Supreme Court No. 91493-1
Court of Appeals No. 32206-8

COURT OF APPEALS OF THE STATE OF WASHINGT

DIVISION III

In re the Guardianship of:

JAMES D. CUDMORE, Appellant

and
JOHN C. BOLLIGER, Appellant

and
TIM LAMBERSON, Respondent

PETITION FOR REVIEW

Bolliger Law Offices
John C. Bolliger, WSBA No. 26378
Attorney for Appellants

5205 W. Clearwater Ave.
Kennewick, WA 99336

(509) 340-3740 – phone
(509) 734-2591 – fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Decisional Law

State Statutes

Court Rules

Other

This petition presents two issues for review, identified below as "Issue No. 1" and "Issue No. 2."

Identity Of The Petitioner For Issue No. 1. The undersigned attorney ("Mr. Bolliger").

Citation To The Court Of Appeals Decisions For Which Review Is Requested For Issue No. 1. The Court of Appeals' 12/16/14 *Commissioner's Ruling* and 3/10/15 *Order Denying Motion to Modify Commissioner's Ruling.*

Issue No. 1. Does Mr. Bolliger have standing to appeal the CR 11 sanction that the trial court imposed against him personally? Answer sought by Mr. Bolliger: "Yes."

Statement Of The Case For Issue No. 1. On 12/27/13, the trial court imposed an unwanted and unneeded guardianship against Mr. Cudmore – and unlawfully revoked his Will. [CP 378-88] On 1/24/14, Mr. Bolliger filed Mr. Cudmore's notice of appeal therefor. [CP 360-88] On 7/22/14, with respect to Mr. Bolliger's representation of Mr. Cudmore in the case, the trial court imposed $9,782.75 in CR 11 sanctions against Mr. Bolliger. [CP 934-40]

With its 9/24/14 letter, the Court of Appeals informed the parties that "[t]his matter will now be set on a Court's motion to determine appealability in light on In re Guardianship of Lasky, 54 Wn.App. 841, 776 P.2d 695 (1989)." In his *Appellants' Brief Addressing Appealability Under Guardianship of Lasky, 54 Wn.App. 841, 776 P.2d 695 (1989),* Mr. Bolliger described how **the Lasky decision expressly acknowledges that**

Mr. Bolliger has standing to appeal the attorneys' fees which the trial court imposed upon him personally.[1]

Moreover, as Mr. Bolliger explained in his *Motion to Modify Commissioner's Ruling,* even Mr. Bolliger's opposing counsel ("Mr. Meehan") acknowledged, in four places in his Lasky briefing, that Mr. Bolliger has standing to appeal the CR 11 sanction which the trial court imposed against him personally.[2]

---

[1] Mr. Bolliger's briefing (on its pp. 33-34) reads as follows on the subject:

II. Lasky Expressly Acknowledges Mr. Bolliger's Standing To Appeal The Trial Court's Imposition Of CR 11 Sanctions Against Him

In Lasky, supra, the alleged incapacitated person, Ms. Lasky, was described as follows:

> . . . mildly retarded and lacks the judgment necessary to control money.

Id. at 843. On 3/13/85, a guardianship therefore was imposed against Ms. Lasky. With respect to that guardianship, the court later made appointments of attorney Steinberg in **two** capacities, as follows (with emphases added):

> By order entered September 5, 1985, Steinberg was appointed as **counsel for [Ms. Lasky]** . . . .
>
> On January 23, 1986, Findings of Fact, Conclusions of Law and Judgment were entered by the Court Commissioner, removing Peter and his wife as guardians and appointing Steinberg as [Ms. Lasky's] **guardian and attorney for the guardianship.**

Id. at 844. Thus, Steinberg was appointed both Ms. Lasky's guardian and her attorney. Thereafter, with respect to his appointment as an **attorney** in the case, after finding that Steinberg had (1) failed to follow express court orders and (2) failed to reasonably investigate the material facts before pursuing the case, the court imposed CR 11 sanctions against Steinberg. Steinberg appealed the imposition of those CR 11 sanctions against him. On appeal, Steinberg's opposing party argued that Steinberg did not have standing to appeal the imposition of CR 11 sanctions against him. Rejecting that argument, the Lasky court held as follows (id. at 848):

> RAP 3.1 provides that "[o]nly an aggrieved party may seek review by the appellate court." An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. Cooper v. Tacoma, 47 Wn.App. 315, 316, 734 P.2d 541 (1987). Here, Steinberg was denied attorneys fees and had CR 11 sanctions imposed against him by order filed February 24, 1988. This order substantially affected a pecuniary right to fees. Therefore, Steinberg is an "aggrieved party" who may appeal that order.

Thus, Lasky expressly acknowledges Mr. Bolliger's standing to appeal the trial court's imposition of CR 11 sanctions against him.

