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NO. 51896-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

IN RE THE GUARDIANSHIP OF:

MARGARET BENNETTS,

An Incapacitated Person.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Brian Bennetts lacks standing to bring this appeal as he is not an aggrieved party under RAP 3.1, nor may he assert Margaret Bennetts's rights as a third party. Even if this Court considers the merits of this appeal, the Superior Court properly appointed Clarity Guardians, LLC., for Mrs. Bennetts, and had good cause not to appoint Brian.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Brian has standing under RAP 3.1 to appeal the March 23, 2018, Order Appointing Full Guardian of Person and Estate for Margaret Bennetts, and the April 19, 2018 Order Denying Reconsideration. If so, whether Margaret Bennetts's failure to contest her incapacity precludes that issue for review.

2. If Brian has standing, whether the trial court properly appointed Clarity Guardianship, LLC., as the full guardian of person and estate for Margaret Bennetts.

III. STATEMENT OF THE CASE

On June 23, 2015, Margaret Bennetts and her disabled son, Kevin Bennetts, visited their family doctor, Dr. Tamara Bunn, and told her that Harry Bennetts,¹ her husband, struck Mrs. Bennetts on the cheek. CP at 449. They recounted that they put themselves in a bedroom and moved a

¹ Harry, Kevin, and Brian are referred to using their first names, as opposed to Mr. Bennetts, for the sake of clarity. No disrespect is intended.

suitcase in front of the door, but that Harry was still able to get in. *Id.* On August 7, Mrs. Bennetts returned to Dr. Bunn's office and told her that Harry hit her on the head nine times when she was in bed, around midnight, for no reason. *Id.* The following day, she woke up feeling dizzy, and fell. CP at 450-51. On August 11, Mrs. Bennetts filed a petition for a protection order to restrain Harry, which included a declaration, stating:

On the evening of August 6, I was in bed and Harry attacked me on the head, by hitting me on the top of my head many times. I could only stop by biting him on the arm. If I hadn't bit him he would have never stopped and I would not have been available to be here today. Since the blows to my head it is hard to concentrate, headaches, anxiety, stress. When Harry finds out about this I fear how he will react. [...] A few months ago Harry punched me in the face out of the blue. Spent the night with my son because I was afraid. I went to the doctor the next day and they filed an APS report.

CP at 530. On August 13, Mrs. Bennetts followed up with Dr. Bunn due to "headaches with concussion due to Harry hitting her in the head." CP at 450. On August 18, Mrs. Bennetts's head was still not feeling better. *Id.* On August 21, an Order for Protection was entered which included a finding that Harry "committed domestic violence as defined in RCW 26.50.010." CP at 534.

On May 12, 2017, Adult Protective Services (APS) received a report from a confidential reporter that Mrs. Bennetts was being physically abused by her husband. *See* CP at 396. The reporter informed APS that they began in-home care for Mrs. Bennetts in November 2016 and roughly every other week they would see bruises on various parts of her body. *Id.* The reporter stated that Mrs. Bennetts initially explained the bruises by suggesting that

she bumped into things but that to the reporter it was obvious that she was pushed or thrown down. *Id.* The reporter stated that eventually Mrs. Bennetts responded to inquiries about the bruises, saying “oh I can’t do this anymore, I can’t protect him, he did this.” *See* CP at 397.

On May 19, 2017, APS received a call from a caregiver for Mrs. Bennetts, who stated that they found Mrs. Bennetts in a secluded part of the house crying and playing with dolls, and believed that it had to do with Harry’s behavior. *See* CP at 397.

On June 2, 2017, Dr. Tamara Bunn, the primary care physician for Margaret and Harry, informed APS that she had long term chronic concerns for Mrs. Bennetts safety, and that she believed Harry has hit Mrs. Bennetts in the past and is mentally abusive towards her. CP at 398. At that time, Mrs. Bennetts weighed only 101 pounds with a body mass index of 18.9, which was considered underweight. CP at 450.

On June 6, 2017, APS received another report that Mrs. Bennetts’s son said that his mother told him that Harry punched her in the eye. CP at 398.

