

**FILED**

MAR 29 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30985-1

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

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In re the Guardianship of:

KENYON CORNELIUS,

An Incapacitated Person.

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**RESPONDENT'S BRIEF**

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AMY S. SOTH  
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## I. INTRODUCTION

Kenyon Cornelius is a developmentally delayed woman. In 1989, a guardianship was entered naming her parents, Christina Baldwin and Scott Cornelius, co-guardians. In March 2010, the Department of Social and Health Services (the Department) filed a petition to modify the Guardianship based on a report that Ms. Baldwin was mentally abusing Ms. Cornelius.

After the Department filed its petition, the superior court temporarily appointed a professional guardian of the person for Ms. Cornelius. The Department then entered into a Memorandum of Agreement with Ms. Cornelius, her parents, and the temporary guardian. The purpose of the agreement was to give Ms. Baldwin time to work on her issues so that she could be reconsidered for reinstatement as her daughter's guardian. Ms. Baldwin was ultimately unable to successfully work through her issues. As a result, the court concluded that the professional guardian should continue to serve as Ms. Cornelius's guardian of the person. This decision was within the superior court's broad discretion to make decisions in the best interest of the incapacitated person, Ms. Cornelius. Therefore, the superior court's decision should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

- A. Did substantial evidence support the court's decision to keep the professional guardian in place?
- B. Does Ms. Baldwin have a protected due process right to be named her daughter's guardian of the person triggering due process rights to notice and the opportunity to be heard?
- C. Can Ms. Baldwin raise an issue on the timeliness of a guardian ad litem report for the first time on appeal?
- D. Did Ms. Baldwin fail to preserve her right to contest the trial court's decision that the parties' Memorandum of Agreement was no longer valid on its terms by failing to raise the issue below and by failing to cite legal authority?

## **III. COUNTERSTATEMENT OF THE FACTS**

Kenyon Cornelius was born on March 16, 1971. (CP 3-7) She suffers from Down's Syndrome. In 2000, she was in a bicycle accident which resulted in a frontal lobe brain injury. In 1989, Ms. Cornelius's parents, Christina Baldwin and Scott Cornelius, were appointed co-guardians of her estate and person. Ms. Cornelius is incapacitated in that she has a moderate development delay. (CP 3-7) She needs protection

and assistance in making informed consent for medical decisions, personal decisions, and management of her property and financial affairs. (CP 3-7).

On March 1, 2010, the Department filed a Petition for Substitution or Clarification of Guardian of Person and Estate. (CP 3-7) The Department filed the petition based on a report alleging that Ms. Cornelius was being mentally abused by her current co-guardian, Ms. Baldwin. (CP 8-15) The Department sought an order appointing a guardian ad litem to act as an independent party to investigate the appropriateness of the current co-guardians and whether one or both should be removed and if a professional guardian should be appointed. (CP 8-15). The court granted the Department's motion and appointed Jill Wahl as the guardian ad litem. (CP 18-24).

Ms. Baldwin responded to the Department's Petition on May 28, 2010. (CP 37-44) Ms. Baldwin sought an order to allow her to become the sole guardian of Ms. Cornelius's person and estate. (CP 37-44) On June 3, 2010, Ms. Wahl filed her report which indicated that utilizing a professional third party guardian would be in Ms. Cornelius' best interest. (CP 113-245).

Ms. Wahl conducted a thorough investigation prior to submitting her report. (CP 113-245) She spoke to Ms. Baldwin and Mr. Cornelius as well as reviewing documents they submitted to her. (CP 115) In addition

she contacted several individuals in Ms. Cornelius' family, former care givers of Ms. Cornelius, Ms. Cornelius' job coach, the back- up guardians, as well as Ms. Cornelius' mental health provider and DDD case manager. (CP 115)