[2] Mr. Bolliger's motion (on its pp. 15-16) reads as follows on the subject:

Fourth, even Mr. Meehan has acknowledged that (again, in this appeal) Mr. Bolliger has standing to appeal the trial court's imposition of attorneys' fees against him. See, e.g., see Mr. Meehan's *Re: Court's Motion to Determine Appealability – Memorandum in Support of Position That Appellant Lacks Standing to Appeal all Asserted Errors Other Than Imposition of CR 11 Sanctions,* which he filed in connection with his "standing" issue addressed above.

Thus, the parties both took the position that there is nothing in Lasky, or any other decision, which prevents Mr. Bolliger – on grounds of lack of standing – from appealing the CR 11 sanction which the trial court imposed against him personally. However, in her *Commissioner's Ruling,* the Honorable Joyce J. McCown concluded as follows (with emphasis added):

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

The bolded portion from Commissioner McCown's just-quoted conclusion reveals that she failed to address this Issue No. 1, at all. However, because her conclusion ended with the words "this appeal filed by Mr. Bolliger is dismissed," the *Commissioner's Ruling* has the erroneous effect of holding that Mr. Bolliger does not have standing to appeal the CR 11 sanction which the trial court imposed against him personally.

In his brief (p. 2), Mr. Meehan represented to the Court as follows (with emphases added):

> .... Bolliger's **standing** as a "aggrieved party" under RAP 3.1 is limited **to challenging the order imposing CR 11 sanctions against him.**

Further in his brief (p. 3), Mr. Meehan represented to the Court as follows (with emphasis added):

> This Court should conclude that Bolliger is not an aggrieved party in regard to the orders appealed – **except the order granting CR 11 sanctions against him** ....

Further in his brief (p. 7), Mr. Meehan represented to the Court as follows (with emphasis added):

> .... Therefore, this Court should conclude that all issues **other than the imposition of CR 11 sanctions against Bolliger** are not appealable ....

Finally in his brief (p. 10), Mr. Meehan represented to the Court as follows (with emphasis added):

> .... Therefore, this Court should conclude that Bolliger is not an aggrieved party for any of the issues he has asserted **except the imposition of CR 11 sanctions against him.** ....

Thus, the parties are in full agreement that Mr. Bolliger certainly has standing to appeal the trial court's imposition of attorneys' fees against him.

Mr. Bolliger therefore filed his *Motion to Modify Commissioner's Ruling,* explaining all of the foregoing (and much more) therein. However, in its *Order Denying Motion to Modify Commissioner's Ruling,* the three-judge panel provided no analysis or discussion of this Issue No. 1 whatsoever, holding only as follows:

> IT IS ORDERED the motion to modify the commissioner's ruling is denied.

Argument For Issue No. 1. A person who is not formally a party to a case can have standing to appeal a trial court's order where the order directly impacts that person's legally protected interests. Such a person needs to be an "aggrieved party" within the meaning of RAP 3.1, which states as follows: ". . . an aggrieved party may seek review by the appellate court." Here, with respect to the trial court's imposition of CR 11 sanctions against him, the only "aggrieved party" is Mr. Bolliger.

The Court of Appeals ambiguously allowed this Issue No. 1 to slip through the cracks – without even addressing the actual subject of Mr. Bolliger's standing to appeal the CR 11 sanction which the trial court imposed against him personally. The RAP 13.4(b) considerations governing acceptance of review of this Issue No. 1 are next presented.

(1) Conflict With A Decision Of The Supreme Court:

See State ex rel. Simeon v. Superior Court, 20 Wash.2d 88, 89-90, 145 P.2d 1017 (1944) ([in a pre-RAP 3.1 decision], a person can appeal to an appellate court if he has a substantial interest in the subject matter which is before the court and is aggrieved or prejudiced by the judgment or order of the court; he must be aggrieved in a legal sense).

(2) Conflict With Decisions Of The Court Of Appeals:

From Division I, see Lasky, supra, (Div. 1 1989) (attorney, who represented a party in the case, but was not himself a party in the case, was an "aggrieved party" for purposes of appealing an order imposing CR 11 sanctions against him in the case); Johnson v. Mermis, 91 Wash.App. 127, 955 P.2d 826 (Div. 1 1998) (attorney, who represented a party in the case, but was not himself a party in the case, could appeal CR 11 and CR 37 monetary sanctions imposed against him in the case); Splash Design, Inc. v. Lee, 104 Wash.App. 38, 44, 14 P.3d 879 (Div. 1 2000) (attorney who is sanctioned under CR 11 becomes a party to the action and thus may appeal as an "aggrieved party"); and Breda v. B.P.O. Elks Lake City 1800 SO–620, 120 Wash.App. 351, 353, 90 P.3d 1079 (Div. 1 2004) (attorney, who represented a party in the case, but was not himself a party in the case, became an "aggrieved party" for purposes of appealing sanctions imposed directly against him).

