

No. 333566

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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IN RE THE GUARDIANSHIP OF : JUDITH HOLCOMB

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REPLY BRIEF of APPELLANTS to  
BRIEF OF AMICUS CURIAE SPOKANE COUNTY GUARDIANSHIP  
MONITORING PROGRAM,  
SPOKANE COUNTY SUPERIOR COURT ADMINISTRATOR.

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## **REPLY ARGUMENT**

Appellants' reply to the amicus brief directly addresses several of the issues, statements, and arguments proffered by the amicus on behalf of the Spokane County Superior Court.

In response to the Issues Presented by the amicus:

1. The appellants clearly demonstrate that the Spokane County Superior Court abused its discretion in each and every one of the 121 appealed cases where the court entered a judgment against the guardian of record for guardian fees, purportedly pursuant to RCW 11.88.090(10), in actions that were wrongfully, and unlawfully initiated, and administered by members of the Spokane County Superior Court, and that were entered absent any due process.
2. The appellant was never give notice a meaningful opportunity to respond as part of the drumhead resulting in the Court's orders assessing it GAL fees as the Spokane County Superior Court reserved the issue of fees in all of the cases; never provided a notice to the appellants nor counsel; never provided a copy of any proposed order or judgment to the appellants or counsel; failed to schedule or notify other appellants or counsel of any hearing on the matter; failed to follow the presentment requirements of the Civil Rules; and abused its power and discretion in these actions without

any legal basis when it entered the orders assessing the appellants GAL fees.

3. The court should NOT strike the appellants' abridged brief, as it did not argue the issues pursuant to the order. But, as the amicus explicitly argued the issue of removal in its brief, that issue is argued herein pursuant to RAP 10.3(f) which states "The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae."

### ***Briefing and Ruling Regarding Appealability<sup>1</sup>***

The amicus of the superior court quotes Commissioner Wasson's ruling on August 26, 2016, as dismissal of the issue as opposed to the actual basis and purpose of the hearing: appealability - whether or not the acts of the superior court were appealable by right pursuant to RAP 2.2.

On July 23, 2015 this Court sent a letter to counsel stating, in part, the following:

We have received the motion to dismiss Hallmark and Peterson as parties, motion to compel appellant to identify and serve current guardians, motion permitting Steven Kinn special amicus status and responses to those motions filed by counsel in this matter.

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<sup>1</sup> Amicus Brief pgs. 3-5.

The Court also has determined that this matter might not be appealable as a matter of right.

Therefore, ***it is has set its own motion to determine appealability*** for August 12, 2015 at 9 a.m. by telephone conference call. The parties' motions and their responses will be considered on that same date and time.

In accordance with RAP 6.2(b), ***counsel should be prepared to argue both (1) finality, and (2) in the event the order is not final, whether discretionary review should be accepted.*** See RAP 2.3(b).

A copy of this letter is attached hereto as Exhibit 1.

As the Amicus for the superior court admits, “the appeal of the Order that assessed fees was appealable,” meaning that the action – the entire action – was appealed. The rules do not require that each error in an action be independently appealed. But, final order are appealable by right under RAP 2.2. Because the order was appealable, and therefore the errors of the entire action leading up to that appealable order could, and should, be presented for review to this Court, it was not necessary to “move to modify Commissioner Wasson’s Ruling as required by RAP 17.7” as asserted by the amicus on page 3 of its brief. The appeal was not dismissed. Furthermore, the Supreme Court , in its Ruling Denying Review entered on June 22, 2017 stated that “[D]enial of discretionary review at this point does not preclude Hallmark from obtaining later review of the Court of Appeals decision or the issues pertaining to that decision. RAP 13.5(d).”