On June 7, 2017, Mrs. Bennetts told APS that Harry hit her in the face and that she then bit him. CP at 399. During this conversation, Mrs. Bennetts told APS that she felt unsafe. *Id.*

On June 19, 2017, Mrs. Bennetts had an appointment with Dr. Bunn, which was cancelled because Harry refused to bring Margaret to the doctor’s office. CP at 450. Dr. Bunn then called Mrs. Bennetts’s son and was informed that Mrs. Bennetts fell five times in five days. *Id.* Dr. Bunn

then instructed Kevin to call 911, and Mrs. Bennetts was then admitted to the Providence St. Peter hospital. CP at 450.

On June 21, 2017, Providence St. Peter hospital staff informed APS that it would not discharge Mrs. Bennetts home due to the concerns of abuse. CP at 400. On June 29, 2017, APS received a call from Brian Bennetts stating his mother was discharged on June 28, with the plan for her to reside in a nursing home for fifteen days, then transition to an adult family home. CP at 401.

On July 11, 2017, APS received a call from Brian who stated that Harry had changed his mind about the adult family home as he did not want to pay for it, and instead would return her home from the nursing facility. CP at 616. Brian stated that he did not think Harry had hit Ms. Bennetts, but that he did not know what to do, did not want her to go home, and did not have the money to take care of her. *Id.*

On July 13, 2017, a social worker with Olympia Health and Rehab informed APS that Harry attempted to remove Mrs. Bennetts from the nursing home. CP at 402. When the facility refused to allow this, Harry stated he would not pay for her care, demanded that other agencies pay, stated that he would be suing someone, and threatened to just take her until the social worker stated she would call the police. *Id.* In addition, Kevin told this social worker that Harry will leave Mrs. Bennetts home alone and will throw things at her when he is angry. *Id.*

Adult Protective Services petitioned for a guardian of person and estate for Mrs. Bennetts on July 28, 2017. CP at 1-4. Virginia Clifford was

appointed as Guardian ad Litem (GAL) in this guardianship proceeding. CP at 568.

On August 4, Mrs. Bennetts was admitted to the Joshua's House Adult Family Home (AFH). CP at 780. During the next 34 days at Joshua's House AFH, Ms. Bennetts gained 35 pounds and by January of 2018 was no longer considered underweight. CP at 781.

On August 7, 2017, Mrs. Bennetts stated to GAL Clifford that Harry does not hit her, but that she "doesn't want any more of this" and gestured a fist swiping the air above her ear. She also stated that she does not want to see Harry, but that she needed to go home to protect Kevin. CP at 407.

On September 14, 2017, Stephen Meharg, Ph.D., issued a medical and psychological report on the condition of Mrs. Bennetts. CP at 414. Mrs. Bennetts told Dr. Meharg that she was abused by Harry. CP at 411. During the examination by Dr. Meharg, Mrs. Bennetts had no recall of the guardianship petition or the Guardian ad Litem. *Id.* Mrs. Bennetts was unaware of her medical problems other than being told she was on the edge of dementia. CP at 412. Her speech exhibited signals of dementia, she knew nothing of her medications, and she was evasive when asked about her age, the duration of her marriage, her location, and the current president. CP at 412. Dr. Meharg administered numerous standardized cognition tests, which revealed "striking deficits in both executive and memory capacity despite reasonably intact skills in basic attention, eye-hand coordination, and in-the-moment reasoning skills. *Id.* Mrs. Bennetts's Dementia Rating Scale profile was highly consistent with patterns commonly observed in

dementia associated with Alzheimer's disease of moderate severity. CP at 414. Mrs. Bennetts failed the Modified Wisconsin Card Sorting Test, measuring her executive problem solving and decisional skills test. *Id.* Dr. Meharg found that the objective test data "clearly support prior considerations of dementia, and suggest a Major Neurocognitive Disorder with behavioral disturbance likely due to Alzheimer's disease of moderate severity, in addition to a Major Depressive Disorder." *Id.* Dr. Meharg determined that intervention was not likely to restore Mrs. Bennetts to capacity in the face of her advanced and degenerative condition. *Id.* Dr. Meharg concluded that Mrs. Bennetts would benefit from full guardianship of both person and estate. *Id.*

On October 26, 2017, Brian requested that Mrs. Bennetts be removed from the adult family home where she resided for reasons including that Harry was uncomfortable with the owners. CP at 570. At unspecified times, Brian also suggested to GAL Virginia Clifford that it would be difficult for him to manage Harry. CP at 441, 579.

