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STATE OF WASHINGTON
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THE SUPREME COURT FOR THE STATE OF WASHINGTON

In re the Guardianship of:

JAMES D. CUDMORE

No. 91493-1

ANSWER OPPOSING PETITION FOR REVIEW

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 ORIGINAL

Respondent, Timothy Lamberson, opposes the petition to review because petition fails to meet the criteria for accepting review. This answer is provided pursuant to RAP 13.4(d). In requesting review, attorney John Bolliger (Bolliger) continues his attempt to appeal on behalf of a party he does not represent. The trial court expressly denied his petition to be appointed as counsel for James Cudmore (Cudmore) and appointed another attorney to represent Cudmore. Despite not representing Cudmore, Bolliger continued to file motions purportedly on Cudmore's behalf up to and including this appeal. The court of appeals on its own motion brought the issue of whether Bolliger had standing to appeal on behalf of a party that he did not represent. After briefing and argument upon the matter, the court commissioner concluded that Bolliger did not have standing to appeal on behalf of Cudmore. If Cudmore wanted to appeal the order appointing a guardian over his person and estate or any other order of the trial court, he could have done so through the counsel that represented him. Therefore, the Court should deny the petition for review.

I. FACTS AND PROCEDURAL HISTORY

On July 12, 2013, Respondent Timothy Lamberson (Lamberson), filed a petition for guardianship of the person and estate of his long-time stepfather, Cudmore. *CP 541-549*. After being appointed as guardian ad

litem, Wayne May (May) petitioned the trial court to appoint attorney Rachel Woodard (Woodard) to act as attorney for Cudmore. *CP 1-2; see also* RCW 11.88.090(5)(g); GALR 4(h)(1-2). The same day, Bolliger also filed a petition to be appointed as the attorney for Cudmore. *CP 17-19*. On July 19, 2013, after a hearing on the matter, the trial court appointed Woodard as attorney for Cudmore and denied Bolliger's petition to be appointed as Cudmore's attorney. *CP 21*. Bolliger filed a motion for reconsideration that the trial court denied. *CP 45-46*. Bolliger continued to file motions, memorandums, and declarations despite not being the attorney for Cudmore. *See e.g. CP 42-43; CP 48-52; CP 54-75; CP 118-119; CP 129-130*.

On December 27, 2013, the trial court entered an order appointing Lamberson as the full guardian of Cudmore's person and estate. *CP 721-731*. Cudmore appeared at the hearing with his attorney, Woodard. *Id.* On January 24, 2014, Bolliger filed a notice of appeal in this matter. In the notice of appeal, Bolliger identified following orders for appellate review: (1) order appointing guardian ad litem; (2) order appointing attorney for the alleged incapacitated person; (3) order denying reconsideration of the order appointing attorney; and (4) order appointing a full guardian of person and estate of Cudmore. *CP 361*.

Aware that he was not the attorney for Cudmore, Bolliger presented himself in a variety of fashions on appeal. Sometimes he was “the former attorney for the appellant in the instant Guardianship appeal.” *Motion to Stay Present Appeal Until Appeal is Filed in a Companion Superior Court Case*, pg. 2. Other times Bolliger declared that he was “the former attorney for the alleged incapacitated person, [and also] an appellant herein.” *Motion for Permission to Receive Copies of Sealed Documents from the Clerk’s File*, pg. 2.

This led the court of appeals to inquire on its own motion whether Bolliger qualified as an aggrieved party for the purposes of RAP 3.1. *Ltr. from Court of Appeals, September 24, 2014*. Bolliger then changed his position in the matter and claimed that he was still in fact the attorney for Cudmore and represented Cudmore in this appeal. *Appellant’s Reply Brief Addressing Appealability Under Guardianship of Lasky*, pg. 25. Bolliger claimed that the declarations identifying himself as the “former counsel” for Cudmore were “merely inadvertent scrivener’s errors” and that in fact he had always been counsel for Cudmore on appeal. *Id. at pg. 8*.