Ms. Wahl's contact with Ms. Baldwin was extensive. Ms. Baldwin had a personal interview and two telephone calls with Ms. Wahl. Ms. Wahl receive over 50 emails from Ms. Baldwin (23 of which were unsolicited), as well as several inches of documentation including old service provider reports, newspaper articles and a book about mental wellness and downs syndrome. (CP 116) Ms. Baldwin also supplied an 83 page chronology of her guardianship activities. (CP 116) Ms. Wahl indicated in her report that Ms. Baldwin also shared personal information with her which wasn't relevant to her duties but made her aware that given this family had long-standing conflict and emotional distress associated with the divorce of Mr. Cornelius and Ms. Baldwin. (CP 116) Additionally, Ms. Wahl learned that Mr. Baldwin's current husband often rewrites emails written by Ms. Baldwin to keep her from offending others. (CP 116)

Ms. Wahl found that there was conflict between Mr. Cornelius and Ms. Baldwin over the use of funds. (CP 117) For example, Mr. Cornelius indicated that Ms. Baldwin spent more money than necessary on a

computer for Ms. Cornelius. (CP 117) He agreed to the expense to avoid an argument but felt it unnecessary as the computer had many features that Ms. Cornelius would not have the capacity to use. (CP 116) He also felt Ms. Baldwin sought more medical assessments than necessary for Ms. Cornelius and that these actions negatively impacted her mental health. (CP 117)

Ms. Cornelius conveyed to Ms. Wahl that she wanted her mother removed as her guardian. (CP 118) Ms. Wahl learned that Ms. Baldwin's involvement as guardian had impacted Ms. Cornelius' ability to maintain employment or maintain housing in a group setting because of her over involvement in the day to day activities of her daughter. (CP 118)

Ms. Wahl concluded that after her investigation, the current situation with her parents as co-guardians of the person was detrimental to Ms. Cornelius. She determined that Ms. Baldwin, while well-intentioned, did not always act in her daughter's best interest. (CP 123) Thus, she recommended a professional guardian be appointed. (CP 123)

On June 22, 2010, the Court issued a Memorandum Decision removing Ms. Baldwin and Mr. Cornelius as guardians of Ms. Cornelius' person. (CP 251-254) The court ordered that Leslie Cloaninger, a professional third party guardian, be appointed as an interim guardian of

the person. (CP 251-254). Ms. Baldwin and Mr. Cornelius would continue to serve as guardian of the estate. (CP 251-254)

The parties then attempted to resolve this matter in a way that would best protect Ms. Cornelius's interests. On January 26, 2011, the parties filed a Memorandum of Agreement with the court. (CP 265-268) That agreement was between Ms. Baldwin, Mr. Cornelius, the Department, the guardian ad litem, the professional guardian of the person, and Ms. Baldwin who was represented by counsel during the agreement negotiations. (CP 265-268).

Under the Memorandum of Agreement, the parties agreed that Ms. Cloaninger would continue as guardian of the person for Ms. Cornelius. (CP 265-268) However, the agreement also provided for reinstatement of the parents as co-guardians if certain conditions were met. Specifically, the agreement allowed for reinstatement of the parents in eight months if: (1) Ms. Baldwin demonstrated an ability to work cooperatively with agencies and professionals; and (2) Ms. Baldwin submitted to a psychological evaluation and demonstrated follow-through with the psychologist's recommendations. (CP 266-67) If the conditions were not met, the professional guardian was to remain in place and any further changes to the guardianship would have to meet the statutorily defined cause for replacement. (CP 266-67) Additionally, the agreement required

appointment of a new guardian ad litem to report to the court on whether the conditions for reinstatement had been met. (CP 266-67)

Pursuant to the parties' agreement, the superior court entered an order Appointing Ms. Cloaninger as the substitute guardian of Ms. Cornelius's person. (CP 269-273) On January 11, 2012, the Department filed a motion seeking to appoint Jim Woodard as the neutral Guardian Ad Litem per the terms of the Memorandum of Agreement. (CP 305-309). Although the Department's motion exceeded the eight months provided for in the Agreement, the motion indicated that the parties agreed to the delay in his appointment. (CP 305-309).