On November 15, 2017, GAL Virginia Clifford filed her Guardian ad Litem Report, in which she recommended that a Certified Professional Guardian be appointed for Mrs. Bennetts, of both person and estate. CP at 566. GAL Clifford's investigation involved contact with at least fifteen individuals, including Mrs. Bennetts, and review of numerous documents. CP at 572-73. In her interview with Mrs. Bennetts, GAL Clifford noted that Mrs. Bennetts could not remember events which occurred within a few hours, such as family visits. CP at 575. In addition, although her reasoning

and ability to accurately observe present circumstances were relatively intact, Mrs. Bennetts could not remember her conclusions or the facts she based them on. *Id.* GAL Clifford observed that Mrs. Bennetts could not initiate meal planning or shopping (*id.*), had no familiarity with paying bills, and showed little understanding of her family assets. CP at 576. GAL Clifford determined that Mrs. Bennetts appeared unable to comprehend sufficient detail to knowingly sign a contract or make financial decisions for herself. CP at 577. Mrs. Bennetts was unable to describe her medical problems to GAL Clifford, and showed little insight into her medical needs. *Id.* GAL Clifford determined that Mrs. Bennetts is in need of assistance in obtaining medical care, understanding treatment proposals involving choices for care, and in taking medications. *Id.* GAL Clifford also reviewed Mrs. Bennetts medical diagnoses, which include dementia. CP at 578.

GAL Clifford reported on possible less restrictive alternatives to guardianship, including the prospect of Harry maintaining decision-making authority under an existing durable power of attorney. CP at 579. She recommended that Harry was not suitable to be Mrs. Bennetts's decision-maker given the history and reports of domestic violence. *Id.* GAL Clifford also recommended that Brian would not be suitable as a decision-maker for Mrs. Bennetts, given her conclusion that Brian could not effectively control Harry. *Id.* GAL Clifford determined that while Brian would be a fine choice under other circumstances, Brian acknowledged that he would not be able to set limits on Harry's behavior. CP at 583.

During the course of the GAL Clifford's investigation, the adult family home provider who cared for Mrs. Bennetts reported that Harry created barriers to Mrs. Bennetts's care. CP at 584. These included failing to provide adequate funds for warm clothing in winter, refusing to sign a care plan, delay in providing Mrs. Bennetts's medical insurance card, delay in signing pharmacy transfer papers, and confrontational behavior with caregivers. CP at 782-85. Although Brian would visit Mrs. Bennetts in the facility, the provider stated that he was not involved in making healthcare decisions for her. CP at 785.

Dr. Bunn's declaration detailed several incidents of domestic violence which were described to her by Mrs. Bennetts and Kevin. CP at 449-51. Dr. Bunn stated that she does not think it was in Mrs. Bennetts's best interest to go home, citing the improvement in Mrs. Bennetts's weight since beginning her stay at the adult family home. CP at 450. Dr. Bunn also noted Mrs. Bennetts's improvement in her weight between June of 2017 and January 2018. *Id.* Dr. Bunn's Declaration includes several exhibits containing medical records of Mrs. Bennetts which support her assertions. CP at 453-63. Dr. Bunn also notes that she has had little contact with Brian and that in her opinion it is in Mrs. Bennetts's best interest to have a non-biased certified professional guardian appointed on her behalf. CP at 451.