From Division II, see Butko v. Stewart Title Co., 99 Wn.App. 533, 543, 991 P.2d 697 (Div. 2 2000) (couple, who were not parties to the escrow at issue, had standing to appeal the order dismissing their claims) (citing Lasky, supra and State ex rel. Simeon v. Superior Court, supra).

From Division III, see In re Estate of Wood, 88 Wn.App. 973, 975-77, 947 P.2d 782 (Div. 3 1997) (woman who was an heir and personal representative under a Will, yet who was not a formal party to the probate, had standing to appeal the order revoking her letters testamentary and removing her as the personal representative).

(4) Issue Of Substantial Public Interest:

The Court of Appeals' *Commissioner's Ruling* and its *Order Denying Motion to Modify Commissioner's Ruling* present an issue of substantial public interest. They stand for the proposition that, whenever a monetary sanction is imposed against an attorney in a case, the sanctioned attorney has no right to ever appeal the sanction – and the underlying merits of the sanction, therefore, never can be reviewed by an appellate court. If that is going to be the new law of Washington State, existing attorneys – as well as persons hoping one day to become an attorney – will need to know that. If attorneys are going to turn away from the practice of law – and if prospective attorneys are going to decide to pursue other career fields – because of their inability to ever have sanctions against them forced to withstand appellate scrutiny, the citizenry of Washington State would be adversely affected. That said, Mr. Bolliger submits that the better approach for this Honorable Court to take would be to accept review of this Issue No. 1, reverse the Court of Appeals' *Commissioner's Ruling* and its *Order Denying Motion to Modify Commissioner's Ruling,* and thereby require the Court of Appeals to address the underlying merits of the CR 11 sanctions that the trial court imposed against Mr. Bolliger. That would properly serve the interests of the present bar, the prospective bar, and the citizens of Washington State.

Conclusion For Issue No. 1. Based upon the foregoing, Mr. Bolliger respectfully requests that this Honorable Court accept review of this Issue No. 1, reverse the Court of Appeals' *Commissioner's Ruling* and its *Order*

Denying Motion to Modify Commissioner's Ruling, and thereby require the Court of Appeals to address the underlying merits of the CR 11 sanctions that the trial court imposed against Mr. Bolliger.

Identity Of The Petitioner For Issue No. 2. The AIP in this guardianship case ("Mr. Cudmore").

Citation To The Court Of Appeals Decisions For Which Review Is Requested For Issue No. 2. The same *Commissioner's Ruling* and *Order Denying Motion to Modify Commissioner's Ruling* addressed above.

Issue No. 2. Is Mr. Cudmore legally entitled to appeal the trial court's order forcing him (against his will) to be defended against the guardianship case by Ms. Woodard? Answer sought by Mr. Cudmore: "Yes."[3]

Statement Of The Case For Issue No. 2. **At all times material hereto,** Mr. Cudmore lived at a deluxe residential care facility ("The Manor"), in his own apartment. The Manor provided his every daily need, e.g., it provided his meals in its dining facility – and care givers who regularly checked on him and timely gave him medications prescribed by his doctor. It has a barbershop, an exercise room, and activities and entertainment. Mr. Cudmore was free to, and did, depart The Manor any time it pleased him. For example, he sometimes would take Dial-A-Ride to his doctor's office across town. Also, he sometimes would take The Manor's bus to Fred Meyer to shop for snacks, drinks, laundry soap, etc. On 9/6/13, he

---

[3] As the aforequoted *Commissioner's Ruling* and *Order Denying Motion to Modify Commissioner's Ruling* show, the Court of Appeals erroneously treated this issue as one of whether Mr. Bolliger has standing to represent Mr. Cudmore in this appeal.

took The Manor's bus to the Mall and "walked the entire mall." (At other times, he would catch a ride from a friend.) He cut his own fingernails and toenails, shaved himself, bathed himself, dressed himself, and used the bathroom by himself. He did his own laundry in the laundry machines down the hall from his room. He did his own shopping and bought his own clothes. Nearly every day, he'd use the exercise machines in The Manor's exercise room – to keep his arms, shoulders, and legs toned; his regular, 1-hour routine was to use 10 workout stations, including an exercise bike. [CP 121-28]

