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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In Re the Guardianship of
CHERYL RUSSELL,
An Incapacitated Person.

EARL RUSSELL,
Appellant,

v.

MELANIE REYNOLDS, of ANCHOR GUARDIANSHIP AND CASE
MANAGEMENT SERVICES, INC. CPGA,
Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUES	3
III.	RESTATEMENT OF THE CASE	5
IV.	ARGUMENTS IN RESPONSE	15
	1. The court did not abuse its discretion in finding that Mr. Russell received adequate notice of the hearing.	15
	a. Standard of review	15
	b. Mr. Russell received timely notice of the court date and the relief requested at the hearing.	16
	2. The trial court had jurisdiction over the Revocable Living Trust of Cheryl Russell of which Ms. Russell was the sole beneficiary.	21
	a. Standard of review	21
	b. The Trust was one of Ms. Russell’s assets over which the court had jurisdiction.	22
	3. The trial court did not abuse its discretion by taking judicial notice that Judge Brosey vigorously reviews court files before making rulings.	26
	4. The trial court did not abuse its discretion in finding that Mr. Russell could have appealed the ruling.	28

5.	Mr. Russell lacks standing to make arguments on behalf of his mother. Additionally, those arguments are unpreserved and lack merit.	29
6.	Mr. Russell is mistaken in his claim that the court received inaccurate information regarding Ms. Russell.	31
7.	The Guardian’s difficulty in blocking the Vanguard accounts is not a basis for granting a CR 60 motion.	34
V.	ATTORNEY FEES.....	36
	Attorney fees should be awarded to the Guardian and not Mr. Russell.	36
VI.	CONCLUSION.....	38

TABLE OF AUTHORITIES

STATE CASES

<i>Ahten v. Barnes</i> , 158 Wn. App. 343, 350, 242 P.3d 35 (2010)	22
<i>Barr v. MacGugan</i> , 119 Wn. App. 43, 48, 78 P.3d 660, 663 (2003)	29, 35
<i>Burlingame v. Consol. Mines & Smelting Co., Ltd.</i> , 106 Wn.2d 328, 335, 722 P.2d 67, 71 (1986)	19, 29
<i>Crosby v. Spokane County</i> , 137 Wn.2d 296, 971 P.2d 32 (1999)	19, 20
<i>Hardcastle v. Greenwood Sav. & Loan</i> , 9 Wn. App. 884, 888, 516 P.2d 228, 231 (1973)	27
<i>Haley v. Highland</i> , 142 Wn.2d 135, 156, 12 P.3d 119 (2000)	16, 21
<i>In re Adoption of T.A. W.</i> , 188 Wn. App. 799, 807, 354 P.3d 46, (2015)	30
<i>In re Estate of Darlene B. Snider</i> , 200 Wn. App. 1066 (October 10 2017) (unpublished opinion)	36
<i>In re Guardianship of Adamec</i> , 100 Wn.2d 166, 173, 667 P.2d 1085 (1983)	16, 21
<i>In re Guardianship of Stamm</i> , 121 Wn. App. 830, 835, 91 P.3d 126 (2004)	27
<i>In re Habeas Corpus of Santore</i> , 28 Wn. App. 319, 327, 623 P.2d 702 (1981)	20

<i>In re Marriage of Major</i> , 71 Wn. App. 531, 533, 859 P.2d 1262, 1264 (1993)	22
<i>Ruland v. Dept of Soc. & Health Servs.</i> , 144 Wn. App. 263, 275, 182 P.3d 470 (2008)	20
<i>Saltis v. DOL</i> , 94 Wn.2d 889, 896, 621 P.2d 716 (1980)	20
<i>Seattle v. Pub. Employment Relations Comm'n</i> , 116 Wn.2d 923, 928, 809 P.2d 1377 (1991)	20
<i>State v. Clark</i> , 124 Wn.2d 90,105, 875 P.2d 613 (1994)	32
<i>State v. Garza</i> , 99 Wn. App. 291, 296, 994 P.2d 868 (2000)	29
<i>State v. Goins</i> , 151 Wn.2d 728, 749, 92 P.3d 181 (2004)	15
<i>State v. Keller</i> , 32 Wn. App. 135, 140, 647 P.2d 35, 38 (1982)	30
<i>State v. Templeton</i> , 148 Wn.2d 193, 220, 59 P.3d 632, 645 (2002)	27

FEDERAL CASES

<i>City of Roseville Employees' Ret. Sys. v. Sterling Fin. Corp.</i> , 963 F. Supp. 2d 1092, 1107 (E.D. Wash. 2013), <i>aff'd</i> , 691 Fed. Appx. 393 (9 th Cir. 2017)	27
--	----

STATUTES AND COURT RULES

ER 201	26
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RAP 18.1.....	3, 36
RAP 2.5(a)	30
RAP 3.1.....	30
RCW 11.88	23
RCW 11.90	23
RCW 11.92	23
RCW 11.92.150	3, 17, 18
RCW 11.96A.....	23
RCW 11.96A.020.....	4, 23, 24, 25
RCW 11.96A.150	3, 36

OTHER AUTHORITIES

Reporting to the Court When You are a Guardian of the Estate	24, 33
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I. INTRODUCTION

The bulk of Earl Russell's brief is devoted to issues not currently under review. The issues properly brought for review are whether Mr. Russell had sufficient notice of the January 2017 hearing, and whether the court had jurisdiction over the trust.

This appeal centers on Mr. Russell's motion to vacate a January 2017 order issued in a Guardianship matter. That order allowed the Guardian to use funds from the Revocable Living Trust of Cheryl Russell to pay for Ms. Russell's living expenses. Mr. Russell is the trustee of his mother's trust. Five months after the order was entered, Mr. Russell filed a motion to vacate under CR 60(b), raising the two issues noted above.

A commissioner denied the CR 60 motion and Mr. Russell filed a motion for revision. He raised the same two issues, and also argued that the judge did not have a complete understanding of the facts before granting the order. The court, applying a de novo review, denied the motion to revise. Mr. Russell filed a notice of appeal.