Mrs. Bennetts initially requested a jury trial to contest the issue of her incapacity. CP at 86-7; *see also* RCW 11.88.045(3). However, Mrs. Bennetts later waived her right to a jury trial and stipulated to her lack of capacity, and to her need for a guardian of person and estate. CP at 108-

10. The only remaining issue which Mrs. Bennetts contested was who should be appointed as her guardian. *Id.*; *see also* RCW 11.88.010(4). Throughout the guardianship proceeding, Harry and Brian were active participants. Though they did not seek to intervene as parties, they were permitted to file motions and present argument. *See* VRP (March 16, 2018) at 12. Both Harry and Brian advocated to have Brian appointed to be the guardian for Mrs. Bennetts. *See* VRP (March 23, 2018).

All participants were represented by counsel at the hearing to determine who would be appointed as Mrs. Bennetts's guardian, including Harry by his attorney John Dziejic. *See* VRP (March 23, 2018) at 2. After being presented with the evidence, the superior court determined that Mrs. Bennetts was in need of a guardian. This conclusion was based on the evidence in the record, both medical evidence and the evidence of her inability to protect herself. *See* VRP (March 23, 2018) at 28. The Order Appointing Full Guardian of Person and Estate (the "Order") which was entered that day made the finding of fact that:

Mrs. Bennetts is at significant risk of personal harm based on a demonstrated inability to adequately provide for her nutrition, health, housing and physical safety. Mrs. Bennetts is at significant risk of financial harm based on her inability to adequately manage property and financial affairs. Mrs. Bennetts is also incompetent for purposes of giving informed consent for health care pursuant to RCW 7.70.050 and RCW 7.70.065.

CP at 167-68. Further, the Court determined that the existing durable powers of attorney have not adequately protected Mrs. Bennetts. *See* VRP (March 23, 2018) at 28.

The Court focused on several factors in deciding whether to appoint Clarity Guardians, LLC., or Brian. The Court considered the physical abuse that was adjudicated in the protection order. *See* VRP (March 23, 2018) at 28-29. The Court also considered the declaration of Dr. Bunn, specifically:

[Dr. Bunn] articulated by way of her declaration interactions with both Mrs. Bennetts, Harry and Kevin and Brian and talked about how Mrs. Bennetts' needs were not met, how Harry refused to seek out the appropriate medical attention for Mrs. Bennetts previously, when she needed that and that, ultimately, on that occasion, Kevin called 911, and Mrs. Bennetts received the medical attention that she needed.

See VRP (March 23, 2018) at 30. Further, the Court was significantly concerned that Mrs. Bennetts was not receiving adequate nutrition in her home, and none of her family members intervened, “allowing her to just waste away.” *Id.* at 30-31. Further, the Court determined that the evidence does not suggest that Brian would be able to set aside the complex family relationships between his parents, and himself, to adequately protect Mrs. Bennetts. *Id.* at 33.

The Order appointed Clarity Guardians, LLC, as the guardian of person and estate for Mrs. Bennetts (CP at 168), and cancelled any existing power of attorney. *See* CP at 174. Brian requested reconsideration. CP at 177-285. Attorney John Dziejcz filed a declaration in support of the

request. *See* CP at 300-80. The request was denied on April 19, 2018. CP at 389. On May 17, 2018, Brian filed a notice of appeal to this Court. Mrs. Bennetts did not seek reconsideration, or appellate review of the Order.

IV. ARGUMENT

A. Standard of Review

On review of a guardianship, the Court reviews challenged findings of fact for substantial evidence and the conclusions of law de novo. *In re Guardianship of Knutson*, 160 Wn. App. 854, 862, 250 P.3d 1072, 1077, (2011). The management of the guardianship by the superior court is reviewed for abuse of discretion. *Id.*

B. Brian Lacks Standing to Bring this Appeal

Brian is not an aggrieved party under RAP 3.1, nor may he assert third party standing on behalf of Mrs. Bennetts. Further, Mrs. Bennetts was the respondent at the Superior Court, and her decision not to contest the issue of capacity causes it to be outside the scope of appellate review.