After issuing a briefing schedule and hearing argument on the issue, the commissioner ruled as follows:

Having considered this Court’s motion to determine the appealability of this matter, the parties’ memoranda and Mr. Bolliger’s reply thereto, the record, file, and oral

argument of counsel, and being of the opinion that Mr. Bolliger does not have standing to pursue this appeal on behalf of Mr. Cudmore in light of RAP 3.1 (“Only an aggrieved party may seek review by the appellate court”); *In re Lasky*, 54 Wn. 841, 848, 776 P.2d 695 (1989) (to be an aggrieved party, the person appealing must have “proprietary, pecuniary, or personal rights” that are substantially affected by the trial court decision); *Breda v. P.P.O. Elks Lake City 1800 So-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (an attorney may not personally appeal decisions that only affect his client since his own rights are not affected by the decisions and he is not an aggrieved party); and *In re Guardianship of Cobb*, 172 Wn. App. 393,402,292 P.3d 772 (2012) (a third party does not have standing to appeal a decision affecting another person’s rights unless the third party can demonstrate the other person’s rights could not be vindicated through their appointed guardian); and here, the trial court appointed a guardian and another attorney to represent Mr. Cudmore; now, therefore,

IT IS ORDERED, since Mr. Bolliger does not have standing to pursue an appeal on behalf of Mr. Cudmore, this appeal filed by Mr. Bolliger is dismissed.

Comm’r Ruling, December 16, 2014. The commissioner’s ruling was affirmed by a panel of the court. *Order Denying Motion to Modify Commr’s Ruling.*

II. ARGUMENT

The Court should deny the petition for review because the ruling of the court of appeals determining that Bolliger is not an aggrieved party to rulings that only affect non-client Cudmore is consistent with Washington law. This conclusion does not create a conflict with the decision of this

Court or the courts of appeal, nor does it raise a significant constitutional issue or involve an issue of substantial public interest.

In considering whether to grant discretionary review, the Court considers the following factors:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In this matter, the court of appeals dismissed Bolliger's appeal because he lacked standing to appeal issues on behalf of a person that he does not represent. Only an aggrieved party has standing to pursue an appeal. RAP 3.1.

Cudmore himself could have been an aggrieved party to any and all of the trial court's orders in the guardianship. *Pet. for Rev. pg. 14.* However, Cudmore did not appeal any orders of the trial court. Only Bolliger, an attorney whose petition to be appointed counsel was denied by the trial court, has appealed. Bolliger does not represent Cudmore in this appeal. This is something that even Bolliger himself understood until he learned that it was fatal to his standing under RAP 3.1. *See Mot. to Stay Present Appeal Until Appeal is Filed in a Companion Superior Court*

Case, pg. 2 (Declaring “I am the former attorney for the appellant in the instant Guardianship appeal”). This ruling does not give rise to any of the factors warranting discretionary review under RAP 13.4(b). Therefore, this Court should deny the petition for review.

A. The Court Should Deny The Petition For Review Because The Ruling Of The Court Of Appeals Concluding That Bolliger Was Not An Aggrieved Party Is Consistent With The Rulings Of This Court And The Courts Of Appeals.

The Court should deny the petition for review because the ruling of the court of appeals—that Bolliger did not have standing to appeal on behalf of Cudmore—is consistent with the prior decisions of this Court and the courts of appeal. Under RAP 13.4, the Court will only accept review of a petition if the decision meets one or more of four considerations, including whether the decision conflicts with a decision of this Court or another Washington appellate decision. RAP 13.4(b)(1-2).

