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IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of the Guardianship and Conservatorship of:

DORA V. COLE.

-----  
DARRELL COLE and TONY COLE,

Co-Guardians and Co-Conservators,  
Petitioners-Respondents,

v.

KELLY COLE,

Respondent-Appellant.

---

RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District for Washington County.

HONORABLE D. DUFF MCKEE, Senior Judge presiding.

Respondent-Appellant:

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**In the Matter of the Guardianship and  
Conservatorship of:**

**DORA V. COLE.**

---

**DARRELL COLE and TONY COLE,  
Co-Guardians and Co-Conservators,  
Petitioners-Respondents,**

**v.**

**KELLY COLE, Respondent-Appellant.**

**Supreme Court No. 45856**

**RESPONDENTS DARRELL COLE AND  
TONY COLE'S BRIEF**

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR  
WASHINGTON COUNTY**

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**I. INTRODUCTION**

This is an appeal of a guardianship and conservatorship case from the Third Judicial District, County of Washington, Case No. CV 2016-259 regarding Dora V. Cole (“**Guardianship Matter**”). Respondents Darrell Cole and Tony Cole are brothers and the adult sons of Dora V. Cole. Darrell Cole and Tony Cole were appointed temporary and then permanent co-conservators and co-guardians of their mother Dora V. Cole, who was diagnosed with vascular dementia, and they acted as such in that capacity (*See R.*, p. 42.) Appellant Kelly Cole is Darrell Cole and Tony Cole’s brother. He contested the appointment of Darrell Cole and Tony Cole as co-conservators and co-guardians for their mother in the proceedings before the Magistrate Division of the District Court. Appellant subsequently appealed the Magistrate’s decision to the District Court and has appealed the District Court’s Decision to this Court. It is important to note that Dora V. Cole died on May 4, 2018. Therefore, the only remaining issue before this Court is the District Court’s award of attorneys’ fees to the Co-Conservators, Darrell Cole and Tony Cole.

Appellant Kelly Cole appealed the Magistrate’s Decision appointing Darrell Cole and Tony Cole as Co-Guardians and Co-Conservators to the District Court in August, 2017. In a Memorandum Decision dated March 7, 2018 (“**Memorandum Decision**”) <sup>1</sup>, the Honorable D. Duff McKee affirmed the Magistrate’s Decision and awarded attorneys’ fees to the Co-Guardians. Appellant Kelly Cole then filed a Notice of Appeal on March 27, 2018, appealing the Memorandum Decision.

It is difficult to determine exactly what alleged errors Appellant assigns below. However, the issues raised by Appellant in his September 14, 2018 Appellants [sic] Brief (“**Appellant’s Brief**”) include the following: 1) whether Idaho Rules of Civil Procedure 3 and 4 applied to the

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<sup>1</sup> Respondents have filed concurrently herewith a Motion to Augment the Record to include the March 7, 2018, Memorandum Decision which was apparently inadvertently not part of the record.

Guardianship Matter and whether issuance of a summons was required in the Guardianship Matter; 2) whether the lack of issuance of a summons deprived the Magistrate Court of personal jurisdiction<sup>2</sup>; 3) whether service of process was made in accordance with law; 4) whether Respondents should be required to repay attorney fees paid from the estate in the Guardianship Matter; and, 5) whether this Court should overrule the Memorandum Decision in its entirety.

In this Brief, Respondents Darrell Cole and Tony Cole address the aforesaid issues raised by Appellant. However, it would appear to Respondents that the intervening death of Dora V. Cole renders moot all issues raised on appeal, except for the issue of the District Court's award of attorneys' fees. In any event, Respondents' position on appeal is that the Decision of the District Court should be affirmed, and attorneys' fees should be awarded to Respondents on appeal.

## **II. STATEMENT OF CRITICAL FACTS AND APPLICABLE LAW**

The following facts are established by the record in this case:

1. In May 2016, Dora V. Cole was diagnosed with vascular dementia. (R., p. 40.)
2. In July 2016, Darrell Cole and Tony Cole were appointed temporary Co-Guardians and Co-Conservators of their mother, Dora V. Cole. (R., p. 4.)
3. Dora V. Cole was served with the Petition in the Guardianship Matter, the Order Appointing Temporary Guardian and Conservator and Letters of Temporary Guardianship and Conservatorship on Dora V. Cole on July 22, 2016. (R., p.15-16.)
4. Kelly Cole appeared personally at several court hearings in the Guardianship Matter as indicated in various court minutes. (R., p. 21, 27, 37.)
5. A guardian ad litem was appointed for Dora V. Cole. (R., p. 29, 33.)
6. On June 16, 2017, after a court trial, the Magistrate Court made specific findings that it was in the best interest of Dora V. Cole that her sons Darrell Cole and Tony Cole be appointed Co-Guardians and Co-Conservators. (R., p. 42.)
7. Appellant Kelly Cole appealed the Guardianship Matter to the District Court (R., p. 47), Respondents Darrell Cole and Tony Cole appeared and filed Respondents' Brief (R., p.63), and the Honorable Duff McKee issued a Memorandum Decision dated March 7, 2016 finding no errors in the procedures followed in the Guardianship Matter.