Mr. Woodard filed his guardian ad litem report on April 3, 2012. (CP 363-393) In making his recommendations, Mr. Woodard relied on many sources of information, including statements from Ms. Cornelius, the psychological evaluation of Ms. Baldwin done pursuant to the Memorandum of Agreement, and statements of Ms. Baldwin's treating therapist. (CP 363-393, RP 94-98) Mr. Woodard specifically addressed whether the required conditions in the Memorandum of Agreement had been met. (CP 363-393)

Mr. Woodard reviewed the psychological evaluation conducted in accordance with the Memorandum of Agreement. (CP 363-393) This evaluation suggests that Ms. Baldwin suffers from borderline and paranoid

personality traits. (CP 429-438) The evaluation also indicates Ms. Baldwin struggles with interpersonal relations and she is rigid and hostile. (CP 429-438) This style is consistent with the pattern of alienation that Ms. Baldwin demonstrated when it came to care providers for Ms. Cornelius. (CP 429-438) Ms. Baldwin lacks any insight into her responsibility for these situations. (CP 479-438)

Ms. Baldwin told Mr. Woodard she was “floored” by the contents of her evaluation and sent changes to the psychologist who refused to make Ms. Baldwin’s proposed changes. (CP 363-393) Mr. Woodard learned from Ms. Baldwin’s treating psychologist that she cannot differentiate between what Ms. Cornelius wants and what she wants. (CP 363-393) Mr. Woodard did not believe that Ms. Baldwin was capable of being Ms. Cornelius’s guardian. While she had undergone the required psychological evaluation, Ms. Baldwin did not demonstrate the capacity or the ability to work with providers as requires by the agreement. (CP 363-393) Furthermore, Mr. Cornelius did not wish to return to the position of co-guardian, thus the provision of the Memorandum of Agreement could not be carried out. (CP 363-393) He recommended that Ms. Cloaninger remain the guardian of her person.

A hearing was held on April 10, 2012 to address the guardian’s initial care plan and budget. (RP 71) Ms. Baldwin was present and

represented by counsel. (RP 71) Mr. Woodard was present as well and indicated he had expected to testify. (RP 71-72, 94-95) The court permitted him to testify that he did not recommend Ms. Baldwin being reinstated as the guardian of Ms. Cornelius's person. (RP 95-102). Mr. Woodard testified that Ms. Baldwin had not had any contact with Ms. Cornelius' providers since her removal as guardian, but despite this he did not believe that she had increased her ability to work with others. (RP 96-97) Mr. Woodard was concerned about the Memorandum of Agreement because it did not seem to take Ms. Cornelius' best interest into account. (RP 97) He stated in his opinion his recommendation was based upon the fact that Ms. Baldwin did not demonstrate insight or judgment into what was in Ms. Cornelius' best interest. (RP 97) It was not one specific thing that caused him concern, but rather a composite of the entire case, everything he had read, and information he gathered by talking to collateral sources. (RP 97-98)

Mr. Cornelius also testified that he no longer wished to serve as co-guardian. (RP 194-198) He stated that Ms. Cornelius is doing well and suffering less turmoil with a professional guardian. (RP 194)

Ms. Baldwin, through counsel, was able to cross examine Mr. Woodard and the other witnesses. (RP 107-114) Ms. Baldwin was also

able to testify. (RP 132-193) Ms. Baldwin testified as to why she believed she was suited to return as the guardian. (RP 179-182).

The court issued an oral ruling that the guardianship should become final and that Ms. Cloaninger should remain Ms. Cornelius's guardian. (RP 215-216). The court specifically stated that the present problem had been going on for a couple of years and this was too long for Ms. Cornelius' well-being. (RP 210) The court indicated that Ms. Baldwin's own testimony was concerning as it showed she continues to take a stubborn and arrogant approach to anyone who disagrees with her and this negatively impact her daughter. (RP 215) The court also found that the Memorandum of Agreement was no longer in effect. (RP 217-18). First, the co-guardianship was no longer possible, as Mr. Cornelius did not wish to return as co-guardian. (RP 216) The court felt the Memorandum of Agreement was a good faith attempt to allow the family to return as guardians, but it did not work and too much time had passed to allow it to continue to bind the parties. (RP 217-218) The court further stated that finality was in Ms. Cornelius' best interest. (CP 217-218) Finally, the court was concerned about the impact Ms. Baldwin's interactions with Ms. Cornelius had on her daughter. The court found that Ms. Baldwin needed to get some professional help regarding how to interact appropriately with Ms. Cornelius. (RP 218) The court permitted the professional guardian to

