

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

LARRY D. CHRISTENSEN, Respondent

Vs.

JENNIFER ROACH, Appellant

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

INVICTUS

By William Earnest Henley

Out of the night that covers me
Black as the pit from pole to pole
I thank whatever gods may be
For my unconquerable soul

In the fell clutch of circumstances
I have not winced nor cried aloud
Under the bludgeoning of chance
My head is blood but unbowed

Beyond this place of wrath and tears
Looms but the Horror of the shade
And yet the menace of the years
Finds and shall find me unafraid

It matters not how strait the gate
How charge with punishments the scroll
I am the master of my fate
I am the captain of my soul

II. ASSIGNMENTS OF ERROR

1. The trial court erred by not conducting a trial as permitted by RCW 74.34. 135(1) instead of a conducting a hearing based solely on Respondent's unsworn and often unsigned declarations;
2. The trial court erred by not entering Findings of Fact and Conclusions of Law in its Vulnerable Adult Protection Order ("VAPO");
3. Mr. Sutherland is prima facie disqualified as attorney in fact for Mr. Christensen because of conflict of interest and potential for pecuniary gain resulting from said conflict of interest;
4. Kitsap County was the improper venue for this proceeding as at all times material hereto, Larry Christensen was a resident of King County.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court entered a VAPO preventing any contact between Ms. Roach and Mr. Christensen based upon evidence submitted by Mr. Sutherland which was unsworn, often unsigned, self serving and replete with hearsay.

On the other hand, Ms. Roach submitted sworn declarations from persons with direct, first hand observations of the relationship between Ms. Roach and Mr. Christensen including Mr. Christensen's health care providers where they recognized Ms. Roach as his caregiver without criticism of that role and, in fact, attested that her care was beneficial for Mr. Christensen.

The trial court failed to conduct a hearing with live testimony and an opportunity to cross examine witnesses. Had Ms. Roach been able to cross

examine Mr. Sutherland and his witnesses, their bias and prejudice would have been divulged.

Furthermore, had Ms. Roach been afforded the opportunity to testify directly she could have answered and all questions that the trial court would have had regarding the claim of financial, emotional and physical abuse of Mr. Christensen. As it was, Ms. Roach was limited to filing sworn declarations regarding those issues attaching thereto voluminous banking and other records which were never referenced by the trial court in her decision. Because of the complete lack of specific referral to any declarations or exhibits filed on behalf of Ms. Roach, she is of the opinion that the trial court did not read those documents.

Had the trial court prepared written Findings of Fact and Conclusions of Law, it would have been clear what facts she was basing her decision upon. Because Findings and Conclusions were not entered, it is impossible to ascertain exactly what parts of the record that the trial court considered in entering the VAPO.

Mr. Christensen was not allowed to address the judge and explain why he wanted to stay in contact with Ms. Roach. When Mr. Christensen told the court from the counsel table that he wanted to continue to see Ms. Roach, the

trial court advised him essentially, that he did not know what he was talking about and as a result, she was not going to allow that to happen.

IV. STATEMENT OF THE CASE

A. Background and Procedural History

Larry Christensen named his sailboat “Invictus” for a reason. The poem’s title is Latin for “unconquerable.” Throughout his life, Mr. Christensen has lived up to that standard.

As a very young boy of 10, Mr. Christensen, along with his little brother, were sent to Boy’s Town in Nebraska as their mother was a single mom with five young children. After less than a year at Boys Town, Mr. Christensen ran away and returned to his home state of Wyoming. His little brother remained behind in Nebraska.

Upon his arrival in Gillette, Wyoming, Mr. Christensen found work on various ranches and helped support his mother and his siblings. Even though he was working while still a youth, Mr. Christensen never quite going to school attending class in whatever community he happened to be working at the time.

Mr. Christensen enlisted in the United States Navy at 17 years of age. Mr. Christensen made a career of the Navy and retired at age 37 after 20 years of service.

Mr. Christensen was a veteran of the Korean War having served at Whidbey Island as a gunnery and ballistics instructor.

It was in the Navy that Mr. Christensen developed a love for the sea.

This romance was continued after his discharge from the service and was reflected in the sail boat of his dreams, "Invictus" a 40' trimaran that he built with his own hands.

As stated by Mr. Sutherland, it was sailing that served as the basis for the contact that he had with Mr. Christensen. Invictus was a well known boat throughout the Puget as it was a beautiful boat and Mr. Christensen was fastidious in his care for her. It was also very fast.

After his discharge from the Navy, Mr. Christensen completed his formal education and graduated from the University of Oregon in 1948. Mr. Christensen was employed during his second career as a math teacher in the Bellevue School District, retiring from that employment in 1989.

In 1996 Mr. Christensen's wife Pearl died. After her death, Mr. Christensen continued to live in the home that he had built with his own hands in Woodinville in the early 1970's.

In 2010 Mr. Christensen was diagnosed with Parkinson's disease and became a patient of John Roberts, MD with offices the Virginia Mason Medical Center in Issaquah and Seattle.

Mr. Christensen hired Ms. Roach as a house organizer and personal secretary based upon a friendship that they had created at the Ballard Elks where they met during dances that were held at that club.

Ms. Roach is a graduate of the University of Washington obtaining a Bachelor of Arts in physics from Seattle Pacific University and a Master's Degree from University in nuclear engineering.

Starting in 2009 when Ms. Roach began working for Mr. Christensen, their developed a trust to the degree that Mr. Christensen wanted her to accompany him to all of his medical appointments. This trust eventually was written down in a Health Care Power of Attorney that Mr. Christensen gave to Ms. Roach in 2012..