RAP 3.1 provides that “[o]nly an aggrieved party may seek review by the appellate court.” RAP 3.1. To be an aggrieved party, one must have “proprietary, pecuniary, or personal rights” that are substantially affected by the trial court decision. *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695, 698 (1989) (quoting *Cooper v. Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987)). In *Lasky*, attorney Jack Steinberg was approached by Paula Lasky, a ward whose brother Peter

was her guardian. *In re Lasky*, 54 Wn. App. at 844. Peter was also the trustee of a trust of which Paula was the beneficiary. *Id.* at 843. The court appointed Steinberg as the attorney for Paula for the limited purpose of seeking a trust accounting. *Id.* at 844. Then, as guardian of Paula, Steinberg filed a summons and complaint against Peter seeking to remove Peter as trustee of the trust. *Id.* at 845. After subsequent hearings on the matter, the trial court ruled that Peter should continue as trustee of the trust and that Steinberg should be removed as guardian of Paula. *Id.* at 847.

Steinberg filed a notice of appeal regarding the order that dismissed the action and removed him as Paula's guardian. *Id.* at 847. On appeal, the trust contended that "Steinberg lacks standing because he has been removed and replaced as Paula's guardian by valid court order [and] has no authority to act on her behalf in bringing this appeal, and is not an 'aggrieved party' as required by RAP 3.1." *Id.* at 848. The court agreed that "Steinberg ha[d] no interest in the guardianship or Trust estate other than for compensation due him" and therefore lacked authority to challenge the order which removed him as guardian. *Id.* at 850. Based on this holding, the appellate court dismissed the Steinberg's appeal of the order removing him as guardian and his "arguments regarding this issue" were not considered. *Id.*

Division II reached a similar conclusion to *Lasky* in *In re Guardianship of Cobb*, 172 Wn. App. 393, 402, 292 P.3d 772, 776 (2012) *review denied*, 177 Wn.2d 1017, 304 P.3d 114 (2013). In *Cobb*, three siblings sought to become guardian of their brother Sean. *Id.* at 395. Sean, who was represented by counsel, produced a hand-written letter during trial which included a jury demand. *Id.* at 398. The court discussed the request on the record but ultimately the court continued with the ongoing non-jury trial. *Id.* Sean was found incapacitated and his sister, Lorraine Scott, was appointed as a limited guardian. *Id.* at 395. Christine and Daniel Scott, whose petition to be appointed as guardians was denied, appealed, alleging in part:

[T]he trial court abused its discretion by denying Sean's demand for a jury trial contained in a writing handed to the judge during Sean's testimony at the end of the trial [and] the trial court denied Sean's procedural due process rights by relying on the guardian ad litem's (GAL) final report....

Id. On appeal, the court immediately questioned whether Christine and Daniel had standing to appeal on behalf of their brother. *Id.* at 401. The court noted that in general, "a person lacks standing to vindicate the constitutional rights of a third party." *Id.* (citing *State v. Gutierrez*, 50 Wn. App. 583, 591-92, 749 P.2d 213 (1988)). Christine and Daniel argued that they had standing under a "next friend" federal habeas corpus analysis. *Cobb*, 172 Wn. App. at 402-03. The court rejected the argument

that Christine and Daniel had “next friend” standing, “even assuming that ‘next friend’ standing analysis applies to litigants appealing guardianship determinations on behalf of a third party.” *Id.* at 403. In doing so, the court held “that Christine and Daniel have not sufficiently demonstrated Sean’s inability to vindicate his rights through Lorraine, his appointed guardian, and they therefore lack standing to appeal the trial court’s rulings in the guardianship proceeding.” *Id.*

Not only was the ruling of the commissioner consistent with the rulings of this Court and the courts of appeal of this state, Washington law is in accord with the great weight of authority from other jurisdictions: An attorney cannot appeal on behalf of a non-client or former client. *See e.g. In re Knichel*, 347 S.W.3d 127, 130 (Mo. Ct. App. 2011) (law firm did not having standing to appeal order removing it from position as special co-trustee); *Baxter Homeowners Ass’n, Inc. v. Angel*, 369 Mont. 398, 404, 298 P.3d 1145, 1149 (2013) (attorney could not appeal administrative decision on behalf of potential, but not presently existing, clients); *Life v. Cnty. of Los Angeles*, 218 Cal. App. 3d 1287, 1292, 267 Cal. Rptr. 557, 559 (Ct. App. 1990) (former attorney was not aggrieved party to adverse judgment against former client); *In re Guardianship of Graham*, 963 So. 2d 275, 276 (Fla. Dist. Ct. App. 2007); *In re Roseman’s Estate*, 203 P.2d 867, 868 (Ariz. 1949). In this case, Bolliger affirmatively asserted that he

