

No. 42076-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Guardianship of:

RICHARD B. MORSE,

A Partially Incapacitated Person,

Appellant,

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY

HONORABLE DIANE M. WOOLARD, JUDGE

CLARK COUNTY CAUSE NO. 10-4-00370-4

BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 11

V. CONCLUSION 16

TABLE OF AUTHORITIES

TABLE OF CASES

In re Guardianship of Matthews, 156 Wn. App. 201, 212, 232 P.3d 1140
(2010).13, 14, 15

TABLE OF STATUTES

RCW 11.88.....15
RCW 11.88.045.....14, 15
RCW 11.88.090.....12, 14, 16

I. ASSIGNMENT OF ERROR

The trial court erred in allowing the Guardian ad Litem (GAL) to have appointed counsel conduct direct examination of the GAL and other witnesses, to cross-examine witnesses and to object to proposed exhibits.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

What authority does the trial court have to appoint counsel for the GAL and allow counsel to examine witnesses and make objections?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Richard Morse served in the United States Navy during the Vietnam War as a navigator and bombardier and in the Naval Reserves after his tours of duty for approximately a total of ten years. (RP-110, 442) He obtained his Bachelor of Arts degree from Washington State University. (RP-442) In the late 1960's he taught at the United State Naval Academy at Annapolis, Maryland (RP-444)

Morse returned home to live with his mother in Clark County in 1970. (RP-445) Morse worked on tree farms and did farm labor after he returned. (RP-445 to 446) He does not use drugs or drink alcohol.(RP-447)

Morse wraps the wounds on his legs per his doctor's instructions and wants to remain in good health. (RP-451)

Morse grew up next door to Shelly Heideggar and she has known him for more than 50 years. (RP-26) Morse returned to Amboy, Washington after serving in the military to live with his mother, whose property neighbored Heideggar's. (RP-28) Heideggar saw Morse working around the property over the years. (RP-28)

Heideggar observed Morse preaching out in his yard and on occasion she observed him wearing clothing that she viewed as inadequate for the weather conditions. (RP-32 to 35) She observed garbage and debris around the home where Morse lived. (RP-36 to 40) Heideggar last spoke to Morse in 1973. (RP-46)

Heideggar's son, Leif Lindberg testified that he had known Morse his entire life (46 years). (RP-54) Lindberg saw Morse out in the yard on three or four occasions in the last four years wearing nothing but a breech cloth during cold weather. (RP-55) Morse told Lindberg that God or the Lord will take of

him (Morse). (RP-56)

Lindberg observed bags of piled up trash and broken down vehicles in Morse's yard. (RP-57) Lindberg observed a pulpit on the hill behind Morse's house that Morse used to preach against the sins of others. (RP-58) Lindberg opined that Morse's eccentric behavior worsened, but Lindberg denied feeling scared of or threatened by Morse. (RP-61 to 62) Morse never came over to Lindberg's property. (RP-63)

Morse's sister Louise Guthrie and her husband Dr. Richard Guthrie bought the home Morse lives in after Morse's mother passed away. (RP-65 to 66) Morse resided in the home from approximately 1975 forward to the time he was eventually hospitalized. (RP-67) Morse worked for the Guthries on the farm clearing land and planting tree. (RP-68) The Guthries sent Morse approximately \$300 per month to help with his bills. (RP-68 to 71) They stopped sending Morse the additional money when he reached the age where he could collect social security. (RP-81)

Morse prepared his own meals and took care of maintaining and insuring his own car. (RP-136)

Morse purchased a 40 acre parcel of bare land approximately a half mile from the family farm where he continued to reside. (RP-79) Morse worked for

the Guthries in exchange for them paying the back taxes on this property. (RP-133) At one point he logged his property to help pay the taxes. (RP-127) Morse's property taxes were current at the time the guardianship petition was filed. (RP-131)