1. Brian is not an aggrieved party under RAP 3.1

As a threshold matter, Brian is not an aggrieved party, and consequently cannot file a notice of appeal. “Only an aggrieved party may seek review by the appellate court.” RAP 3.1. Brian is neither a party nor aggrieved.

a. Brian is not a party

In a guardianship proceeding there are two parties: (1) the person or entity who petitions for appointment of a guardian (the petitioner) and (2) the alleged incapacitated person (the respondent). RCW 11.88.030(1), .045(1)(a). Other persons are entitled to notice, *see* RCW 11.88.040, but they are not parties. In this case, the Department of Social & Health Services (DSHS) was the petitioner and Mrs. Bennetts was the respondent. CP at 1-4. Brian was entitled to notice under RCW 11.88.040, but he never sought to intervene as a party under CR 24. As a result, Brian was not a party to the guardianship proceeding. Although it may be beneficial for the trial court to hear the perspectives of these persons when considering certain issues, such as who would be an appropriate guardian, those persons do not have a right to be heard on the issue. *See In re Mignerey's Guardianship*, 11 Wn.2d 42, 46, 118 P.2d 440 (1941). If every person entitled to notice had the right to appeal, it would conceivably lead to numerous appeals of a single order.

b. Brian is not aggrieved

In addition, Brian was not aggrieved by the Order. “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987). “The real party at interest in a guardianship proceeding is the alleged incapacitated person[.]” *In re Guardianship of Matthews*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010). Brian has not identified any proprietary, pecuniary, or personal right of his that has been

substantially affected by the Order. Under RAP 3.1, Brian is not permitted to seek appellate review of the order appointing a guardian for Mrs. Bennetts.

Brian wrongly argues that he has a “substantial personal interest in being able to serve as the named agent” for Mrs. Bennetts. Appellant’s Brief at 15. He cites no legal basis for this proposition. Further, this is not the correct inquiry. The question is not whether he has an *interest* in being able to serve as a guardian, it’s whether he has a *right* to do so. *See In re Guardianship of Lasky*, 54 Wn. App. 841, 849, 776 P.2d 695 (1989). The guardianship act, RCW 11.88, “does not treat . . . family members as having a right to serve as guardian.” *In re Guardianship of Cornelius*, 181 Wn. App. 513, 523, 326 P.3d 718, 723 (2014). No *right* to serve as the guardian is created by this process, and therefore Brian is not an aggrieved party.

The *Lasky* court held that a person is not sufficiently aggrieved merely because he is “hurt in his feelings” or “disappointed over a certain result” or “feels that he has been imposed upon” or that “ulterior motives may have prompted those who instituted proceedings.” *Lasky*, 54 Wn. App. 841 at 850. None of Brian’s perceived harms differ significantly from those rejected by *Lasky*, including: any damage to his relationship with his mother, the time and money expended pursuing the matter below, or any harm to his privacy or character. Even a paid guardian does not have standing to appeal the termination of that agency, as was the case in *Lasky*. *Lasky* goes on to conclude that the attorney guardian had “no interest in the

guardianship or trust estate other than for compensation due him” and therefore could not appeal the order removing him as the guardian. *Id.* at 849. Mrs. Bennetts’s designation for Brian’s appointment as guardian in her power of attorney is an interest of Mrs. Bennetts, not Brian. Only Mrs. Bennetts has standing to appeal that issue, on the basis of whether the court had good cause to appoint someone else. For these reasons, Brian does not have any right that is substantially affected by the appointment of a certified professional guardian. As result, he is not an aggrieved party under RAP 3.1.

2. Brian does not have third party standing

Insofar as Brian purports to bring this motion on behalf of Mrs. Bennetts, he lacks standing. The general rule is that individuals lack standing to vindicate the rights of a third party. *In re Guardianship of Cobb*, 172 Wn. App. 393, 401, 292 P.3d 772 (2012). There is an exception to this general rule, but the exception applies only where, among other elements, “there exists some hindrance to the third party’s ability to protect his or her own interests.” *Id.* at 402. There is no such hindrance here. Mrs. Bennetts was represented by counsel below; she could have challenged the superior court’s order regarding the appointment of a guardian through her counsel.