The fact is that this is a singular set of actions, wherein all of the issues and events are intertwined. And, the irony is that even the respondent is unable to argue its case without bringing in the events that were the subject of the first notice of appeal. Even the amicus cites a 2017 case, *Matter of Guardianship of Fowler 32979-8-III, 2017*, in which this court reviewed the issue of improper removal of a guardian. Now that they are explicitly addressed and referenced by the amicus, those issues will be responded to herein by the appellants pursuant to RAP 10.3(f).

***Amicus's and Superior Court's Misinformation Regarding the Court's Original Order(s)***<sup>2</sup>

On page 5 of the Amicus brief, it states that “[i]n anticipation of the effective date of [Ms. Petersen’s *temporary*] suspension, the Superior Court ordered [sua sponte, and without notice or hearing] the appointment of a special master to facilitate the expedited appointment of GALs to review and to report to the Court in the 124 Guardianships in Spokane County where Ms. Petersen was appointed as a guardian, standby guardian or had an ownership interest in a guardianship agency. Response Brief pg. 5.

           The amicus’s statement is a half-truth, or in political speak, an

2 Amicus Brief, pg. 5. Sect. B. Substantive Facts and Superior Court Procedural History

“alternative fact”. The respondent’s statement is belied by the words of the superior court itself.

These guardians were appointed, not to simply review and report, but to specifically **“oversee the transition of 125 cases currently assigned to Ms. Petersen and/or the agencies with which she [was] involved.”** See Letter from Kathleen M. O’Connor to the Guardians ad Litem dated April 7, 2015, a copy of which is both in the record and attached hereto as Exhibit B. The letter further stated that **“the only issue in these cases will be appointment of a successor guardian and/or standby guardian..”** *Id.* The judgment and final determination was made by Ms. Kemmerer and Judge O’Connor before the guardians were even appointed. Even the General Order Appointing Special Master explicitly stated that “the court appoint[ed] a special master to **oversee the transition to and appointment of successor guardians** for incapacitated person serviced by the said Lori Petersen and the agencies of which she [was] a designated CPG or standby guardian.”<sup>3</sup>

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3 CP 5-11. The spin control started soon thereafter when the judge who signed the order declared “Let’s be very clear about what this order does because it does only two things; it appoints retired Judge Paul Bastine as special master and orders a \$100,000 surety bond to be paid by Lori Petersen and/or Hallmark, Castlemark, Eagle. I will note for the record when I refer to Hallmark in this decision, I am including Castlemark and Eagle as a group. The order I signed does not remove Hallmark from any case nor does it order the appointment of any guardian in any case.” RP 5/18/15 at 2-3  
In the same hearing the judge contradicted her misinformation by admitting that “the cases are appropriately being heard individual with regard to appointment of guardians and standby guardians.” RP 5/18/15 at 4

The GAL's review and reporting had NOTHING to do with the superior court's drumhead – a fact that is made poignantly clear when a GAL, who found no wrong-doing in his review and report, was berated by Commissioner Steve Grovedahl and ordered to find a new CPG. RP 138.

In that hearing, the GAL stated:

[i]n my report ... I notice ... the guardian is not Lori Petersen. So she hasn't acted as guardian, she acted as standby. I didn't see anything in that case that showed me that she had been serving as the guardian on those cases. So in looking at the order [by Judge O'Connor to transition the IPs], don't know that I have authority to remove a guardian *that seems to be doing and acting in good standing* for a different, for a successor guardian. RP 138.

To which the court later replied:

[T]he position that the Court has taken is that because of the lack of transparency from Castlemark we [**Judge O'Connor and Commissioner Steven Grovedahl**] have no idea of what Lori Peterson's involvement is with Castlemark, has not been forthcoming at all. We still think that because of that transparency that there is probably still some involvement and the concerns that we have that led to Lori Peterson's suspension are the same concerns we have with her continuing to serve as a guardian. RP 140

The transcript continues:

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...Continued from previous page.