On 7/4/13, **mentally competent** Mr. Cudmore [CP 11-16] hired Mr. Bolliger, with a written fee agreement, to prepare for him power of attorney documents for both financial and health care decision making, a health care directive, and a Will [CP 162] (with which Mr. Cudmore decided to specifically disinherit his step children). On 7/12/13, in order to try to prohibit Mr. Cudmore from disinheriting him, Mr. Cudmore's step son petitioned for a guardianship over Mr. Cudmore. [CP 541-49] Under RCW 11.88.045(1)(a), Mr. Cudmore, as the alleged AIP in this guardianship case, was statutorily entitled to be defended against the guardianship by the attorney of his own choosing. On 7/18/13, **mentally competent** Mr. Cudmore hired Mr. Bolliger, with a second written fee agreement, to defend him against the guardianship case. [CP 164] On 7/18/13, Mr. Bolliger therefore filed the RCW 11.88.045(2)-required petition to be appointed to defend Mr. Cudmore against the guardianship case. [CP 17-20] On 7/19/13, Mr. Bolliger appeared at the initial

guardianship hearing on Mr. Cudmore's behalf. At that hearing, the trial court erroneously appointed Ms. Woodard as Mr. Cudmore's attorney.[4] [CP 372-73] Mr. Cudmore made it known often in the guardianship case that he wanted to exercise his RCW 11.88.045(1)(a) entitlement to be defended against the guardianship by the attorney of his own choosing – by Mr. Bolliger, and not by Ms. Woodard, as set forth in the following footnote.[5]

---

[4] Ms. Woodard never filed an RCW 11.88.045(2)-required petition to be appointed as Mr. Cudmore's attorney, she was not in attendance at the 7/19/13 initial guardianship hearing, and she and Mr. Cudmore had never met nor communicated with each other before. [CP 37 and 58]

[5]

- Mr. Cudmore came to Mr. Bolliger's offices on 4 occasions (7/2/13, 7/4/13, 7/8/13, and 7/26/13) – totaling approximately 6½ hours – specifically to direct, discuss, review, and sign new estate planning documents which he wanted Mr. Bolliger to prepare for him – and, on 7/4/13, Mr. Cudmore hired Mr. Bolliger with a written fee agreement expressly for those purposes. [CP 3-10, 55, and 162]
- On 7/18/13, Mr. Cudmore hired Mr. Bolliger – with a second written fee agreement – expressly to defend him against the guardianship case. [CP 164]
- Mr. Cudmore wanted a declaration from his personal physician since 1999, Dr. Vaughn, addressing Mr. Cudmore's **mental competence** – and, on 7/18/13, he accompanied Mr. Bolliger to Dr. Vaughn's office to be present while Dr. Vaughn reviewed, provided his own typewritten exhibit thereto, and signed his declaration. [CP 11-16]
- Mr. Cudmore wanted the judge to reconsider his decision to deny Mr. Cudmore his statutory right – under RCW 11.88.045(1)(a) – to be defended against Mr. Meehan's guardianship case by his chosen and hired attorney (Mr. Bolliger), so Mr. Bolliger filed Mr. Cudmore's *Motion for Reconsideration* on 7/24/13. [CP 23-34]
- In his 7/26/13 *Declaration of James D. Cudmore,* Mr. Cudmore explained how GAL Mr. May tried to dissuade Mr. Cudmore from keeping Mr. Bolliger as his attorney in the guardianship case – and how Mr. May directed Mr. Cudmore to choose one of two other attorneys (one of which was Ms. Woodard). Mr. Cudmore further declared about Ms. Woodard, "I don't want her to be my attorney in this case." Mr. Cudmore further declared, "I have told Mr. Bolliger at least 20 times that I want him to be my attorney for this case. I ask the judge to appoint Mr. Bolliger to be my attorney for this case, not Rachel Woodard. I'm not sure why people keep telling me that the judge won't let Mr. Bolliger be my attorney in this case." [CP 36-38]
- In his 8/18/13 handwritten statement, Mr. Cudmore wrote "I, James Cudmore, want John Bolliger for my attorney and not Rachel Woodard." [CP 52]
- In his 9/12/13 *Declaration of James D. Cudmore,* Mr. Cudmore declared "I want Mr. Bolliger to be my attorney – and not Rachel Woodard." Mr. Cudmore also set forth his understanding of his rights in the guardianship case: to a jury trial, to have his Dr. Vaughn prepare the statutory medical report, to a court-ordered mediation, and to have the court review all power of attorney documents at issue – and Mr. Cudmore asserted that he wanted to exercise all of those rights. Mr. Cudmore elaborated that Ms. Woodard had been doing nothing to explain or advance any of those rights on his behalf. Finally, Mr. Cudmore explained that he wanted the guardianship case to be resolved with the "least restrictive alternative" for his ongoing care and decision making

Throughout the guardianship case, Ms. Woodard did **absolutely nothing** to defend Mr. Cudmore against it – and she did **absolutely nothing** to pursue any of the legal interests he declared he wanted pursued in the case, including, e.g. to have a jury trial, to have his Dr. Vaughn prepare the statutory medical report, to have a court-ordered mediation, and to have the court review all power of attorney documents at issue. On 9/12/13, Mr. Cudmore declared that he wanted the guardianship case resolved with [CP 121-28]

> the "least restrictive alternative" for my ongoing care and decision making assistance. [RCW 11.88.005] **I want that to continue to be provided by The Manor, and be provided as set forth in my power of attorney documents prepared by Mr. Bolliger – without the need for any guardianship.** (Emphasis added.)