Rather than focusing upon these issues, Mr. Russell devotes much of his brief to challenging the wisdom of the initial January order. But that is an issue that should have been raised in an appeal, not a CR 60 motion. He also claims that the figures provided by the Guardian for the January hearing were inaccurate. Not only is that claim wrong, but it was not

adequately raised at the revision hearing and is not part of this appeal. Mr. Russell also argues that his mother's rights were violated. However, Cheryl Russell did not file an appeal and Mr. Russell has no standing to raise issues on her behalf. He also asserts that the Guardian has not complied with the terms of the January order. Again, not only is this incorrect, but the implementation of the order is not an issue on appeal.

The primary issue on appeal is whether the revision court erred in declining to vacate the January 2017 order based on an alleged lack of notice. Mr. Russell claims this should be reviewed de novo, because this case "raises significant issues which justify looking beyond the abuse of discretion standard." AOB at 3. But the standard of review does not change based on the belief that an issue is important or significant. The standard of review is abuse of discretion. Here, the Court had substantial evidence that Mr. Russell received multiple notices of the hearing and that the documents provided to Mr. Russell provided sufficient notice of the relief requested by the Guardian. The court did not abuse its discretion in denying the motion to vacate the order.

Mr. Russell's second issue fares no better. He erroneously claims that the trial court in the guardianship matter did not have subject matter jurisdiction over the trust. By statute, the court in a Guardianship has authority over the incapacitated person's assets, including trusts. Here, both

the corpus of the trust and income from the trust are solely for the benefit of Cheryl Russell. Because the trust was one of Ms. Russell's assets, the guardianship court had jurisdiction to use that trust for her benefit.

Mr. Russell also challenges two inconsequential findings. They are both supported by the evidence but could be easily stricken without impacting the validity of the court's order.

Appellant has caused extra work for the Guardian by raising issues totally irrelevant to this appeal. This meritless appeal has also delayed payment to the Guardian and her attorney. This Court has discretion to award attorney fees under RAP 18.1 and RCW 11.96A.150. Given the meritless nature of this appeal and the impact it has had on others, attorney fees are appropriate.

II. RESTATEMENT OF ISSUES

1. RCW 11.92.150 requires ten days advance notice of a hearing to a notice party. Mr. Russell first received notice of the hearing on September 2, 2016. Then on December 23, 2016, Mr. Russell received copies of the Docket Notice for the hearing, as well as a copy of the Petition for Approval of the 90-day Report. While the docket notice referred to an annual review hearing instead of the 90-day approval hearing, the Petition for Approval provided Mr. Russell with the specific relief the Guardian would be requesting. Did the court properly exercise its discretion in finding

Mr. Russell received adequate notice of the January 6, 2017 hearing and that vacating the order was unnecessary?

2. RCW 11.96A.020 confers Superior Courts with full and ample authority to administer and settle all matters concerning assets of an incapacitated person. This includes trusts benefiting the incapacitated person. Cheryl Russell, an incapacitated person, is the sole beneficiary of the Revocable Living Trust of Cheryl Russell. Did the trial court have authority to use proceeds from this trust to pay for Cheryl Russell's living expenses?

3. At the revision hearing, Mr. Russell suggested that because the court file and pleadings were not discussed at a short hearing, the court must not have been aware of those documents. In response, the revision court noted that it is common practice for judges to review the court file and pleadings before signing an order, and that she knows Judge Brosey is attentive to detail and reviews the entire file before making a ruling. Did the trial court abuse its discretion by taking judicial notice of the fact that Judge Brosey carefully reviews files before he makes his rulings?

4. The revision court noted both orally and in written findings that it was applying a de novo standard of review. Even if the above identified finding related to Judge Brosey was to be stricken and disregarded, must the order still be upheld?

5. After finding that Mr. Russell had adequate notice of the hearing, the court questioned why he did not file an appeal if he did not like the ruling. The court noted an appeal would have been an appropriate remedy for an order Mr. Russell disagreed with. Did the court abuse its discretion in making this observation?

6. Neither Cheryl Russell nor her attorney filed an appeal challenging the Guardianship order issued in January 2017 or the denial of the CR 60 motion to vacate that order. Nevertheless, Mr. Russell now asks this Court to reverse the lower court decision based on alleged violations of Cheryl Russell's personal rights. Should this Court find that Mr. Russell lacks standing to raise these issues on behalf of another person?

7. Mr. Russell could have filed an appeal in which he challenged the January 2017 order and the way it was implemented. He now seeks to challenge the alleged impropriety of the order through a CR 60 hearing. Should this Court disallow Mr. Russell's attempted end run around the 30-day time period for filing an appeal?

8. Should this Court refuse to consider Mr. Russell's additional arguments when he failed to preserve them at the revision hearing?

III. RESTATEMENT OF THE CASE

Cheryl Russell, an incapacitated person, is the subject of this Guardianship action. Cheryl Russell initially established a Revocable

Living Trust with funds from her mother's estate. Cheryl Russell was the original trustor/trustee and the sole beneficiary of the trust. The remainder beneficiaries of the trust are her three children, one of which is Mr. Russell, the appellant. When Cheryl Russell became unable to handle her affairs, Mr. Russell, her son, was appointed as successor trustee. CP 940-941.

Mr. Russell filed a Petition for Guardianship on May 10, 2016, in Lewis County requesting that he be appointed Guardian over Cheryl Russell, his mother. CP 230, 233. The Guardian Ad Litem did not believe that Mr. Russell was an appropriate choice and recommended that the court appoint a Certified Professional Guardian instead. On August 17, 2016, Mr. Russell filed an objection to the Guardian Ad Litem's recommendation. CP 157.

On September 2, 2016, the Court, after considering the Petition, the Guardian Ad Litem's report, remarks of counsel and the court record, appointed Anchor Guardianship and Case Management Services, with Respondent, Melanie Reynolds as the designated Guardian for Cheryl Russell. CP 114, 115. The Order further granted the Guardian powers over all assets of Cheryl Russell, "including but not limited to" the following:

"To close any financial accounts, including bank accounts held individually or jointly with another, and to make withdrawals, deposits or transfer of funds into or out of any such accounts, without the necessity of obtaining the written authority of any other person named on any such

joint accounts...” and “any ...institution holding assets of the Incapacitated Person, including but not limited to cash, investments, stocks, bonds, certificates, funds, safe deposit box or personal property, shall release information or *deliver the assets to the Guardian as directed by the Guardian...*”

CP 119, 120. (*emphasis added*)

While granting the Guardian power over all assets, including the trust, the

Order allowed the trustee to continue managing this asset:

“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.”