During those visits to Mr. Christensen's doctors, Ms. Roach discussed an exercise and medicine plan that would minimize the Parkinson's symptoms. The exercise program that Mr. Christensen was following at the time of the hearing before Judge Dalton was one that was known and approved by Dr. Naini his neurosurgeon and John Roberts, MD, Mr. Christensen's neurologist. Ms. Roach also accompanied Mr. Christensen to all of his appointments with Lee Amsler his cardiologist and his physical rehabilitation therapists.

On October 16, 1996 Mr. Christensen signed a General Durable Power of Attorney ("POA") in which he designated Mr. Sutherland as his attorney-in-fact.

CP 7. The DPA was drafted by Mr. Sutherland and Mr. Christensen did not consult with an attorney before he signed it.

The DPA provided that upon Mr. Sutherland becoming “incapacitated” that Mr. Sutherland would then step into Mr. Christensen’s shoes and be granted all of those powers usually associated with such an appointment: the ability to sell real and personal property, consent to medical care and to transfer property into trust.

CP 8.

On April 27, 2012 Mr. Christensen signed the Larry Dale Christensen Living Trust Declaration of Trust (“Trust”). As with the POA, this document was prepared by Mr. Sutherland and as previously, Mr. Christensen did not have independent legal counsel before he signed the instrument. CP 28.

Mr. Christensen’s trust provided that upon a determination of “incapacity” of Mr. Christensen, that three persons would select the successor of his trust. It is not clear who selected these individuals, but it can be assumed that as Mr. Sutherland drafted the document that he named these “electors” who included his wife, daughter and Ms. Roach. CP 28.

The trust also provided that should Mr. Sutherland not be able to serve as successor trustee that in his stead his wife, Loretta V. Sutherland would be appointed trustee. CP 28.

On November 6, 2012 Loretta Sutherland and Jessica Sutherland, the wife and daughter of Mr. Sutherland signed a document entitled Statement in Support of Incapacity of Trustee and Appointment of Successor Trustee. CP 36.

In that document, the signers stated as follows:

Based upon our direct knowledge of his current circumstances and the likelihood that such circumstances will continue in the future indefinitely,, it is our opinion that the trustor, Larry Dale Christensen is no longer physically or mentally capable of serving as trustee of this Trust and that said duties should immediately pass to Richard M. Sutherland as Successor Trustee.

There is no showing of any medical opinion that Mr. Christensen was “no longer physically or mentally capable of serving as trustee.” This is a medical conclusion made by two unqualified laypersons.

The legal effect was that as a result of being the trustee of Mr. Christensen’s trust and still possession the POA that Mr. Sutherland was in complete control of Mr. Christensen’s person and estate in all particulars.

Now that Mr. Sutherland had complete control of Mr. Christensen the only obstacle to his ability to do as he deemed fit without any fear of objection or criticism was to marginalize Jennifer Roach.

To that end, Mr. Sutherland filed the Petition for Vulnerable Adult Protection Order (“VAPO”) in Kitsap County. CP 2-4.

A hearing on this petition was held on November 30, 2012 before the Hon. Jeanette Dalton, Superior Court for Kitsap County.

Mr. Christensen was present in the company of Mr. Sutherland and Ms. Roach was present with her attorney, David Gates.

At the hearing, Judge Dalton indicated that she had received materials in support of the motion from Mr. Sutherland at a previous hearing on November 16, 2014 and continued that hearing for two weeks so that Ms. Roach and her attorney would have an opportunity to read it. VR 2.

The day before the current hearing, Judge Dalton said that she had received approximately 500 pages from Ms. Roach the day before the hearing. VR 2. Judge Dalton summarized as follows:

... I can tell the parties that both my law clerk, Ms. Zanowski, who's in the back of the courtroom and I – she more thoroughly than I, but I have also—had an opportunity to review the materials. VR 3.

At this hearing Mr. Sutherland summarized his position regarding Mr. Christensen's vulnerability based upon medical testimony and the observations of an APS worker. VR 9.

Mr. Sutherland claimed that Ms. Roach had financially exploited Mr. Christensen as she withdrew substantial amounts of money from Mr.

Christensen's ATM and other accounts and went on an extended trip with Mr. Christensen to Scandinavia.

Mr. Sutherland claimed that Ms. Roach had harmed Mr. Christensen medically because of her termination of his Flomax prescription resulting in Mr. Christensen's incontinence . VR 9-10.

Mr. Christian also claimed that Ms. Roach had yelled at Mr. Christensen and had become emotionally involved with Mr. Christensen. VR. 11.

In opposition to Mr. Sutherland's claim. Mr. Gates argued that Mr. Sutherland had failed to submit any medical evidence to support Mr. Sutherland's "incompetence". VR 13-18.

Mr. Gates objected to a "letter" that was allegedly written as an act of free will by Mr. Christensen in which he claimed that Ms. Roach was a "predatory Female." VR. 19. Mr. Gates indicated that he did not believe that the letter was written voluntarily by Mr. Christensen. VR 19-20.

Mr. Gates characterized the statements introduced by Mr. Sutherland as hearsay and that Mr. Sutherland had failed to bring in "independent evidence" that would corroborate the claim being made by him. VR 21.

After Mr. Gates concluded his argument, Judge Dalton allowed Mr. Sutherland the chance to respond at which time he indicated that there were records from Harrison Hospital showing that Mr. Christensen's Flomax had been

withheld and Mr. Sutherland concluded from that that Ms. Roach had done that.
VR 22.