RCW 11.88.120 provides the appropriate mechanism for non-parties, such as Brian, to advocate on behalf of persons with guardians. It allows for represented persons to file motions, and unrepresented persons

to submit complaints, in the guardianship. *See* RCW 11.88.120. The court must then respond accordingly to address the issues raised, as detailed in RCW 11.88.120 (1) and (2). That process is the appropriate mechanism for family members to challenge the continued need for a guardianship, or seek replacement of the guardian.

3. In the alternative, if Brian has standing it is limited to the selection of the Guardian, not whether to appoint a Guardian

Even if the Court allows Brian to challenge the March 23 Order - and it should not- he should not be permitted to appeal the issue of whether Mrs. Bennetts was properly adjudicated to be incapacitated. Mrs. Bennetts did not contest that issue. RAP 2.5(a) allows the appellate courts to “refuse to review any claim of error which was not raised in the trial court.” RAP 2.5. Mrs. Bennetts did not claim that her incapacity determination was in error. To the contrary, Mrs. Bennetts affirmatively stipulated to her incapacity. *See* CP at 108-10. Although Brian argues that his interests are aligned with his mother’s, Appellant’s Brief at 15, that is clearly not the case on this significant issue. Effectively, Mrs. Bennetts did not assert that the Superior Court’s finding her incapacitated was an error. Even if Brian is allowed to proceed in this appeal on behalf of Mrs. Bennetts, he should be bound by her decision to stipulate to incapacity and challenge only what she challenged below: who her guardian should be.

B. A Certified Professional Guardian (CPG) was Properly Appointed for Margaret Bennetts

If this Court concludes that Brian does not have standing, it need not address the arguments in this section. The Superior Court properly granted the petition to appoint a guardian for Mrs. Bennetts's person and estate. In addition, good cause exists to appoint a certified professional guardian instead of Brian.

1. The Superior Court properly granted the Petition to Appoint a Guardian for Mrs. Bennetts's person and estate

The Department's Petition for a guardian met all statutory requirements. The superior court properly adjudicated Mrs. Bennetts to be incapacitated to her person and estate and appropriately concluded that there was no viable less restrictive alternative to guardianship.

a. The Petition complied with all statutory requirements

The Petition for appointment of a guardian met all statutory requirements. RCW 11.88.030 dictates the requirements for a guardianship petition. The petition must contain information for the purpose of identifying the alleged incapacitated person, the nature of their alleged incapacity, the estate, existing decision makers, relatives, and other information. *See* RCW 11.88.030. The Department's Petition contained all of the information specified by RCW 11.88.030. CP 1-4.

Brian incorrectly argues that the petition was deficient, and should be denied, because it stated that “Mrs. Bennetts’s family members have not produced a durable power of attorney document executed by her,” when one was later produced to the GAL. Appellant’s Brief at 22-23. Such a reading of the statute would lead to an absurd result, allowing an abuser with control of this document to defeat a guardianship petition by simply refusing to provide it. This result would be contrary to the legislative intent of RCW 11.88, which is to protect liberty and autonomy of vulnerable adults while adequately providing for their health and safety. *See* RCW 11.88.005.

b. Mrs. Bennetts was properly adjudicated as incapacitated as to her Person and Estate

The Superior Court properly adjudicated Mrs. Bennetts to be incapacitated. The Court’s determination that Mrs. Bennetts is incapacitated to person and estate was on the evidence in the record, not simply Mrs. Bennetts’s stipulation.² An individual is incapacitated as to person when they are at significant risk of personal harm based on a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. *See* RCW 11.88.010(1)(a). An individual is incapacitated as to estate

² Brian argues that the court cannot appoint a guardian based solely on the agreement of the parties (Appellant’s Brief at 25), but this was not the case. Although the court focused on the contested issue in its oral ruling on March 23, it clearly referenced the evidence in the record in concluding that Mrs. Bennetts is incapacitated. *See* VRP (March 23, 2018) at 28.

