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NO. 51591-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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EARL RUSSELL,  
APPELLANT  
VS.  
MELANIE REYNOLDS,  
RESPONDENT

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OPENING BRIEF APPELLANT

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## TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	ii
II.	INTRODUCTION	1
III.	SUMMARY OF ARGUMENT	3
IV.	ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	7
V.	STATEMENT OF THE CASE	11
VI.	LEGAL ARGUMENT.	20
	<b>Assignment of Error #1</b>	20
	Totality of Circumstances	
	<b>Assignment of Error #2</b>	28
	Interpretation of Notice Party Statute	
	<b>Assignment of Error #3</b>	42
	No Jurisdiction over Trust	

	<b>Assignment of Error #4</b>	47
	Appeal is Not Only Remedy	
VII	REQUEST FOR ATTORNEYS FEES	51
VII	RELIEF REQUESTED	52

## I. TABLE OF AUTHORITIES

<u>TABLE OF CASES</u>	Pages
<u>State v. Law</u> 110 Wn.App 36, 39, 38 P.3d 374 (Wash. Div 3 2002)	19
<u>Kinnan v Jordan</u> , 131 Wn.App 738, 751, 129 P.3d 807	19
<u>Skamania County v. Columbia River Gorge Comm'n</u> , 144 Wn.2d 30, 42, 26 P.3d 241 (2001)	21
<u>Kevin Dolan and a Class of similarly situated individuals, Respondents v. King County, a political subdivision of State of Washington, Petitioner</u> , 172 Wn.2d 299 (Wash 2011), 258 P.3d 20	22
<u>Estate of Treadwell v. Wright</u> , 115 Wn.App 238, 249, 61 P.3d 1214 2003)	28
<u>State v. Wentz</u> , 149 Wash.2d 342, 346, 68 P.3d 282 (2003)	28
<u>In Re Guardianship of McKean</u> , 136 Wn.App 906, 913, 151 P.3d 244 Div 2, 2007)	28,35
<u>Young v. Clark</u> , 149 Wash.2d 130,132, 65 P.3d 1192	31

(2003)

<u>Jenkins v. Snohomish City Public Utility, District 1</u> , 105 Wn.2d 99, 102, 713 P.2d 79 Washington (1996) citing <u>Smith v. Skagit County</u> , 75 Wn.2d 715 (Wash 1969)	31
<u>Chai v Kong</u> , 122 Wn.App 247, 93 P.2d 936, (Div 1, 2004)	34
<u>In re Marriage of Leslie</u> , 112 Wash. 2d 612, 619-20, 772 P.2d (1989)	34
<u>Mitchell v. Kitsap County</u> , 59 Wash.App 177, 797 P.2d 516 (1990)	34
<u>In re the Matter of the Estate of Rathbone No 94356-7</u> (p.16,) Supreme Court of Washington, filed 3/15/18	37
<u>Ryan v. State</u> , 112 Wn.App 869, 899-900, 51 P.3d 175 (2002)	39
<u>Gusafson v. Gusafson</u> , 54 Wash.App 66, 7-1	39
<u>State v. J.P.</u> , 149 Wash.2.d 444, 450, 69 P.3d 318 (2003)	39
<u>Mathews v. Eldridge</u> , 424 U.S. 319,332, 96 S.Ct 893, 47 L. Ed 2d 18 (1976)	45
<u>Cleveland Bd of Educ. V. Loudermill</u> , 470 U.S. 532,542,	45

105 S.Ct 1487, 84 L.Ed.2d 494 (1985)

<u>TABLE OF STATUTES</u>	Pages
RCW 11.88.100	13, 28, 35
RCW 11.88.105	27, 28, 37
RCW 11.88.120(1)	45
RCW 11.92.040(1)	27
RCW 11.92.040(1)(a)	21
RCW 11.92.040(3)	7
RCW 11.92.040(7)	13, 24, 16, 17, 25, 29, 34
RCW 11.92. 043(1)(e)	46
RCW 11.92.150 (Notice Party)	1, 3, 4, 6, 9, 10, 14, 21, 22, 23, 24
RCW 11.96A	10, 31, 35
RCW 11.96.020	37

## II. INTRODUCTION

Cheryl Russell (Cheryl) is a retired schoolteacher who enjoys ballroom dancing and keeping a close eye on her investments. She established the Cheryl Creed Russell Living Trust (Trust) as Grantor/Trustee in 2008; it is a nonreporting discretionary Trust, intended to handle finances for her even if she became disabled. Most of Cheryl's assets remained in Trust under the control of her son Earl Russell (Trustee); disbursements from the Trust were to be at his discretion for her benefit. However, her son Earl Russell ("Trustee") filed a Petition for Guardianship for Cheryl, concerned regarding her safety and vulnerability. Cheryl denies any need.

On 9/2/16 Anchor Guardianship and Care Management Services Inc., employing Certified Professional Guardian (CPG) Melanie Reynolds ("Guardian") was appointed as Full Guardian of her Estate and Limited Guardian of her Person. Two of Cheryl's three adult children, Holly Russell (in Oregon) and Earl Russell (in Illinois) filed Requests for Special Notice under RCW 11.92.150. They did not receive the mandatory 90 Day Reports filed by the Guardian on 12/2/16. A Notice of hearing was filed and served (not on Cheryl) but the language of the notice was incorrect. Cheryl never received the pleadings or notice, although she still had the right to receive pleadings in her case, in order to participate in those decisions under the terms of the Guardianship Order. (CP

117). Cheryl also lost her rights to receive future pleadings as part of the 1/6/17 Order.

The Order Approving 90 Day Reports ("1/6/17 Order") in Superior Court for Lewis County ("Lewis Ct") is the underlying Order challenged in the CR 60(b) Motion in Thurston County Superior Court ("Thurston Ct."). It also approved the Care Plan, Inventory and budget, permitted the Guardian to determine spending amounts required to be paid from the separate Trust assets, without consent of the Trustee. The Guardian tripled expenses per month: up to \$25,000/ month from Trust assets was spent for 24/7 caregivers, against the wishes of Cheryl and the Trustee.

Bond was waived in the 1/6/17 Order, based on the information in the verified Inventory, which represented that all but \$10,000 was in blocked accounts, but it really was \$55,000 in the unblocked accounts. No Guardianship accounts were ever blocked. The Guardianship IRA assets (\$650,000+) remained unsecured in Cheryl's name until June 2017 and some were spent by the Guardian without court authorization. \$200,000 was spent in the first year. Additional fees of \$50,000 are still claimed by the Guardian and counsel.

To force cooperation in spending decisions, Earl Russell (Trustee) challenged the validity of that 1/6/17 Order and the manner in which it was entered, by filing an Amended Motion for Relief under CR 60(b)(1) and (11) on 5/17/17. Relief was denied

(6/16/17), and Revision was denied by the Thurston Ct. on 11/17/17. This appeal is from that denial. Cheryl now has a new Guardian, and the parties are working together, but she still hates having a Guardianship. Modification of the Guardianship is pending. Cheryl is reunited with her son.

### **III SUMMARY OF ARGUMENT**

This is an appeal from denial by the Thurston Ct. on 11/17/17 of a Motion for Relief under CR 60 (B)(1) and (11) from an Order Approving Budget, Disbursements and Initial Personal Care Plan (called "90 Day Reports") and Transfer Matter to Thurston County entered on 1/6/17 ("1/6/17 Order") in the Lewis Ct (CP 7). Appellate review of CR 60(b) denial is normally reviewed on appeal for abuse of discretion only. This case is different: it raises significant issues which justify looking beyond the abuse of discretion criteria, in order to address the underlying statutory interpretation on RCW 11.92.150 and the rights of individuals and their families to participate in the decisions about an individual living under Guardianship. Most people lack the funds to raise these Guardianship rights on appeal. Defining what RCW 11.92.150, the Notice Party statute, requires as to Cheryl and her children's right to notice and service of 90 Day Reports (permitting an individual and her family to participate) is important to many incapacitated persons and their families, just as family participation in forming an I.E.P. is important to a student with disabilities.