However, the very next day – on 9/13/13 – Mr. Cudmore's polar-opposing attorney in the guardianship case, Mr. Meehan, unscrupulously insinuated himself as a VAPO petitioner, in an effort to prevent Mr. Cudmore from being defended against the guardianship by his chosen and hired attorney for this guardianship case, Mr. Bolliger. In other words, as

---

assistance, asserting that "I want that to continue to be provided by The Manor, and be provided as set forth in my power of attorney documents prepared by Mr. Bolliger – without the need for a guardianship." [CP 121-28]

- Mr. Cudmore wanted the judge to revise his decision to deny Mr. Cudmore his statutory right – under RCW 11.88.045(1)(a) – to be defended against Mr. Meehan's guardianship case by his chosen and hired attorney (Mr. Bolliger), so Mr. Bolliger filed Mr. Cudmore's CR 54(b) motion for revision on 8/19/13. Mr. Cudmore was looking forward to providing his own, personal testimony to the judge on the subject, at the calendared 9/20/13 hearing on his CR 54(b) motion for revision. [CP 54-75]

- Two days after Mr. Meehan served his stack of VAPO paperwork on Mr. Cudmore – i.e., on 9/15/13 – Mr. Cudmore left the following voice message on Mr. Bolliger's phone, showing that Mr. Cudmore still was seeking legal advice from Mr. Bolliger, after the VAPO restrained Mr. Bolliger from communicating any further with Mr. Cudmore:

  > Hey, John. This is Jim Cudmore. Dona Belt's here with some paperwork – and she's on her way to bring it to your office, so, I'd appreciate if you would read this paperwork and determine it and help me out on it because its really complex. Thank you, John. This is Jim Cudmore. Have a good day. Bye-bye.

a personal VAPO petitioner himself, Mr. Meehan pretended that Mr. Cudmore needed to be "protected" from Mr. Bolliger.[6] The ensuing VAPO entered against Mr. Bolliger is the subject of a separate appeal presently before the Court of Appeals, no. 32024-3.

On 12/27/13, as a result of Ms. Woodard's total passivity in defending Mr. Cudmore against the guardianship, the trial court erroneously imposed a full guardianship over the person and the estate of Mr. Cudmore – and unlawfully purported to revoke his Will. [CP 378-88] On 1/24/14, Mr. Cudmore timely filed his notice of appeal. [CP 360-88]

Argument For Issue No. 2. The Court of Appeals apparently believed that – because a guardianship eventually got imposed against Mr. Cudmore – Mr. Cudmore has no right to appeal the trial court's erroneous order forcing Mr. Cudmore (against his clearly declared will) to be defended against the guardianship case by Ms. Woodard (i.e., now, only Mr. Cudmore's guardian can authorize Mr. Cudmore's appeal). Yet, that is a circular argument.

The **seminal** issue in this guardianship case is Mr. Cudmore's absolute statutory entitlement to be defended against the guardianship case by the attorney of his own choosing, pursuant to RCW 11.88.045(1)(a), which reads as follows (with emphasis added):

> Alleged incapacitated individuals [i.e., **Mr. Cudmore] shall have the right to be represented by willing counsel of [his] own choosing** at

---

[6] Thus, from the very inception of his pursuit of his VAPO case against Mr. Bolliger, Mr. Meehan was engaging in a **clear and concurrent conflict of interest:** Mr. Meehan was purporting to represent the legal interests **OF** Mr. Cudmore (in Mr. Meehan's VAPO case against Mr. Bolliger) while, at the same time, he was representing Mr. Cudmore's step son **AGAINST** Mr. Cudmore (in the step son's guardianship case against Mr. Cudmore). That is not allowed under RPC 1.7(a).

any stage of the guardianship proceedings. . . . .

All of the other ills which transpired in the guardianship case arose as a consequence of the trial court erroneously denying Mr. Cudmore his statutory right to be defended against the guardianship case by his chosen and hired attorney, Mr. Bolliger (and not by Ms. Woodard). That is because (1) Mr. Cudmore chose to be defended by Mr. Bolliger, (2) Mr. Cudmore did not want to be defended by Ms. Woodard, and (3) throughout the guardianship case, Ms. Woodard did **absolutely nothing** to defend Mr. Cudmore against it – and she did **absolutely nothing** to pursue any of the legal interests Mr. Cudmore declared he wanted pursued in the case.

