guardianship and Conservatorship of T.B. that was filed in Flathead County District Court on June 28, 2024 in DG-24-48(D). This is the second Petition for Guardianship and Conservatorship of T.B. The first Petition was filed on May 23, 2023 in DG-24-35(C), and the issues in this case began in DG-24-35(C). In DG-24-35(C), because T.B. did not have counsel of her choosing, pursuant to §47-1-104(4)(b)(vii), §72-5-315 and §72-5-408, MCA, the Court appointed OPD to represent her. See Exhibit A, Original Petition, Answer to Petition, and Order Appointing OPD.

After T.B. requested a jury trial, to rid her of that right, the petitioner, through his attorney, Mrs. von Jentzen, requested the Court remove OPD and appoint a private attorney, one who presumedly would not assert her jury trial right. Exhibit

B, Motion For Removal of Court-Appointed OPD Counsel and Appointment of Private Counsel, page 5:

> "While Petitioner had hoped the appointment of OPD would reduce legal expenses, the payment for private counsel will be far less than legal fees associated with a jury trial..."

The Motion for Removal was based on communication Ms. von Jentzen and Mrs. Larsen had about OPD representing their opposition in guardianship proceedings. Exhibit B, page 2:

> "The undersigned [Ms. von Jentzen] has been supplied a copy of email correspondence from Dianne Rice to attorney Christina Larsen..."

In this motion, Ms. von Jentzen asked the Court to appoint private counsel, suggesting Ms. Larsen would be an appropriate private attorney to represent T.B. instead of OPD. See Exhibit B, page 5:

> "There are a number of competent private attorneys experienced in guardianship/conservatorship matters this Court could elect to appoint (including...Christina Larsen).

At this time, Mrs. Larsen also had an active case where the opposing party was represented by OPD and asserting his jury trial right to which Mrs. Larsen was trying to prevent, DG-24-11(D). The Honorable Dan Wilson presided over that matter. Exhibit C, Transcript of Proceedings in DG-24-11(D). At a hearing in DG-24-11(D), after OPD's client asked for a jury trial, Mrs. Larsen represented to the Court that she does not agree that individuals subject to guardianship proceedings have the right to a jury trial. Exhibit C, page 7 lines 14-25 through page 8 lines 1-17:

> "The Court: Is there a right to a jury trial in a guardianship case where ethe court sits in equity?

Ms. Rice: I do believe the statutes say that the client has the right to a jury trial…

The Court: Are you aware Ms. Larsen?

Ms. Larsen: No, Your Honor. In fact, I have simply never had a guardianship go to a jury trial. Certainly, that right is available in an involuntary commitment proceeding and that certain – several of those cases that also touch on guardianship issues. But I could not sit here and say that I agree."

In DG-24-35(C), T.B.'s attorney responded to the Motion to Remove OPD, arguing that a number of T.B.'s rights would be violated if the Court removed her attorney and assigned private counsel of petitioner's choosing. Exhibit D, Response to Motion for Removal of Court-Appointed OPD. On June 27, 2024, the Court held a hearing on the issue, and the Court, through the Honorable Heidi Ulbricht, told Mrs. von Jentzen that she would dismiss the case so Ms. von Jentzen could refile and get rid of OPD. T.B.'s counsel objected. Exhibit E, Transcript of Proceedings in DG-24-35(C), page 12 lines 20 though page 15 lines 1-14:

"THE COURT: So as the Court is looking at this, I mean it seems a lot of energy going into this where Ms. von Jentzen could simply dismiss this case, or motion to dismiss this case without prejudice. The Court would grant that. It could be refiled with a different attorney being appointed…

MS. VON JENTZEN: Your Honor, I'd move to dismiss…

MS. RICE: … I think that the Court is telling her to do -- to - - how to res -- you know, meet her objectives in a way that is violating my client's rights. We have formed an attorney client relationship, and she does want a jury trial. Her stepson is here today. He met with us. He can testify that she does want a jury trial and if they are just going to hire -- first, how -- they've alleged she's –

> THE COURT: Let me go back, how does it violate her rights? You are objecting to a guardianship proceeding. So, by the Court granting the order to dismiss, that is what you're requesting, that there is not a guardianship…
>
> MS. RICE: Because it's not a motion to dismiss -- if you would dismiss it with prejudice, fine. But you're telling her to dismiss it and bring it back. She's going to bring it back with private counsel, one that she presumes won't listen to my client and assert her right, her procedural rights, her constitutional rights. She has constitutional rights to dignity and due process under Article II, Section 17 – …
>
> THE COURT: No. The Court's prepared to rule. The Court will grant the Petitioner's motion to dismiss without prejudice. Court is adjourned."