Lack of Service, and Notice was Wrong: On Revision on 11/17/17, the Thurston Ct. should have granted relief under CR 60(b)(1) and (11) from the 1/6/17 Order entered by the Lewis Ct. because the Guardian didn't comply with RCW 11.92.150 (Notice Party Statute). The Guardian admitted at the CR 60(b) hearing on 6/16/17 that she had not provided service of the 90 Day Reports. Earlier on, the Lewis Ct. had no way of knowing that the 1/6/17 Order it was signing incorrectly stated that proper notice had occurred. The Thurston Ct made an incorrect Finding of Fact #3 (that "the Trustee had notice") since the it incorrectly interpreted what RCW 11.88.150 (Notice Party Statute) required (not just notice but service) before the 1/6/17 Order could be validly entered. The Thurston Ct interpreted the statute to say that notice that a hearing would occur was sufficient to meet the Guardian's duty, but the plain language of RCW 11.92.150 the notice party gets ALL pleading, plus proper notice of what the hearing will address. This misinterpretation was an error of law, a misinterpretation of the statute, and therefore abuse of discretion. The Thurston Ct. made an additional error of law (building on the incorrect interpretation of RCW 11.92.150) in concluding in Finding of Fact #6 that "no procedural irregularity occurred and no extraordinary circumstances exist to justify under CR 60(b)(11) relief". Relief should have been granted under CR 60(b) because the Guardian's withholding of required information from the parties and the Lewis Ct. caused the erroneously signing the 1/6/17 Order.

Cheryl Wrongly Excluded. Cheryl had no notice of hearing and no participation in the 1/6/17 hearing. Cheryl did not receive copies of any of the 90 Day Reports, or of the Petition which sought to remove her right to receive further pleadings, so that all future care decisions such as where she lives, with whom and at what rate of spending would be entirely outside of her knowledge, in contradiction of the rights reserved to Cheryl in the Guardianship Order “to have input in deciding who shall provide care and assistance” and the right “to make decisions regarding social aspects of her life”.(CP 117). Cheryl did protest once she got to attend the CR 60(b) hearing on 6/16/17

90 Day Reports Incorrect. Irregularities in procedure and misstatements of fact by the Guardian in the 90 Day Reports, plus actual alteration of the relief granted in the order (compared to relief requested in the Petition for Approval) all point to a cluster of misinformation by the Guardian, which the Lewis Ct could never have known about, since the Lewis Ct was entitled to rely on the Guardian’s information in the 90 Day Reports. Since they didn’t receive the 90 Day Reports, no one in Cheryl’s family could challenge the facts presented in them. Thus, the Guardian’s omissions of fact had the effect of preventing a correct decision on 1/6/17 by the Lewis Ct.

Appeal Was Not Exclusive Remedy. The Thurston Ct made an error of law in Finding #4 that the only appropriate remedy was appeal, not relief under CR 60(b). Procedural irregularities are what

CR 60(b) relief is designed to provide. During the time for appeal, the Trustee did not have accurate information of the total sums held by the Guardian, due to the inaccuracy of the 90 Day Reports. However, the total facts were in the record on Revision, and relief was appropriate.

Not a Fact for Judicial Notice. The Findings of Fact #2 on Revision (entered 11/17/17) contains findings (that the Thurston Ct takes “judicial notice” on the carefulness of Judge Brosey’s preparation for hearings) for which no evidence exists in the record in support, and it was error of law to take judicial notice of a matter of opinion, which is not permissible under ER 201; the Thurston Ct also made an incorrect conclusion of law #6 that “no procedural irregularities occurred in entry of the 1/6/17 Order and no extraordinary circumstances exist to justify CR 60(b)(11) relief.”

Guardian’s Duty to Update. The 90 Day Reports as filed with the Court were later shown to be seriously inaccurate. The Guardian had a duty to update the court at hearing, but she did not do so. The 1/6/17 Order adopting 90 Day Reports relied on their accuracy; that mistake had the effect of endangering Cheryl’s assets because the Order waived statutory requirements for bond on all Guardianship accounts, the Inventory incorrectly stated that only \$10,000 cash was in accounts, when it was \$55,000+. Relief on Revision from the 1/6/17 Order adopting the incorrect 90 Day Reports was appropriate under CR 60(b)(1) and (11), and denial was both an abuse of discretion but also an error of law

Guardian improperly spending Trust assets. The 1/6/17 Order also permitted the Guardian access to spend unlimited amounts of Trust assets; but the Trust was not a Guardianship asset. That non-reporting, discretionary Trust was intentionally created by Cheryl as Grantor in 2008. The Guardianship Order on 9/2/16 specifically recognized the separate status of that Trust apart from the Guardianship estate; the 1/6/17 Order changed that fact and allowed the Guardian to force payment from the Trustee for involuntary 24/7 caregivers in Cheryl's home, against her wishes and those of her Trustee.

Trust Remained Separate Asset. The Guardianship court lacked jurisdiction over the Trust itself before and after 1/6/17; there never was compliance with the statutory requirements for jurisdiction through TEDRA. Relief from the 1/6/17 Order under CR 60(b)(1) and (11) should have been granted on the basis of lack of jurisdiction by the Lewis Ct. over the nonreporting Trust, forcing the Trustee to spend Trust assets in ways which he considered contrary to Cheryl's best interests. The Thurston Ct. Finding of Fact #7 in the Order on Revision on 11/17/17 that "Judge Brosey had jurisdiction to hear the matter and provide relief" on 1/6/17 provides no support for the conclusion of law in Finding of Fact #6, the denial of relief under CR 60(b). The Thurston Ct. erred in concluding that the Trust assets were subject to the Guardianship Court and could be ordered spent in the discretion of the Guardian against the objection of the Trustee.

Violation of Statutory Intent. The Thurston Ct.'s Finding of Fact # 6 that no procedural irregularities occurred in entering the 1/6/17 Order by Lewis Ct. was without substantial evidence in the record to support it, and the Findings of Fact/Conclusion of Law # 6 that no CR 60(b) relief need be granted was an incorrect legal conclusion by the Thurston Ct. on 11/17/17. In actuality, the 1/6/17 Order approving the 90 Day plans without notice of hearing to Cheryl or service of the 90 Day Reports or Petition to Cheryl also granted a request by the Guardian to deny Cheryl her right to service of future pleadings in her case when Cheryl had no notice that her right to participate in future decisions was in jeopardy (because all the pleadings containing this request were withheld by her Guardian). The 1/6/17 Order denied Cheryl's liberty interest without due process (notice and opportunity to be heard) and it violated the statutory intention underlying RCW 11.88.005 stated policy of maximizing the individual's liberties, autonomy and exercise of their rights.

**IV. ASSIGNMENTS OF ERROR  
AND Issues Pertaining to Assignments of Error**

1. **NOTICE AND SERVICE:** The Thurston Ct. erred on 11/17/17 as a matter of law in refusing Revision to grant relief under CR 60(b)(1) and (11) from the 1/6/17 Order, The Thurston Ct incorrectly interpreted the Notice Party Statute, RCW 11.92.150, to

minimize notice and permit skipping service of pleadings; this error in interpretation led it to improperly conclude in Finding of Fact # 6 that no procedural irregularity occurred and no extraordinary circumstances existed to grant relief under CR 60(b)(11).

1.1 Did the Trial court misinterpret the Notice Party Statue's requirements to only require notice that some kind of hearing would occur be made on parties who filed a request for special notice under RCW 11.92.150?

1.2 Was refusal of Revision of the 6/16/17 Order denying relief under CR 60(b) an abuse of discretion when the Order entered 1/6/17 by default, without notice to Cheryl, removed Cheryl's right to receive future notice and future pleadings when she had not been given the opportunity to be aware and be heard on this issue (since she had no notice of the 1/6/17 hearing) and when she did protest it when she first obtained the opportunity to be present in court on 6/16/17?

1.3 Was the Thurston Ct's Conclusion of Law #6 that "no procedural irregularity occurred and no extraordinary circumstances exist to justify CR 60(b)(11) relief" contradicted by the facts presented in the Motion for Revision, Clarification of Documents for Review on Revision (CP 589-598), Memorandum of Authorities (CP 339-350), the Transcript of 6/16/17 hearing on the 60(b) Motion in which the Guardian admitted failure to serve the Notice Parties (CP 656), Cheryl's statement at that hearing that she had no notice (CP 662), Trustee's Reply (CP625 -631), and the Amended Motion for

Relief Under CR 60(b) (CP 294-301); so that it was error of law for the Thurston Ct. to conclude that no irregularities occurred since these pleadings contained specific information about violations of procedure and the notice party statutes (RCW 11.92.150)?

## 2. **NO JURISDICTION OVER THE SEPARATE TRUST**

The original Guardianship Order recognized the Cheryl Creed Russell Living Trust as a separate asset apart from the Guardianship Estate. When the Lewis Ct never established subject matter jurisdiction over the Trust through a TEDRA action (RCW 11.96A), the Lewis Ct. did not have jurisdiction over the Trust on 1/6/17 to order the Trustee to pay funds from the nonreporting discretionary Trust in the Guardian's sole discretion. Finding of Fact # 7, "The Court found Judge Brosie had jurisdiction to hear the matter and provide relief" was an error of law when it was used by the Thurston Ct to justify that the 1/6/17 Order had jurisdiction to order the Trustee to expend funds against his judgment of what was appropriate for Cheryl. this lack of jurisdiction over the Trust assets was irregularity under CR 60 (b)(1) and (11), and the trial court's refusal to grant relief was abuse of discretion.