CP 116. The Order notified all parties, including attorneys for Mr. Russell and Cheryl Russell, that the next court hearing would take place on January 6, 2017 in Lewis County. CP 114.

On October 24, 2016, Melanie Hantze, the attorney for the Guardian, filed a Docket Notice for a November 4, 2016 hearing, and a Petition for Approval to sell the mobile home in Lewis County. CP 60, 62, 81. The documents were sent to Mr. Russell and other parties. CP 61, 82.

On November 4, 2016, Judge Brosey called the case. Mr. Russell did not appear at the hearing. CP 59. Melanie Hantze, attorney for the Guardian, presented the Order to Judge Brosey. The Court approved the sale of Cheryl Russell’s mobile home located in Lewis County. CP 57.

On December 2, 2016, the Guardian filed the Guardianship Personal Care Plan and Inventory in Lewis County. CP 42, 51. The Inventory listed all assets (including two Vanguard IRA accounts with a combined balance at that time of over \$500,000) that had come into the possession and control of the Guardian at the time of her appointment. CP 42-54. Under Section D of the Inventory, the Guardian requested that bond be waived and that all assets, with the exception of \$10,000, be held in blocked accounts. CP 53.

The filed Inventory again informed the court that there was a revocable trust, with Cheryl Russell as the sole beneficiary and Mr. Russell as the now acting Trustee. The inventory also stated, “Trust Manager will continue to provide funds from the Trust for IP’s use and benefit, as necessary” and that the “current trust fund balance, managed by Successor Trustee Earl Russell, is estimated to be approximately \$2.5 million.” CP 52-53. At the time the guardianship was created, the trial court ordered determination of whether there should be blocked accounts and/or a bond would be decided at the 90-day hearing in January. CP 121.

On December 19th, 2016, the Guardian’s attorney filed in Lewis County a Docket Notice for the January 6, 2017 hearing and the Petition for Approval of the 90-day Report, which outlined the relief being requested. CP 23, 36. This Docket Notice mistakenly referred to the January hearing as “Approval of first annual accounting” rather than “Approval of the 90-

day report.” CP 23-24. Given that the Guardianship was a little less than 3 months old, this scrivener’s error was obvious. On that same day, December 19, 2016, the Guardian’s attorney mailed copies of the Docket Notice and Petition to all notice parties, including Mr. Russell and counsel for Cheryl Russell. CP 23-24; See also CP 653, RP 17. Mr. Russell received the documentation on December 23, 2018. RP 7.

Section 1.10’s heading on page 3 of the Petition for Approval stated in bold, “**Trustee to Pay Guardian for expenses beyond Monthly Income.**” CP 38. That paragraph contained the Guardian’s request that the Trust continue to pay the set monthly expenses, as well as any other expenses that exceeded Ms. Russell’s monthly income:

The IP has funds available in excess of approximately 2.5 million from the Cheryl Russell Living Trust, of which she is the sole beneficiary. Even though the IP has funds in Vanguard Roth IRAs, the IP's CPA has suggested to the Guardian that funds should be pulled from the Trust and not the IRAs if needed to support the IP. The Guardian is thus requesting the Trustee to continue to pay the \$6,500 per month to the IP *and also pay any expenses that exceed her monthly income.*

CP 38 (emphasis added). This same heading and similar text is repeated again in the Relief Request section on page 4 of the Petition under subsection 2.9. CP 39.

On January 6, 2017, the case was called by Judge Brosey. As with the hearing for the sale of the mobile home, Mr. Russell again did not

appear. The Guardian and her attorney, Melanie Hantze, were present.¹ The court signed an order authorizing several actions, including:

(1) Guardian to change venue to Thurston County, where Cheryl Russell resided;

(2) Guardian to be relieved of duty to provide copies of all court pleadings to Cheryl Russell as the paperwork caused Ms. Russell undue stress and confusion;

(3) Mr. Russell, as trustee of Cheryl Russell's Trust, to continue sending \$6,500 per month to the Guardianship for living expenses and pay any expenses that exceed Cheryl Russell's monthly income. CP 7.

On March 10, 2017, Mr. Russell filed a Motion to Restrict the Guardian from either purchasing a mobile home or entering into a lease of residence for Cheryl Russell. CP 246. The trial court denied Mr. Russell's motion on April 14, 2017. CP 256.

On May 12, 2017, Mr. Russell filed his Motion for CR 60(b) relief requesting the Court to vacate Judge Brosey's January 6, 2017 Order. CP 272. On May 17, 2017, Mr. Russell filed an Amended Motion for CR 60(b) relief. CP 294. Relying upon CR 60(b)(1) and 60(b)(11), Mr. Russell argued

¹ The transcript of the hearing incorrectly states the attorney who appeared was Janet McClanahan Moody (attorney for Cheryl Russell) instead of Melanie Hantze, attorney for the Guardian. CP 362-364. The Order signed by Judge Brosey on January 6, 2017 clearly shows it was presented by Melanie Hantze, attorney for the Guardian, and not by Janet McClanahan Moody. CP 10.

that he had not received proper notice of the hearing and that the court lacked jurisdiction to authorize payments out of the trust account. CP 294-299. The Guardian filed her Objection to the motion. CP 302.

On June 5, 2017, the Guardian filed a Second Notice of Change in Circumstances outlining the reasons for the increase in the costs of care for Cheryl Russell. The Guardian noted that Mr. Russell was not sending sufficient funds to cover all costs of care. She also detailed her numerous attempts to block the Vanguard accounts. CP 335.