Mr. Sutherland admitted that he had “stuck my neck out” when he prepared the POA. Mr. Sutherland went on to say that “The living trust, yeah, it looks weird, I agree. That’s why I wrote a conflict-of-interest statement in my write-up, is to say, year it does look weird.” VR 23.

At this point Judge Dalton took over the proceedings and commenced to analyze the evidence and render her decision. VR 24.

Judge Dalton’s first finding was that Mr. Christensen was vulnerable adult.
VR 25.

Judge Dalton’s next finding was that Ms. Roach’s beginning to live in Mr. Christensen’s home was a ‘red flag’ for the Court. Judge Dalton stated that it was unusual for caregivers to move in their client’s home unless they were providing 24 hour care. VR 26.

Judge Dalton’s third finding was that with Ms. Roach’s assistance that Mr. Christensen was able to maintain some level of mobility. The judge indicated that the “record is replete” with declarations that said that Mr. Christensen would walk with Ms. Roach.

The next finding is that from the above, judge Dalton concludes that “... and so I have no doubt that his interest in her, which became romantic over time – and

I will talk to that in a bit – energized him and reinvigorated him to the point where he was able to improve so some of his physical components, but he still needed 24 –hour care, as evidenced by the fact that Ms. Roach continued to not only live with him, but continued to bill him as a caregiver for the care that she provided.” VR. 26.

At this point in her analysis, there is absolutely no evidence of a “romantic interest” between Mr. Christensen and Ms. Roach. Rather, Judge Dalton jumped to this conclusion on her own without any evidence to support it. Having reached this unfounded conclusion, it begins to permeate the remainder of her decision with constant references to “exploitation.”

The fourth finding refers to “doctor’s recitations” of which she identifies “two that are in the record, one from Dr. Moore and one from Dr. Delcampo.” VR 26-27.

The “recitations” only pertain to Mr. Christensen’s inability to manage his finances and taking care of his activities of daily living.

Those limitations have never been contested by Ms. Roach.

After making these four findings, Judge Dalton shifts her decision to a review of whether or not Ms. Roach “committed acts of abuse, either physical exploitation or physical abuse or negligence such that is has caused him harm.” VR 27.

Judge Dalton also states that she has examined materials "... provided through Mr. Sutherland and those declarations of people that have known Mr. Christensen for some time that prior to meeting Ms. Roach, Mr. Sutherland (sic) historically, was very fiscally secure, meaning he managed his money extremely well, he paid his bills every month, he as able to save a lot of money. VR 28.

If her conclusion had been reduced to a Finding of Fact, Mr. Gates would have been afforded the opportunity to object to a fundamental error in her thinking: there were no "declarations" from people who had known Mr. Christensen for a long time. Rather, the only evidence submitted by Mr. Sutherland were unsworn and often unsigned emails and other memoranda that stated opinions often without any facts showing upon which those opinions were based.

Judge Dalton stated that she had read Mr. Christensen's bank records and found that he had never spent money in the amounts claimed by Mr. Sutherland at any time in the past.

What Judge Dalton does not say is whether she read the declaration of Ms. Roach to explain why the money was withdrawn and whether or not the \$100/ day rate for his care it was used for Mr. Christensen's benefit. CP 206-214.

In that declaration, Ms. Roach stated that Mr. Christensen agreed to pay her \$100 per day three years ago. CP 207. For that payment, Ms. Roach worked

between four to eight hours a day, every day cleaning his house, taking him on trips to Taco Time for his daily newspaper, taking him to the doctor, regular grocery shopping trips, doing home repairs, pressure washing a 65' x 10' deck, leveling and installing new 10' support posts and even replacing the ignition switch in his truck. VR 207.

Ms. Roach goes on to state that "2 years ago I started sleeping over to help Larry with his BiPAP (sleep apnea breathing device) and my job quickly became a 24 hours a day job at the same pay rate of \$100/day and (sic) the couch. For about 2 months I would pull up a mat in the hall outside Larry's door after he fell asleep so I could hear if he took his BIPAP off. (It's easy to take off while sleeping) I would set my alarm every hour just in case I slept through the alarm on the BiPAP. This settled down and I was able to spend the night on the couch and just check on him 2-3 times a night." VR 207.

In her declaration Ms. Roach explains that there was more money spent in June 2012 than normal as Mr. Christensen wanted to pre-pay bills before he and Ms. Roach left on a trip to Scandinavia. These payments did not benefit Ms. Roach in any way.

In her declaration, Ms. Roach stated that during 2012, when Mr. Sutherland was claiming that Mr. Christensen was incompetent, he was nevertheless competent to continue to drive his car as decided by his physician, John Roberts,

MD and interestingly was competent enough to sign the trust agreement prepared for his signature by Mr. Sutherland.

Ms. Roach stated in detail the deposit summary into Mr. Christensen's bank accounts as well as an itemization of the work that she did for Mr. Christensen.

In her oral decision, Judge Dalton made no reference to having even looked at Ms. Roach's declaration that there was financial exploitation because there was no written contract setting forth the terms of Ms. Roach's employment. VR 29.

Judge Dalton goes on to say that she was familiar with the rates charged by care givers in "this area" and "I can tell you that's a lot of money to be charged by a caregiver, much more so, in fact, multiple times, what the average caregiver rate is in this county." VR 29.

Where is the evidence for this finding?