work with the therapists of both Ms. Cornelius and Ms. Baldwin to determine how contact should occur. (RP 219)

On June 15, 2012, the court entered an order appointing Ms. Cloaninger as the full guardian of Ms. Cornelius's person. (CP 444-451). The order also allows Ms. Cloaninger to determine contact between Ms. Baldwin and Ms. Cornelius. (CP 444-451) This appeal follows.

#### IV. ARGUMENT

##### A. Standard of Review

Ms. Baldwin claims the court erred in finding that she could not serve as guardian and in limiting her contact with her daughter. Essentially she is challenging the court's findings of fact.

Courts review 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 (2011). Evidence is substantial if there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). This

standard “necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *State ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn.App. 614, 618, 829 P.2d 217 (1992).

**B. The Superior Court’s Decision is Supported by Substantial Evidence in the Record and Does not Constitute an Error of Law**

Ms. Baldwin argues that the superior court’s decision was not in the best interests of Ms. Cornelius. Opening Br. at 15-29. Ms. Baldwin is incorrect. The superior court’s decision was reached after hearing the testimony multiple witnesses, including Ms. Baldwin. The guardian ad litem’s recommendation was based on a psychological evaluation of Ms. Baldwin, statements of Ms. Baldwin’s own therapist and the professional guardian, and Ms. Cornelius’s wish to not have her mother reinstated as guardian. Substantial evidence supports the court’s conclusion that a professional guardian was in the best interest of Ms. Cornelius.

The general guardianship statute, Chapter 11.88 RCW, sets forth procedural rules for establishing guardianships and limited guardianships for incapacitated persons. In delineating specific requirements for these actions, the Legislature seeks to guarantee that the liberty and autonomy of incapacitated persons “should be restricted through the guardianship

process only to the minimum extent necessary to adequately provide for their own health or safety, or to manage their financial affairs. *In re Marriage of Blakely*, 111 Wn. App. 351, 357, 44 P.3d 924 (2002) (quoting RCW 11.88.005) Any person, including the Department, may petition in good faith for appointment of a guardian or limited guardian for an alleged incapacitated person. RCW 11.88.030(1).

A guardianship petitioner's duties and responsibilities in guardianship proceedings are generally limited. *In re Guardianship of Matthews*, 156 Wn. App. 201, 209, 232 P.3d 1140 (2010). The petitioner's role is essentially to alert the trial court of the potential need and reasons for a guardianship of an incapacitated person and to respond to any inquiries from the trial court. *Id.* at 209-210.

The real party at interest in a guardianship proceeding is the incapacitated person, and it is the trial court's duty to ensure that his interests are protected. *Id.* See also *Seattle-First Nat'l Bank v. Brommers*, 89 Wash.2d 190, 200, 570 P.2d 1035 (1977) (the court is the "superior guardian" of a ward while the appointed guardian is "an officer of the court"); *In re Gaddis*, 12 Wash.2d 114, 123, 120 P.2d 849 (1942) (a guardian "is directly responsible only to the court of his appointment. The guardian is in effect an agent of the court, and through him the court seeks to protect the ward's interest.") (citation omitted). In deciding whether to

replace a guardian, the court's paramount duty is to determine what is in the best interest of the incapacitated person. RCW 11.88.120(4).