2.1 Did the Guardianship Order language designating the Trust as a separate asset remain in effect in the absence of a TEDRA petition being filed, so that the 1/6/17 Order could not grant authority to the Guardian to require funds from the discretionary

Trust without the Trustee's agreement that it was in Cheryl's best interests?

### **3. APPEAL WAS NOT THE ONLY REMEDY**

It was abuse of discretion and error of law by the Thurston Court on 11/17/17 to deny relief under CR 60(b)(1) from the Order entered on 1/6/17 based on the Finding of Fact/Conclusion of Law # 4 that "the [only] appropriate remedy for the 1/6/17 Order was appeal or request for review" when clear errors in procedure (such as failure to comply with the notice party statute) were demonstrated in the transcript of hearing before the Court Commissioner on 6/16/17 which was reviewed on Revision, and CR 60(b) provides for relief from judgment for irregularities in the manner in which the original order was entered.

3.1 Was the Conclusion of Law #4 that appeal was the only remedy for the improper entry of 1/6/17 Order an error of law when the record on Revision had the admission by the Guardian that basic statutory requirement of service of pleadings was missing, and the record demonstrates that clear notice of hearing was missing on 1/6/17 in violation of the Notice Party statute?

### **4. JUDICIAL NOTICE WAS NOT APPROPRIATE**

The Thurston Court erred in Finding of Fact #2 that "The Court takes judicial notice of the carefulness of Judge Brosey in matters appearing before him and he vigorously reviews the files before

hearing.” was incorrect usage of judicial notice and an inadequate basis to conclude that no irregularity occurred.

4.1 Was it error of law to take judicial notice of an unverified opinion or observation as an administrative fact under ER 201 to reach the conclusion in Finding of Fact #6 that “The Court finds that no procedural irregularity occurred and no extraordinary circumstances exist to justify CR 60(b)11 relief” when that conclusion was based on the Thurston Ct’s incorrect use of judicial notice?

## **V. STATEMENT OF THE CASE**

Cheryl Russell (Cheryl) established Cheryl Creed Russell Living Trust (Trust) on 5/6/08. (CP. 913) The Trust is revocable during her lifetime (CP 913), but upon her disability provides for her child to be successor Trustee (CP 922-23) and grants discretionary power to the Trustee to disburse funds for her benefit. (CP 913) at the discretion of the Trustee (CP 915) and distributions are to be “Without continuing supervision or the intervention of a Guardian, conservator or other legal representative” (CP 920). “All trusts created under this agreement shall be administered free from the active supervision of any court” (CP 924). Reimbursement for expenses and compensation to the Trustee is provided in the Trust (CP 925) The Third Amendment to Trust names son Earl Russell as Successor Trustee after Cheryl (CP 941); he has never paid himself for his duties (CP 355).

Earl Russell (son and Trustee) filed a Petition to Establish Guardianship of Cheryl Russell (CP 230) in Lewis County Superior Court (Lewis Ct.), where she resided. On 9/2/16 an Order Appointing Guardian (CP 114) was entered naming Anchor Guardianship and Case Management Services Inc. (Guardian) as Limited Guardian of the Person and Full Guardian of the Estate of Cheryl Russell. The Guardianship assets exceeded \$650,000. (CP 51). The first page of the Order required 90 Day Reports to be filed 12/1/16 and set a hearing date for 1/6/17, deferred decisions on bonding of the Guardians' liquid accounts and requirements for blocking assets (required by RCW 11.88.100) to be decided at the hearing on the 90 Day reports (CP 121). The Guardianship Order (CP 116, line 12) specifically refers to the Trust assets and says that ***"The trust shall remain in place for the named trustee to manage assets pursuant to its terms and directions"***.

In the Guardianship Order (CP 114) Cheryl retained "The right to have input with the Guardian in deciding who shall provide care and assistance and in making medical decisions, as well "The right to make decisions regarding the social aspects of her life" (CP 117). Cheryl has always been unhappy with the Guardianship and with the full-time caregivers in her residence. (CP 544-45, 534, 653-4, 660-61, 663, 666, 712-13)

The Trustee, Cheryl's son in Illinois, filed and served a Request for Special Notice under RCW 11.92.150 on 9/26/16 (C.P.

85), as a relative, requesting service of all documents and advance notice of all hearings on requests for actions from the Court.

Holly Russell, daughter in Oregon, filed and served a Request for Special Notice under RCW 11.92.150 on 11/29/16 (C.P. 55), requesting service of all documents and advance notice of all hearings on requests for actions from the Court.

On 12/2/16 the Guardian filed a verified Inventory (CP 51); the Guardian also filed a proposed Initial Personal Care Plan and Budget. (CP 42). The initial Inventory, Care Plan and Budget are commonly known as “90-day reports” Neither of the notice parties (children) were served with these documents, which Guardian’s counsel admits. (CP 656, 300). Cheryl did not receive any of these reports (CP 661-662), although the Guardianship Order permits her to participate in care plan decisions (CP 117). No certificates of service for any of the 90 Day reports are in the court file. (CP 2-6)

The Inventory (CP 51) incorrectly stated that \$624,000 was in blocked accounts and \$10,000 total was in unblocked accounts, and it suggested that the “court does not require a bond” (CP 53): no bond is ever set (CP 7). In actuality, no blocked accounts existed (CP 335). The Guardian filed a Petition for Approval of 90 Day Reports and to Transfer Cause to Thurston (CP 36) on 12/21/16, which Petition lists Cheryl’s income as \$7436.64/month, including \$6500 from the Trust (CP 36), and contains a request for approval of a proposed budget of \$5800/month (CP 37). The Petition requests that the Trustee continue to send \$6500 per

month to the Guardian (CP 39), which he had agreed to do (CP 290) and it requests authority for the Guardian to spend up to \$1000 extra in three months of the year without further order being required. (CP 39). It requested leave to discontinue serving Cheryl with future pleadings in the Guardianship (CP 13), adding an assurance "The Guardian is required to send copies of documents to the Trustee of IP's trust and to notice parties.". No 90-day reports were sent to the Trustee or notice parties or Cheryl and Cheryl did not get the Petition. (CP 662, 656).

Added into the end of the Petition by Guardian is the request for an Order that the Trustee "also pay any expenses that exceed her monthly income" (CP 38). The Trustee did not perceive that this budget would be expanded to \$25,000/month without further court approval within a few months (CP 254, 335). The notice to parties of hearing for 1/6/17 was incorrect. A docket notice for hearing of "Approval of First Annual Accounting" on 1/6/17 (CP 23) was filed by the Guardian on 12/21/16, with the certificate of service to the two notice parties, but not to Cheryl (CP 24).

Hearing occurred in Lewis Ct. on 1/6/17 and no notice party or Cheryl attended. Earl was pro se at this time (CP 91). The Guardian's counsel was not present. (CP 17) The Order provided by the Guardian, recites that "Notice has been properly provided to persons entitled to notice of this presentation" (CP 8). The 1/6/17 Order approved the budget proposed in the Petition (CP 9), waived

bond and ordered that blocked agreements be placed on the IRA accounts. (CP 8). It excused service of pleadings on Cheryl (CP 8).

The Order Approving the 90 Day Care Plan entered on 1/6/17 found as fact that “the IP has funds in trust to pay for her expenses that exceed her monthly income and therefore, the trustee should pay these expenses from the Trust assets” (C.P. 8, line 22). No reference to the Trust as distinct from the Guardianship assets exists in this Order. The 1/6/17 Order authorized the Guardian to make all the decisions on expenditures, compelling the Trust to pay “all expenses exceeding income of the IP” (C.P. 10). RCW 11.92.040(7) requires the Guardian to seek approval in advance for the budget, and it provides that authorized amounts may be modified by the court upon review. No TEDRA action (RCW 11.96A.090) was ever brought. (CP 2-6)

The Order as presented on 1/6/17 also changed the language in the relief granted from that in the Petition (CP 15) and substituted language (CP 9, paragraph 2.5) permitting the Guardian to expend an additional \$1000/month each month.. No mention to the court of the alteration of language in the Order is made at the presentation hearing, only transfer of venue (CP 361-365)

The Guardian filed a second Notice of Change of Circumstances (C.P. 253) on 6/5/17, disclosing that the large Vanguard IRA Guardianship account had remained unblocked since 9/2/16 and that the Guardian had removed \$10,000 unilaterally in May without leave of the court.