The court in its oral ruling further stated that “As to the due process issues, again, this order merely appoints a special master to oversee the process of review. No dispositive issues were determined. Hallmark was given notice of the order and an opportunity to be heard, which they have exercised by the filing of this motion.” *Id.* At 5. What the court fails to address is that this hearing was held two weeks after the superior court started the series of 124 “hearings” during which the court removed guardians over the continued objection of the appellants. That is not meaningful due process.

[GAL]: That seems like, from my standpoint, a due process issue and I don't know -- my job as I saw the order was to go in and determine if she was guardian and who would be a good successor guardian. I don't know that she's on the payroll for Castlemark. I certainly didn't ask them for that information. I don't know that she works there, but if Your Honor feels uncomfortable with my recommendation and you want to override it because you feel like there is some impropriety

THE COURT [Grovedahl]:

I don't have a recommendation from you except your oral and, again, I'm not going to leave Ms. Hooper without a guardian, an effective guardian, and I would indeed appoint Ms. Clark as a successor.

[GAL]:

Where I'm struggling, Your Honor, is when you say there's not an effective guardian. I've got a whole file that shows there have been guardian reports that have been filed and approved, the orders have been approved and I don't know that there have been any complaints against the particular guardian that has served on that case.

THE COURT [Grovedahl]:

The other thing I would share with you is that we have numerous complaints for Castlemark, Hallmark, Eagle. There are six outstanding complaints right now as we sit in our county, 13 statewide from the CPG Board.<sup>4</sup>

[GAL]: Those certainly weren't in the file that I received when I got my CD from the clerk, Your Honor. I'm not privy to that. So if that's my fault because I didn't have those, I apologize but at the same standpoint I don't have the information that you have and I'm not seeing anything in the file that says that Castlemark has served ineffectively as guardian.

So if you don't agree with my report, I appreciate that. If you want to continue it because you want me to investigate

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4 The Court failed to state that none of these “numerous complaints” had been adjudicated, researched, validated, or even reviewed.

the complaints that you've received and you want me to go through and see if she's on the books, I'm happy to do that so we can continue this matter. But based on what I saw in the file from what I received, that seemed like it was outside of my report reading. RP 140-141.<sup>5</sup>

Neither the superior court nor the Amicus could point to any court rule, statute, or other legal basis to justify this process.<sup>6</sup>

### ***What is “Good Cause” or “Good Reason?”***

“Good cause” or “good reason” is referred to and relied upon heavily by the superior court in these actions. But, what is the minimum bar to meeting the threshold of “good cause?”

On page 6 of the Amicus brief, it states in footnote 4 that “[e]ach order appointing GAL found good cause to shorten the period for filing the GAL reports prior to the commencement of the scheduled hearings.” The amicus also states on page 11 that [a] court, for good reason, may modify or terminate a guardianship

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5 It is of curious coincidence that the GAL in this proceeding has been removed by the Spokane County Superior Court from the GAL RCW 26 Registry list. *See* <https://www.spokanecounty.org/DocumentCenter/View/7146>

6 The superior court and amicus both claim and accept that it is the court’s duty and responsibility is to protect incapacitated persons. RP 5/18/17 at 2, Amicus Brief 11-12. In practice, it is a capricious duty that the court only chooses to undertake at its discretion as I still have the remains of three dead IPs in my office that neither the court, nor its counsel, nor the GMP (or the amicus for the IPs) have been willing to accept and to properly deal with. I am NOT a guardian, nor do I have any right or legal process to dispose of these dead people. Duty is not contingent on convenience and the courts need to deal with these remains.

7 Amicus Brief pgs. 6 fn. 4, 11.

and grant relief ‘as it deems just and in the best interest of the incapacitated person.’” (presumably citing RCW 11.88.120) .

The appellants contend “good cause” or “good reason” DOES NOT mean “with impunity.”

In this case “good cause” to shorten the period for filing GAL reports, and “good reason” to remove the appellants from their appointed position were all done without notice, without hearing, and sua sponte by a judge in cases that were never assigned to her.