The Guthries first became concerned about Morse's living conditions in approximately 1976. (RP-97) They helped Morse clean up his property in 2003 in response to a notice from the county. (RP-112)

From January to February, 2010 the Guthries became concerned about Morse's health because he was having trouble getting around and breathing heavily when he moved around. (RP-73) Morse resisted their efforts to get him to seek medical treatment. (RP-73 to 75) Mr. Guthrie observed large sores on Morse's legs and an odor of decaying flesh around him in early 2010. (RP-75)

Morse executed a durable power of attorney naming the Guthries on February 26, 2010. (RP-143)

Morse was eventually hospitalized for more than a month at Southwest Washington Medical Center. (RP-77) The Guthries observed substantial accumulated garbage and debris in Morse's home at the time he was hospitalized. (RP-82 to 85)

The Guthries indicated that Morse was very adamant about his religious

beliefs. (RP-102, 110)

Neither of the Guthries believed that a power of attorney would be an alternative to guardianship because there was no history of Morse cooperating with them and they lived too far away to make a power of attorney a feasible alternative. (RP-78, 149)

Morse went to Vancouver Health and Rehabilitation Center (VHR) after he was discharged from the hospital. (RP-345) VHR is a skilled nursing facility. (RP-345) Karthryn Jackson, the Social Services Director at VHR, attempted to develop a discharge plan for Morse. (RP-351) Morse responded that "God will provide." (RP-351) Morse's doctor had ordered an assessment so that Morse could be discharged to an appropriate level of medical supervision. (RP-354)

Jackson described removing two 32 gallon garbage bags full of spoiled food from Morse's room on August 10, 2011 because the spoiled food was causing an insect infestation at the nursing home. (RP-355) He also stored containers of urine in his room. (RP-356) Jackson testified that Morse washed his clothing wherever he chose because God instructs him to do this. (RP-361)

When his bill became 45 days past due, the accounting department turns the bill over to Social Services to investigate getting the bill paid. (RP-362)

Jackson filed the petition to establish a guardianship. (RP-364) She asked the court to appoint a third part guardian for Morse. (RP-364)

The court appointed Tom Deutsch guardian ad litem for Morse on May 14, 2010. (RP-169) Deutsch made an unannounced visit to Morse at VHR and found Morse in the middle of attending a church service, so he left Morse a copy of the pleadings and departed. (RP-173) Likewise, Morse was in the middle of a church service on Deutsch's second visit to VHR. (RP-173) On a third visit Deutsch talked with Morse briefly in the dining room. (RP-173) Morse expressed his unhappiness with the petition, questioned Deutsch regarding his spiritual beliefs and gave Deutsch a piece of scripture to take with him. (RP-174)

Deutsch spoke with Louise Guthrie and Kathryn Jackson about Morse and reviewed Morse's chart. (RP-175 to 176) Deutsch was concerned that Morse faced discharge from the facility due to inability to pay and Morse had implanted wound pumps that required a great deal of medical care. (RP-176) Due to the conflict Deutsch had with Morse, he recommended a certified professional guardian. (RP-177)

Deutsch spoke to Dr. Ross, Morse's treating physician and he recommended that Morse have full guardianship over his estate and limited

guardianship over his person. (RP-177, Exhibit 3) DSHS denied Morse services because he owned property. (Exhibit 17) Deutsch had counsel appointed for himself as guardian ad litem for Morse because he needed assistance in getting an order to have Morse's property listed for sale to be able assist Morse in applying for Medicaid. (RP-179) Morse's property had an assessed value of \$247,920. (RP-182 to 183)

Deutsch testified that he believed Morse lacked insight and judgment because he refused to sign the Medicaid application, because he did not want to list his property for sale, because he did not appear for a scheduled appointment with the neuropsychologist, because he refuses to let the nursing home know his whereabouts when he comes and goes during the day, because he refuses to comply with medication and monitoring and because he fails to address his issues of hoarding food . (RP-192) Deutsch opined that Morse's condition had significantly improved by the time of trial strictly because of the safety net of services around him. (RP-194)