The view that, because Mr. Cudmore eventually was adjudicated as incapacitated, only Mr. Cudmore's guardian can now authorize Mr. Cudmore's appeal of the case – is without any legal merit. See Mr. Cudmore's *Motion to Modify Commissioner's Ruling,* in which he discusses how the legal doctrine of substituted judgment entitles him to appeal the trial court's erroneous decision prohibiting Mr. Cudmore from being defended against the guardianship case by his chosen and hired attorney, Mr. Bolliger (and not by Ms. Woodard).[7]

---

[7] Mr. Bolliger's motion (on its pp. 9-13) reads as follows on the subject:

B. The Doctrine Of Substituted Judgment Requires The Court To Honor Mr. Cudmore's Repeatedly Expressed Desire To Be Defended Against The Guardianship Case By Mr. Bolliger (And Not By Ms. Woodard)

In Matter of Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 329 P.3d 853 (2014), the Supreme Court of Washington affirmed the Certified Professional Guardian Board's decision to discipline Ms. Petersen, a certified professional guardian, for her failure to implement substituted judgment with respect her guardianship of two adult wards. In so holding, the Court acknowledged and quoted the Board's *Standards of Practice* 405.1 (with emphases added in bold and underline), id. at 776, fn. 6, as follows:

The primary standard for decision-making is the Substituted Judgment Standard based upon the

guardian's determination of the incapacitated person's competent preferences, i.e., what the incapacitated person would have decided when he or she had capacity. The guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person when the incapacitated person had capacity.

See, also, Raven v. DSHS, 177 Wn.2d 804, 817-18, 306 P.3d 920 (2013); Detention of Schuoler, 106 Wn.2d 500, 507-08, 723 P.2d 1103 (1986); Guardianship of Ingram, 102 Wn.2d 827, 836-43, 689 P.2d 1363 (1984); the National Guardianship Association's ("NGA's") *Model Code of Ethics for Guardians* (on its p. 8, in the section titled "Substituted Judgment" – see p. A-6 of the Appendix hereto); and the NGA's *Standards of Practice* (on its p. 7, in the section titled "Substituted Judgment" – see p. B-9 of the Appendix hereto).[2]

Fn. 2 The doctrine of substituted judgment also finds support in the legislative intent for the guardianship statutes, RCW chapter 11.88. The legislative intent for RCW chapter 11.88 is found in RCW 11.88.005, titled "Legislative intent." Although the legislative intent does not expressly use the words "substituted judgment," the concept of substituted judgment certainly finds support in the following language of legislative intent (with emphasis added):

> It is the intent of the legislature to **protect the liberty and autonomy of all people of this state, and to enable the to exercise their rights under the law to the maximum extent, consistent with the capacity of each person.** The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, **their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary** to adequately provide for their own health or safety, or to adequately manage their financial affairs.

Moreover, although the phrase "substituted judgment" normally is not expressly invoked in these scenarios, the concept of honoring a competent person's wishes, even after the person becomes incapacitated, commonly finds examples elsewhere under the law, namely: last wills and testaments, trusts, powers of attorney, health care directives, and "do not resuscitate" forms are given full legal effect, even after the competent principals who executed such documents later have become incapacitated.

Finally, on December 7, 2014, Mr. Bolliger emailed the Washington State Lay Guardian Training Program, inquiring whether its training materials for lay guardians address the subject of substituted judgment. The following day, Kim Rood, of the Office of Guardianship and Elder Services, emailed Mr. Bolliger in response, attaching two Power Point slides.[3] The first Power Point slide used in the lay guardian training states as follows (with original emphasis):

> **Substituted Judgment.** This standard requires the guardian to make a decision that best reflects what the incapacitated person would have decided when he or she had capacity.

The second Power Point slide used in the lay guardian training states as follows (with emphasis added in underline):

> The Role of the Guardian
>
> - A Guardian is Authorized to Make Decisions on Behalf of the Incapacitated Person.
> - Decision-Making Standards:
>
> a. Substituted Judgment.
>
> b. Best Interest.

Then, that second Power Point slide explains what substituted judgment is as follows (with emphasis added in bold

Thus, by operation of the legal doctrine of substituted judgment, it cannot be legally maintained that, now, only Mr. Cudmore's guardian can authorize Mr. Cudmore's appeal of the trial court's erroneous order forcing him (against his clearly declared will) to be defended against the guardianship case by Ms. Woodard. Mr. Cudmore's **mentally competent** wishes on the subject must – even now – be honored by his guardian and by the courts. On this Issue No. 2, Mr. Cudmore is the "aggrieved party" within the meaning of RAP 3.1, supra. He therefore is the proper appellant for this appeal.