is not the attorney for Cudmore in the declarations attached to his appellate motions, one of which read: “I am the former attorney for the appellant in the instant Guardianship appeal.” *Motion to Stay Present Appeal Until Appeal is Filed in a Companion Superior Court Case*, pg. 2.

One particularly relevant case to the question before the commissioner was the Ninth Circuit Court of Appeals’ decision in *Matter of Grand Jury Subpoena Issued to Chesnoff*. 62 F.3d 1144, 1144 (9th Cir. 1995). In *Chesnoff*, attorney David Chesnoff and the law firm of Goodman & Chesnoff appealed a district court order disqualifying them from further representation of client Richard Perry. *Id.* Perry was under investigation for tax evasion by the IRS and a grand jury was convened. *Id.* at 1145. The grand jury issued a subpoena to Chesnoff to testify about Perry’s “expenditures, income, and life style, and about fees paid” to the firm. *Id.* Chesnoff refused to testify and was held in contempt. *Id.* The government then issued a records subpoena to the law firm. *Id.* The law firm refused to comply. *Id.* Ultimately, the firm agreed to produce the records if the government recommended the contempt order be purged and after Perry “agreed to waive any conflict of interest that might exist between himself and Chesnoff.” *Id.* The trial court did not agree to accept the waiver, finding the potential conflict of interest to be substantial and

therefore disqualified Chesnoff and the law firm from representing Perry.

Id. Chesnoff and the law firm timely appealed. *Id.*

The court of appeals on its own motion requested that the parties address Chesnoff's standing to bring the appeal. *Id.* In discussing the issue, the court began with the following framework:

Appellants have not identified any right of their own that has been affected by the district court's order. Instead, by their own account, they seek to protect their client's right to counsel of his choice. Ordinarily, "a litigant 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S. Ct. 1428, 1431, 108 L.Ed.2d 701 (1990).

Id. The court, recognizing the Constitutional requirement of a case or controversy, needed to resolve two questions: (1) whether Chesnoff suffered an injury-in-fact as required for standing under Article III; and (2) even if the Article III standard was met, whether the court should allow the litigant to proceed on the third party's behalf. *See Id.* The court answered "no" to both of these questions. *Id.* at 1145-46.

In rejecting the Article III standing argument, the court determined "[a]ppellants in this case have nowhere identified any injury to *them* caused by the district court's disqualification order." *Id.* at 1146 (emphasis in original). Thus, the court concluded:

Moreover, we note that even if Appellants had satisfied Article III's requirement, prudential considerations would

still lead us to reject their assertion of third-party standing. Although Appellants do have a close relationship to the third party whose rights they seek to assert, there is no “hindrance to the third party’s ability to protect his ... own interests,” If and when Perry is injured by the disqualification order [...] he will clearly be “free to appeal [the order] on his own behalf,” if he so desires.

Id. at 1146 (internal citations omitted). Based on this, Chesnoff and the law firm could not appeal the disqualification order on behalf of Perry and the appeal was dismissed. *Id.*

The appeal in *Chesnoff* and the question before the commissioner bear striking similarities. The attorney in *Chesnoff* was disqualified by the court after a conflict of interest arose. Bolliger’s petition to be appointed attorney for Cudmore was denied, at least in part, because it appeared he would likely be a witness in the case. *RP*, 7/19/13 at 20; see also *In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 905, 332 P.3d 1063, 1075 (2014) (it remains the providence and duty of the court to ensure compliance with the rules of professional conduct, and where necessary, enter orders remedying the violation where the attorney refuses voluntary compliance). Both attorneys sought to appeal orders on behalf of clients that they did not represent or no longer represented. As discussed above, Washington courts do not allow attorneys to appeal issues on their own behalf when the issues only affect their client. See *Cobb*, 172 Wn. App. at 403. Based on this, the Court should deny the petition for review because

the commissioner's ruling is consistent with the rulings of this Court and the courts of appeal. Bolliger cannot appeal on behalf of a person he does not represent.