Saying that she is familiar with the rate of care givers pay "in this area" and then not setting forth what a proper rate would be and the bases for that opinion is the very definition of an arbitrary and capricious decision. No opportunity was given to challenge the judge's knowledge and Ms. Roach is left trying to read the court's mind as to how this conclusion was reached.

Judge Dalton continued to doubt Ms. Roach's veracity when she held up bank records provided by Ms. Roach that had been "blacked out." VR 30-31, CP 244-345.

Judge Dalton said that both she and her law clerk “couldn’t make sense of any of this and neither could she. The numbers don’t add up. The fact that stuff is blacked out makes it suspicious. It’s the messiest type of accounting that I think I have ever seen submitted by an individual who allegedly has absolutely nothing to hide.” VR 31.

Given the confusion of the court, why didn’t Judge Dalton allow Ms. Roach to testify and explain the exhibit that she had submitted. Keep in mind, Jennifer Roach is not stupid. She has a degree in nuclear engineering from the University of Washington and a Masters degree in that field from Seattle Pacific University.

However, Judge Dalton had already set the limits of the hearing when she declared at its very beginning that, “Now normally, these are proceedings that are done without testimony. I do rely on the pleadings and I have reviewed the pleadings in their entirety.” VR 3. Judge Dalton continues as follows, “Argument is normally limited to ten minutes per side.” VR 6.

There is no legal basis for limiting the time a party has to present their case and there is no requirement that the case can only be heard without testimony. RCW 74.34.135(1).

As Judge Dalton’s decision continues, she states for the first time, “ I am going to find out –These are the findings of fact that I am prepared to make: Mr. Roach (sic) was taken out of the hospital prematurely in September against

medical advice. Ms. Roach was the person who was with him at the time. That is clearly documented in the hospital records. And it was Ms. Roach who presented herself as a durable power of attorney to the hospital and who, with Mr. Christensen, encouraged him to leave against medical advice prior to when he should have been rehabilitated.” VR32.

Had she been given the opportunity to address Mr. Christensen’s discharge from the hospital, she would have informed the court that she was following Mr. Christensen’s fervent request that he be allowed to return home immediately. Mr. Christensen stated that he would continue to obtain rehabilitation but that he would do it from his home rather than as an admitted patient in a hospital.

The question then would have been, was Mr. Christensen harmed by going home to follow up with his rehabilitation or was continued admission to the hospital the only way in which that rehabilitation could have taken place?

If there are two legitimate options on that point, Ms. Roach cannot be found to have exploited Mr. Christensen by choosing one over the other. Judge Dalton made no effort to explore any consideration as to whether Mr. Christensen’s discharge from the hospital might have had another reason.

Judge Dalton next found that Ms. Roach did not keep a clean house for Mr. Christensen and that she allowed “tripping hazards” to exist which posed a danger to Mr. Christensen because of his Parkinson’s disease, stating “ Ms. Roach didn’t

life a finger to take care of any of the tripping hazards because she did not see herself as a cleaning woman in spite of her claimed affection for Mr. Christensen”. VR 32.

There is nothing in the record to support this conclusion. There are only self serving documents from Mr. Sutherland and his witnesses but none of which were sworn nor often signed. These items cannot be considered as evidence by Judge Dalton.

On the other hand, Ms. Roach submitted a sworn declaration setting forth the cleaning duties that she assumed nearly three years before this VAPO was sought by Mr. Sutherland. CP 218-222.

In her declaration, Ms. Roach stated that Mr. Christensen never let her clean his room and referred to it as the “boar’s nest.” CP 219. Ms. Roach states further that when she began her work as a care giver in 2009 that there “was stuff everywhere” including the stair well. CP 219.

The only portion of this declaration that apparently Judge Dalton considered was the reference to Ms. Roach saying that the Sutherland’s had been in the house at one time and left a mess in the kitchen and that Ms. Roach “ ... did not consider it a priority to clean up after them. I only wanted to make sure that Larry had company as much as possible.” CP 219. This may explain Judge Dalton

statement above that Ms. Roach didn't consider herself a cleaning woman despite expressing affection for Mr. Christensen. VR 32.

Judge Dalton's decision continued in which she stated, "The other issue that I have a great concern about, and I do make a finding, is that Ms. Roach withheld prescribed medication from Mr. Christensen. That withholding that medication did result in Mr. Christensen becoming overly tired.... She agreed that she deprived him of the Flomax." VR 33.

To equate the use of Flomax and Mr. Christensen's lack of sleep is not supported by the medical records in this case: 1) Dr. Naini stated that Mr. Christensen's sleep problems were persisting but that when it was resolved that Mr. Christensen would see an improvement in his memory, his ability to walk and reduced urinary urgency." CP 115-116. and furthermore, 2) from Mr. Christensen's sealed confidential medical records from Neurological Associates who diagnosed Normal Pressure Hydrocephalus and found the following, ..."which may bear upon his gait difficulty and predisposition to falls as well as some of his cognitive problems and apparent urinary problems. Otherwise stable." CP 145-160.

There is nothing in her oral decision indicating that Judge Dalton read these medical records. Rather, Judge Dalton accepted the theory advanced by Mr.

Sutherland that the sleeping difficulties were connected to Ms. Roach alleged discontinuing Mr. Christensen's Flomax administration.

To the contrary, if the records from Neurological Associates are to be believed the proximate cause of the "persistent" urinary problems was secondary to hydro encephalopathy and Flomax has no treatment powers so far as that diagnosis is concerned as this condition is marked by an accumulation of cerebrospinal fluid resulting in dilation of the cerebral ventricles and raised intracranial pressure – Flomax works on the bladder, not the brain.