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<sup>2</sup> Respondents concede that no summons was issued in the Guardianship Matter; however, as the District Court correctly held, a summons was not required and all applicable process and notice requirements were met.

8. Respondents Darrell Cole and Tony Cole moved for fees and costs, and the Court issued a Ruling on Fees on April 16, 2018 awarding attorney fees in the amount of \$7,874.25 to Respondents on appeal. (R., p.135.)
9. Dora V. Cole died on May 4, 2018 (*See* Appellant’s Brief, p.2).

### **III. STANDARD OF REVIEW**

“We have repeatedly stated that when reviewing a decision of the district court acting in its appellate capacity, this Court will review the record and the magistrate court's decision independently of, but with due regard for, the district court's decision.” *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). “When this Court reviews a decision rendered by a district court acting in its appellate capacity, it considers the trial court's decision, and if that decision is free from error and if the district court affirmed that decision, we affirm the district court's decision as a matter of procedure.” *Montgomery v. Montgomery*, 147 Idaho 1, 5, 205 P.3d 650, 654 (2009).

### **IV. ARGUMENT**

#### **1. THE DISTRICT COURT CORRECTLY HELD THAT A SUMMONS UNDER I.R.C.P. 4 IS NOT REQUIRED IN A GUARDIANSHIP MATTER BECAUSE THE PROBATE CODE DOES NOT REQUIRE IT.**

Appellant concedes that “Dora Cole died on May 4, 2018 so the issues of the Guardianship and Conservatorship are moot.” (*Appellant’s Brief*, p. 2.) However, Appellant then continues to advance the same arguments that he raised before the District Court, and some which he did not. Among Appellant’s arguments is the assertion that a summons was required in the Guardianship Matter.<sup>3</sup> The District Court correctly held that issuance of a summons was neither appropriate nor required in the Guardianship Matter.

The notice requirements in guardianship and conservatorship proceedings are set forth in Idaho Code §15-5-309. The Guardianship Matter does not require a summons directing a defendant to appear or suffer the consequences of default. “A civil action must be commenced by filing a complaint, petition or application with the court.” I.R.C.P. 3(b). “A summons must be directed to the defendant” and “notify the defendant that a failure to appear and defend will result in a default judgment against the defendant or the relief demanded in the complaint” I.R.C.P.

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<sup>3</sup> Respondents Darrell Cole and Tony Cole assume that Appellant argues that a summons should have been served upon Dora V. Cole and/or Appellant Kelly Cole.

4(a)(1)(G), (I). The Guardianship Matter was initiated by a Petition for Appointment of Temporary and Permanent Guardian and Conservator, rather than a Complaint. (R., p. 4.) Respondents Darrell Cole and Tony Cole sought court involvement for the protection of their mother. There were no plaintiffs, there were no defendants, and there was no risk of default against either Dora V. Cole or Appellant Kelly Cole.

Dora V. Cole herself received notice of the Guardianship Matter in accordance with Idaho Code §15-5-309(a). On July 22, 2018, Dora V. Cole was served with the Guardianship Matter initial pleadings. (R., p. 15.) Both an attorney and a guardian ad litem were appointed by the Magistrate Court to represent Dora V. Cole's interests. (R., p. 29.) There was no requirement under Idaho Code §15-5-309(a) or any Idaho Rule of Civil Procedure that Appellant Kelly Cole be personally served with a summons in the Guardianship Matter. However, as early as October 10, 2018, Kelly Cole was served with Notice of Hearing for Permanent Guardian and Permanent Conservator. (R., p. 18-19.) That certificate of service lists Kelly Cole as an "Interested Party". (R., p. 19.) Appellant Kelly Cole appeared personally at hearings held on November 23, 2016, filed a Demand of a Guardian Ad Litem and Continuance on January 30, 2017, and appeared at and presented his positions and arguments at hearings held on January 31, 2017, April 24, 2017, and June 16, 2017. (R., p. 21-28, 35-42.)