There are many statutory proceedings that require good cause or good reason. Washington statutes generally require a department, agency, claimant, plaintiff, or prosecutor along with an affidavit or record for the court to act (not for the court to act on its own volition) : I.e:

- For the Dept. of Revenue to be granted a search and seizure of property. RCW 82.24.190
- For the state patrol to get a search warrant for fuel tax evasion. RCW 82.38.380

Do star chamber “good cause” and “good reason” findings apply to these as well? For example, can the court, or a judge, find good cause and take ex-parte action on its own (without any claimant, plaintiff, or prosecutor, affidavit, complaint, or record); to subject a mediator in a parenting dispute to compulsory process to testify as in RCW 26.09.184?; or, to take a person into custody and bring him or her before the court?

RCW 7.36.190?

Good cause is defined and discussed in multiple places in our state code: “Good cause” is a substantial reason or legal justification for failing to appear, to act, or respond to an action. WACs 182-526-0020, 82-04-060(3), 388-02-0020, 292-100-150, 388-14A-1020 170-03-0020. “Good reason” and “good cause” appear to be synonymous under our laws, with one defining the other. *See* WACs 388-02-0020, 292-100-150. “Good reason” and “good cause” require a substantial reason or legal justification. While “good cause” and “good reason” do allow for some breadth of discretion – generally it must minimally meet the threshold of a substantial reason or legal justification.

Other explanations of good cause include:

“Good cause” may be demonstrated by a reasonable showing of harm wherein the one arguing “good cause” must provide facts that demonstrate harm is likely to occur, and not merely speculative or theoretical evidence. *See* WAC 458-20-269(3)(b).

WAC 388-855-013 requires that a court finding of good cause must be supported by records.

In the present set of cases, the court relied on “good cause” or “good reason” to justify its acts. And, while there is discretion in that term, it

still must minimally meet the threshold of a substantial reason or legal justification. There is no affidavit, declaration, citation, or other record of a legitimate substantial reason or legal justification.

### **Improper Removal of Guardian<sup>8</sup>**

The amicus, on page 11 of its brief, cites *In re Guardianship of Cornelius* as a legal basis for this superior courts sua sponte, and ex-parte act and order by the superior court removing the appellants as guardians and transferring the IPs to successor guardians. *In re Guardianship of Cornelius*, 181 Wn. App 513, 529 (2014). As the amicus, itself, has opened up this matter for argument, the appellants are responding herein pursuant to RAP 10.3(f).

In its argument the amicus declares, without any citation to record or legal basis, that “[i]n all of the Guardianships before this Court, the Superior Court was confronted with the reality of Lori Petersen’s suspension and the resulting emergent necessity to review all of her Guardianships as well as the Guardianship Agencies she controlled in Spokane County.”

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<sup>8</sup> While the Appellants were barred from arguing this issue in their initial brief, the nexus of this issue and the appealable judgment is inextricably intertwined. Amicus has specifically addressed and argued the courts right and justification to act on this issue on pgs. 6, 11-16

What “emergent necessity”? Or, in the definition of “good cause”, what substantial reason or legal justification for failing to appear, to act, or respond to an action?

The court was informed BEFORE it issued the letter order by Judge O’Connor, that every single IP for which Ms. Petersen was the CPG of record, was being transferred to a new CPG of record in good standing. GR 23 was satisfied. There was no record of an emergent necessity. There was no record of a crisis except that which the superior court itself created.

On page 14 of the amicus brief, the amicus cites “massive instances of Hallmark’s mismanagement and misconduct of its duty as a guardian...” The amicus further states that “the Court incorporated its findings of Hallmark’s administrative incompetence in each of the judgments it ordered assessing fees.” Each and every one of these citations either refers to a confidential guardian ad litem report (which neither the appellants, nor counsel ever received a copy of for any of these causes of action), or, an order entered by the court based on the contents of these GAL reports. That the court entered findings of “administrative incompetence” absent any meaningful process does not a fact make; it only demonstrates the superior court’s complete disregard for the court rules, for Washington Statutes, for administrative procedures, and for due

process in its continued crusade to justify that which is unjustifiable.