Judge Dalton continues to disregard the materials that were submitted by Ms. Roach when she stated that the exercise program that Mr. Christensen was following was not supported by his physicians. CP 32.

The discharge summary at Neurological Associates specifically referred to Mr. Christensen's exercise program when it stated that he was "doing better than when I first saw him and this is probably due to his exercise program." CP 158.

At this point in her decision, Judge Dalton resumes her discussion a romantic involvement between Mr. Christensen and Ms. Roach, one that Judge Dalton concluded was "... not emotionally nurturing. In fact, I find it was emotionally abusive." VR 37.

To buttress this conclusion, Judge Dalton says that from her review of the record that "There is nothing that I have seen in this record that would evidence

any tenderness towards Mr. Christensen, any responsible affection towards Mr. Christensen. So for that reason, I do find exploitation and neglect”.

If Judge Dalton and her law clerk read the 500 pages that she claimed she did, she could not have missed multiple declarations from witnesses that attested to just the opposite conclusion. These declarations spoke of Mr. Christensen being very happy with Ms. Roach’s company and that he seemed to be more content and cheerful than he had been in years.

The first declaration included in the Clerk’s Papers would be from Dr. Naini who met with Mr. Christensen and Ms. Roach to discuss the T12 fracture for which he was treating Mr. Christensen. In this declaration, Dr. Naini never expressed any concern of Ms. Roach’s presence during the post operative follow up visits that he had with Mr. Christensen.

The second declaration is that from Yvonne Morrison in which she stated that she is a physical therapist having graduated from the University of Copenhagen and the University of Washington. Ms. Morrison declared that she had cared for orthopedic and neurological patients as a physical therapist for 37 years and that, in particular, she had known Mr. Christensen since 2007.

Ms. Morrison attested to a “remarkable improvement” on Mr. Christensen’s part secondary to the physical exercise program that he had been on with Ms.

Roach. His improvement was so great, that he was able to “lead” at those dances held at the Elk’s Club in Ballard where Ms. Morrison and met Mr. Christensen.

Ms. Morrison stated that as a result of the exercise program that Mr. Christensen’s mind became sharper and he became the “old Larry we all enjoyed.” She continues by saying, “If Jennifer had not taken care of him he would have been wheelchair bound years ago.” CP 129-130.

In her declaration Ms. Morrison said that “Jennifer is a very sweet and caring person and their relationship is one of mutual respect, affection and care for each other.” CP. 120.

The direct, first hand observations of Ms. Morrison are completely the opposite of Judge Dalton who only had unsworn statements from Mr. Sutherland’s witnesses from which she could conclude as she did.

The declaration of Kathy “Nan” Little had to have been ignored by Judge Dalton given who she is, her line of work and her first hand observations of Mr. Christensen and Ms. Roach.

Ms. Little is the Chair of the King County Guardian ad Litem (“GAL”) program. She is also the national treasurer of the Court Appointed Special Advocates (“CASA”) program. She has a PhD in anthropology and for what it is worth, she is married to Douglas Little a senior partner at the Perkins Coie law firm in Seattle.

Ms. Little is a Parkinson's patient and among her many symptoms is a REM sleep disorder that leaves her fatigued. Her sleeplessness has nothing to do with Flomax.

Ms. Little observed the relationship that Mr. Christensen and Ms. Roach had and described it as one of great benefit to him. As a friend to both of them, Ms. Little saw nothing that proved that Mr. Christensen had been exploited in any way by Ms. Roach. CP 168-174.

These two declarations that are included in the Clerk's Papers establish a healthy relationship between Mr. Christensen and Ms. Roach. Contained within the 500 pages submitted by Ms. Roach before the hearing with Judge Dalton are up to 40 other declarations saying the same thing.

How is it possible for there to be 42 declarations which were supportive of Mr. Christensen and Ms. Roach's friendship and for Judge Dalton to claim that "There is nothing that I have seen in this record that would evidence any tenderness toward Mr. Christensen, any responsible affection towards Mr. Christensen. So for that reasons, I do find exploitation and neglect". CR. 37.

At this point in the proceedings, Judge Dalton issued the following decision, "For those reasons I am going to issue a permanent restraining order." VR 37.

When asked by Judge Dalton if Mr. Christensen had any questions for her the following colloquy took place:

MR. CHRISTENSEN: Uh, this is terribly hurtful to Jennifer and I think the way that the thing has come together has an incredible bias against her. I do, in fact love her.

THE COURT: You know, I have no doubt that you do, Mr. Christensen and I hope for your sake that you will cherish that affection that you have in your heart, okay?

MR. CHRISTENSEN: I will. Why can't I – can I see her, talk to her?

THE COURT: No.

MR. CHRISTENSEN: I'm put in prison.

THE COURT: No, no. no. No, no Mr. Christensen – And this just evidences everything that I have said up to this moment.

Mr. Christensen, it is clear to me that you are cherished by the people who love you. I hold your pain at the feet of Ms. Roach right now. If she had done a better job of taking care of you, if she hadn't taken your money from you, if she had give you your prescriptions when you were supposed to take them, and not charged you up the ying yang the way she had, this would be a completely different circumstance. But this is laid at the feet of Ms. Roach. It's her responsibility, not yours.

MR. CHRISTENSEN: I feel I need to do something to save her from what actually happened, which is a terrible consternation of circumstances. And I have no idea where am I going to go from here.