Moreover, there is no issue here about Mr. Bolliger's "standing" to represent Mr. Cudmore on appeal – any more than there is an issue about any other attorney – in any other appeal – representing his client below on

---

and underline):

> In a guardianship, the court takes from the incapacitated person the right to make important life decisions regarding such things as medical care and place of residence. The right to make these decisions is given to the guardian. **When making a decision on behalf of an incapacitated person, a guardian is expected to follow certain decision-making standards. The primary standard for decision-making is the "substituted judgment" standard. Here, the guardian must make a decision that best reflects what the incapacitated person would have decided when he or she had capacity. This involves examining past statements or actions of the incapacitated person to determine his or her values and preferences.** However, it is not always possible to determine past preferences of the incapacitated person. This would be the case if the incapacitated person was incapacitated from birth.

Fn. 3 Those material are attached in the Appendix hereto, pp. C-1 through C.

Thus, the lay guardianship training, which is mandated for lay guardians under RCW chapter 11.88, also teaches the substituted judgment doctrine that lay guardians (like Mr. Lamberson, here) must follow.

In this case, during his period of **mental competency,** Mr. Cudmore always expressed his desires to have Mr. Bolliger (and not Ms. Woodard) defend him against the guardianship case. See, again, fn. 1 above. Indeed, Mr. Meehan has provided the Court **no evidence to the contrary.** Thus, under the doctrine of substituted judgment, both Mr. Lamberson (as Mr. Cudmore's present-day guardian) and the Court are required to honor Mr. Cudmore's repeatedly expressed desire to be defended against the guardianship case by Mr. Bolliger (and not by Ms. Woodard).

Based upon the foregoing, the appellants – Mr. Cudmore and Mr. Bolliger – respectfully request that the Honorable Court modify the *Commissioner's Ruling,* by holding that there exists no legal "standing" impediment to Mr. Bolliger continuing to represent Mr. Cudmore on appeal.

appeal. **Mentally competent** Mr. Cudmore had the statutory right – under RCW 11.88.045(1)(a) – to be defended against the guardianship case by the attorney of his own choosing. Mr. Cudmore chose Mr. Bolliger (and specifically didn't want Ms. Woodard) – and Mr. Cudmore hired Mr. Bolliger for the express purpose of defending him against the guardianship case, with a written fee agreement. Mr. Cudmore declared many times in the guardianship case that he wanted Mr. Bolliger (and not Ms. Woodard) for his attorney. So, Mr. Cudmore here submits that he most definitely is legally entitled to appeal the trial court's erroneous order forcing him (against his will) to be defended against the guardianship case by Ms. Woodard. The RAP 13.4(b) considerations governing acceptance of review of this Issue No. 2 are next presented.

(1) Conflict With Decisions Of The Supreme Court:

See Matter of Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 329 P.3d 853 (2014) (affirming the Certified Professional Guardian Board's decision to discipline Ms. Petersen, a guardian, for her failure to implement substituted judgment with respect to her guardianship of two adult wards); Raven v. DSHS, 177 Wn.2d 804, 817-21, 306 P.3d 920 (2013) (approving the substitute judgment doctrine in holding that guardian's good-faith decision not to place ward in a nursing home, against ward's prior competent wishes, could not be the basis for a finding of neglect); Detention of Schuoler, 106 Wn.2d 500, 506-08, 723 P.2d 1103 (1986) (the trial court, in authorizing electro-convulsive therapy for a patient pursuant to the involuntary commitment statute, failed to make a

substituted judgment about the patient's desires); and Guardianship of Ingram, 102 Wn.2d 827, 836-43, 689 P.2d 1363 (1984) (reversing the trial court's order that a laryngectomy be performed on a guardianship ward, because application of the doctrine of substituted judgment revealed that the ward, when competent, did not want a laryngectomy).

(3) Significant Question Under The Constitution Of The State Of Washington:

Here, the guardianship which was erroneously entered against Mr. Cudmore was a full guardianship over both his person and his estate. As such, since the guardianship was imposed on 12/27/13, Mr. Cudmore has been prevented from dealing with his own finances, voting, re-marrying, making medical decisions about himself, and etc. Those prohibitions are violative of Art. 1, § 3 of the Constitution of the State of Washington, which states as follows:

> No person shall be deprived of life, liberty, or property, without due process of law.

Here, Mr. Cudmore was deprived of his right to due process of law ever since – at the 7/19/13 initial guardianship hearing – the trial court erroneously deprived Mr. Cudmore of his statutory entitlement under RCW 11.88.045(1)(a) to be defended against the guardianship case by his chosen and hired attorney, Mr. Bolliger – and the trial court, instead, forced Mr. Cudmore to be represented by Ms. Woodard, against his wishes. Ms. Woodard then did **absolutely nothing** in the guardianship case to advocate for Mr. Cudmore according to his declared legal objectives for the case – yet, Ms. Woodard was required to so advocate for

Mr. Cudmore pursuant to RCW 11.88.045(1)(b), which provides as follows (with emphasis added):

> Counsel for an alleged incapacitated individual **shall act as an advocate for the client and shall not substitute counsel's own judgment** for that of the client on the subject of what may be in the client's best interests. . . . .