Hearing occurred on 6/16/17 on Earl Russell's request for a care assessment of Cheryl Russell's needs, for mediation, and for Relief under CR 60 (b). **At court, Cheryl stated that she had not been told about any of the hearings in her case** (CP 661,662). Cheryl expressed her concern about the speed at which her funds were being spent. (CP 659-61). Cheryl's attorney raised the fact that no notice had been given to Cheryl since the Guardianship Order was entered (CP 662). **The Guardian admitted that she had not served the 90 days reports to the two notice parties,** but no mention to Cheryl. (CP 656). The Guardian asserted general legal authority to use Trust assets because Cheryl is the beneficiary (CP 655), and that the Guardian did not need to consult with the court re large increases in expenditures, when the court inquired about this omission (CP 653, 656). RCW 11.92.040(7) requires Guardians to return to court for approval and RCW 11.92.040(2) requires a court order specifying expenditures.

The Court Commissioner's Order (CP 357) denied relief under CR 60(b), found that there was no irregularity in procedure, that there was no issue of jurisdiction over the Trust and that the 1/6/17 Order was a valid one. (CP 357-360). From this denial of Relief under CR 60(b), the Trustee filed an Amended Motion for Revision on 6/26/17 (CP 366)

Mediation occurred on 6/28/17. The parties reached an agreement, in a CR2A (CP 456- 460). The Trustee agreed to pay \$8200 in additional fees, plus \$35,000. On 7/20/17 the Trustee

moved for an Order to Enforce the Mediation Agreement (CP 494) because the Guardian was not complying.

On 6/30/17 the Guardian filed a Declaration explaining her efforts (CP 378) and filed a request (CP 405-412) for approval of a new budget (\$24,893/month), requested retroactive ratification of her removal of the \$10,000 from the (not-blocked) IRA and requested \$47,398 more in fees. She also filed her Accounting, Statement of Fees, and numerous Bank records. (CP 398-404).

On 7/20/17 the Trustee obtained an Order to Show Cause; to Replace the Guardian (CP 492) and to appoint a Guardian ad Litem for the purpose. The Trustee's Declaration (CP461) alleged abuse of spending authority, isolation of Cheryl from her family, failure to meet statutory duties to block assets (ordered 1/6/17) and use of funds from blocked accounts without leave (CP 493).

The Trustee filed Objections (CP 464) and again on 7/20/17 to retroactive approval of fees for Guardian's mismanagement (CP 476), again asserting lack of jurisdiction of the Guardianship court to access the asserts of a non-reporting Trust and excessive, unauthorized spending against his objection.

The Guardian set hearing on all matters for hearing before the Court Commissioner on 7/21/17, with a Reply date the day after the Trustee's attorney returned on 7/18/17. At hearing, an Agreement was entered as an Order on 7/28/17 (CP 521) that an additional \$25,000 would be available from the IRA to the

Guardian's use for Cheryl Russell's living expenses during the month of August when the Guardian's counsel was on vacation.

. The Guardian asserted at hearing on 7/21/17 (CP 693) that Trustee Earl Russell had no standing in the Guardianship to object to spending of his mother's money. The Commissioner found (CP 710) that Earl was a party in interest, and the Court's Order (CP 525) states that "the trustee has standing regarding financial issues in the Guardianship" due to his status as notice party and son of Cheryl. The Guardian announced that she would withdraw from the matter (CP 714)

At hearing on 7/28/17 the Court Commissioner (C.P.524) compelled the Guardian to deliver the originals of the Trust documents to the Trustee (CP 1003). A GAL was appointed; he filed his report on 9/7/17 (CP 524); Summit Guardianship Services was appointed as successor Guardian. (CP 399-400, 785) Outstanding fees in excess of \$50,000 beyond what was already paid for one year of service of the original Guardian are still pending (CP 405)

On 9/8/17 Judge Schaller requested clarification of the documents to be reviewed by the court on Revision Motion. (CP548) The Trustee filed a Clarification on 9/26/17 (C.P. 589-98) outlining issues regarding additional specific procedural violations in the 90 day reports, lack of jurisdiction over the Trust assets, plus objection to the open-ended obligation to pay whatever costs the Guardian elected to incur, violation of the statutory requirement for

approval of a specific budget and duty to return to court to report changes in circumstances so the court to revise the budget and/or adjust the bond. The Trustee also filed a Memorandum of Authorities (CP 339-50) setting forward the specific legal arguments for relief.

11/9/17 The Guardian filed Objection to the Motion for Revision (CP 565) asserting, among other things that TEDRA would have permitted the Guardianship to reach Trust assets. On 11/16/17 The Trustee filed a Response (CP 625) reiterating that no action was brought under RCW 11.96A.090.(CP 628-29) The Trustee also argued the substantial violations of the right to notice and bad faith in the Guardian switching the language of the 1/6/17 Order presented, which added specific permission to spend \$1000 more per month than the budget requested.(CP 9). No proof of service of the proposed Order presented on 1/6/17 was ever filed

11/17/17 Hearing in Thurston Ct. occurred on the Trustee's Motion for Revision before Judge Christine Schaller. The Court found that there were no procedural irregularities because "Mr. Russell knew about the hearing", that the issue of subject matter jurisdiction over the Trust was a matter that should have been appealed, and could not be addressed in a 60(b) Motion, that Judge Brosey is meticulous in his preparations for hearings such as the one on 1/6/17, and that there are "no extraordinary circumstances exist to justify CR 60(b) (11) relief". (C.P. 606) (RP)

Earl Russell filed his Notice of Appeal on 11/21/17.

## **VI. LEGAL ARGUMENT**

### **ASSIGNMENT OF ERROR #1**

**1. NOTICE AND SERVICE:** The Thurston Ct. erred on 11/17/17 as a matter of law in refusing Revision to grant relief under CR 60(b)(1) and (11) from the 1/6/17 Order, The Thurston Ct incorrectly interpreted the Notice Party Statute, RCW 11.92.150, to minimize notice and permit skipping service of pleadings; this error in interpretation led it to improperly conclude in Finding of Fact # 6 that no procedural irregularity occurred and no extraordinary circumstances existed to grant relief under CR 60(b)(11).

1.1 Did the Thurston Ct. misinterpret the Notice Party Statute's requirements (service of pleadings and notice of hearing) to only require notice that some kind of hearing would occur be was sufficient under RCW 11.92.150 for parties who filed a Request for Special Notice?

**Standard of Review:** Normally, the decision to grant relief from judgment under CR 60 (b) is reviewed for abuse of discretion, but the Thurston Ct. interpreted the language of RCW 11.92.150 incorrectly and limited the rights of Incapacitated Persons and the Notice Parties.

A court's choice, interpretation or application of a statute is a question of law that we review de novo under an error of law

standard. A court must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous.

*Kinnan v. Jordan*, 131 Wn. App. 738, 751, 129 P.3d 807.

**Argument:**

Two notice parties properly filed their request in this guardianship; Earl Russell (Cheryl's son and Trustee) filed his request on 9/21/16 (CP 85) and Holly Russell (Cheryl's daughter) requested special notice on 11/21/16 (CP 55). Both Earl and Holly requested copies of "all documents" and advance notice of any application for Court approval of any action in the guardianship (CP 55, 85). This request clearly expresses Earl Russell's desire to fully participate in Cheryl's care; he is also the successor Trustee to whom the Guardianship Order refers as the person will handle the majority of her assets. (C.P 116).

RCW 11.92.150 Request For Special Notice of Proceedings permits

"any person interested in the estate, or in the incapacitated person or any relative of the incapacitated person... may serve upon the Guardian...and file with the clerk of the court... A written request stating the specific actions of which the applicant requests advance notice.

Where the notice does not specify matters for which notice is requested, the Guardian or limited Guardian shall provide copies of all documents

filed with the court and advance notice of his or her application for court approval of any action in the guardianship

The Guardian admitted at the CR 60(b) hearing on 6/16/17 that she had not provided service of the 90 Day Reports (CP 636). The 1/6/17 Order adopted a proposed Care Plan, Budget and verified Inventory without compliance with statutorily required service of the reports on both notice parties (RCW 11.92.150) and on Cheryl, the incapacitated person.

The Thurston Ct. Order on 11/17/17 (CP 776) Finding of Fact #3 that “the Trustee had notice of the hearing on 1/6/17”; is an error of law is because the notice of hearing he received was inadequate under the plain language of RCW 11. 92.150, since the notice designated that the hearing was for “Approval of First Annual Accounting”. (CP 23). The actual topic of the hearing was approval of crucial 90 Day Reports. The notice parties were unaware of what was actually pending for hearing on 1/6/17. (CP 292-93, 300-301). The Trustee contacted the Guardian after the fact on 1/11/17 for information about setting up the new Guardianship budget (CP 352).