Thus, it is undisputed that the statutory notice requirements were satisfied, Dora V. Cole was properly notified of the proceedings and was represented by an attorney and a guardian ad litem, and Appellant Kelly Cole was properly notified and appeared and presented his positions and arguments throughout the Guardianship proceedings. The District Court's Memorandum Decision on this issue is based on substantial evidence and is correct as a matter of law.

**2. THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S CLAIM THAT THE MAGISTRATE COURT LACKED PERSONAL JURISDICTION.**

The Magistrate Court clearly had personal jurisdiction in the Guardianship Matter and venue was appropriate inasmuch as Dora V. Cole resided in Washington County at the Salubria Assisted Living, in Cambridge Idaho. (R., p. 15.)

Appellant Kelly Cole makes no factual or legal argument in support for his contention that "if so is the July 15, 2016 Order Appointing Temporary Guardians and Conservators void for lack of Personal Jurisdiction." (*Appellant's Brief*, p. 3.) However, read in context, Appellant's claim that the Magistrate Court lacked personal jurisdiction appears to be premised



on Appellant's contention that the issuance of a summons was required. As is noted above, the District Court correctly held that a summons was not required to be issued in the Guardianship Matter. Moreover, Appellant waived this argument by extensively participating in the Guardianship proceedings before first raising the issue.

I.R.C.P. 4.1(a) states that: "The voluntary appearance of a party or service of any pleading by the party, except as provided in subsection (b) of this Rule, constitutes voluntary submission to the personal jurisdiction of the court." The judicial interpretations of the Rule have defined "general appearance" as any action other than a special appearance made for purposes of filing a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. The Supreme Court has succinctly stated the rule in holding that "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection." *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 193 P.3d 866 (2008). In *Craft*, the party had moved to dismiss for lack of personal jurisdiction, but, prior to the hearing on that Motion also filed a motion to strike an amended complaint. The Court held that, in so doing, *Craft* had entered his appearance generally and subjected himself to the personal jurisdiction of the Court. The opinion also cited other factual circumstances in which a general appearance had been found to have been entered by the filing of motions for an extension of time, for a change of venue and to strike a Complaint. Similarly, in *EGP Investments LLC v. Skinner*, 2014 WL 7278693 (Ct. App. 2014), the Court of Appeals held that propounding discovery after filing a special appearance and motion to dismiss constituted a general appearance in the case.<sup>4</sup>

Under the clear language of I.R.C.P. 4.1(a) and the above-cited holdings of the Supreme Court and Court of Appeals, the record of the proceedings below establishes that Appellant subjected himself to the jurisdiction of the Magistrate Court and has waived the right to now challenge personal jurisdiction on appeal. Appellant first raised his argument that the Magistrate Court lacked jurisdiction because no summons had been issued in a Motion to Dismiss, filed on the eve of trial. Prior to filing the Motion, Appellant fully participated in the proceedings below, as evidenced by the following actions:

1. He filed an Objection to the appointment of Respondents as Permanent Guardians and Conservators (R., p.6.);

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<sup>4</sup> See also *Idaho Dept. of Health and Welfare v. John Doe*, 154 Idaho 175, 296 P.3d 381 (2013); *Hutchinson v. State*, 134 Idaho 18, 995 P.2d 363 (Ct. App. 2000).

2. He initiated discovery and responded to discovery (R., p.7.);
3. He moved for the appointment of a Guardian Ad Litem and for a continuance of the hearing on the permanent appointment, both of which motions were granted (R., p.23-26, 29-34);
4. He appeared at and presented argument at the hearing on his motions (R., p.27-28.);
5. He moved to disqualify the Magistrate Judge (R., p.8.);
6. He appeared at the hearing and presented argument on his motion (R., p.35-36.);
7. He participated in the pretrial conference (R., p.35-36.);
8. He issued trial subpoenas (R., p.9); and,
9. He filed trial witness and exhibit lists (R., p.10).

Under the authority cited above, even if these actions had been taken after the filing of the Motion to Dismiss, the outcome as a matter of law would be no different. Appellant subjected himself to the personal jurisdiction of the Magistrate Court and has waived the right to now claim otherwise.

**3. APPELLANT'S ARGUMENT THAT RESPONDENTS' ATTORNEY FEES SHOULD BE REPAID TO THE ESTATE IS BEING RAISED FOR THE FIRST TIME IN THIS APPEAL.**

Appellant cannot raise a new argument for the first time on appeal. Whether attorney fees should be repaid that were expended by the Estate in the Guardianship Matter and also in the District Court appeal was not an issue raised below. As such, it cannot now be raised for the first time on appeal. *In re Estate of Kaminsky*, 141 Idaho 436, 111 P.3d 121 (2005)<sup>5</sup>.