A hearing on the CR 60 motion was held on June 16, 2017 before Thurston County Court Commissioner Zinn. Mr. Russell's Motion for CR 60(b) relief was denied. CP 357. At that hearing, Mr. Russell's attorney acknowledged that he received the Petition for Approval, which included the request that the trustee pay all expenses that exceeded the monthly expenses. CP 649-50. He claimed, however, that the Petition was confusing and he did not understand what was being requested. *Id.*

As to jurisdiction, Mr. Russell reiterated that the court had no jurisdiction over a non-reporting trust. CP 651. He did not cite any authority for that proposition. The commissioner asked whether there were any other reasons the judgment should be vacated. CP 651. Mr. Russell argued that the Guardian had not filed a notice of special circumstances when the expenses increased and so the court did not have notice of this change. CP

651. Mr. Russell also argued that a blocking account on the Vanguard IRA was ordered but had not yet occurred. CP 652.

The attorney for the Guardian acknowledged she inadvertently neglected to include the inventory and personal care plan when she mailed the docket notice and Petition to Mr. Russell. However, she explained that everything that was in the inventory was also included within the Petition she sent. CP 654-657. She noted that the petition was very detailed about what was being requested and included a copy of the budget. CP 654. It also demonstrated the upcoming increase in expenses. *Id.* The Guardian's attorney noted that there had been on-going discussions with the trustee prior to the January hearing, and that he was familiar with all of the estate's assets. CP 654, 656.

The commissioner denied the CR 60 motion. CP 357-360. On June 26, 2017, Mr. Russell filed a motion to revise that ruling. CP 366. The Guardian filed her objection to the revision. CP 565-67.

Between filing the motion for revision in June and the revision hearing in November, there were additional events in the Guardianship. These include petitions for new budgets, reports regarding the Vanguard account, an order authorizing withdraw of funds from the Vanguard account, issues relating to payment of fees, and the withdrawal of the

Guardian. As none of these events have any bearing on the validity of the January 2017 order, they are not discussed here.

The revision hearing occurred on November 17, 2017 before Thurston County Superior Court Judge Schaller. At that hearing, counsel for Mr. Russell summarized, “so the question of this validity of this order really comes down to procedural and jurisdictional issues.” RP 10. Mr. Russell restated that he did not receive adequate notice because he never got the care plan or inventory, and that he was not consulted on how the money should be spent. RP 7-8. As to the jurisdictional issue, Mr. Russell argued that the provision allowing the Guardian to take funds from the trust to pay for living expenses was invalid because the trustee was not a party to the case. RP 9.

Mr. Russell also argued the order was invalid because the inventory incorrectly stated that the accounts were blocked, but in fact they had not been blocked yet. RP 7. Accordingly, argued Russell, the court never knew that the accounts needed to be blocked. RP 8.

The Guardian reminded the revision court that complaints about the order itself are not the proper subject of a CR 60 motion. She pointed out that the Guardian has authority over all assets and the Trust was for the sole benefit of Cheryl Russell. RP 14. Analogizing to TEDRA cases, the

Guardian noted that the courts have plenary and ample powers to deal with reporting and non-reporting trusts. *Id.*

The Guardian pointed out that taking money from the trust was a tax advantage to Ms. Russell and the remainder beneficiaries, and that this action was done at their request. RP 16. Mr. Russell objected that this was not in the record. RP 16-17. The Guardian reiterated that the petition sent to Mr. Russell and his mom was “very specific” and “outlines exactly what we were going to be asking for.” RP 17. Additionally, the budget had to be prepared in December, and the high costs about which Mr. Russell complained had not yet been incurred. *Id.*

After a de novo review, the court denied the motion to revise. RP

19. The court found that Mr. Russell had notice of the hearing:

First of all I would indicate, from this court’s perspective, 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 a remedy. When you don’t like an order from a judge, you file to reconsider or you file a request for an appeal.

RP 20.

Judge Schaller also found the previous court had jurisdiction over the trust. RP 21.

The court rejected Mr. Russell’s claim that the absence of any discussion of certain matters contained in the court file meant that Judge Brosey was unaware of those documents:

He is a judge who is prepared and reads files and looks at things. And especially in a guardianship matter, you can’t just flip open the file and kind of glance through it. You have to look for the things that you are reviewing, including the notice and what is the budget and what is the care plan all of those details. That’s why you are there. And oftentimes there’s never any argument during a guardianship hearing at all. And so I believe that judges routinely vigorously prepare for these hearings to ensure that they are aware of what’s going on[.]

RP 22-23. The judge signed written findings reflecting her ruling. CP 603-606.

IV. ARGUMENTS IN RESPONSE

1. The court did not abuse its discretion in finding that Mr. Russell received adequate notice of the hearing.

a. Standard of review

This is an appeal from the revision court’s denial of a motion to vacate an order under CR 60(b). Civil Rule 60 provides that “the court *may* relieve a party or the party’s legal representative from a final judgment, order, or proceeding for the following reasons” (emphasis added). The word “may” is permissive rather than mandatory. *State v. Goins*, 151 Wn.2d 728, 749, 92 P.3d 181 (2004) (“Fundamental to statutory construction is the doctrine that ‘shall’ is construed as mandatory language and ‘may’ is

construed as permissive language.”) Thus, a decision as to whether circumstances justify vacating an order is necessarily a discretionary decision.

“A trial court's denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion.” *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000); *In re Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). Ignoring this established case law, Mr. Russell argues that the ruling should be reviewed de novo because this case “raises significant issues which justify looking beyond the abuse of discretion criteria.” AOB at 3. But the standard of review does not change based on perceived importance of an issue. The standard of review is abuse of discretion.

b. Mr. Russell received timely notice of the court date and the relief requested at the hearing.

Mr. Russell was a notice party. The statute provides that any interested party may request and receive advance notice of court actions regarding the estate and guardianship of an incapacitated person:

When any account, report, **petition**, or proceeding is filed in the estate of which special written notice is requested, the court shall fix a time for hearing which shall allow at least ten days for service of the notice before the hearing; and **notice of the hearing shall be served upon the person designated in the written request at least ten days before the date fixed for the hearing.** The service may be made by leaving a copy with the person designated, or that person's

authorized representative, or by mailing through the United States mail, with postage prepaid to the person and place designated.

RCW 11.92.150 (emphasis added).