Deutsch recommended that Morse lose the right to appoint someone to act on his own behalf, that he lose the right to sue or be sued, that he lose the right to buy or own property or to sell, lease or mortgage property, and that he lose the right to consent to or refuse medical treatment. (RP-197) He

recommended that Morse retain the right to drive, the right to select his care givers in conjunction with his guardian, that he retain the right to vote, that he retain the right to make social decisions, that he retain the right to make a will and that he retain the right to marry, divorce or enter into a domestic partnership. (RP-197) Morse refuses to speak to Deutsch because Morse is represented by counsel. (RP-210)

Morse regularly went to appointments with John Majerus, a physical therapist treating Morse's legs. (RP-234 to 235) Morse gave Majerus consent to treat him and followed through with the recommended treatment. (RP-234 to 236)

Dr. Steve Meharg, a licensed psychologist specializing in neuropsychology evaluated Morse pursuant to a court order. (RP-256 to 258) After two missed appointments, Morse appeared for his appointment with Meharg. (RP-258 to 260) Meharg described Morse as pleasant and engaging in conversation with his staff. (RP-259) Meharg reviewed records from VHR, Morse's medical records, and he talked to Louise Guthrie. (RP-261)

Meharg testified that he reviewed Dr. Janice Carter's mental status evaluation and depression inventory of Morse at Southwest Washington Medical Center which she found to be normal and made no mental health

diagnosis. (RP-263) Likewise Dr. Kaplan at VHR found the results of the mental status evaluation he performed on Morse were normal. (RP-263)

Meharg testified that VHR's records indicated that Morse hoarded jugs of urine and foodstuffs in his room and other residents were uncomfortable with Morse's proselytizing. (RP-264)

Meharg found no evidence of dementing illness. (RP-285) Morse denied any emotional distress. (RP-286) Meharg indicated that Morse demonstrated a broad range of religious based illusions that were consistent with a psychotic disorder and not a normal expression of spirituality. (RP-288) He found Morse to be highly intelligent with a strong history of education and service. (RP-288) Meharg indicated that Morse suffers from a psychotic disorder, no specific origin. (RP-294) Meharg admitted that this is "a wastebasket diagnosis" in that he lacked sufficient information so the diagnosis was "a best clinical guess". (RP-318)

Meharg believed that Morse would likely return to the same behaviors that resulted in his hospitalization absent some protective oversight. (RP-344 to 345)

Allison Kannisto, Nursing Director at VHR testified as to Morse's physical condition when he was admitted to VHR. (RP-417 to 418) Morse had

an irregular heart rate, which caused swelling in his legs, which in turn caused multiple open weeping and infected wounds. (RP-418) He also suffered from insulin dependent diabetes. (RP-418) Morse requires a number of daily medications to be administered at 8:00 a.m. and at 5:00 p.m. (RP-419) Morse has not been compliant with taking all of his medications as directed. (RP-419 to 420)

Morse declined to be evaluated for mental health medications. (RP- 420 to 421) Kannisto described episodes of Morse hoarding food and singing hymns in the middle of the night loudly. (RP-422)

B. STATEMENT OF PROCEDURAL HISTORY

Kathryn Jackson filed a Petition for Guardianship on May 14, 2010. (CP-1) She filed an amended petition on March 14, 2011. (CP-75) The matter went to trial before a jury from March 28, 2011 to March 31, 2011. On April 1, 2011 the jury found Mr. Morse partially incapacitated as to his person and fully incapacitated as to his estate. (CP-147 to 150) On April 27, 2011 the court signed an Order Appointing Limited Guardian of Person and Full Guardian of the Estate. (CP-159)

From this order Richard Morse timely appeals.