Here, the court made two decisions that Ms. Baldwin takes issue with. The first was the court's finding that it was in Ms. Cornelius's best interests to have the professional guardian continue to serve as guardian of the person. The second was that the professional guardian should be given the authority to limit Ms. Baldwin's contact with her daughter as necessary to protect Ms. Cornelius's interests. Contrary to Ms. Baldwin's arguments, both aspects of the court's decision are supported by substantial evidence.

First, there was substantial evidence to support the court's decision to not reinstate Ms. Baldwin as the guardian of Ms. Cornelius's person. The court considered the testimony of several individuals in making its decision. It considered the testimony of the professional guardian, the court appointed guardian ad litem, Ms. Baldwin, and Mr. Cornelius. The court also considered several reports.

Mr. Woodard testified that having a professional guardian was what was best for Ms. Cornelius. (RP 97) Mr. Woodard relied on many sources of information, including statements from Ms. Cornelius, the psychological evaluation of Ms. Baldwin done pursuant to the Memorandum of Agreement, and statements of Ms. Baldwin's treating

therapist. (RP 94-98). His full recommendations were contained in his report filed with the court. (CP 363-393)

He testified that Ms. Baldwin viewed the situation as what she was entitled to, but he was looking at what Ms. Cornelius needed. (RP 97) He also testified that when Ms. Baldwin was the guardian, she struggled in her role as mother. (RP 98) Ms. Cornelius wanted Ms. Baldwin to be her mother, not her guardian. (RP 98) Mr. Woodard felt Ms. Baldwin struggled with judgment and insight and thus at times had difficulty acting in a way consistent with Ms. Cornelius's best interests. (RP 98-103) Ms. Baldwin's psychological assessment suggested that she has a personality disorder which results her ability to demonstrate good insight and judgment. (RP 102-103) This diagnosis is consistent with the pattern of alienation that Ms. Baldwin demonstrated when it came to care providers for Ms. Cornelius. (CP 363-393, 429-438, RP 102-103) Ms. Baldwin lacks any insight into her responsibility for these situations or the anxiety that her behavior causes for Ms. Cornelius. (CP 479-438, RP 103)

Mr. Woodard learned from Ms. Baldwin's treating psychologist that she cannot differentiate between what Ms. Cornelius wants and what she wants. (CP 363-393) Mr. Woodard did not believe that Ms. Baldwin was capable of being Ms. Cornelius's guardian. He recommended that Ms. Cloaninger remain the guardian of her person.

Mr. Cornelius also testified that Ms. Baldwin had not changed in any demonstrated manner as envisioned and thus he did not think she should be reinstated as guardian. (RP 195-200) He stated that Ms. Cornelius is doing well and suffering less turmoil with a professional guardian. (RP 194) He believed that if guardian, Ms. Baldwin would over involves herself in every situation. (RP 196) He has observed that this causes Ms. Cornelius to become over-entitled to special treatment which in turn causes problems for her. (RP 196) He felt Ms. Cornelius would be best served by a professional guardian. (RP 198)

Ms. Baldwin testified and was unable to articulate her role as guardian versus her role as mother. (RP 179-181) She blamed the professional guardian for interfering with her mother daughter relationship as well as her duties under the Memorandum of Agreement. (RP 146) She testified that Ms. Cornelius was pressured to discredit her as the guardian. (RP 163) Ms. Baldwin also acknowledged that Ms. Cornelius indicated she wanted a professional guardian, but she took issue with that view because Ms. Baldwin did not see it as being in her daughter's best interest. (RP 183)

The court also considered the written reports of both guardian ad litem and the reports of Dr. Mary Dietzen and Dr. Gloria Waterhouse. Dr. Dietzen's evaluation suggests that Ms. Baldwin suffers from

borderline and paranoid personality traits. (CP 429-438) Ms. Baldwin struggles with interpersonal relations and she is rigid and hostile. (CP 429-438) This style is consistent with the pattern of alienation that Ms. Baldwin demonstrated when it came to care providers for Ms. Cornelius. (CP 429-438) Ms. Baldwin lacks any insight into her responsibility for these situations. (CP 429-438) She felt that Ms. Baldwin needed some significant psychological counseling. (RP 100) However, her report indicated that Ms. Baldwin's personality traits would make counseling a difficult process. (CP 429-438)