The next day, June 28, 2024, the second Petition for Guardianship and Conservatorship of T.B was filed., which is the subject of this writ, DG-24-48(D). Exhibit F, Second Petition for Guardianship and Conservatorship of T.B. This time, without providing lawful authority for the request, and without disclosing that §72-5-408, MCA, mandates the appointment of OPD in conservatorship actions, the Petition asked the Court to appoint the private attorney Ms. von Jentzen had been communicating with about OPD representing their opposition in guardianship cases, Mrs. Larsen. See Exhibit F, page 4, paragraph 13:

> "Christina Larsen, Esq. is a proper person to serve as attorney for T.B. and she has consented to act."

The Court appointed Mrs. Larsen to represent T.B. Additionally, the Court bestowed Mrs. Larsen with the powers of a GAL, so T.B. does not have an actual attorney to represent her desired interests. See Exhibit G, Order Appointing Attorney:

> "The Petition … for the appointment of Guardian and Conservator of an incapacitated person having come before the Court, and it appearing that the incapacitated person is not represented by legal counsel of her own choice, Christina Larsen, Esq., is hereby appointed to represent [T.B.] in the proceedings before the Court with all the powers and duties of a Gaurdian Ad Litem."

On July 30, 2024, OPD filed a Motion for Leave to Intervene, asking the Court to appoint OPD, providing the Court with the procedural statutes mandating the appointment of OPD, and alerting the Court to the procedural history of the original petition for guardianship and conservatorship, DG-24-35(C). Exhibit H, Motion for Leave to Intervene. The Court denied the Motion reasoning that the Court can appoint any attorney it wants and that OPD cannot be made a party so intervention is improper. Exhibit I, Order Denying Motion to Intervene. Since that Motion was filed, the Court amended its order appointing attorney to read:

> "... Order Appointing Attorney filed July 02, 2024, now properly reads: ... Christina Larsen, Esq. is hereby appointed to represent [T.B.] as attorney and Guardian ad Litem ..."

Exhibit J, Order Nunc Pro Tunc Appointing Attorney. Attorneys and GALs have conflicting duties so one person cannot do both at the same time.

The issue raised in this writ application involves the Honorable Judge Wilson's choice to disregard the law that: (1) mandates he appoint OPD in conservatorship actions; and (2) necessitates he appoint OPD in this guardianship action because T.B. does not have private counsel of her own choosing, and the appointed attorney was made into a GAL and the defense attorney. See §72-5-408 and §72-5-315, MCA.

III. DISCUSSION

A. STANDARDS FOR JURISDICTION

> Proceedings commenced in the supreme court originally to obtain writs of ... mandate... shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules.

M.R.App.P. 14(2).

> (1) A writ of mandamus may be issued by the supreme court ... to any lower tribunal... or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office...
> (2) The writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law.

Section 27-26-102, MCA. A writ of mandamus is specific and statutorily driven. To state a claim for mandamus, a party must show entitlement to the performance of a clear legal duty by the party against whom the writ is directed and the absence of a plain, speedy, and adequate remedy at law. Section 27-26-102, MCA; *Smith v. Missoula Co.*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834

B. LEGAL QUESTIONS RAISED

1. Does the Honorable Judge Dan Wilson have a lawful duty to appoint OPD instead of private counsel to represent T.B. in the guardianship and conservatorship action?
2. Is there a plain, speedy and adequate remedy at law?

C. ARGUMENT

1. Judge Wilson has a lawful duty to appoint OPD because §72-5-408, MCA, mandates the appointment of OPD.

The Honorable Judge Wilson has a lawful duty to appoint OPD to represent T.B. because §72-5-408, MCA mandates the appointment of OPD in a conservatorship action where the allegedly incapacitated individual does not have counsel of their own choosing. Section 72-5-408(2), MCA, states:

> "Upon receipt of a petition for appointment of a conservator or other protective order ...**Unless the person to be protected has counsel of the person's own choice, *the court shall* order the office of state public defender to assign counsel to represent the person** pursuant to the Montana Public Defender Act, Title 47, chapter 1."

The word "shall" is a direct mandate from the legislature. The legislature intended for OPD to represent people subject to conservatorship proceedings. There is an important reason to provide attorneys at public expense in conservatorship cases. The purpose of conservatorship proceedings is to protect a person's estate from being:

> "wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds."

See §72-5-409, MCA. Forcing individuals in these proceedings to incur private legal fees wastes/dissipates an estate that is needed for their support, care and welfare. That is why §47-1-104(4)(b)(vii), MCA, provides OPD will represent individuals subject to guardianship and conservatorship actions without an ability to pay determination. See §47-1-104(4)(b)(vii), MCA:

> "...in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows...for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5..."