IV. ARGUMENT

Morse objected at trial to the guardian ad litem having counsel and the counsel for the guardian ad litem being able to question witnesses. (RP-22) The court allowed counsel for the guardian ad litem to sit at counsel table with the petitioner's counsel, conduct the direct examination of the guardian ad litem and to question witnesses at trial. (RP-24) She cross-examined Dr. Guthrie about Morse's willingness to take on payment of his own expenses. (RP-106)

Deutsch's attorney conducted the direct examination of Deutsch before the jury. (RP-167 to 200) The court then gave the petitioner the opportunity to cross-examine Deutsch. (RP-200) Deutsch's attorney also conducted the direct examination of Dr. Meharg. (RP-255 to 300) Petitioner's counsel then cross-examined Meharg. (RP-296 to 297) Deutsch's counsel conducted redirect examination followed by a second cross examination by petitioner's counsel and a second redirect examination by Deutsch's attorney. (RP-339 to 345)

Deutsch's attorney cross-examined Morse's physical therapist. (RP-247 to 248) The court asked Deutsch's attorney if she had any objection to the

admission of exhibits offered by Morse. (RP-249)

RCW 11.88.090(3)¹ requires the court to appoint a guardian ad litem when the court receives a petition for guardianship. The statute enumerates the specific duties of the guardian ad litem.²

¹RCW 11.88.090:

(3) Upon receipt of a petition for appointment of guardian or limited guardian, except as provided herein, the court shall appoint a guardian ad litem to represent the best interests of the alleged incapacitated person, who shall be a person found or known by the court to:

- (a) Be free of influence from anyone interested in the result of the proceeding; and
- (b) Have the requisite knowledge, training, or expertise to perform the duties required by this section.

The guardian ad litem shall within five days of receipt of notice of appointment file with the court and serve, either personally or by certified mail with return receipt, each party with a statement including: His or her training relating to the duties as a guardian ad litem; his or her criminal history as defined in RCW 9.94A.030 for the period covering ten years prior to the appointment; his or her hourly rate, if compensated; whether the guardian ad litem has had any contact with a party to the proceeding prior to his or her appointment; and whether he or she has an apparent conflict of interest. Within three days of the later of the actual service or filing of the guardian ad litem's statement, any party may set a hearing and file and serve a motion for an order to show cause why the guardian ad litem should not be removed for one of the following three reasons: (i) Lack of expertise necessary for the proceeding; (ii) an hourly rate higher than what is reasonable for the particular proceeding; or (iii) a conflict of interest. Notice of the hearing shall be provided to the guardian ad litem and all parties. If, after a hearing, the court enters an order replacing the guardian ad litem, findings shall be included, expressly stating the reasons for the removal. If the guardian ad litem is not removed, the court has the authority to assess to the moving party, attorneys' fees and costs related to the motion. The court shall assess attorneys' fees and costs for frivolous motions.

²RCW 11.88.090:

(5) The guardian ad litem appointed pursuant to this section shall have the following duties:

- (a) To meet and consult with the alleged incapacitated person as soon as practicable following appointment and explain, in language which such person can reasonably be expected to understand, the substance of the petition, the nature of the resultant proceedings, the person's right to contest the petition, the identification of the proposed guardian or limited guardian, the right to a jury trial on the issue of his or her alleged incapacity, the right to independent legal counsel as provided by RCW 11.88.045, and the right to be present in court at the hearing on the petition;
- (b) To obtain a written report according to RCW 11.88.045; and such other written or oral reports from other qualified professionals as are necessary to permit the guardian ad litem to complete the report required by this section;
- (c) To meet with the person whose appointment is sought as guardian or limited guardian and ascertain:
 - (i) The proposed guardian's knowledge of the duties, requirements, and limitations of a guardian; and
 - (ii) The steps the proposed guardian intends to take or has taken to identify and meet the needs of the alleged incapacitated person;
- (d) To consult as necessary to complete the investigation and report required by this section with those known relatives, friends, or other persons the guardian ad litem determines have had a significant, continuing interest in the welfare of the alleged incapacitated person;
- (e) To investigate alternate arrangements made, or which might be created, by or on behalf of the alleged incapacitated person, such as revocable or irrevocable trusts, durable powers of attorney, or blocked accounts; whether good cause exists for any such arrangements to be discontinued; and