Dr. Waterhouse indicated Ms. Baldwin is unable to differentiate between what Ms. Cornelius wants and what she wants. (RP CP 363-393) Dr. Waterhouse was only recommending limited contact between Ms. Baldwin and Ms. Cornelius. (RP 101)

Substantial evidence demonstrated that Ms. Baldwin was unable to place her daughter's needs above her own. Ms. Baldwin had signed the Memorandum of Agreement which appointed a professional guardian. During this time she had eight months to accomplish tasks in order to establish that she was suited to be reinstated as guardian. She failed to comply with these requirements or otherwise demonstrate her suitability to serve as guardian of the person. More than 8 months had passed since the entry of the Memorandum of Agreement. Substantial evidence

demonstrated that Ms. Baldwin lacked the judgment and insight required to act as guardian. In light of this evidence, the court did not err in concluding that it was in Ms. Cornelius's best interest to appoint a professional guardian.

The court also did not err in permitting the professional guardian to limit contact between Ms. Cornelius and her mother. The evidence before the court was that contact with Ms. Baldwin caused stress and anxiety for Ms. Cornelius. Ms. Baldwin's own treating psychologist recommended limiting her contact with her daughter. (RP 101)

On one occasion, Ms. Cornelius was scheduled to go to a living nativity with a caregiver. (RP 118-119) But Ms. Baldwin continuously called Ms. Cornelius to attend a party with her. (RP 119) When asked which she wanted to attend, Ms. Cornelius said the living nativity but was unwilling to tell her mother, instead asking the professional guardian to communicate with her mother. (RP 119) Ms. Baldwin was upset because Mr. Cornelius was unable to see her talk at the event, not that she had missed seeing her daughter. (RP 119) When Ms. Baldwin and Ms. Cornelius do see each other, Ms. Baldwin treats Ms. Cornelius as a young child. (RP 123) While this may be appropriate in the moment, it causes Ms. Cornelius to start acting like a child in other areas of her life, such as her workplace. (RP 123) When she acts like a child in the workplace it

causes problems for her diminishes her ability to be independent. (RP 123)

Ms. Baldwin also expects Ms. Cornelius to make her happy. (RP 125) Ms. Cornelius is very protective of her mom, and shows fear if she disagrees with her. (RP 125)

The evidence was also that Ms. Baldwin was unable to have normal mother/daughter interactions with Ms. Cornelius. Her interactions with her daughter caused anxiety in Ms. Cornelius. In order for a healthy relationship to form, there would need to be limitations on contact. (RP 125) Ms. Baldwin's own therapist felt contact should be limited. The court did not err in finding that the professional guardian should have the ability to limit contact as necessary to protect Ms. Cornelius's best interest. The court's decision is supported by substantial evidence and should be affirmed.

**C. The Court did not violate Ms. Baldwin's due process rights because Ms. Baldwin did not have an interest protected by due process, but even if she did, she was provided notice and an opportunity to be heard before the court made its decision.**

Ms. Baldwin argues that the court violated her due process rights when the court entered a final order appointing the professional guardian.

Opening Br. at 9-12. Ms. Baldwin's argument fails on several grounds.

First, Ms. Baldwin has not established that she has a protected interest in being the guardian of Ms. Cornelius's person as necessary to claim a due process right. When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). A person alleging a violation of due process has the burden of establishing the deprivation of an interest cognizable under the due process clause. *King County Dept. of Adult and Juvenile Detention v. Parmelee*, 162 Wn. App. 337, 353, 254 P.3d 927 (2011).

Ms. Baldwin does not cite any authority suggesting that being appointed a guardian under RCW 11.88 is a cognizable interest under the due process clause. Rather she simply asserts that she should have been afforded notice and the opportunity to be heard without asserting that she has any interest entitled to due process protections. In fact, Ms. Baldwin does not have a constitutional right to serve as guardian for her daughter. Rather, the guardianship statute makes it clear that it is the *incapacitated person* who has rights that need to be protected. *See. e.g.*, RCW 11.88.005 (legislative intent is to protect all persons' liberty "and to enable them to exercise their rights under the law to the maximum extent, consistent with

the capacity of each person.”) Ms. Baldwin has no constitutional due process right that was implicated.