The Conclusion of Law which the Court reached was that sufficient notice had been given, **when the plain language of the statute RCW 11.92.150 required both service of pleadings and notice of hearing. This statute was the legal definition of what was required procedurally for the 1/6/217 Order to be properly entered; the Thurston Ct erred by interpreting the statute to**

**require less.** This incorrect conclusion in Finding of Fact #3 (that “the Trustee had notice”) was the basis of Finding of Fact/Conclusion of Law #6 (that no procedural irregularity occurred and no extraordinary circumstances exist to justify CR 60(b)(11) relief. The Thurston Ct. applied an incorrect interpretation of the notice statute (RCW 11.92.150)

On 1/6/17, the Lewis Ct. had no way of knowing that the 1/6/17 Order it was signing incorrectly stated that proper notice had occurred (CP 7). However, the Thurston Ct knew better because it had facts showing failure of service to Notice parties

The Thurston Ct. made an additional error of law (building on the incorrect interpretation of RCW 11.92.150) in concluding in Finding of Fact #6 that “no procedural irregularity occurred and no extraordinary circumstances exist to justify under CR 60(b) (11) relief”, since the Guardian’s choice to withhold required information from everyone, the Lewis Ct, Cheryl and to the notice parties, caused the inadvertently erroneous signing the 1/6/17 Order. There was no one aware to notify the court. (CP 285) The Guardian had a duty to update the court of changes in financial positions within 30 days of the events under RCW 11.92.040(7), but no update was filed (CP 2-6) nor was anything mentioned at hearing (CP 362)

**90 Day Reports.** The 90 Day Reports are crucial blueprints of how a person’s life will be arranged. Once approved, they were entered as Orders of the Court on 1/6/17 with a complete absence

of participation from Cheryl and her family. The Lewis Ct had no knowledge that the proposed Care Plan, Budget and Inventory were each incorrect in material ways.

The Personal Care Plan for the Incapacitated Person (required by RCW 11.92.043(1)(a); it includes

- (i) an assessment of the incapacitated person's physical, mental and emotional needs and such person's ability to perform or assist in activities of daily living, and (ii) the guardian's specific plan for meeting the identified and emerging personal care needs of the incapacitated person

These initial evaluations of the persons capabilities/needs and the Guardian's plans for meeting those needs through minimal restricted living arrangement are crucial information for the family members and the incapacitated person to receive. This is both because the family can give important information about the person's abilities and preferences but also because the person, her family and friends may be the only advocates available to argue to the court for the person's wishes or best interests.

The **Personal Care Plan** (CP 42), nine pages long, was never provided to the notice parties until 1/11/17, after the Order approving had been entered on 1/6/17. (CP 351). Since both children and Cheryl did not know about the existence of the 90 Day reports, these pro se notice parties had no idea that they were missing a hearing on decisions about their mother's daily care. The Guardian expressed her surprise at this in an email on 1/11/17

(after the Order approving had been entered on 1/6/17) (CP 351). Under the Guardianship Order, Cheryl had the right to participate in decisions about “who shall provide care and assistance” and to make “decisions about the social aspects of her life” (CP 117). Cheryl got no pleadings and no notice of hearing for 1/6/17 (CP 662). The medical report provided as part of the GAL investigation identified Cheryl’s needs to be for only a part-time caregiver (CP 24) Nonetheless, the Guardian went forward unilaterally with plans for increasing caregivers in Cheryl’s home, a circumstance which Cheryl hated, regardless of the families’ concern and the Guardian’s counsel persistently refused efforts to get an independent care assessment of Cheryl’s needs. (CP 248, 269, 342, 544-45, 634, 644, 653-4, 660-61, 664-66, 712-13, 1003).

Guardians have concerns (liability/insurance concerns pushing for 24/7 care as “safest” choice after *Cummings v. Guardianship Services of Seattle*, 128 Wn. App. 742, 110 P.3d 796 Div I, 2005) which may conflict with the person’s best interests. The trade-off between Cheryl’s autonomy and malpractice insurance prudence, as approved in the 1/6/17 Order was weighed on the side of convenience, contrary to her family and Cheryl’s wishes. The Guardian’s counsel admits failure to serve the 90 Day Reports at hearing on 6/16/17 and shrugs it off. (CP 656). Counsel says “...so as the court knows, the guardian’s duty is to file a 90-day report, and in that report, all that is required is what are the assets that she is in charge of and what is the proposed budget and then the personal care plan. And I do have—I

**will admit that it is my inadvertent fault, I did not send—attach a copy of the inventory and the personal care plan when I mailed a notice in the petition.**

But I just want the court to be aware that the trustee had constructive notice, because everything that was in the inventory was in the petition, so he had notice.” (CP 657). (emphasis supplied)

In reality, there is no “constructive notice”. The Proposed Care Plan is not described at all in the Petition; the only overlap between the Petition and the 90 Day Reports is the proposed budget (CP 17), which was already being exceeded the day the Petition was filed (12/21/16).

**Inventory:** RCW 11.92.040(1) requires the guardian to provide the verified Inventory listing all assets available to the guardian, whether in or out of the title of the Guardianship estate. The Inventory (CP 51) filed on 12/2/16 was incorrect: it stated that less than \$10,000 was in unblocked accounts, when actually \$55,000 was in cash and that the Roth IRA Vanguard Accounts (\$650,000) were blocked. It represented to the court that no bond was needed. Based on this (wrong) information, the Lewis Ct. waived bond in the 1/6/17 Order (CP 7). RCW 11.88.100. In fact, no blocked accounts existed (CP 335) and the guardianship had already received more than \$100,000 in cash. The Guardianship by 12/2/16 had already received \$11,645.78 from Bank of the Cascades (CP 399), \$35,000 from the mobile home proceeds (CP 399), \$46,500 in checks from the Trustee (CP 283), and \$10,403

from Cheryl's WSECU account (CP 283, 290), a total \$103,548.78 in cash. On 12/5/16 the Guardianship bank account had \$ 68,517 in it (CP399) and on 1/6/17 it had \$54,788 in cash (CP 400). No update of the Inventory assets was filed prior to or at the hearing (CP 5). The Guardianship Order required notice to the court within 30 days of change of income or assets of Cheryl (CP 121) and RCW 11.92.040(3) but no update was filed.

No bond was ever ordered (CP 7) despite the requirement that bond or blocked accounts shall be established before letters of Guardianship are issued RCW 11.88.100. The 1/6/17 Order (CP 9) that required blocked accounts to be set up was also never followed.

**Proposed Budget** is required by RCW 11.92.040(7) which states that the Guardian must

"apply to the court no later than the filing of the inventory for an order authorizing disbursement". And "The amounts authorized under this section may be decreased or increased from time to time by direction of the court".

A proposed budget was listed in the Petition, but the Order approved at hearing on 1/6/17 had different spending amounts authorized from the ones in both the budget in the Guardianship Order and the budget in the Petition. It also contained what the Guardian considered to be open-ended authorization to spend, and the Trust would be ordered to pay all expenses exceeding Cheryl's income of \$1133/month. Still, this increased upper limit

(approximately \$8000/month) was exceeded repeatedly immediately, since caregivers were in place but not disclosed at 1/6/17 hearing, nor in the Initial Personal Care plan (CP 47-49), nor in the proposed budget (CP 44)

1.2 Was refusal of Revision of the denial of relief under CR 60(b) abuse of discretion when the Order entered 1/6/17 by default, without notice to Cheryl, removed Cheryl's right to receive future notice and future pleadings when she had not been given the opportunity to be aware and be heard on this issue (since she had no notice personally of the 1/6/17 hearing) and she did protest it when she first obtained the opportunity to be present in court on 6/16/17?

**Standard of Review:**

Review for error of law is de novo. *Snohomish County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42. Review for factual error is review for substantial evidence, which is interpreted as sufficient quantity of evidence to persuade a fair-minded person of the truth of the premise. *King County v. Wash. State Boundary Review Bd*, 122 Wn. 2d 648, 675 (1993).

**Argument:**

Cheryl had retained the right to participate in formation of her care plan, under the Guardianship Order (CP 117). Cheryl had the right under the Guardianship order (CP 117) "to have input with the

Guardian in deciding who shall provide care and assistance...” and she had the right to pleadings. None of this was done by the Guardian. Cheryl’s retained right regarding care and assistance, with her right to make decisions on social aspects of her life was part of why the Guardianship of the estate was a Limited One (not full). Cheryl had the right to participate in the 90 Day Care Plan, as well as the budget and Inventory. The GAL report (CP399-400) found that she had financial capacity to understand her affairs. Cheryl never got the Petition and she is not listed on the Certificate of Service for the incorrect Docket Notice of Hearing. (CP 24). Cheryl was denied any voice, and when she got to Court, she protested. (CP 668).