Amicus relies on a scant few cases, none of which are on point to the issues in this case.

Amicus cites an unpublished opinion, *Matter of Guardianship of Fowler*, to support the fact that “no statute or court rule requires a formal evidentiary hearing in a guardianship proceeding. *Matter of Guardianship of Fowler 32979-8-III, 2017*, Brief, pg. 16.<sup>9</sup> In *Fowler*, the appellant was at a hearing to consider the guardian's proposed annual report, accounting and budget, and the court noted concerns with her performance. *Id.* The court ordered a show cause hearing for which both the guardian and the IP submitted declarations. *Id.* Again, THE IP ACTUALLY SUBMITTED A COMPLAINT A DECLARATION – it was not the court acting alone. *Id.*

In *Fowler*, after a show cause hearing for which the guardian had both notice, and a meaningful opportunity to appear and respond, the court issued proposed findings of fact and conclusions of law. *Id.* After the guardians objection a presentment hearing was held resulting in a final order. *Id.*

The court’s analysis in *Fowler*, holds that “No statute or court rule

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<sup>9</sup> The Respondent in this case was Joseph Valente, the individual who spearheaded the GMP over the objections of Ms. Petersen while they were both serving on the CPG Board.

requires a trial or evidentiary hearing prior to termination of a guardianship.”<sup>10</sup> *Matter of Guardianship of Fowler* citing RCW 11.88.120(1). But, “good reason” is still required under the statute.<sup>11</sup>

Given the court’s actions in the present cases, I am inclined to believe that the superior court failed to provide due process and that the broad powers afforded to the superior court allow it to be too flexible and discretionary in its acts. But, at least in *Fowler*, there was some process. There was an initial hearing; an opportunity to directly respond to the asserted claims; a show cause hearing with appropriate notice period; a notice of the proposed findings of fact and conclusions of law; an opportunity to object and respond; and, a presentment hearing under the civil rules<sup>12</sup>. In the present case NONE of these process were afforded to

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10 It appears that the court erred in equating the terms “guardianship” and “guardian”, the first of which refers to the legal relationship, and the second to the actual person or entity appointed to the estate. The court can modify or terminate the guardianship depending on the needs and status of the IP. Removal of a guardian still requires some process. “[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Indeed, “when the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” 503 U.S. 249, 254.

11 For both terminating a guardianship, or modifying a guardianship which may include terminating the “guardian”.

12 Where I disagree with the holding in *Fowler* is with respect to the description of Joseph Valente’s role and possible bias in the action: Mr. Valente reviewed the guardianship file, meaning that he was working with the court prior to action. He then was appointed as the investigator which creates a built in bias contrary to the guidelines of the CJC. The court should have appointed an independent GAL pursuant to 11.88.090 to maintain transparency and the appearance of fairness in its actions. In its reliance on 11.88.120, the court ignored the fact that it is only one part of a group of statutes, and that 11.88.120(2) prescribes the process due.

the appellants – only a post-termination set of hearings, machine-gunned through the system in an attempt to justify the court’s orders.

As stated above, the amicus first argues that “no statute or court rule requires a formal evidentiary hearing in a guardianship proceeding”, and that “due process is a flexible concept that does not demand a strict set of procedures in every situation.” Then, on page 18, the amicus states that “there was no requirement to follow the Civil Rules since the Court was following the distinct procedures mandated under chapter 11.88...” But, the court did NOT follow ANY distinct procedure. It followed no procedure whatsoever. And, when it comes to entering an order or judgment, only the civil rules provide the procedure and due process for doing so.