THE COURT: You are going to be healthy, you are going to be loved and cared for by your very best friends on the planet.

MR. CHRISTENSEN: But I want to take care of Ms. Roach. I don't want her to suffer. Because if we took the things one item at a time, then

you could see that there's a reason for that that she wasn't out to hurt me; to the contrary. And we had a good life together and it was getting better, just as all of the things that she planted around my house, where are things of beauty, are growing up and maturing and they're going to be all right. But they won't be all unless I'm all right with her. I mean that's the truth. This hurts me terribly. So I am wondering what can I do? Do I have any legal recourse? I will take what money I have and spend it on defending her.

THE COURT: That's not going to be possible.

MR. CHRISTENSEN: See, why should I be put in a position where I'm suffering and I'm being punished by the county? I'm a Korean War veteran. I gave my life for these people. What can I do to help her?

THE COURT: Nothing. She is an adult and she can take care of herself

MR. CHRISTENSEN: Will I have to move to Mexico, or –

UNIDENTIFIED PERSON: No, no.

MR. CHRISTENSEN: I will do whatever it will take.

THE COURT: Well, it is obvious from his responses to the Court today with respect to Ms. Roach that the level of manipulation has gone far more deeper than was even apparent to me on the first day that I met Mr. Christensen and I can imagine no greater abuse than that.

Ms. Roach if you go near this man, if there is even a hint of a violation of my court order today, I will not hesitate to do everything I can, with the power of the law that I have to sanction you.

To give Mr. Christensen the due process that he was entitled to as well as to give Ms. Roach the due process that she was entitled to, Judge Dalton should have permitted a full trial on the record so that all of the issues in this case could have been made clear.

There is no doubt that Mr. Christensen strongly disagreed with Judge Dalton's decision. The real issue is to determine if his feeling toward Ms. Roach were the result of exploitation as concluded by Judge Dalton, or honest feelings of affection of an 80 year old man who found pleasant company with whom to spend his remaining years.

V. APPLICABLE LAW & ARUGMENT

ASSIGNMENT OF ERROR No. 1: The trial court erred by not conducting a trial as permitted by RCW 74.34.135(1) instead of conducting a hearing based solely on Mr. Sutherland's unsworn and often unsigned declarations

The failure of the court to conduct a full trial on the merits in lieu of the evidentiary hearing that she did permit prevented Ms. Roach, and for that matter, Mr. Christensen, from cross examining witnesses called by Mr. Sutherland whose statements were made a part of the record as unsworn and often unsigned statements.

This failure was a denial of Ms. Roach's right to due process of law in that she did not have a fair trial which would have provided her the opportunity to cross examine witnesses against her:

The ability to have one's case heard in full before an impartial magistrate is a right of citizenship designed to resolve cases and controversies.

Tatham v. Rogers, 170 Wn. App. 76, 93, 283 P.3d 583 (2012):

The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The right to a jury trial is a right guaranteed by our state constitution: Article 1 § 21:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record and for a verdict by nine or more jurors in civil cases in any court of record and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Under this article of the state constitution, Ms. Roach was entitled to a jury trial even though the proceeding was civil in nature- our constitution does not limit the right to a jury trial just to criminal proceedings.

The Vulnerable Adult Protection Act (“VAPA”) found at RCW 74.34. 135 (3) provides that Ms. Roach should have had the opportunity to testify in response to the petition:’

At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner and in the court’s discretion other interested persons, the opportunity to testify and to submit relevant evidence.

Thus, by the terms of the state constitution and by the statutory language of VAPA, Ms. Roach, as well as Mr. Christensen had a right to a trial. This right was never made known to either of them by Judge Dalton. Instead, Judge Dalton advised them at the beginning of the proceeding that the case would only be heard on declarations and that each side only had 10 minutes in which to state its case.

In fact, Judge Dalton did not stop with her failure to advise the parties of their right to a trial. When Ms. Roach tried to correct the judge regarding the administration of Flomax, the judge threatened her with contempt and jail.

Rather than allow Ms. Roach to testify, the court told Ms. Roach to sit down and be quiet rather than allow her to speak what was on her mind. Judge Dalton went so far as to call of a deputy from the Kitsap County Sherriff's department to escort Ms. Roach from the courtroom if she made another "outburst." VR 33, 35.

Clearly at this point in the hearing, Judge Dalton knew, or should have known, that oral testimony to clear up issues in controversy was going to be necessary.

This was even more evident when Mr. Christensen tried to address the court and inform her that he didn't want to be restricted from being able to see Ms. Roach. VR 42-45.

Despite both the alleged vulnerable adult (Mr. Christensen) and the respondent (Ms. Roach) wanting to orally address the court, the trial judge ordered Ms. Roach to be quiet and informed Mr. Christensen that despite his wishes, she was not going to allow him to be around Ms. Roach.

At the moment that Ms. Roach and Mr. Christensen directed themselves to the court, Judge Dalton should have recessed the proceedings and noted the

matter for a trial on an expedited docket. Judge Dalton had the authority to order such a trial which has been done by other courts in the state.

The lead VAPO case in Washington is *Endicott v. Saul*, 142 Wn. App. 899, 176 P.3d 560 (2008) which was tried in Island County. The trial was described as one which was a 10 day bench trial which took place over a period of three months. *Endicott*, p. 903.

If Island County could tie up one of its judges for 10 days of trial spread out over three months, then Judge Dalton in Kitsap County could have done the same thing.