This court addressed the role of the respective parties in a guardianship case in In re Guardianship of Matthews, 156 Wn. App. 201, 212, 232 P.3d 1140 (2010).

why such arrangements should not be continued or created in lieu of a guardianship;

(f) To provide the court with a written report which shall include the following:

(i) A description of the nature, cause, and degree of incapacity, and the basis upon which this judgment was made;

(ii) A description of the needs of the incapacitated person for care and treatment, the probable residential requirements of the alleged incapacitated person and the basis upon which these findings were made;

(iii) An evaluation of the appropriateness of the guardian or limited guardian whose appointment is sought and a description of the steps the proposed guardian has taken or intends to take to identify and meet current and emerging needs of the incapacitated person;

(iv) A description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such alternatives should be used in lieu of a guardianship, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;

(v) A description of the abilities of the alleged incapacitated person and a recommendation as to whether a guardian or limited guardian should be appointed. If appointment of a limited guardian is recommended, the guardian ad litem shall recommend the specific areas of authority the limited guardian should have and the limitations and disabilities to be placed on the incapacitated person;

(vi) An evaluation of the person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made;

(vii) Any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardian or limited guardian or guardianship or limited guardianship;

(viii) Identification of persons with significant interest in the welfare of the alleged incapacitated person who should be advised of their right to request special notice of proceedings pursuant to RCW 11.92.150; and

(ix) Unless independent counsel has appeared for the alleged incapacitated person, an explanation of how the alleged incapacitated person responded to the advice of the right to jury trial, to independent counsel and to be present at the hearing on the petition.

Within forty-five days after notice of commencement of the guardianship proceeding has been served upon the guardian ad litem, and at least fifteen days before the hearing on the petition, unless an extension or reduction of time has been granted by the court for good cause, the guardian ad litem shall file its report and send a copy to the alleged incapacitated person and his or her counsel, spouse or domestic partner, all children not residing with a notified person, those persons described in (f)(viii) of this subsection, and persons who have filed a request for special notice pursuant to RCW 11.92.150. If the guardian ad litem needs additional time to finalize his or her report, then the guardian ad litem shall petition the court for a postponement of the hearing or, with the consent of all other parties, an extension or reduction of time for filing the report. If the hearing does not occur within sixty days of filing the petition, then upon the two-month anniversary of filing the petition and on or before the same day of each following month until the hearing, the guardian ad litem shall file interim reports summarizing his or her activities on the proceeding during that time period as well as fees and costs incurred;

(g) To advise the court of the need for appointment of counsel for the alleged incapacitated person within five court days after the meeting described in (a) of this subsection unless (i) counsel has appeared, (ii) the alleged incapacitated person affirmatively communicated a wish not to be represented by counsel after being advised of the right to representation and of the conditions under which court-provided counsel may be available, or (iii) the alleged incapacitated person was unable to communicate at all on the subject, and the guardian ad litem is satisfied that the alleged incapacitated person does not affirmatively desire to be represented by counsel.

“A GAL appointment exists at the will of the court. See former RCW 11.88.090(11) (stating after a GAL submits a report and the court enters an order, the GAL has "no further duties or obligations *unless otherwise* ordered by the court" (emphasis added)). Thus, a GAL is an agent of the court with duties and obligations flowing from the GAL to the court with a duty to protect the interests of an incapacitated person.” Matthews supra at 212

No statute or case law provides the basis for allowing the GAL to have Counsel appointed to examine and cross-examine witnesses on the GAL’s behalf at a jury trial. RCW 11.88.045(5)³

³
RCW 11.88.045 (1)(a) Alleged incapacitated individuals shall have the....