Amicus cites *Scheib v. Crosby* as support for its argument that the civil rules do not have to be followed when it comes to guardianship proceedings, and that they are exempt pursuant to CR 81. *Scheib v. Crosby*, 160 Wn.App. 345, 249 P.3d 184 (Div. 3 2011). But, *Scheib* does not even mention guardianships! *See Generally* Id. What *Scheib* does say is that civil court rules **shall govern** all civil proceedings " *[e]xcept* where inconsistent with rules or statutes applicable to special proceedings," **and** that otherwise, the **civil court rules " supersede all procedural statutes and other rules that may be in conflict."** CR 81.

Here, 11.88 provides no procedure for entering orders, no procedure for entering judgments, no procedure for setting hearings, no procedure for notice, etc. There is no inconsistency because those procedures do not exist – therefore the civil court rules *shall govern* all civil proceedings (including these actions that were before the court). CR 81. It is an absurd argument for the prosecutor/amicus to declare and argue that since the statute provides a basic method of modifying a guardianship that the courts can proceed completely at their discretion on how to proceed, which rules it can ignore, and which ones it can use as a sword against any party. Such a rule would create complete inconsistency between the courts of this state – a blatant and egregious violation of Article IV, Section 23 of the Washington Constitution that specifically requires “[t]he judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.”

The amicus, in its brief, defines due process as notice and a *meaningful opportunity* to be heard. Appellants nor their counsel ever received copies of these double-secret, confidential reports, nor was there ever any opportunity, reasonable or otherwise, to review, to be heard, or to defend any of the allegations in these reports. None. No adjudication whatsoever. The fact that the county prosecutor and the Spokane County Superior Court, the presumed guardians of the law, not only appear to

believe that this has any semblance of due process, but defend the complete absence of any meaningful process, is both frightening and repugnant. These star-chamber tactics have no place in our legal system, and it is frankly embarrassing that, knowing that these matters were occurring, no other attorney, no other member of the court, and no other court in the state has questioned these acts.

If there was any substance to these allegations at all, there are, both in statute and in the Certified professional guardian rules, processes for these facts to be properly adjudicated – rules and processes that our local court and the local prosecutor's office completely abandoned and ignored.

The rules and processes are laid out in the Washington statutes and the rules governing certified professional guardians that provide two parallel processes for the removal of a guardian. *See* RCW 11.88.120 and Guardianship Program Rules Regulation 500.

Before continuing, it is important to clarify terms for which both the amicus and the superior court continue to show great inconsistency in use and definition: A “Guardianship” is the legal construct wherein a person or entity may be appointed as the guardian or limited guardians of an incapacitated person, and is created through a “letter of guardianship.” *See* RCWs 11.88.030(1), 11.88.127. A “Guardian” is the person or entity who is appointed to the guardianship. *See* RCW 11.88.008(1), 11.88.127.

It is crucial to distinguish between a “guardian” and a “guardianship” as this, along with the complete absence of due process, is what is fatal to the superior court’s and the amicus’ argument.

A guardianship (the legal construct) may be modified, and the guardian replaced pursuant to RCW 11.88.120, which states, in part that the court may modify or terminate a guardianship, or replace a guardian (the person or entity) for a "**good reason.**" RCW 11.88.120. “Good cause” and “good reason” were discussed above. “Good Reason” does NOT mean “with impunity.” Good reason means **substantial reason** or **legal justification.** Contrary to the holdings in *Fowler* and *In re Guardianship of McKean*, which *Fowler* cites, **legal justification**, should refer to an identifiable process that is already laid out in 11.88.120(2). I.e. If there is a suspected problem, the court can appoint a GAL to investigate and advocate for the IP, while the court maintains its prescribed role as an **unbiased** finder of fact, an ensurer of due process, and applier of the laws and rules of the State of Washington.