A fundamental right in trials, both civil and criminal, is the right to confront one's accusers and subject them to cross examination. This right is protected in RCW 74.34.135(1) which was recognized in Island County but was ignored by Judge Dalton in Kitsap County.

While it may be Judge Dalton's practice to hear VAPO cases only on declarations and only for 10 minutes, there is nothing in the statute that sets that limitation, nor does it appear to be the practice throughout the state.

If Judge Dalton is alone in this practice, then it is safe to say that her actions in this case were arbitrary and capricious:

We have expressly recognized that the administrator of justice is dependent upon the impartiality, disinterestedness and fairness on the part of the judge.

...

We are also of the opinion that it is fundamental that a trial before a biased and prejudiced judge would constitute a denial of due process under the fourteenth amendment to the Federal constitution and Art I. § 3 of our state constitution.

State ex rel McFerran v. Saul, 32 Wn 2d, 545, ___ P.2d ___ (1949).

This case got off on the wrong foot the minute that Judge Dalton ruled that it was to be based solely on declarations and that the time for presentation would be limited to 10 minutes per side.

The two people most affected by her decision, Mr. Christensen and Ms. Roach tried to get her to listen, but she shut them off abruptly. Ms. Roach was threatened with jail and Mr. Christensen was chastened for wanting to continue to see Ms. Roach as Judge Dalton felt that the record convinced her that it was not in his best interest to do so.

The problem with Judge Dalton's thinking is that the record submitted by Mr. Sutherland and upon which Judge Dalton based her ruling, was no more than a smattering of self serving, unsworn, unsigned statements that should not have even been permitted into evidence by the court.

ASSIGNMENT OF ERROR No. 2: The trial court erred by not entering Findings of Fact and Conclusions of Law in its VAPO.

While Judge Dalton made repeated reference to “findings” in her oral decision, these observations were not written Findings of Fact and Conclusions of Law which are necessary for a full review by this court.

The general rule regarding written Findings of Fact and Conclusions of Law is found at CR 52(a) which states:

(a) Requirements.

(1) Generally. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law

As this case was tried to Judge Dalton only and not to a jury, she was obligated to enter Findings of Fact and Conclusions of Law. Only in this way, can this court know specifically what evidence she relied upon when she made her decision. Without Findings and Conclusions, this court has to guess as to what facts she relied upon as she made her legal conclusions.

Where the trial court has failed to enter Findings and Conclusions, the procedure to follow under those circumstances is for a remand for findings to be made on the existing record. *Templeton v. Hurtado*, 92 Wn. App. 847,850-51, 853 P.2d 1131 (1998).

Given the fact that Mr. Christensen and Ms. Roach were constitutionally guaranteed a right to trial, there must be Findings of Fact and Conclusions of Law based upon substantial evidence to protect those rights. *In re Marriage of*

Hadden, 27 Wn. App. 566, 619 P.2d 374 (1980), See Also Case Notes, “Where Fundamental Constitutional Rights are Involved the Court May Re-examine Findings of Fact Which are Supported by Substantial Evidence”, 17 Gonz. L. Rev 185 (1981-1982).

The failure of Judge Dalton to enter written Findings of Fact and Conclusions of Law requires the reversal of her decision and a remand for further proceedings based upon the record herein.

The Findings of Fact when entered shall have the same effect as a verdict.

RCW 4.44.060

ASSIGNMENT OF ERROR No. 3: Mr. Sutherland is prima facie disqualified as attorney-in-fact for Mr. Christensen because of a conflict of interest and the potential for pecuniary gain resulting from said conflict of interest.

Mr. Sutherland wrote the POA that named him attorney-in-fact that Mr. Christensen signed. Mr. Sutherland also wrote Mr. Christensen’s trust over which he became successor trustee when his wife and daughter found Mr. Christensen to be “incompetent”.

There cannot be a more clear picture of a conflict of interest by Mr. Sutherland representing Mr. Christensen before judge Dalton. Even Mr. Sutherland said it was “weird” that he had assumed so many roles.

Despite that admission, Judge Dalton let Mr. Sutherland continue to appear before her.

Moreover, when Mr. Christensen asked “ do I have any legal recourse” I will take what money I have and spend it on defending her.” Judge Dalton’s response was that there was nothing he could do despite his stated desire to do so. VR 44.

When Mr. Christensen asked if he was going to have to move to Mexico, an unidentified person said, “No, no.” VR. 45.

It is reasonable to assume that the unidentified voice was Mr. Sutherland who was seated next to him. It was clearly not Judge Dalton.

Imagine the scene where Mr. Christensen is being told by the judge and Mr. Sutherland at the same time that 1) his wishes are not going to be listened to and 2) that he was going to remain where he was, namely with Mr. Sutherland. What is omitted by both Mr. Sutherland and Judge Dalton is the statement that Mr. Christensen felt that there was an “incredible bias” against Ms. Roach with the way “the thing has come together.” VR 42.

When Mr. Christensen asked if he had any “legal recourses” Judge Dalton should have advised him that he did. She should have advised him that he had the right to hire his own attorney who would represent him. She did not do that,

rather, she permitted Mr. Sutherland to serve in that capacity despite the fact that Mr. Christensen was clearly asking for independent legal advice.

ASIGNMENT OF ERROR No. 4: Kitsap County was the improper venue for this proceeding as at all times material hereto, Larry Christensen was a resident of King County.

Judge Dalton should not have heard this cause as it should never have been filed in Kitsap County in the first place.