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person. Counsel shall be provided as soon as practicable after a petition is filed and long enough before any final hearing to allow adequate time for consultation and preparation. Absent a convincing showing in the record to the contrary, a period of less than three weeks shall be presumed by a reviewing court to be inadequate time for consultation and preparation.

(b) 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. Counsel’s role shall be distinct from that of the guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual’s expressed preferences.

(c) If an alleged incapacitated person is represented by counsel and does not communicate with counsel, counsel may ask the court for leave to withdraw for that reason. If satisfied, after affording the alleged incapacitated person an opportunity for a hearing, that the request is justified, the court may grant the request and allow the case to proceed with the alleged incapacitated person unrepresented.

(2) During the pendency of any guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed to represent the incapacitated or alleged incapacitated person. Fees for representation described in this section shall be subject to approval by the court pursuant to the provisions of RCW 11.92.180.

(3) The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. The standard of proof to be applied in a contested case, whether before a jury or the court, shall be that of clear, cogent, and convincing evidence.

(4) In all proceedings for appointment of a guardian or limited guardian, the court must be presented with a written report from a physician licensed

confers limited power on the GAL to petition for temporary relief. See also In re Matthews. Supra.

While RCW 11.88 confers broad authority on the court to appoint a GAL, Morse would respectfully submit that allowing the GAL to be treated as a party to the trial by allowing the GAL's appointed counsel to examine

to practice under chapter 18.71 or 18.57 RCW, psychologist licensed under chapter 18.83 RCW, or advanced registered nurse practitioner licensed under chapter 18.79 RCW, selected by the guardian ad litem. If the alleged incapacitated person opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the alleged incapacitated person. The guardian ad litem may also obtain a supplemental examination. The physician, psychologist, or advanced registered nurse practitioner shall have personally examined and interviewed the alleged incapacitated person within thirty days of preparation of the report to the court and shall have expertise in the type of disorder or incapacity the alleged incapacitated person is believed to have. The report shall contain the following information and shall be set forth in substantially the following format:

- (a) The name and address of the examining physician, psychologist, or advanced registered nurse practitioner;
- (b) The education and experience of the physician, psychologist, or advanced registered nurse practitioner pertinent to the case;
- (c) The dates of examinations of the alleged incapacitated person;
- (d) A summary of the relevant medical, functional, neurological, or mental health history of the alleged incapacitated person as known to the examining physician, psychologist, or advanced registered nurse practitioner;
- (e) The findings of the examining physician, psychologist, or advanced registered nurse practitioner as to the condition of the alleged incapacitated person;
- (f) Current medications;
- (g) The effect of current medications on the alleged incapacitated person's ability to understand or participate in guardianship proceedings;
- (h) Opinions on the specific assistance the alleged incapacitated person needs;
- (i) Identification of persons with whom the physician, psychologist, or advanced registered nurse practitioner has met or spoken regarding the alleged incapacitated person.

The court shall not enter an order appointing a guardian or limited guardian until a medical or mental status report meeting the above requirements is filed.

The requirement of filing a medical report is waived if the basis of the guardianship is minority.

(5) During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary relief under chapter 7.40 RCW, to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40 RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.

witnesses, to cross examine other witnesses and to make objections as to exhibits exceeds the scope of the powers and duties conferred on the GAL by RCW 11.88.090 and acted to deprive Morse of a fair trial in this matter.

V. CONCLUSION

This court should reverse the jury verdict in this matter and remand the matter for a new trial wherein the GAL may be called as a witness in the proceedings by either party.

Respectfully submitted this  day June, 2012,


SUZAN L. CLARK, WSBA #17476
Attorney for the Appellant

SUZAN L CLARK ATTORNEY AT LAW

June 18, 2012 - 2:05 PM

Transmittal Letter

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