Mr. Russell first received notice of the January 6, 2017 hearing at the time the Guardian was appointed. The first page of the September 2, 2016 Order Appointing Guardian stated: “**NEXT DATE COURT REVIEW ON INITIAL REPORTS: JANUARY 6, 2017.**” CP 114 (emphasis in original). At the time he received this notice, Mr. Russell was represented by counsel. *Id.*

Mr. Russell received notice again on December 23, 2016, when he received the docket notice of the hearing and a copy of the Petition for Approval which outlined the relief requested. CP 23; RP 7. Substantial evidence supported the trial court’s finding that Mr. Russell had sufficient notice of the hearing.

Mr. Russell argues that because the Docket Notice mistakenly stated “Nature of the Hearing: Approval of First Annual Accounting” instead of “Approval of 90-day Report,” the order should be vacated. AOB at 23. His argument is meritless. As noted, Mr. Russell had previously received notice identifying this date as the 90-day approval hearing. CP 114. Additionally, the petition Mr. Russell received along with the docket notice was entitled

“Petition for Approval of 90 Day Report and to Transfer Case.” CP 36. This Petition listed the date of the hearing as January 6, 2017. CP 36.

Move over, given that the Guardianship had been created just three months earlier, it strains credulity for Mr. Russell to claim he did not attend the hearing because he thought it was an annual review. He was served with the Petition for Approval and was well aware of the subject matter of the hearing.

Mr. Russell also argues that because the Personal Care Plan and Inventory were not mailed before the hearing, notice was invalid. AOB at 23. He is correct that RCW 11.92.150 directs the Guardian to send copies of everything she files in court and the Guardian’s attorney apparently did not remember to send those two documents back in early December. But this is a motion to vacate an order based on a lack of notice, not on a technical violation of the statute. Mr. Russell had notice of the hearing, the relief requested, and the supporting data contained in the petition. The action he now complains of—his mother’s additional living expenses being paid from the trust—was specifically identified in bold letters in the Petition for Approval.

Neither the Inventory nor Personal Care Plan deviated in any way from the order establishing the Guardianship. There was nothing in the Personal Care Plan about immediately changing Ms. Russell’s residence

from The Firs, which is where Ms. Russell was residing before the establishment of the Guardianship. The Plan did acknowledge that management at The Firs might require Ms. Russell to move—again something her son was aware of—but at this point there was no discussion about where she would go or the level of care she would need. CP 47-48. The Guardian was still taking Ms. Russell to different facilities and mobile home parks to help determine their future actions. *Id.* None of the major increases in the cost of her care were addressed in the Plan because the Guardian was still experimenting with lower cost alternatives. In other words, none of the concerns that Mr. Russell had about increased costs would have been addressed in the Plan.

Again, all of the Guardian’s requested actions were contained within the Petition for Approval. The additional supporting documentation was accessible in the court file. Mr. Russell had sufficient notice of the hearing and its nature. *See Burlingame v. Consol. Mines & Smelting Co., Ltd.*, 106 Wn.2d 328, 335, 722 P.2d 67, 71 (1986) (“actual notice satisfies due process.”)

Even if the focus of this appeal was on statutory compliance instead of whether Mr. Russell received sufficient notice, the same result would be appropriate under the doctrine of substantial compliance. *See Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999).

“Substantial compliance” is defined as “actual compliance in respect to the substance essential to every reasonable objective of [a] statute.” *Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (internal citation omitted) quoting *In re Habeas Corpus of Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981). “The foundation of substantial compliance is meeting the basic purposes of the statute, which include timeliness, appropriate forum, and notice. *Saltis v. DOL*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980); *Crosby*, 137 Wn.2d at 303. In *Ruland v. Dept of Soc. & Health Servs.*, 144 Wn. App. 263, 275, 182 P.3d 470 (2008), the appellate court found substantial compliance with a jurisdiction requirement even though the notice of appeal was sent to the wrong entity.

Here, the purpose of the notice provision is to alert the notice party of the hearing and request for relief asked of the court. The purpose was fulfilled. The Petition for Approval contained all the necessary information for Mr. Russell to decide whether to respond to the Guardian’s petition.

Mr. Russell was not surprised by what occurred at the January 2017 hearing, as demonstrated by the lack of an appeal or a CR 60 motion in January. He took no action upon learning of the order and reviewing the supporting documentation. Then in March, his attorney filed an objection to the proposed purchase of a home for his mother. CP 246. Still there was

no complaint that the January 2016 order was entered without notice to him. Not until May did Mr. Russell raise the claim that the order was entered without notice to him. As the revision judge noted, “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.” RP 20.

It is clear that Mr. Russell disagreed with the Guardian’s implementation of the grant of authority from the January 2017 order. But he did not file an appeal. Instead, he has scoured the record looking for ways in which he might challenge the order in a CR 60 motion. Similar to the petitioner in *Haley v. Highland*, Mr. Russell “is merely attempting to use the appeal of his motion to vacate under CR 60(b) to reach the merits of an issue that was not appealed.” *Haley v. Highland*, 142 Wn.2d 135, 158, 12 P.3d 119 (2000). Mr. Russell had adequate notice of the hearing, and knowledge of the relief to be requested. The court did not abuse its discretion in refusing to vacate the order.

2. The trial court had jurisdiction over the Revocable Living Trust of Cheryl Russell of which Ms. Russell was the sole beneficiary.

a. Standard of review

The standard of review on a CR 60 motion is abuse of discretion.

In Re Guardianship of Adamec, 100 Wn.2d at 173. There is a limited

exception, however, when a petitioner moves to vacate a void judgment under CR 60(b)(5). The question of whether a ruling is void for lack of jurisdiction is reviewed de novo. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010). Thus, while the trial court should be given deference as to the particular facts and the inferences to draw from those facts, the question of whether those facts reveal a lack of jurisdiction is reviewed de novo by the appellate court.²

b. The Trust was one of Ms. Russell’s assets over which the court had jurisdiction.

“Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power.” *In re Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262, 1264 (1993). In that case, Mr. Major filed a CR 60(b) motion challenging the Court’s subject matter jurisdiction. The Motion was denied by the Superior Court and an appeal was brought. The appellate court found the trial court had subject matter jurisdiction for all matters under a Title 26 dispute. “It is the authority of the court to hear and determine the class of actions to which the case belongs.” *In re Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262, 1264 (1993).

² Mr. Russell did not move to vacate the order under CR 60(b)(5). He did so under CR 60(b)(11), which involves a different standard of review. Nonetheless, the Guardian recognizes that this Court is duty bound to examine the jurisdiction issue de novo, regardless of how it was presented below.

The legislature has provided a similar grant of authority to the courts in matters involving incapacitated persons. The Revised Code of Washington Section 11.96A.020 states it is the legislature's intent that courts have full and ample power and authority under this title to administer and settle all matters concerning the estate and assets of incapacitated persons including trusts. The legislature has made such authority and jurisdiction explicit for all matters under Title 11. Here, the trial Court clearly possessed authority to hear and determine the class of actions to which this case belongs—that is, guardianship actions dealing with the care of the incapacitated person and all matters regarding trusts. RCW 11.88, 11.90, 11.92 and 11.96A.

The Cheryl Russell Living Trust was created by Cheryl Russell and the corpus of the trust and income from the trust are to be used solely for the benefit of Cheryl Russell. Cheryl Russell was the original trustee and when she became incapacitated, her son, Earl Russell, was appointed as successor Trustee. CP 912. Under the Guardianship, the Guardian has the power and responsibility to manage all assets of Cheryl Russell for her benefit, including making withdrawals from all assets belonging to Cheryl Russell, individually or with another. CP 119.

Only the Guardian, with ultimate approval by the Court, and not a Notice Party, has the duty and power to determine what is in Cheryl

Russell's best interests. In this case, working with a CPA and Mr. Russell, the Guardian determined that it was in Ms. Russell's best interests if the living expenses that exceeded her income were paid by the Trust. Mr. Russell's apparent belief that he alone is allowed to decide what expenses of his mother's he shall pay is simply wrong. Again, Mr. Russell misstates that the Petition was requesting 24/7 caregivers. AOB at 40-41. This was never part of the petition or care plan.

Mr. Russell argues that the non-reporting status of the trust means it is not an asset for purposes of the guardianship. He does not cite any authority for this proposition. Moreover, it runs contrary to the customary grant of authority in the original order of guardianship (which he did not appeal) and to the plain language of RCW11.96A.020 which confers the court with authority over "all trusts and trust matters." The official Washington Courts website contains a publication called, "Reporting to the Court When You are a Guardian of the Estate," which requires the Guardian to list both reporting and non-reporting assets of the incapacitated person. Handbook, Appendix I, at pg 43.³

3

<https://www.courts.wa.gov/content/publicUpload/Guardian%20WINGS%20II/Reporting%20to%20the%20Court%20when%20you%20are%20Guardian%20of%20the%20Estate%20Handourt.pdf>

The order creating the guardianship allowed the trustee to continue managing the trust. From this, Mr. Russell extrapolates that the court has no control over this asset and cannot use it to benefit Ms. Russell. Had the court intended such a limitation, however, the court expressly would have said so. The fact that Mr. Russell is allowed to manage the trust does not prevent the court (via the Guardian) from treating it as an asset to benefit Ms. Russell.

Mr. Russell argues that a TEDRA petition must be filed before the trial court has jurisdiction over the trust. AOB at 38. Again, this argument ignores the fact that RCW 11.96A.020 plainly states:

It is the intent of the legislature that the **courts shall have full and ample power and authority under this title** to administer and settle . . . All matters concerning the estates and assets of incapacitated . . . persons, including matters involving . . . all trusts and trust matters.

(emphasis added).

What is particularly upsetting about the Mr. Russell's argument is his blatant misrepresentation of the judge's order. Mr. Russell argues "On Revision (11/17/17) the Thurston Ct declined to address the issue of whether Lewis Ct lacked subject matter jurisdiction over the Trust when it entered the Order Approving the 90 Day Reports." AOB at 41. This is false; the Court specifically ruled "the court found Judge Brosey had jurisdiction

to hear the matter and provide relief.” CP 605. The court also made an oral finding to that effect. RP 21.

While not necessary to the ruling on this issue, it is noteworthy that this is not a situation where a trustee is unwittingly dragged into Lewis County. When Mr. Russell sought the Guardianship in Lewis County, he submitted himself and the trust to the authority of the court when he initiated the Guardian proceedings. CP 230, 233. His claim that the Lewis County has no authority over the trust is meritless.

3. The trial court did not abuse its discretion by taking judicial notice that Judge Brosey vigorously reviews court files before making rulings.

Mr. Russell challenges the following finding: “The Court takes judicial notice of the carefulness of Judge Brosey in matters appearing before him and he vigorously reviews the files before the hearings.” CP 604.

He argues it was an inadequate basis to conclude that no irregularity occurred, and that Judicial Notice (ER 201) does not apply. AOB at 47. Context is everything. Mr. Russell had suggested that because Judge Brosey did not specifically discuss documents contained within the court file, that he must not have been aware of those documents. The revision judge rejected this, explaining that guardianship judges routinely review all pleadings in the court file before signing an order, regardless of whether there is specific discussion about it on the record. RP 21-22. Further, based

on her own extensive knowledge of Judge Brosey, she was aware of the Judge's diligence. RP 21.

A trial court's decision regarding the admission of evidence is reviewed to determine if there was abuse of discretion. See *In re Guardianship of Stamm*, 121 Wn. App. 830, 835, 91 P.3d 126 (2004). Evidence Rule 201 allows the court to take judicial notice. Generally, courts may take judicial notice of information which is generally known within the territorial jurisdiction of the trial court and thus not subject to reasonable dispute. *City of Roseville Employees' Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1107 (E.D. Wash. 2013), *aff'd*, 691 Fed. Appx. 393 (9th Cir. 2017).