Washington case law has several examples of what a "good reason" is for removal of a guardian. *See Infra.* A guardian may be removed for gross mismanagement of the ward's estate, gross violations and derelictions of fiduciary duty, or management of the estate in a way otherwise inimical to the ward's interests. *In re Gardella*, 152 Wash. 253,

253 (1929). In *Gardella*, the guardian loaned large sums of money belonging to the estate, without security and without permission by the Court. *Id.* A guardian may also be removed for defrauding a ward or the Court. *South Bend Land Co., v. Denio*, 7 Wn. 303, 304 (1893). Self-dealing is another "good reason" for terminating a guardianship. *In re Eisenberg*, 43 Wn. App. 761, 766 (1986). In *Eisenberg* the guardian "continued to invest guardianship assets in securities of the company of which he was the principal stockholder, despite the fact that the securities had declined in value and that the company ultimately failed." *Id.* But, in any action, the egregious of action on the part of the guardian is required to be substantiated by "ample evidence." *In re Gardella*, 152 Wash. at 253.

A certified professional guardian may also be removed by the process defined in the disciplinary regulations (DR). Guardianship Program Rules Regulation 500 Disciplinary Regulations (DR). The process of removal pursuant to the DR requires that grievance be filed with the Administrative Office of the Courts.

The duty, power, and jurisdiction to discipline a Certified Professional Guardian is vested in the Certified Professional Guardian Board. GR 23. The Superior Court does not have original jurisdiction in cases and proceedings that have been vested by law exclusively in another court or

administrative body. c.f. RCW 2.08.010. This is another salient point that moots the amicus's argument that the superior court is not required to follow the rules of civil procedure.

Taken together, civil court rules shall govern all civil proceedings "[e]xcept where inconsistent with rules or statutes applicable to special proceedings," and, that otherwise, the civil court rules "supersede all procedural statutes and other rules that may be in conflict." CR 81. While 11.88 gives the court some authority to act, where not specified otherwise, the court must act pursuant to the civil rules. And, where the issue is the discipline of a Certified Professional Guardian, that jurisdiction is explicitly granted to the Certified Professional Guardian Board under GR 23.

The amicus argues on page 8 of its brief that each of the court-drafted orders states "the GAL investigation was necessitated by the suspension of Lori Petersen as a CPG in this matter and her associate with related agencies." Again, the superior court made a finding of fact without any record, substantial reason, or legal justification, for that "fact." There was no showing of necessity, no record, no affidavit, no proceeding.

In the Holcomb judgment quoted by the amicus, the court states that the agency "failed to disclose the interest that Ms. Petersen had...." But, again, the court completely failed to cite the legal justification for that

statement.

If the issue was whether or not Ms. Petersen or Hallmark were properly qualified and met the requirements for licensing, then General Rule 23 establishes the standards and criteria for the certification of professional guardians as defined by RCW 11.88.008 and prescribes the conditions of and limitations upon their activities. GR 23.

The requirements of a guardian are to:

- (i) Be at least 18 years of age;
- (ii) Be of sound mind;
- (iii) Have no felony or misdemeanor convictions involving moral turpitude;
- (iv) Possess an associate's degree from an accredited institution and at least four full years' experience working in a discipline pertinent to the provision of guardianship services, or a baccalaureate degree from an accredited institution and at least two full years' experience working in a discipline pertinent to the provision of guardianship services, or a Masters, J.D., Ph. D., or equivalent advanced degree from an accredited institution and at least one year's experience working in a discipline pertinent to the provision of guardianship services;
- (v) The experience required by this rule is experience in which the applicant has developed skills that are transferable to the provision of guardianship services and must include decision-making or the use of independent judgment for the benefit of others, not limited to incapacitated persons, in the area of legal, financial, social services or health-care or other disciplines pertinent to the provision of guardianship services;
- (vi) Have completed the mandatory certification training.
- (vii) Applicants enrolled in the mandatory certification training on September 12, 2008, and who satisfactorily complete that training, shall meet the certification requirements existing on that date, or the date the applicant

submitted a complete application for certification, whichever date is earlier, and not the requirements set forth in this rule.