People in these proceedings are entitled to OPD's services and OPD is entitled to represent them. OPD was created so that State attorneys could represent people who could not afford an attorney and people subject to conservatorship actions, among others. If the courts stopped appointing OPD even though the laws mandated their appointment, OPD would become an unnecessary institution. Forcing an individual subject to a conservatorship to incur legal fees without that person's consent, when the legislature provided for an attorney at public expense, is contrary to the purpose for conservatorships and unlawful. The Montana Supreme Court should compel

Judge Wilson to rescind the appointment of private counsel and appoint OPD instead.

2. Judge Wilson has a lawful duty to appoint OPD because §72-5-315 and §47-1-104(4)(b)(vii), MCA provide for an attorney at public expense and the Court cannot force T.B. to incur private attorney's fees without her consent.

Judge Wilson has a lawful duty to provide T.B. with an attorney at public expense. The District Court cannot lawfully force T.B. to incur attorney's fees that she has not consented to when the law provides for a free attorney.

Further, Judge Wilson has a lawful duty to provide T.B. with independent counsel. Section 72-5-315(2), MCA provides:

> "Upon the filing of a petition... The allegedly incapacitated person may have counsel of the person's own choice or the court may, ***in the interest of justice***, appoint an appropriate official or order the office of state public defender...to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1..."

Section 72-5-315(4) provides:

> "The person alleged to be incapacitated ... is entitled to ... trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it."

Appointing counsel of Petitioner's choosing, who communicated with Petitioner's attorney about OPD representing their opposition in guardianship cases and who does not agree with a person's right to a jury trial in these proceedings, to represent T.B. who has already tried to assert that right is not in the interests of justice. It is a way to take away a vulnerable person's rights. Here, Mrs. von Jentzen specifically asked the Court to appoint private counsel instead of OPD because T.B. asserted her right to trial. Mrs. von Jentzen conferred with Mrs. Larsen, who also took issue with

OPD asserting a client's rights, and the two then worked out an agreement to have Ms. Larsen appointed instead. These private attorneys understand that this practice can occur because there will be no one to appeal the issue. In acquiescing to this practice and appointing private attorneys of the opposing party's choice, the Court is violating vulnerable individuals' rights, here T.B.'s.

The legislative history of § 72-5-315, MCA provides further support for the assertion that Judge Wilson must appoint OPD. Before the 2005 legislative amendment from Senate Bill 146, § 72-5-315(2), MCA provided:

> "The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice appoint an appropriate official or attorney to represent him in the proceeding."

The 2005 amendment, which went into effect July 1, 2006, deleted "attorney" and inserted reference to ordering OPD. See Exhibit K, Chapter 449, Laws of Montana (2005), (Senate Bill 146, page 82 and Exhibit 3). While the new language left "appropriate official" included, that language cannot be construed to mean a private attorney because that language was included when private attorney was included as well. Clearly the legislature contemplated an "appropriate official" to be someone other than an attorney, otherwise, both "appropriate official" and "attorney" would not have been included in the original language. There is no reason the legislature would have purposely deleted the word "attorney" and inserted OPD, and also provided for OPD to represent people subject to guardianships in § 47-1-104(4)(b)(vii), MCA, if the legislature wanted courts to appoint private counsel to represent people in guardianship proceedings. A more reasonable interpretation of the legislature's intent when including the language "professional person" as well as "OPD" [and previously "attorney"] in §72-5-315(2) is that the legislature contemplated courts could assign GALs as well as OPD in guardianship cases. In

either event, the Court cannot assign one person to be both the attorney and the GAL. See section 3 below.

Additionally, Exhibit 3 to Senate Bill 146, states that a reason for the creation of OPD was because one problem with judges appointing private attorneys is that "defenders lack independence," and a solution is for OPD to represent people because then "judges no longer directly appoint defenders." See Exhibit K. Senate Bill 146 was introduced, in part, to stop the situation presented in this case, where private attorneys are not independent.

Appointing a private attorney of the opposing party's choosing also violates T.B.'s right to be informed of, and provide consent to, possible conflicts of interest under the Montana Rules of Professional Conduct Rule 1.7(a)(2) and (b). These rules require that attorneys avoid conflicts of interest, disclose to the client possible conflicts, and acquire informed consent before representation. See Rule 1.7(a)(2) and (b):

> "... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer...Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if (1)...(2)...(3)...and (4) each affected client gives informed consent, confirmed in writing."

T.B. has the right to independent counsel who is not beholden to the opposing party. She has the right to be notified of conflicts of interest - that Petitioner sought her out to represent T.B - and to consent to the representation despite the possible conflict. The Court appointing Ms. Larsen without T.B.'s input is improper.