Judicial notice may be taken of common practices within institutions. See *Hardcastle v. Greenwood Sav. & Loan*, 9 Wn. App. 884, 888, 516 P.2d 228, 231 (1973). In *Hardcastle*, the Court of Appeals noted that the court was entitled to take judicial notice of the common practice followed by lenders of insisting that insurance coverage be at least sufficient to cover the full amount of the indebtedness. *Id. at 888*. If courts are able to consider common practices for lenders, they are also entitled to do so for practices within the courthouse.

Even if it was error to take judicial notice, it did not affect the final ruling and was harmless error. "An error is prejudicial if, within reasonable

probabilities . . . the error had not occurred, the outcome . . . would have been materially affected.” *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632, 645 (2002). Here the revision judge specifically applied a de novo review, giving no weight to the opinions of prior judges before her. She made specific findings that Mr. Russell had notice of the hearing and that the court had jurisdiction over the trust. Neither of these findings, nor any other findings, are dependent upon the court’s finding relating to Judge Brosey. The finding can be stricken and there is still substantial evidence to support the trial court’s ruling in denying the Motion for Revision and affirming the denial of the motion for relief under CR 60(b).

4. The trial court did not abuse its discretion in finding that Mr. Russell could have appealed the ruling.

Mr. Russell challenges a ruling the trial court never made. According to appellant, the trial court stated that an appeal was Mr. Russell’s exclusive remedy. AOB at 5. Not true. The court specifically ruled that Mr. Russell had notice of the hearing and that Judge Brosey had jurisdiction to hear the matter and provide relief. CP 604-05. In addition to those issues, Mr. Russell vaguely complained that accounts had not been blocked and that the order did not provide sufficient restrictions on the guardian. In other words, these were challenges to the order itself. The revision court entered Finding Number 4 as follows: “The court finds that

the appropriate remedy for the 1/6/17 Order was appeal or request for discretionary review.” CP 605.

The court was correct. “Errors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors.” *Burlingame v. Consolidated Mines & Smelting Co., Ltd.*, 106 Wn.2d 328, 722 P.2d 67 (1986). Consequently, on review of an order denying a motion to vacate, only “the propriety of the denial, not the impropriety of the underlying judgment’, is before the reviewing court.” *Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660, 663 (2003).

While the revision court did find it odd that Mr. Russell did not file an appeal if he objected to the order (RP 20), she certainly did not say that an appeal was the exclusive remedy. In fact, in her oral ruling, she acknowledged that either approach could be acceptable. RP 20. *See State v. Garza*, 99 Wn. App. 291, 296, 994 P.2d 868 (2000) (oral ruling can clarify written findings).

Given that the revision court specifically ruled on the notice and jurisdiction issues, Mr. Russell’s challenge to this finding is meritless.

5. Mr. Russell lacks standing to make arguments on behalf of his mother. Additionally, those arguments are unpreserved and lack merit.

Throughout his opening brief, Mr. Russell argues that his mother was harmed by the restriction of rights imposed by the court. These include

losing her right to notice of court hearings, abdication of decision making regarding her care and living arrangements, emotional turmoil, and causing distrust of her son. AOB 29, 30, 34, 35, 44. Mr. Russell does not have standing to challenge these issues.

Had Ms. Russell believed her rights had been violated, she could have filed an appeal or brought a motion. While Mr. Russell may have standing to raise issues relating to management of his mother's trust, he does not have standing to argue that her personal rights are violated by this court order. See RAP 3.1 (Only an aggrieved party may seek review by the appellate court).

Additionally, with the exception of the claim that Ms. Russell did not receive notice, all of the other complaints relate to the order itself or the way it is being implemented. But a CR 60 hearing is not the forum for addressing the merits or legality of the order. "The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35, 38 (1982).

Furthermore, most of these issues were not addressed below and none of them were presented as a reason why the order should have been vacated. As this Court has noted, "Under RAP 2.5(a), we generally do not

review any claim of error not raised in the trial court.” *In re Adoption of T.A.W.*, 188 Wn. App. 799, 807, 354 P.3d 46, (2015).

Finally, these claims relating to Ms. Russell simply are not supported by the evidence. She did receive the court date and the Petition for Approval. See CP 24. It was because the court documents were causing Ms. Russell “undue stress and confusion,” that the Petition for Approval asked to be relieved of responsibility of providing these documents to her in the future. CP 37. This Petition for Approval was sent to the trustee and Ms. Russell’s attorney more than ten days before the January 2017 hearing. RP 17. There was no attempt to keep Ms. Russell away from the court hearings. In fact, she was present at both the CR 60 motion and the revision motion. At the revision hearing, she was asked whether there was anything she wished to say or let the court know. Her only response was “there have been a lot of comments (indiscernible) to my family, and it’s tearing the family apart. And it’s not necessary. And it’s breaking my heart.” RP 11. She did not voice any of the concerns Mr. Russell tries to raise in this appeal.

In sum, Mr. Russell’s arguments relating to his mother are irrelevant to the issues in this appeal and should be disregarded.

6. Mr. Russell is mistaken in his claim that the court received inaccurate information regarding Ms. Russell.

Mr. Russell's brief is redundant, restating the same misinformation in multiple arguments. For instance, he repeatedly asserts that the inventory was inaccurate because it did not include some of Ms. Russell's more recent assets. AOB 24, 25, 27-28, 34-36. This argument fails for multiple reasons.

First, he did not ask the revision court to vacate the order on the basis of the inaccurate information. See CP 366-370. As such, the revision court was not called upon to make factual findings as to those assets, nor was the Guardian put on notice to present evidence as to their accuracy. *State v. Clark*, 124 Wn.2d 90,105, 875 P.2d 613 (1994) (Raising the issue below helps ensure the "benefit of developed argument on both sides and lower court opinions squarely addressing the questions.") The issue is not preserved for appeal.

Additionally, Mr. Russell's argument demonstrates a fundamental misunderstanding as to the purpose and function of the inventory. The inventory is a "snapshot" of the assets at the start of the Guardianship. It is not intended as an up-to-date accounting, which is what occurs at the end of the year in the Annual Accounting. This is evident from the first sentence of the inventory, which provides:

The Full Limited Guardian of the Estate, being first duly sworn, states that the following is a true and correct inventory of the assets and liabilities of the Incapacitated Person **as of the date of the Order Appointing the Guardian.**

CP 51 (emphasis added).