(4) Issue Of Substantial Public Interest:

At all times material hereto, Mr. Cudmore lived at a deluxe residential care facility – The Manor – in his own apartment. At that facility, Mr. Cudmore's every daily need was provided for. (There are no facts in the record which suggest Mr. Cudmore is not still living at The Manor.) Before being adjudicated as incapacitated, Mr. Cudmore declared in this case that he wanted the guardianship case resolved with

> the "least restrictive alternative" for my ongoing care and decision making assistance. [RCW 11.88.005] **I want that to continue to be provided by The Manor, and be provided as set forth in my power of attorney documents prepared by Mr. Bolliger – without the need for any guardianship.** (Emphasis added.)

In RCW 11.88.005, the Legislature accorded Mr. Cudmore the right to that "least restrictive alternative," as follows (with emphases added):

> It is the intent of the legislature to **protect the liberty and autonomy** of all people of this state, and to enable them to **exercise their rights under the law to the maximum extent,** consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, **their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary** to adequately provide for their own health or safety, or to adequately manage their financial affairs.

The foregoing public policy directed by the Legislature has been thwarted in Mr. Cudmore's case. He did not want or need a full guardianship over

his person and his estate. **Mentally competent** Mr. Cudmore already, and comfortably, was residing in a full-care residential facility – and he already had made provisions for assistance with his financial and heath care decision making. The Court of Appeals' decisions in its *Commissioner's Ruling* and its *Order Denying Motion to Modify Commissioner's Ruling* effectively have denied Mr. Cudmore his entitlement to the "least restrictive alternative" for the outcome of the guardianship case – and those decisions, therefore, have banished Mr. Cudmore to a controlled existence which the Legislature has sought for us all to avoid for our elderly citizens. That creates an issue of substantial public interest because, sooner or later (if we don't die earlier), we will all be in the advanced-age position that Mr. Cudmore was in when he was confronted with this guardianship case.

Conclusion For Issue No. 2. Based upon the foregoing, Mr. Bolliger respectfully requests that this Honorable Court accept review of this Issue No. 2, reverse the Court of Appeals' *Commissioner's Ruling* and its *Order Denying Motion to Modify Commissioner's Ruling,* and thereby require the Court of Appeals to address Mr. Cudmore's appeal of the trial court's erroneous order forcing him (against his will) to be defended against the guardianship case by Ms. Woodard.

////

Thank you for your time.

RESPECTFULLY SUBMITTED this 9 day of April, 2015.

BOLLIGER LAW OFFICES

By: _____

John C. Bolliger, WSBA No. 26378
Attorneys for the Appellants

DECLARATION OF JOHN C. BOLLIGER

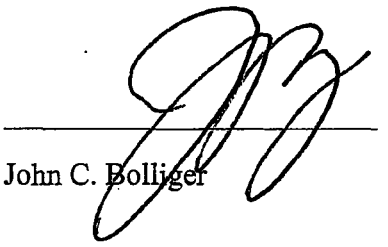
I, John C. Bolliger, declare as follows:

1. I am an attorney for the appellant alleged incapacitated person, I separately am an appellant herein, I have personal knowledge of the facts set forth above, and, if called to testify about the same, I can and will competently do so.

2. I swear under penalty of perjury under the laws of the state of Washington the facts set forth above are true and correct.

DATED this 9 day of April, 2015.

Kennewick, WA
City, state where signed



John C. Bolliger

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF BENTON)

I, John C. Bolliger, declare as follows:

On the date set forth below, I caused a true and correct copy of this document to be sent to the following persons and entities in the manner shown:

Shea C. Meehan	[ ] regular mail
	[ ] certified mail, RRR no. _____
Walker Heye Meehan & Eisinger	[ ] facsimile no. 735-7140
1333 Columbia Park Trail	[ ] Pronto Process & Messenger Service
Richland, WA 99352	[X] hand-delivery by Bolliger

I swear under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

DATED this 9 day of April, 2015.

Kennewick, WA
City, state where signed

Signature

The Court of Appeals
of the
State of Washington
Division III

In re the Guardianship of:	)	COMMISSIONER'S RULING
	)	NO. 32206-8-III
JAMES DONALD CUDMORE	)	

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.[1]

December 16 , 2014.

Joyce J. McCown
COMMISSIONER

[1] Since the Commissioner has read the over length materials submitted by Mr. Bolliger and is dismissing this appeal, no action is taken on his very recently filed Motion for Leave to File Overlength Briefs.