Mr. Christensen was a resident of King County when the action was filed. Furthermore, Ms. Roach was a resident of King County at the time the case was filed. The general rule regarding venue in a VAPO proceeding is as follows:

An action under this section shall be filed in the county where the vulnerable adult resides; except that if the vulnerable adult has left or been removed from the residence as a result of abandonment, abuse, financial exploitation, or neglect, or in order to avoid abandonment, abuse financial exploitation or neglect, the petitioner may bring an action in the county of either the vulnerable adult's previous or new residence.

RCW 74.34.110 (8).

The only person who resided in Kitsap County was Mr. Sutherland – who was the same person who prepared the POA and the trust which is the source of his conflict of interest in this proceeding.

In these documents, Mr. Sutherland chose the parties who would serve as the persons who were to determine when and if Mr. Christensen was incompetent,

he chose the language within each instrument and by filing in Kitsap County, he chose the forum in which those instruments would be reviewed by a Superior court judge.

In the VAPO petition, Mr. Sutherland claimed that Mr. Christensen suffered a developmental disability as governed by RCW 71A. 10.020. (CP 2-3). However, this statute provides that a disabled person must have an onset of their disability “before the individual attains age eighteen...” RCW 71A.10.020 (4). Mr. Sutherland made no such claim in the petition.

Mr. Sutherland signed a petition in which he misrepresented a material fact, namely claiming that Mr. Christensen was a disabled person as set forth in RCW 71A. 10.020. Mr. Christensen has never been found to be a disabled person and the untrue statement that he was, casts doubt into the remaining claims that Mr. Sutherland asserted in the petition.

In the petition, Mr. Sutherland claims as examples of Mr. Christensen’s “incapacity” was his Parkinson’s diagnosis and the influence of Ms. Roach claiming her “love” for Mr. Christensen, crying and otherwise “pleading for Larry’s concurrence for her ideas.

RCW 74.34.020, the definitions section of the Vulnerable Adult statute, does not define “incapacity.” The closest definition in the statute is

“Incapacitated person” which requires a finding of financial harm as set forth in RCW 11.88.010 (1). See RCW 74.34.020(8).

However, Mr. Sutherland states in the petition that there no guardian has been appointed for Mr. Christensen and therefore, there is no determination that Mr. Christensen was an incapacitated person” as defined by the guardianship statute.

This is another example of Mr. Sutherland misleading the court: first, he claims that Mr. Sutherland is a disabled person per RCW 71A.10.020 and second that Mr. Christensen is an incapacitated person when, in fact, he has never found to be such via RCW 11.88.010 (1).

Given these material misrepresentations at the very beginning of this case, Judge Dalton should have ruled, at a minimum, that the statute be followed regarding venue and that the petition should have been filed “where the vulnerable adult resides” namely King County and not Kitsap County.

VI. CONCLUSION

Ms. Roach respectfully moves that the decision by Judge Dalton regarding the VAPO be reversed because of inadequate evidence, as well as judicial bias and prejudice.

Judge Dalton made no reference whatsoever to the declarations that Ms. Roach had filed, in particular the declarations from Mr. Christensen’s health care

providers. To the contrary, Judge Dalton apparently based her decision on those statements that Mr. Sutherland submitted although here is no way of knowing for sure since there were no written Findings of Fact and conclusions of Law entered.

The day before the this hearing, Judge Dalton received a binder from Ms. Roach that she estimated had 500 pages of materials in it. At that moment, she should have continued the hearing date so that she, not her law clerk, could have read every page in that submission and determine which ones were admissible and which ones were not. VR 3.

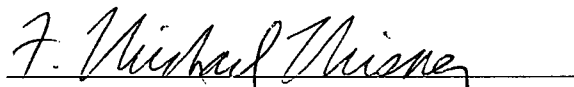
During that review, Judge Dalton should have seen that the case before her was not capable of a ten minutes hearing for each side bases solely on pleadings and other statements.

In her oral decision, Judge Dalton recognized that at a hearing the week before, she could tell that both Mr. Christensen and Ms. Roach were upset by those proceedings. Accordingly, given the issues at stake and the state of mind of Mr. Christensen and Ms. Roach, she should have done what the judge in Island County did in the *Endicott* case did and set the matter for trial, even if it took 10 days of trial over a three month period.

Because of Mr. Christensen's age (over 70) his case would have been deemed a priority matter and would probably have been heard with a minimal continuance. RCW 4.44.025.

If the VAPO is not dismissed for lack of substantial evidence, then it is requested that this case be remanded for further proceedings the entry of specific Findings of Fact and Conclusions of Law.

Respectfully submitted this 25th day of August, 2014.

A handwritten signature in cursive script that reads "F. Michael Misner". The signature is written in black ink and is positioned above a horizontal line.

F. Michael Misner, WSBA #5742
Attorney for Appellant Jennifer Roach

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

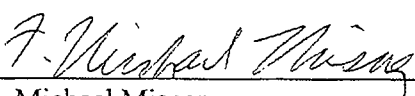
LARRY CHRISTENSEN, et al,
Respondents,
v.
JENNIFER ROACH,
Appellant.

NO. 44340-6-II

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, 2014 at approximately 4:00 p.m. that I delivered by email and placed in the Unites States mail a true and correct copy of Appellant's Supplemental Appellate brief in the above cause of action to Richard Sutherland attorney in fact for Larry Christensen as follows: Email address (rick.m.sutherland@boeing.com) and home address (10419 Olympiad Drive, Port Orchard, WA 98366).

DATED this 25th day of August, 2014.



F. Michael Misner
Attorney for Appellant