Ms. Baldwin asserts that she had a right to notice under RCW 11.88.040 giving rise to her right to notice and the opportunity to be heard. Opening Br. at 10. However, RCW 11.88.040 governs the initial filing of the petition for a guardianship. Here, the Department sought to modify an existing guardianship and, therefore, RCW 11.88.040 arguably does not apply. But even if it did, Ms. Baldwin was given notice when the Department initially filed its petition. She responded to the petition. Furthermore, Ms. Baldwin participated in all stages of the proceedings.

Because the Department sought to modify an existing guardianship, RCW 11.88.120 is the governing statute:

**Modification or termination of guardianship—Procedure**

(1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.

(2) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. If applicants are represented by counsel, counsel shall move for an order to show cause why the relief requested should not be granted. If applicants are not represented by counsel, they may move for an order to show cause, or they may deliver a written request to the clerk of the court.

(3) By the next judicial day after receipt of an unrepresented person's request to modify or terminate a guardianship order, or to replace a guardian or limited guardian, the clerk shall deliver the request to the court. The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. ...

(4) In a hearing on an application to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may grant such relief as it deems just and in the best interest of the incapacitated person.

RCW 11.88.120. There is nothing in this statute requiring notice to the existing guardians. In fact, this statute permits the court, on its own motion for good reason to modify the guardianship. RCW 11.88.120(1). However, as noted above, Ms. Baldwin received notice and participated in all stages of the proceedings.

The fact that Ms. Baldwin received notice reveals additional flaws in her due process arguments. The purpose of due process is to afford interested parties in an action, notice and an opportunity to present their objections. See *In re the Guardianship of McGill*, 35 Wn. App. 265, 268, 654 P.2d 705 (1983)(quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 657-58, 94 L.Ed.865 (1950). Here Ms. Baldwin received notice of the petition to modify the

guardianship. She responded to the petition in writing. (CP 37-11). She appeared at each and every hearing and was represented by counsel. Her own testimony at the April 10, 2012, hearing was directed to the issue of why she should be re-instated as the guardian. (RP 140-145) She also testified as to why having someone other than her as the guardian was problematic. (RP 181) She also acknowledged that this proceeding had been pending for 2 years and her daughter, the incapacitated person, needed resolution. (RP 190-192)

The need for final resolution to these proceedings was certainly before the court on April 10. A complete reading of the record indicates that all parties testified and presented evidence on the ultimate issue, which was whether it was in Ms. Cornelius's best interest to reinstate Ms. Baldwin as guardian of the person. There was ample evidence before the court on this issue and the court, as the ultimate guardian for Ms. Cornelius, had the authority under RCW 11.88.120 to make such a determination.

Ms. Baldwin does not have a constitutionally protected due process right to be the guardian of her daughter's person. However, she was afforded notice and opportunity to be heard. Additionally, under RCW 11.88.120 she has the right to bring an action to modify the current

guardianship. The court's actions on April 10 were proper under chapter 11.88 of the Revised Code of Washington. Due process was not violated.

**D. The Court Properly Considered the Guardian Ad Litem's report because Ms. Baldwin did not object to its admission.**

Ms. Baldwin also asserts that the court erred in considering the report of the guardian ad litem because it was not timely. Opening Br. at 12-13. RCW 11.88.090(5)(f) sets forth requirements of the guardian ad litem's report. That statute requires the report to be filed 15 days prior to the hearing on the merits of the petition.

Here, the guardian ad litem did not file his report fifteen days before the hearing. However, Ms. Baldwin failed to object to the report being admitted and considered by the court. In order to properly preserve an issue for appeal, the evidence must be objected to at trial. RAP 2.5(a); *see City of Seattle v. McCoy*, 101 Wn. App. 815, 844, 4 P.3d 159 (2000) (citing *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983)). Her failure to properly preserve this issue precludes review.