when they are at significant risk of financial harm based on a demonstrated inability to adequately manage property or financial affairs. *See* RCW 11.88.010(1)(b). The record is replete with evidence demonstrating Mrs. Bennetts's inability to protect her person and estate. This evidence includes: medical conditions that affect Mrs. Bennetts's cognition, CP at 578, a thorough cognitive assessment involving numerous standardized cognition tests conducted by a board certified psychologist, CP at 412, an opinion by Mrs. Bennetts's family doctor, CP at 449-51, and the conclusions of the GAL based on her comprehensive investigation, CP at 566. Mrs. Bennetts, through her appointed counsel, ultimately chose not to contest her incapacity and instead challenged only the issue of *who* should be her guardian. *See* CP at 108-10. Nevertheless, sufficient evidence in the record exists to prove Mrs. Bennetts's incapacity.

c. No less restrictive alternative was sufficient to protect Mrs. Bennetts

The durable power of attorney document, naming Harry and Brian as alternate decision-makers for Mrs. Bennetts, would have been insufficient to protect Mrs. Bennetts's person and estate. Only when a less restrictive alternative provides adequate support for an incapacitated person's needs should they be deferred to. *See* RCW 11.88.120(1)(b). Both

Harry and Brian have demonstrated that they cannot provide adequately protect Mrs. Bennetts's person or estate.

Harry would be inappropriate to be the decision-maker for Mrs. Bennetts for numerous reasons: the proven physical abuse that he inflicted upon Mrs. Bennetts, CP at 534, the continued allegations of physical abuse, CP at 399, 407, 411, and 450, Mrs. Bennetts's malnourishment while residing with him, CP at 450, and his obstruction of routine care and financial matters, CP at 782-84. These issues demonstrate Harry's inability to act in Mrs. Bennetts's best interest for both personal and financial matters.

Brian, as attorney in fact, is also not a viable less restrictive alternative to guardianship. The Durable Power of Attorney naming Brian as agent would be insufficient to protect Mrs. Bennetts for the same reasons that the Court declined to appoint him as guardian, discussed below. These reasons generally involve Brian's failure to take necessary steps to protect and advocate for Mrs. Bennetts before, and after the filing of, the guardianship petition. In addition, Brian has also minimized the violence of Harry against Mrs. Bennetts. CP at 616. Further, Brian has himself suggested, and demonstrated, that he would be unable to intervene on Mrs. Bennetts's behalf against Harry. CP at 441, 579, 583.

Although Brian suggests otherwise, the Superior Court's oral ruling, in conjunction with its written order, met the technical requirements of RCW 11.88.095. The finding of incapacity was based upon the capacities, condition, and needs of Mrs. Bennetts. Further, it contained the other required information, such as the bond amount and the accounting dates. *See* CP at 165.

2. Good Cause Exists to Appoint a CPG

The trial court correctly concluded that there was good cause to appoint a certified professional guardian instead of Brian. A court may decline to appoint an alleged incapacitated person's nominated guardian, and appoint another, for good cause. *See* RCW 11.88.010(4). The record contains significant evidence that Brian has failed to intervene on Mrs. Bennetts's behalf when doing so would entail conflict with Harry.

Brian failed to intervene on his mother's behalf in the months leading up to her hospitalization. As the Superior Court noted, Mrs. Bennetts was malnourished, alleging abuse by Harry, and missing medical appointments prior to her hospitalization. *See* VRP (March 23, 2018) at 31. The record does not reflect significant involvement by Brian in his mother's care or protection during that period. Although Brian's position has been to seek agency for his mother, his actions before and, and after the filing of the guardianship petition, do not reflect that commitment.

In addition, Brian has minimized the violence that Harry has inflicted upon Mrs. Bennetts, by stating that he did not think that Harry had hit her, CP at 616, characterizing Harry as “cantankerous,” CP at 122 and generalizing about his “behaviors,” CP at 55. None of Brian’s declarations in the record directly address Harry’s physical abuse. Instead, Brian has stated that he is “not sure how it is relevant whether [he] can ‘control’ [his] father.” CP at 89.