Worse than that, the Petition sought to remove Cheryl's right to participate in her future hearings, and Cheryl never got the Petition, so she had no notice of what was at stake on 1/6/17. The 1/6/17 Order removing her right to future pleadings: something clearly of concern to her, since she objected on 6/16/17 that she had been excluded from notice of hearings, and her new counsel objected to failure to serve pleading on her. None the less, the Court Commissioner refused relief under CR 60(b) of that 1/6/17 Order. Cheryl lost her right to use her rights she retained under the Order Appointing Guardian, which affect her liberty, how she lives and with whom. Due process means at the minimum the right to notice and the right to be heard. Due process is a flexible concept, but at a minimum it requires the right to notice and an opportunity to

be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Cheryl did not get a copy of the Docket Notice of hearing (with the incorrect topic listed). The certificate of service doesn't list her, but her attorney of record, Janet McClanahan Moody, who presented the 1/6/17 Order without comment or her signature approving it, apparently as a courtesy to Guardian's counsel. (CP361-65) The order presented on 1/6/17 represented that notice had been given, and the Lewis Ct had no reason to doubt it. The Guardian later asserted (unsworn testimony) in the Guardian's Response (CP 305, line 1), that testimony was taken at the hearing on 1/6/17 before entry of the Order Approving 90 Day Reports when in fact Ms. Hantze was not present at that court appearance, and no testimony was taken (CP 361-365).

However, this Thurston Ct on Revision on 11/17/17 had the complete record before it, including the admission by the Guardian that she had not provided the 90 day Reports. (CP 636). No proof of service of the 90 Day Reports was ever filed (CP 2-6) and the guardian never served Cheryl or the family. It was error of law on the part of the Thurston Court to ignore this fact of lack of service. Cheryl's right to notice of hearing and service of future pleadings was removed at the 1/6/17 hearing and she never knew it.

1.3 Was the trial court's Finding of Fact/Conclusion Of Law (#6) Denying Revision of the Motion for Relief Under CR 60(b)(1) and (11) from the 1/6/17 Judgment an error of law, in

Finding of Fact #6 that “no procedural irregularity occurred and no extraordinary circumstances exist to justify CR60(b)(11) relief” because the totality of the facts presented in the Motion for Revision, Clarification of Documents for Review on Revision (CP 589-598), Memorandum of Authorities (CP 339-350, the Transcript of 6/16/17 hearing on the 60(b) Motion in which the Guardian admitted failure to serve the Notice Parties (CP 656), Cheryl’s statement at that hearing that she had no notice (CP 662), Trustee’s Reply (CP625 -631), the Amended Motion for Relief Under CR 60(b) (CP 294-301) in concluding that no irregularities occurred since these pleadings contained specific information about violations of procedure and the notice party statutes (RCW 11.92.150)?

**Standard of Review:**

.Review for error of law is de novo. *Snohomish County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 42. Review for factual error is review for substantial evidence, which is interpreted as sufficient quantity of evidence to persuade a fair-minded person of the truth of the premise. *King County v. Wash. State Boundary Review Bd*, 122 Wn. 2d 648, 675 (1993).

Appellant argues that the error of law review should be used in this combined Finding of Fact/Conclusions of Law entered by the Thurston Ct. Order on Revision on 11/17/17 (CP 774) because overwhelming evidence existed in the record on Revision to

establish multiple factual errors which the Lewis Ct could not know about, when the information presented to it (90 Day Reports) was incorrect and no one was there to state anything to the contrary. Only on Revision was the file information sufficiently clear to identify the facts, and the overwhelming aspect of them tainted the entire Order entered on 1/6/17.

No witness testimony was taken at any hearing, and the record consists of documents only. When the record at trial consists entirely of records, the trial court did not assess the competency of any witnesses, and the appellate court reviews de novo. *Dolan v. King County* 172 Wn.2d 299, 310 (2011)

Argument: The Thurston Ct made an error of law in its' Finding of Fact/Conclusion Of Law (#6) denying Revision of the Motion for Relief Under CR 60(b) from the 1/6/17 Order entered by Lewis Ct by deciding that "no procedural irregularity occurred and no extraordinary circumstances exist to justify CR60(b)(11) relief" because the Lewis Ct accepted as fact the representations by the Guardian contained on the face of that Order, but by the time of Revision hearing, the record before the Thurston Ct. identified that the representations made on 1/6/17 were incorrect:

The Thurston Ct on Revision had sufficient facts in the record to find irregularities had occurred in the manner of obtaining entry of the 1/6/17 Order but also that the extremely erroneous content of the 90 Day Reports presented by the guardian, a CPG,

for approval on 1/6/17 created an extraordinary circumstance justifying relief under CR 60(b)(11). The guardian withheld relevant evidence from the Lewis Ct, despite a duty of mandatory updates to the 90 Day Reports (required by the Guardianship Order and by RCW 11.92.040(7) resulted was error in entering the 1/6/17 Order, and refusal to grant relief on Revision by the Thurston Ct abuse of discretion.

There are multiple irregularities in the actual 90 Day Reports, both because they were incorrect factually and because they sought impermissible authority. The factually incorrect Inventory was the basis of waiver by the court of the statutorily required bond (RCW 11.88.100) for the protection of the Cheryl's liquid assets; the Care Plan did not mention 24/7 caregivers was not being followed on 1/6/17; Cheryl's right to receive future pleadings was removed without notice to her; the separate discretionary Trust was required to pay any amount of expense which the Guardian chose to make, regardless of RCW 11.92.040(7) The Guardianship court had a responsibility to oversee and protect the incapacitated person's assets. "A Guardian is the court agent, through which the court protects the wards interests". *In re Guardianship of McKean*, 136 Wn. App. 906, 913. The Lewis Ct could not protect Cheryl because it had no information about what was occurring.

Cheryl's financial interests as well as her emotional well-being was harmed in all of this: she filed a Declaration on 5/24/17 (CP 1000) stating that she objected to her son refusing to use

money from her Trust to support her. The Trustee's Declaration 5/25/17 expresses his concern (CP 329) that Cheryl was being manipulated into distrusting him, because he had actually sent \$79,000 from the Trust (CP 283-84) and an additional \$6617 in Oct-Nov 2016 (CP 284), plus the Guardian had used \$55,000 in Cheryl's cash assets (CP 283).

The Trustee filed a Memorandum of Law on 6/14/17 (CP 339) identifying the issues of impermissibility of blanket authorization for a Guardian to expend any funds, since a budget for expenditures is required to be approved in advance by statute RCW 11.92.040(7) and also asserting that Guardianship letters should not have been issued without bonds or blocked account receipts being supplied to the court under RCW 11.88.100 and 105.

The Trustee raised continued concerns about funds which were missing or spent by the Guardian without disclosure in the Inventory. (C.P. 829, 851).

The Trustee filed an Amended Motion for Relief From Judgment from the Order entered 1/6/17 under CR 60 (b)(1) and (11), on 5/17/17 (C.P. 295) asserting procedural errors regarding service of notice and lack of subject matter jurisdiction (CP 294) The Guardian asserted that the language of the original Guardianship Order, permitted decisions on spending "in the Guardian's sole discretion" and was insufficient to permit her actions to bind the Trustee as to Trust assets (CP 302).

On Revision on 11/17/17, the record was replete with the inaccuracies and procedural violations involved in entry of the 1/6/17 Order, which the Lewis Ct. could not have known about. They had now been documented in specific detail. Relief under CR 60(b) (1) and (11) should have been granted on the totality of the irregularities, misstatements and secrecy in which the 1/6/17 Order had been issued.

An additional irregularity was also demonstrated at the Revision hearing (PR 8-9); Changed Numbers in the Order as signed on 1/6/17. The Petition outlined a budget for which approval was sought: it was for \$5800/month,. The 1/6/17 Order contained changed language (CP9) permitting “to pay miscellaneous expenses of the IP up to the amount of \$1000 per month in connection with this guardianship without further order of the court.” This was authority to spend another \$9000 per year. This change required disclosure to the Court of the changed language in the order being presented for signature when the notice parties weren’t present at hearing.

