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**In Re: Guardianship of Rubin, 137 Nev. Adv. Op. 27 (Jul. 1, 2021).**

Julia Standish

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### **Summary**

In an opinion drafted by Chief Justice Hardesty, the Nevada Supreme Court considered whether a certificate under NRS 159.044(2)(i)(1) needs to be based on an *in-person* examination of the proposed protected person. The Court concluded that although a certificate is required for the district court to consider the petition, the certificate does not need to be based on an in-person examination of the proposed protected person. Additionally, it is within the sound discretion of the district court to decide whether the petition and certificate warrant the need for a guardianship or further proceedings, such as ordering discovery or holding an evidentiary hearing.

### **Background**

This case arose when appellant Jason Rubin filed a petition for appointment of temporary guardian and to establish a general permanent guardianship over his mother's, respondent Ida Rubin, estate and person. This first filing included Jason's allegation that Ida suffered from paranoid schizophrenia and that her mental health was declining evidenced by call logs and incident reports. Ida objected. The district court denied Jason's petition without prejudice reasoning that, under NRS 159.044(2)(i)(1), it cannot be granted without a physician's certificate. However, the order also stated that Jason could refile the petition if he produced a physician's certificate.

Thereafter, Jason filed a second petition, the "Petition for Rehearing and Reconsideration of Petition for Appointment of Guardians of the Person and Estate of Ida Rubin." This one mirrored the first petition, but also included a physician's certificate. However, the doctor never saw Ida in person before issuing it and simply recommended that she "receive a complete neurological evaluation and a complete psychiatric evaluation to assess her mental functioning and possible need for treatment . . . [ , which] could also provide further data to support [a] need for [a] guardianship." The district court also denied this petition reasoning that the physician's certificate was insufficient as the signing doctor never evaluated Ida in person and, therefore, "was based on hearsay and double hearsay." Additionally, the district court stated that it would not "not open discovery or require a [medical] evaluation of . . . I[da] . . . as it is an inappropriate shifting of the burden." Jason appealed this decision.

### **Discussion**

The Court found that the district court did not abuse its discretion when it denied the guardianship petition. First, the Court concluded that the district court did not err when it concluded that a physician's certificate is required for a guardianship petition. This is because the

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<sup>1</sup> By Julia Standish.

use of “must” in NRS 159.044(2) makes a physician’s certificate a requirement.<sup>2</sup> Therefore, it was appropriate that the district court required that Jason include a certificate with his guardianship petition.

The Court also determined that while the district court’s reasoning was flawed in denying the petition, it was ultimately the correct result. The district court reasoned that the physician's certificate was insufficient to satisfy NRS 159.044(2)(i)(1) because the physician had not evaluated Ida in person and, therefore, it was based on hearsay. This is incorrect reasoning because hearsay is often used in expert opinions and is valid under NRS 50.285(2).<sup>3</sup> Additionally, the plain language of NRS 159.044(2)(i)(1)(I)-(V) does not require any in-person examination, and the Court declined to revise the statute to require it. Even so, the Court determined that the district court reached the correct result in denying the petition because even though Ida’s behavior was concerning, it did not warrant the conclusion that her safety was in jeopardy. Additionally, Mark, Ida’s other son, already had a power of attorney over her. Therefore, the district court did not abuse its discretion when it denied Jason’s petition for a guardianship over Ida's person and estate.

In addition, the Court decided it was within the sound discretion of the district court to deny Jason’s petition without conducting discovery or holding an evidentiary hearing. Because Nevada’s guardianship statutes are silent on whether discovery is required in guardianship petitions, the Court concluded that the district court has discretion to control and limit discovery under NRCP 26. Likewise, the Court reasoned it is also under the district court’s discretion to determine whether to conduct an evidentiary hearing in a guardianship matter. Therefore, while it was erroneous for the district court to declare that discovery would be “an inappropriate shifting of the burden,” the district court was still correct in denying further investigation and proceedings. This is because the Court felt the record did not indicate that Ida was unable to care for herself or was a danger to herself, but rather that she suffered from mental illness. Mental illness does not surpass the high bar a guardianship requires as guardianships “are not to be lightly granted and are not required for every individual who suffers from a mental illness.” Therefore, it was ultimately correct for the district court to deny the petition without ordering discovery or holding an evidentiary hearing.

## **Conclusion**

The Court affirmed the district court’s decision to deny the guardianship petition even though the reasoning behind the decision was flawed. The Court, therefore, concluded that although a physician's certificate is required for a district court to consider a petition for guardianship, the certificate does not need to be based on an in-person examination of the proposed protected person. Furthermore, it is within the sound discretion of a district court to

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<sup>2</sup> NEV. REV. STAT. 159.044(2) states that “[t]o the extent the petitioner knows or reasonably may ascertain or obtain, the petition must include, without limitation” certain information and documents.

<sup>3</sup> NEV. REV. STAT. 50.285(2) states that experts may rely on “facts or data [that are] not . . . admissible in evidence so long as it is “of a type reasonably relied upon by experts in forming opinions or inferences upon the subject.”

decide whether the petition and certificate warrant the need for a guardianship or further proceedings, such as ordering discovery or holding an evidentiary hearing.