B. The Court Should Deny The Petition For Review Because The Decision Of Court Of Appeals Does Not Raise A Significant Question Of Law Under The State Or Federal Constitution Nor Does It Involve An Issue Of Substantial Public Interest.

The Court should deny the petition for review because the prohibition of RAP 3.1 disallowing a non-party to purportedly appeal on the behalf of a party to a trial court proceeding does not raise a constitutional or substantial public interest concern. The Court may grant a petition for review where the decision below raises a significant constitutional question or a question of substantial public interest. RAP 13.4(b)(3-4). A decision may raise a question of substantial public interest where the ruling below has the potential to affect other matters and “invites unnecessary litigation on that point and creates confusion generally.” *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005). The Court will not consider facts unsupported by the record in a petition for review. *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615, n.1, 160 P.3d 31, 33 (2007).

In the petition, Bolliger asserts that “[t]he AIP in this guardianship case (‘Mr. Cudmore’)” is the identified petitioner. *Pet. for Rev.*, pg 7.

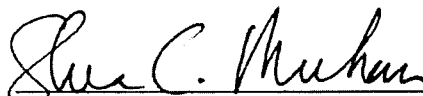
This contention is not supported by the record. Bolliger's petition to be appointed counsel as Cudmore was expressly denied and Cudmore was represented by a separate attorney throughout the guardianship process. CP 21-22; CP 722. Further, Bolliger's contention that "the Court of Appeals erroneously treated this issue as one of whether Mr. Bolliger has standing to represent Mr. Cudmore in this appeal" is particularly confusing. See *Pet. for Rev.*, pg 7, n. 3. The motion before the commissioner was the "Court's motion to determine appealability in light of In re Guardianship of Lasky, 54 Wn. App. 841, 776 P.2d 695 (1989)." *Ltr. from Court of Appeals, September 24, 2014*. Bolliger does not explain how the court of appeals misinterpreted its own motion. Nor does he explain how the court denying Bolliger the ability to appeal on behalf of a person he does not represent violates the constitution or affects the public interest. RAP 3.1 is consistent with Article III of the United States Constitution which requires a case or controversy for subject matter jurisdiction. U.S. Const. art. III, § 2; *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 103 Wn. App. 764, 769, 14 P.3d 193, 195 (2000) *aff'd*, 146 Wn.2d 207, 45 P.3d 186 (2002). Similarly, Washington requires opposing parties and "which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149, 1153

(2001). Based on this, Bolliger has failed to raise an issue meriting review. Therefore, this Court should deny the petition for review because the commissioner's ruling that Bolliger could not appeal issues on behalf of Cudmore, a person he does not represent, does not raise an issue of constitutional importance or affect a substantial public interest.

III. CONCLUSION

The Court should deny the petition for review because the court of appeals correctly concluded that Bolliger does not have standing to appeal issues on behalf of Cudmore. This decision was in accord with the rulings of this Court and the lower courts of appeal. Further, the decision does not implicate the constitutional rights of the appellant or affect a substantial public interest. Therefore, the petition for review should be denied.

DATED this 30th day of April, 2015



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Attorneys for Respondent

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No. 91493-1

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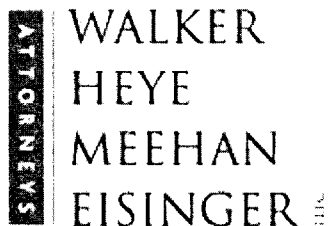
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