**Last but not least, the Inventory which was filed on 12/2/16 was almost completely incorrect,** and the Guardian did not alert the Judge that \$68,517 in cash assets on (12/5/16) were not disclosed in it (CP 865). \$54,789 existed in the Guardianship checking on 1/6/17, the date of hearing (CP 866). RCW 11.92.040(3) mandates that the Guardian “*shall report any*

*substantial change in income or assets of the guardianship estate within 30 days”.*

No update to the court by the Guardian was provided prior to or at hearing on 1/6/17 and no discussion of the need for bonding was raised at hearing. (CP 361-65). Bond was waived. (CP 15). Under RCW 11.888.100, bond should had been placed to equal the liquid assets before the Letters of Guardianship were ever issued on 12/2/16 (CP 41). The Lewis Ct. had an important role to play in securing the safety of the Guardianship assets by blocking agreements or bond, but it did not have the facts. “A Guardian is the court’s agent, through which the court protects the ward’s interests”. *In re Guardianship of McKean* 136 Wn. App. 906,913. 151 P.3d 224 (Div 2, 2007). “*Under RCW 11.88.100 and 11.88.105, the clerk should not issue letters of guardianship before the ward’s cash or securities are fully covered either by a bond, blocking agreements or a combination of the two of these.*” *Estate of Treadwell v. Wright* 115 Wn .App. 238., 249, 61 P. 3d 1214 (2003), *petition for review denied*, 75 P.3d 969 (2003). (CP345)

Because the Guardian did not correct the information, Judge Brosey could not know of the danger to Cheryl’s assets if he signed the Order as presented on 1/6/17, with no bond and no blocked accounts, when more than \$650,000 in assets were left vulnerable to misuse. (CP 213, 46). Cheryl could have moved, gifted or spent the Vanguard IRA assets remaining in her name alone.

The Thurston Ct denied Revision on 11/17/17 (CP 774). The Court found (Finding of Fact/Conclusion of Law # 7) that the Lewis Ct. had jurisdiction “to hear the matter, enter the order and provide relief” (CP 210). The ruling did not address the issue of that court’s jurisdiction over the nonreporting Trust.

## **#2:NO JURISDICTION OVER SEPARATE TRUST**

The original Guardianship Order recognized the Cheryl Creed Russell Living Trust as a separate asset apart from the Guardianship Estate. When the Lewis Ct never established subject matter jurisdiction over the Trust through a TEDRA action (RCW 11.96A), the Lewis Ct. did not have jurisdiction over the Trust on 1/6/17 to order the Trustee to pay funds from the nonreporting discretionary Trust in the Guardian’s sole discretion. Finding of Fact # 7, “The Court found Judge Brosie had jurisdiction to hear the matter and provide relief” was an error of law when it was used by the Thurston Ct to justify that the 1/6/17 Order had jurisdiction to order the Trustee to expend funds against his judgment of what was appropriate for Cheryl. this lack of jurisdiction over the Trust assets was irregularity under CR 60 (b)(1) and (11), and the trial court’s refusal to grant relief was abuse of discretion.

2.1 Did the Guardianship Order language designating the Trust as a separate asset remain in effect in the absence of a TEDRA petition being filed, so that the 1/6/17 Order could not grant authority to the Guardian to require funds from the discretionary

Trust without the Trustee's agreement that it was in Cheryl's best interests?

Standard of Review: Ordinarily, discretionary decisions of the court in guardianship (such as relief under CR 60(b) are reviewed for abuse of discretion. However, whether a trial court had subject matter jurisdiction over a controversy is a question of law, which is reviewed de novo. Young v. Clark, 149 Wash. 2d 130, 132, 65 P. 3d 1192 (2003)

Appellate review of denial of CR 60(b) relief is appropriate (instead of by immediate appeal) to vacate a void order irrespective of lapse of time. "Where a court lacks jurisdiction over the parties or the subject matter or lacks the inherent power to make or enter the particular order, it's judgment is void." "A motion to vacate a void judgment may be brought at any time and the court must vacate the judgment as soon as the defect comes to light." Chai v. Kong, 122 Wn.App. 247, 93 P.3d 936, 255 (Div 1, 2004), citing In re Marriage of Leslie 112 Wash. 2d 612, 619-20, 772 P. 2d 1013 (1989) and Mitchell v. Kitsap County 59 Wash.App. 177, 797 P. 2d 516 (1990)

Review de novo is appropriate when all decisions are made purely on documentary evidence in the court file, not on the court's observation and evaluations of witnesses Jenkins v. Snohomish City Public Utility District No. 1 105 Wn 2d 99, 102, 713 P.2d 79 (Washington 1986), citing Smith v. Skagit County 75 Wn.2d 715 (Wash.1969)

Argument:

As the prevailing party, the Guardian had the responsibility to request the Thurston Ct. to address the silence in the findings in the order on Revision as to jurisdiction over the Trust itself as a Guardianship asset, and failure to do so left only a generalized Finding of Fact # 7 "The Court found that Judge Brosey had to make a finding of fact and conclusion of law that the Lewis Ct had jurisdiction over the Trust, which was identified as separate from guardianship assets in the original Guardianship Order.(CP 114).

What legal action occurred between 9/2/16 (Order Appointing Guardian) and 1/6/17 (Approval of 90 Day Reports) to change that status? Nothing. The Personal Care Plan (C.P. 50) refers to the Guardian's plan to work with Earl Russell and identifies that some assets will be under the guardianship and other assets will remain in the Trust under the authority of the successor Trustee, Earl. (C.P. 50). However, the 1/6/17 Order approving the Care Plan does not include that language.

There is no dispute as to the Superior Court's authority to hear the Petition for Approval of 90 Day Reports, but the Thurston Ct was in error in assuming it also had jurisdiction over the Trust. This was error as a matter of law because lack of subject matter jurisdiction over the subject of the Trust made the 1/6/17 Order void as to authority to require the Trustee to spend funds in ways to which he and Cheryl objected (for 24/7 caregivers, something the Guardian did not disclose was being funded by the 1/6/17 Order).

The Trustee's attorney argued repeatedly in pleadings and at hearing on Revision (RP 9-10) that Lewis Ct. in the Guardianship action lacked subject matter jurisdiction over the Cheryl Creed Russell Living Trust (Trust) when it entered the Order on 1/6/17 approving a budget requiring the Trustee to fund actions taken by the Guardian without his consent.

No TEDRA Action. An action under TEDRA (11.96A.100) is available to permit the Guardianship to join the assets of the Trust into the authority of the Guardianship Court. However, TEDRA is a specific supplemental statutory remedy available only by a separate Petition and citation issued to the parties. **The provisions of RCW 11.96A, the Trust and Estate Dispute Resolution Act can apply to guardianship actions.** *In re Guardianship of McKean* 136 Wn. App. 906,913 (2007). RCW 11.96A.090 has very specific statutory requirements to establish the court's jurisdiction over the Trust. But in this situation, this option remained unexplored and the Trust remained outside the guardianship estate control. The Guardianship Order did not assert jurisdiction over the assets of Cheryl's Trust; the Trust was excluded from the guardianship estate (CP 116) in the original Order Appointing Guardian on 9/2/16. In fact, in the Order Appointing Guardian entered on 9/2/16 in this case, the Lewis Ct found that: "...*the Court has jurisdiction over the person and/or estate of the alleged Incapacitated Person*" (CP 116, line 2). The Order not assert any jurisdiction over the existing Trust. To the contrary, it found that (CP116, line 12-13): "***There is a living***

***Trust in place to manage most of Cheryl Russell's financial assets. The trust shall remain in place for the named trustee to manage assets pursuant to its terms and directions."***

On Revision (11/17/17) the Thurston Ct declined to address the issue of whether the Lewis Ct. lacked subject matter jurisdiction over the Trust when it entered the Order Approving the 90 Day Reports; the 1/6/17 Order required: (CP 10) "The Trustee of the Cheryl Russell Living Trust shall pay the monthly sum of \$6500 to the guardianship and shall pay any expenses that exceed the monthly income of the IP"..(emphasis supplied)

The Thurston Ct on Revision ended evaluation once it determined that the only proper remedy to fix the 1/6/17 Order Approving 90 Day Plans was appeal.

The Trustee consistently asserted from the very beginning (CP 314-15, 328) that he had a fiduciary responsibility to his mother because he was her successor trustee and that his discretionary authority and that he required information about her needs in order to make responsible decisions about caregivers and her residence. All his requests were thwarted by the Guardian's refusal to cooperate in sharing information and reaching agreements through compromise (CP 341).

Trust history and Purpose: The Trust document, by its own terms, was established for the purpose of administering Cheryl Russell's assets outside of any intervention by the court and specifically exonerated the Trustee from needing to obtain court

orders or approval. Cheryl Russell established the Trust on 5/16/08, with the stated intention that she would control her own funds until such time as she became disabled or died. (CP 914). If she became disabled, she instructed that the successor Trustee would expend the funds for her care and benefit in his sole and absolute discretion (CP 915) without the need for any court supervision; in fact, she stated in the trust that no court would acquire jurisdiction over the Trust beyond the task of naming a successor trust if necessary (CP 923). The Trustee is specifically authorized to act outside of the jurisdiction of any court (CP 924); the Trustee is to use his powers for the benefit of the beneficiary without necessity for application for court order (CP 926), the Trustee has the power to initiate and defend the trust in litigation (CP 929) and the Trustee is to protect the Trust assets from encumbrances (CP 932).

The Restatement (Third) of Trusts paragraph 50 states that: "A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee."