3. Judge Wilson has a lawful duty to appoint OPD to represent T.B.'s desired goals instead of an attorney who the Court ordered to be a guardian ad litem as well.

By definition, a guardian ad litem (GAL) is a court appointed official who represents an individual's best interests, not their desired interests. Because Mrs. Larsen was appointed with all the powers of a GAL, T.B. does not have an attorney to represent her desired interests. T.B. is entitled to an attorney who will represent her interests. See Montana Code Annotated 72-5-315(4):

> "The person alleged to be incapacitated is ... ***entitled to be present by counsel... and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it."***

One cannot represent someone's best interests as well as their desired goals at the same time, because the two may conflict. The Court is violating T.B.'s due process rights by not providing her with an attorney who is bound to represent her desired interests.

A GAL is not a sufficient substitution for an attorney, nor can the attorney appointed be required to be a GAL. In a 2007 amendment to § 72-5-315, MCA, the legislature specifically chose to get rid of the practice of having attorneys in guardianship proceedings function as GALs. See Chapter 184, Laws of Montana (2007). Before the 2007 legislative amendment, § 72-5-315(2), MCA included a sentence that read: "The official or assigned counsel has the powers and duties of a guardian ad litem." The 2007 amendment, which went into effect April 10, 2007, deleted that entire sentence showing that the legislature specifically intended for appointed counsel to function as a defense attorney representing the allegedly incapacitated person wishes and not a GAL who represented their best interests instead.

Additionally,

> "Guardianship impacts a person's liberty interests because a guardianship order can significantly or totally restrict the legal and human rights of the person. A person's fundamental rights to decide where they live, how they live, and the freedoms of association guaranteed by the 1st Amendment are commonly restricted by a guardianship order. Guardianship orders remove the ability to make everyday decisions that most people take for granted."

See Erica Costello, JD.; *Defense Against Guardianship, A Lawyer's Guide to Representing Individuals in Guardianship Cases;* The American Bar Association, Commission on Aging; page 13, October 2023. The United States Supreme Court ruled in some cases a person has a right to retain an attorney when their rights are at risk. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Subsequently, SCOTUS ruled that a person is only entitled to an attorney if substantial personal interests are at risk. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Here, T.B.'s right to make her own choices, including where she lives, which is a substantial personal interest, is at stake. Thus, there is a meritorious argument that T.B. has a constitutional right to an attorney. A GAL is not sufficient, statutorily or constitutionally.

4. There is no plain, speedy, and adequate remedy in the ordinary course of law.

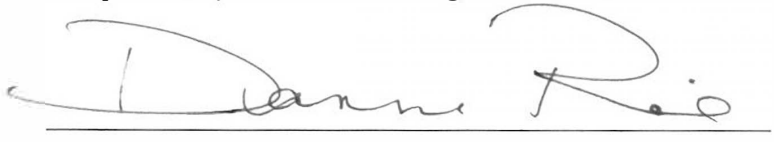
There is no plain, speedy, and adequate remedy here. Judge Wilson was informed of the law mandating the appointment of OPD but chose to disregard it even though he sua sponte revised his order appointing Christina Larson after the Motion for Leave to Intervene was denied. Ms. Larson financially benefits from her appointment and has no interest in arguing that OPD should represent people in these proceedings. If she did, she would have already argued that or not consented to the

appointment in the first place. Further, Ms. Larson's (and all attorneys representing petitioners in these cases) practice benefits from her also defending people in these cases because she can ensure allegedly incapacitated individuals do not assert their rights by having the Court appoint an attorney of her choosing to represent them instead of OPD. The usual remedy of an appeal is not available because there is no one in the underlying proceedings to assert these rights. Even if OPD appealed the denial of the Motion to Intervene, T.B. would be harmed financially by the legal fees incurred by the forced continuing representation by Mrs. Larson during the pendency of DG-24-48(D) and any future appeal.

IV. CONCLUSION

For the forgoing reasons, OPD prays the Court will grant the relief requested, order the Honorable Judge Wilson to rescind the appointment of private counsel and appoint OPD in DG-24-48(D), and stay the District Court proceedings while this writ is pending.

Respectfully submitted August 16, 2024.



Dianne Rice, Office of the State Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P. 11(4)(e), Petitioner certifies that: this document's line spacing is 1.5 lines and it is proportionately spaced in Times New Roman font, 14 point size with a word count, according to the Word processing system, of 3,936 (including the cover page).

/s/Dianne Rice

CERTIFICATE OF SERVICE

I, Dianne Ingrid Rice, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-20-2024:

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Dated: 08-20-2024