Throughout the record, Harry is described by declarants as confrontational, controlling, and aggressive. CP at 785, 450, 584. In order to defend Mrs. Bennetts’s interests where they may conflict with those of Harry, an independent professional with the time and expertise to advocate for Mrs. Bennetts is necessary. Brian, however, has made statements to GAL Clifford admitting that he would have difficulty placing limits on his father. CP at 441, 579, 583.

Brian was relatively uninvolved with decision-making and care management for Mrs. Bennetts. CP at 785. Further, when it was necessary to obtain items, funds, or information for Mrs. Bennetts, Ms. Reaves (the adult family home manager) had to extract them from Harry when they should have been provided by Brian. CP at 783-84. Brian’s failure to adequately advocate for his mother in these relatively routine issues calls into question his willingness to do so in the potentially extreme conflicts

that could occur, such as protecting his mother from physical abuse, or petitioning for divorce and aggressively seeking an inventory of community assets.

Although Brian is the son of Mrs. Bennetts, this does not afford him any priority to be Mrs. Bennetts's guardian: "The [guardianship] act does not treat parents or other family members as having a right to serve as guardian or as receiving special consideration for appointment as guardian." *In re Guardianship of Cornelius*, 181 Wn. App. 513, 523, 326 P.3d 718 (2014). The Superior Court properly found good cause to appoint a certified professional guardian, concluding that "the evidence does not appear to support that [Brian] would be able to set aside the very complex issues that exist in families of negotiating the family relationships between parents and son to adequately protect his mother." VRP (March 23, 2018) at 33.

C. The Superior Court Properly Denied Brian's Motion for Reconsideration.

The Superior Court properly denied Brian's motion for reconsideration. Brian argues that the purpose of his motion for reconsideration was to present additional evidence and request a modification of the guardianship. Appellant's Brief at 43. Indeed, the court "reviewed and considered all documents filed in association with the motion" and nevertheless declined to modify its order. CP at 389. The

Superior Court was within its authority under CR 59 to decline to allow oral argument on the motion. *See* CR 59(e)(3). Although Brian argues that “[b]y denying [his] Motion for Reconsideration, without oral argument and without rationale, the trial court essentially ignored the law” he does not specify what law the court was ignoring. Appellant’s Brief at 44. For the same reasons that the Superior Court properly found good cause to appoint a professional guardian, instead of Brian, it properly denied his motion for reconsideration. In addition, for the same reasons that Brian should not be permitted to pursue this appeal, as he was not a party below, the trial court properly denied Brian’s reconsideration motion.

D. Appellant’s Request for Attorney’s Fees Should be Denied

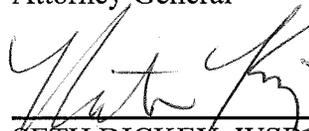
Appellant does not cite any basis for his request that the Department pay for his costs on appeal, “attorney fees paid to resist the petition for guardianship filed by Adult Protective Services,” and expenses of complying with the guardianship order. Although RCW 11.96A.150 contemplates that a court on appeal may in its discretion, order costs, including reasonable attorneys’ fees, from any party to be awarded to any party in a guardianship matter, Brian is not a party, as argued above. For this same reason, it would be inequitable for the court to award costs and fees to Brian. To the contrary, Brian’s pursuit of this appeal has presumably incurred legal expenses for Mrs. Bennetts.

V. CONCLUSION

The Department respectfully requests that this Court uphold the Order of March 23, appointing Clarity Guardianship LLC., as guardian of person and estate for Margaret Bennetts.

RESPECTFULLY SUBMITTED this 22nd day of October, 2018.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

US Mail Postage Prepaid
Via Federal Express, Next Day Delivery
Via Personal Service
Via Facsimile *per agreement*
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I certify under penalty of perjury, under the laws of the State of
Washington, that the foregoing is true and correct.

EXECUTED this 22 day of October, 2018 at Tumwater,
WA.



Ashlee Strickland, Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

October 22, 2018 - 3:08 PM

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