By creating this Trust for herself, Cheryl established her wish to have her family make decisions for her if she became disabled. She named her son Earl to be successor Trustee (CP 941). Cheryl's efforts in creating this Trust as a nonreporting discretionary trust are comparable to the intentions of the testator in establishing Nonintervention powers in her personal representative. Recently the Supreme Court of Washington construed limits on the authority

given to the courts under TEDRA, in order to honor the testator's intent:

Such broad intervention by courts goes against Ms. Rathbone's intent that courts not be involved in the administration of her estate. TEDRA acts to supplement, not supplant, other statutory provisions and is not an independent basis to invoke the authority of Superior Court's over nonintervention wills

*In the Matter of the Estate of Rathbone* No 94356-7 p.16, Supreme Court of Washington, filed 3/15/18.

RCW 11.97.020 provides that: The rules of construction that applied in this state to the interpretation of a will and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property

More than \$200,000 in Trust assets were spend in one year for living circumstances which Cheryl deplored. Cheryl and her children were unable to participate in the process of decisions about her care, but her Trust was compelled to pay every expense. This violated Cheryl's right to autonomy, and her assets were used without her consent.

The legislative intent of RCW 11.88.005 expresses

"the intent of the legislature to protect the liberty and autonomy of all people in of the estate, and to enable them to exercise their rights under the law to the maximum extent... 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"

In the absence of compliance with the requirements of TEDRA, the guardianship court could not override the independence of the Trust created by Mrs. Russell during her time of ability. The Guardian was required to work with the Trustee in order to accomplish agreement on spending assets from the Trust.

### **3. APPEAL WAS NOT THE ONLY REMEDY**

It was abuse of discretion and error of law by the Thurston Court on 11/17/17 to deny relief under CR 60(b)(1) from the Order entered on 1/6/17 based on the Finding of Fact/Conclusion of Law # 4 that “the [only] appropriate remedy for the 1/6/17 Order was appeal or request for review” when clear errors in procedure (such as failure to comply with the notice party statute) were demonstrated in the transcript of hearing before the Court Commissioner on 6/16/17 which was reviewed on Revision, and CR 60(b) provides for relief from judgment for irregularities in the manner in which the original order was entered.

3.1 Was the Conclusion of Law #4 that appeal was the only remedy for the improper entry of 1/6/17 Order an error of law when the record on Revision had the admission by the Guardian that basic statutory requirement of service of pleadings was missing, and the record demonstrates that clear notice of hearing was missing on 1/6/17 in violation of the Notice Party statute?

Standard of Review is de novo because this is an error of law.

The Thurston Court on 11/17/17 incorrectly stated in Finding of Fact #4 “The Court finds that the appropriate remedy for the 1/6/17 Order was appeal or request for discretionary review”, implicitly conceding that there was an issue about jurisdiction over the Trust assets, but stating that it could not be addressed in a CR 60b) Motion for Relief from Judgment (presuming that it was only an error of law and that there were no procedural issues): “there is no explanation as to why, if Mr. Russell as the trustee was so unhappy with what happened in January for which he did have notice- I do find he had notice- why he didn’t appeal the order. Because that’s the remedy”. (RP 20)

However, the irregularities in the Guardian’s 90 Day Reports (especially the amount of money (\$55,000) held without disclosure to the Lewis Ct while obtaining waiver of the statutorily required bond, the failure to update the Court within 30 days of changes in financial circumstances, the fact that blocked accounts did not exist until a new guardian was appointed in September 2017 are all indications that procedural irregularities occurred in entry of the 1/6/17 Order, for which relief under CR 60(b) is an appropriate remedy. The Thurston Ct missed the factual data indicating that the Lewis Ct was not provided with accurate information, and it was induced to enter an Order in the absence of notice that the 90 Day reports were incorrect and not properly served on notice parties.

The Conclusion of Law in #4, that appeal was the only remedy, is incorrect.

#### **4. JUDICIAL NOTICE WAS NOT APPROPRIATE**

The Thurston Court erred in Finding of Fact #2 that “The Court takes judicial notice of the carefulness of Judge Brosey in matters appearing before him and he vigorously reviews the files before hearing.” was incorrect usage of judicial notice and an inadequate basis to conclude that no irregularity occurred.

4.1 Was it error of law to take judicial notice of an unverified opinion or observation as an administrative fact under ER 201 to reach the conclusion in Finding of Fact #6 that “The Court finds that no procedural irregularity occurred and no extraordinary circumstances exist to justify CR 60(b)11 relief” when that conclusion was based on the Thurston Ct’s incorrect use of judicial notice?

ER 201 permits a court to take judicial notice of an adjudicative fact “not subject to reasonable dispute” and either generally known within the areas of jurisdiction of the trial court or readily determined by resort to sources whose accuracy cannot be questioned. The Thurston Ct.’s high opinion of Judge Brosey as meticulous is not such a fact: it is subject to reasonable dispute and cannot be readily determined by resort to an accurate source (such as a reference book). It is also not included under RCW 5.24.010,

which covers laws. It may be an accurate opinion, but it cannot be taken under judicial notice.

The entire point which the Thurston Ct missed is that Judge Brosey acted accurately under the facts which he had been supplied, but he did not have accurate facts. Judge Brosey might be meticulous, but he is not clairvoyant. The 1/6/17 Order recited that proper notice had been given to all parties entitled to it; he relief on that representation, but in fact RCW 11.92.150 had not been complied with. He relied on the 90 Day Reports, but each had significant inaccuracies in them both as filed on 12/2/16 and on the date of hearing on 1/6/17. The only court with knowledge of the actual facts was the Thurston Ct on Revision, which had the bank account records, the Declarations and the admission by the Guardian that she did not serve the notice parties. Therefore, the Thurston Ct.'s finding #2 was incorrect legally and insufficient to support the finding/conclusion #6 that no irregularities or extraordinary circumstances occurred on 1/6/17.

**VII. APPELLANT SHOULD BE GRANTED REASONABLE ATTORNEY'S FEES ON APPEAL, SINCE HE RAISED THE ISSUES REGARDING THE 1/6/17 ORDER OVER AND OVER AGAIN IN THE TRIAL COURT, TO NO AVAIL.**

RAP 18.1(a) permits the court of appeals to grant attorneys' fees on appeal if applicable law grants a party a right to recover reasonable attorneys' fees and expenses. Under RCW

11.96A.150(1) in a guardianship action (even outside of TEDRA) a court “may.. order costs, including reasonable attorney’s fees, to be awarded to any party: (a) From any party to the proceedings.” Appellant repeatedly raised the issues of the Guardian’s improper spending amounts without court authorization, improper access to compel him to pay expenses for 24/7 care which Cheryl hated (CP 663,666) and which the Trustee did not approve (but which was a method to avoid potential liability of the Guardian, and which disregarded Cheryl’s wishes. The Trustee was reviled by the Guardian, who would not collaborate in any decision. The Guardian (or her counsel’s) intransigence in refusing to work with Cheryl and her family is the root cause of this appeal. Now there is still a claim of \$50,000 in additional fees claimed by the Guardian under the elastic permission granted to spend in the 1/6/17 Order, to the detriment of Cheryl.

RCW 11.96A.150(1) states that “... the court may consider all factors that it deems to be relevant and appropriate, which factors may but not include whether the litigation benefits the estate or trust involved.” Cheryl’s guardianship estate and her Trust will benefit from relief from the 1/6/17 Order, but most importantly, her rights, retained despite her Guardianship, are protected by upholding procedural safeguards for meaningful participation in the process of decisions about her life. Attorney fees for the necessity of this appeal should be granted to Trustee Earl Russell, who persevered through months of deaf ears to his valid concerns.

**VIII. CONCLUSION:** Despite all the protections provided by the Guardianship statutes and the Guardianship Order, Cheryl was excluded from the process of deciding the conditions under which she lives in the 1/6/17 Order. Her children, notice parties, were also excluded. Revision of denial of the CR 60(b) Motion for Relief from Judgement was appropriate on 11/17/17 and should have been granted; incorrect information was the basis of the error of the Lewis Ct in granting the Order on 1/6/17. Errors of law of statutory interpretation and conclusions of law were the basis of the Thurston Ct decision on 11/17/167 denying relief under CR 60(b). Cheryl and her family ask this Court to grant relief for Cheryl's sake, as well as for all people affected by 90 Day Reports

**VII RELIEF REQUESTED**

Appellant Earl Russell requests this Court to vacate the Order entered on 1/6/17 and to grant him reasonable attorney's fees and costs to Appellant for the expenses of this appeal.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
VIRGINIA A. CLIFFORD WSBA # 32354

5/29/18

Attorney for Appellant Earl Russell

**LAW OFFICE OF VIRGINIA A CLIFFORD**

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