Additionally, while the hearing was held on April 10, the final order was not entered until June 15. During those 60 days, Ms. Baldwin did not file any objections, motions to reconsider, or requests to open the record or to present evidence to contest the findings of the guardian ad

litem. Ms. Baldwin had the opportunity to object to the report but failed to do so. She cannot raise this issue for the first time on appeal.

**E. The Court Properly Determined the Memorandum of Agreement Was No Longer in Effect**

Ms. Baldwin claims that the court erred in determining that the Memorandum of Agreement entered in January 2011 was no longer in effect. This Court should not consider this issue. First, Ms. Baldwin again failed to raise this issue below. An error must be raised below to preserve the issue on appeal. RAP 2.5(a). This affords the trial court the opportunity to correct any error when it arises. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The purpose of the rule is that such correction will prevent the necessity of an appeal or a new trial. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Ms. Baldwin's failure to bring her alleged error to the superior court's attention precludes review at this stage.

Moreover, Ms. Baldwin has failed to provide legal authority to support the alleged error as required under RAP 10.3(a)(5). Accordingly, these allegations are unreviewable.

Even if this Court does reach the issue, it is clear that, by its own terms, the Memorandum of Agreement was no longer in effect. Courts will enforce a settlement agreement so long as it was fairly and knowingly

made. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065, 1069 (2001).

A settlement agreement is an ordinary contract, the construction of which is governed by general contract principles. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wash. App. 299, 311, 57 P.3d 300, 306 (2002). Courts interpret contract language to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). In doing so the court applies an objective manifestation test, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998).

Here the Memorandum of Agreement required Ms. Baldwin to meet certain criteria within 8 months. (CP 265-268) If she failed to meet those criteria, then a professional guardian would remain in place and any further attempt to change the guardian would need to meet the statutorily defined cause for replacement. (CP 265-268)

Here, the parties agreed to extend the deadlines beyond those originally contemplated in the Memorandum of Agreement. However, even under the extended deadlines, Ms. Baldwin was unable to meet the criteria required under the agreement. Additionally, the Memorandum of Agreement provided that Ms. Baldwin could be re-instated as a co-

guardian with Mr. Cornelius. It did not contemplate her becoming the sole guardian. It was appropriate for the court to issue a final order appointing a professional guardian for Ms. Cornelius. Once that decision was made, the agreement no longer needed to remain in effect.

Ms. Baldwin argues that the agreement needed to remain in effect because it required the guardian to encourage a mother daughter relationship between Ms. Baldwin and her daughter. Opening Br. at 13. Ms. Baldwin argues that it was implicit that all parties believed that the agreement, including this provision, was in the best interests of Ms. Cornelius. Opening Br. at 14. She cites no evidentiary support for this assertion. Furthermore, her argument ignores the fact that it is the court, not the parties, that decides what is in the best interest of the incapacitated person. After hearing testimony from multiple witnesses and reviewing multiple reports, the court concluded that it was in Ms. Cornelius's best interest not to reinstate Ms. Baldwin as guardian. The Memorandum of Agreement explicitly provided for this outcome if Ms. Baldwin did not meet the criteria required of her.

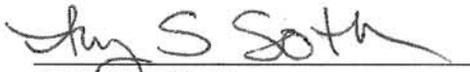
The court did not err in concluding that the agreement was no longer in effect, nor would it have changed the outcome in this case. The court's decision is supported by substantial evidence and should be affirmed.

V. CONCLUSION

For the reasons stated herein, the Department respectfully asks the Court to affirm the superior court's order.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of March, 2013, I mailed a copy of the Brief of Respondent by first class mail to:

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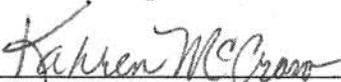
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29<sup>th</sup> day of March, 2013 at Spokane, Washington.

  
KAHREN MCCROW