**4. THE DISTRICT COURT'S MARCH 7, 2018 MEMORANDUM DECISION SHOULD BE UPHeld AS THERE WAS NO ERROR BELOW.**

In its Memorandum Decision, the District Court correctly observed: "The sole issue raised in [Appellant Kelly Cole's] appeal is that the court below erred in not dismissing the petition for lack of jurisdiction upon the grounds that a 'summons' had not been served upon either Dora Cole or upon the appellant, as he contends is required by Idaho Rule of Civil Procedure 4(a)." *Memo Decision*, p. 3. As is argued above, the District Court correctly held that

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<sup>5</sup> Pursuant to Idaho Code §15-5-314, any guardian or temporary guardian is entitled to receive from the estate necessary expenses including attorney fees.

the Magistrate Court had jurisdiction in the Guardianship Matter and that, if any defect in notice had existed, Appellant's participation in the proceedings prior to first raising the issue supported a finding that Appellant had waived the right to challenge the adequacy of the notice.

The Memorandum Decision made specific findings in support of the award of attorneys' fees to Respondents, citing that Appellant demonstrated a "fundamental lack of understanding of the principles of due process, the distinctions between the various types of actions, and the manner and means of giving notice when required." *Memo Decision*, p. 6.

Respondents filed their Memorandum of Costs and Attorney Fees and Declaration of Steven J. Millemann on March 30, 2018 setting forth the legal framework and I.R.C.P. 54(e)(3) factors. (R., p. 115-124, 127-128.) The Declaration of Steven J. Millemann set forth I.R.C.P. 54(e)(3) factors including that his firm represented Respondents in the appeal since its filing, the skill required to perform the legal services and the experience and ability of the attorneys, and the prevailing charges for like work. (R., p. 116-117.) Respondents reduced the total fees claimed for fees incurred related to Respondent's Motion to Dismiss the Appeal, which was not granted. (R., p. 118.) Respondent sought fees in the amount of \$8,946.75. (R., p. 118.)

The Ruling on Fees specifically found that "the affidavit [Declaration of Steven J. Millemann] sufficiently identifies the hours claimed to be those related to the cross appeal, at a billing rate consistent with counsel's experience. The hours enumerated and the billing rate claims are appropriate and reasonable to the facts of the case. The court does not allow attorney fees for the effort of seeking fees, and therefore does not allow the identified \$1,072.50 for preparation of the fee request. In addition, the court has considered the [sic] all of the elements enumerated in I.R.C.P. 54(e)(3) in its final decision." (R., p. 135-136.) The Court awarded fees in the amount of \$7,874.25.

Appellant has offered no factual or legal basis for the reversal of the District Court's award.

#### V. ATTORNEY FEES

Appellant Kelly Cole's arguments set forth in this appeal have no basis in law or fact. Appellant persists in advancing an argument that was rejected in the Guardianship Matter and found to be frivolous on appeal before the District Court. Appellant continues to make the same unfounded factual assertions without any regard for the Record on which the Magistrate based his Decision. Appellant also raises several issues for the first time on appeal. Appellant's Brief fails

to offer any citations to the Record or applicable legal authority for his arguments made in this appeal. Appellant also concedes that “Dora Cole died on May 4, 2018, so the issues of the Guardian and Conservatorship are moot.” (*Appellant’s Brief*, p. 2.) However, despite this concession, Appellant continues to advance arguments related to the Guardianship Matter and does not voluntarily dismiss his appeal.

This appeal was brought frivolously, unreasonably and without foundation. Under Idaho Code §12-121, Respondents should be awarded their attorney fees as the prevailing party for having to defend this frivolous appeal. Respondents are also entitled to recover their costs as the prevailing party pursuant to I.A.R. Rule 40(a).

## VI. CONCLUSION

Based on the foregoing, Respondents Darrell Cole and Tony Cole request that this appeal be dismissed with prejudice, the Memorandum Decision and Rulings on Fees below be upheld, and Respondents be awarded their attorneys’ fees and costs incurred in their defense of the appeal.

DATED this 11<sup>th</sup> day of October, 2018.

MILLEMANN PEMBERTON & HOLM LLP

By: 

Steven J. Millemann

Amy K. Holm

*Attorneys for Respondent*

CERTIFICATE OF SERVICE

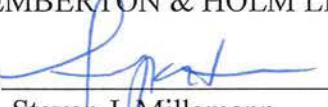
I hereby certify that on the 11<sup>th</sup> day of October, 2018, I electronically filed the foregoing which will automatically cause a true and correct copy of the foregoing document to be served upon the following persons by the method indicated below:

**Respondent-Appellant:**

Kelly Cole  
2583 Council-Cuprum Rd.  
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By:   
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