The previously mentioned Handbook for Guardians on the official Washington Courts webpage provides a helpful explanation of the procedures.⁴ It explains that the Inventory Report is just a snapshot (page 5) and that the Annual Accounting “covers the period from your date of appointment.” Page 6.

This Handbook also contains forms and samples which demonstrate the role of the Inventory Report. For instance, Appendix C of the Handbook is an Inventory Worksheet for the 90 day accounting. One of the headings on the worksheet is:

FINANCIAL ASSETS (Balance as of appointment date of guardianship).

Handbook, page 25 (emphasis added). Similarly, Appendix D gives examples of the type of documentation that should be included in the Inventory, and refers to:

“Investments: Investment statement or printout [as] of date of appointment.”

Handbook, page 27.

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<https://www.courts.wa.gov/content/publicUpload/Guardian%20WINGS%20II/Reporting%20to%20the%20Court%20when%20you%20are%20Guardian%20of%20the%20Estate%20Handourt.pdf>

Mr. Russell's claim that the Personal Care Plan was incorrect (AOB at 25) suffers the same fate as the 90-day inventory. The issue was not raised below at a time the court could have made factual findings and cannot now be raised for the first time on appeal.

Mr. Russell also argues that the Guardian has failed to follow the Personal Care Plan. AOB at 34. But the manner in which the January 2017 order is implemented has no bearing on whether it was improperly issued.

Mr. Russell's scattershot strategy is intended to distract from the fact that he has no valid arguments.

7. The Guardian's difficulty in blocking the Vanguard accounts is not a basis for granting a CR 60 motion.

At the time of the appointment, the court reserved the issue of whether to require a bond or blocked accounts. The order stated that the decision would be made at the time of the 90-day hearing. CP 121. The subsequent Petition for Approval, states, "the Guardian recommended blocking the Vanguard Roth IRA accounts. CP 38. In the Relief Requested section of the Petition, it similarly recommends "Ordering that the Vanguard Roth IRA accounts be blocked and waive the requirement of a Bond." CP 39. This is what the court then ordered. CP 8.

Mr. Russell argued that the Court was never informed that the account was unblocked, and because there was no discussion on the record,

the court must have believed that the accounts were already blocked. RP 7-8. This is a meritless. The September order creating the Guardianship and the Petition for Approval were both clear as to what was required. Even if the court had been mistaken, however, this would not be grounds for invalidating the order.

Although not entirely clear, Mr. Russell also appears to argue that the January Order needs be vacated because the court should have ordered a bond in addition to blocking the IRA accounts. See AOB at 37. He bases this on the claim that the inventory was wrong and that the court would have acted differently had the court had the correct figure. But as noted in an earlier section of this brief, the inventory was correct. Moreover, the court's discretionary decision to block an account rather than require a bond should be the subject of an appeal rather than a CR 60 motion. *See Barr v. MacGugan*, 119 Wn. App. at 48 (CR 60 is not a proper means of attacking the impropriety of the underlying order).

Mr. Russell argues that after the order was issued, the Guardian did not immediately block the accounts. The record establishes, however, that the Guardian advised the Court of the difficulties she was experiencing in getting the accounts blocked. CP 335, CP 410. More to the point, whether the Guardian immediately blocked the accounts following the order has no

bearing on the validity of the orders at its inception. Again, Mr. Russell is raising issues that are not relevant to the denial of the CR 60 motion.

V. ATTORNEY FEES

Attorney fees should be awarded to the Guardian and not Mr. Russell.

Attorney fees and costs on appeal are available at the court's discretion. RAP 18.1 and RCW 11.96A.150. An appellate court has broad discretion in awarding attorney fees under RCW 11.96A.150. An example of this can be found in this Court's unpublished decision, *In re Estate of Darlene B. Snider*, 200 Wn. App. 1066 (October 10 2017) (unpublished opinion). In *Snider*, the trial court denied the appellants' CR 60 motion. On appeal, they raised arguments not raised below. This Court affirmed the trial court's ruling. Turning to the request for attorney fees, the court observed that its decision is guided by principles of equity. The Court noted appellants "improperly raise arguments on appeal that they did not raise below and they do not even attempt to address the burden they must meet under CR 60(b)(11)." *Id. at *6* This Court awarded attorney fees.

In the present case, Mr. Russell devotes much of his brief to issues not raised below. Because of the way in which the appeal was written, the Guardian had to expend considerable time trying to understand what issues were being raised and then comparing that with the record below. Mr.

Russell states, “The Guardian (or her counsel’s) intransigence in refusing to work with Cheryl and her family is the root cause of this appeal.” AOB at 49. It is an abuse of the appellate process to file an appeal based on a party’s personal belief, and not the merits of the case. Mr. Russell further states, “Cheryl’s guardianship estate and her Trust will benefit from relief from (*sic*) the 1/6/17 Order....attorney fees for the necessity of this appeal should be granted to Trustee Earl Russell...” AOB at 49. Mr. Russell does not explain how relief from the January 6, 2017 Order will benefit the Guardianship in light of the fact that the Guardian withdrew in September 2017, and has no current power or authority over any of the guardianship assets. Additionally, even if the January 6, 2017 Order is vacated in its entirety, the Guardian was still required, per terms of the original Order Appointing Guardian in September 2016, to continue acting as Cheryl Russell’s Guardian until she was replaced. This appeal provides no benefit to the Guardianship and in fact unnecessarily depletes Cheryl Russell’s assets.

Based on the equities, this Court should deny Mr. Russell’s motion for attorney fees and grant the Guardian’s motion for reimbursement of costs and attorney fees.

VI. CONCLUSION

The court's denial of the CR motion to vacate is supported by facts, law and equity. The Guardian asks this Court to uphold that ruling and award attorney fees and costs against Mr. Russell.

Dated this 3rd Day of August 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 3, 2018, I caused to be served: Brief of Respondent
Via Washington State Appellate Courts' Portal to Law Office of Virginia A. Clifford, PLLC, 2952 Limited Lane NW, Unit A, Olympia, WA 98502, email:
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August 3, 2018, at Olympia, Washington.

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