(2) Agency Certification. Agencies must meet the following additional requirements:

(i) All officers and directors of the corporation must meet the qualifications of RCW 11.88.020 for guardians;

(ii) Each agency shall have at least two (2) individuals in the agency certified as professional guardians, whose residence or principal place of business is in Washington State and who are so designated in minutes or a resolution from the Board of Directors; and

(iii) Each agency shall file and maintain in every guardianship court file a current designation of each certified professional guardian with final decision-making authority for the incapacitated person or their estate.

Nowhere in GR 23 is there a requirement that a professional guardian agency disclose ownership interest. None. The court, as a purported basis for commencing its actions required a certification criterion that exceeded the court's jurisdiction, the state's rules, and the GR 23 requirements.

***Is Due Process So Flexible That the Court Act Solely At Its Own Discretion?*<sup>13</sup>**

The amicus argues on page 16 that “due process is a flexible concept that does not demand a strict set of procedures in every situation.” But, one should at least have a reasonable expectation that the court would follow its own rules, or that it would not create alternate facts, or discretionary criteria in order to substantiate its actions. It makes for a

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13 Amicus Brief pg. 15-18

rather unlevel playing field where the referee is also the captain of the opposing team.

Regardless of the issue, due process remains a constitutional requirement. Proceedings by Washington public agencies are governed by the Administrative Procedures Act (the "APA"). RCW 35.05 et al. Whereas, proceedings by the Certified Professional Guardianship Board (the "CPG Board") are governed by the Guardianship Program Rules and the Washington Court rules. *See* GUARDIANSHIP PROGRAM RULES and RULES FOR SUPERIOR COURT.

The CPG Board acts similar to an administrative agency (without direct oversight), and for the purpose of explanation, should have similar protections from undue bias, and for due process. Under the APA, "[a] person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its preadjudicative stage, or one who is subject to the authority, direction, or discretion of such a person, may not serve as a presiding officer in the same proceeding." RCW 34.05.458. Under the Guardianship Program Rules, in a hearing by CPG Board, the Board may be represented by an attorney or other staff, and the professional guardian may be represented by an attorney - following the first argument herein that a professional guardian, like any other party, has the due process right to an adversarial proceeding. Rule 002.12. Like

RCW 34.05.458, a member of the investigating Standards of Practice Committee (the "SOPC"), also the claimant party, is disqualified from acting as a Hearing Officer. Furthermore, the Hearing Officer is disqualified from participating in any CPG Board review of its decision, or from a CPG Board vote on the matter. DR 512.4.4.

The Guardianship Program Rules, like the APA, provide the procedural framework for an intra-agency adjudicative proceeding. To convene an inquisitorial hearing as the Court attempted to do in this matter, without an appearing adversarial claimant, and without the perceived benefit of a fair, impartial, and neutral hearing, is contrary to the mission of the courts - to promote a legal system that is based upon the principle that an independent, impartial, and competent judiciary will strive to maintain and enhance confidence in the legal system.

Here, the actions of the Court are unsubstantiated, unexplained, and do not meet the appearance of fairness.

The result of these proceedings was that Hallmark Care Services, Inc., an Agency in good standing at the time these actions were commenced, had all of its goodwill and going concern removed by the Courts. As counsel for Petersen/Hallmark stated in the Reconsideration hearing, "good will [sic] and going concerns are property interests. They are sellable.... And when these businesses sell, a large part of what the

business asset is, is the good will and going concern of the client base and a promise of a minimum client base." RP 01/27/15, 33. Goodwill is an asset base recognized in several Washington statutes and administrative code. *See* RCW 46.96.035, WAC 458-20-193, WAC 388-96-010. For nursing facilities, a business model that is not unlike a guardianship agency, goodwill is defined as "the excess of the price paid for a nursing facility business over the fair market value of all net identifiable tangible and intangible assets acquired, as measured in accordance with generally accepted accounting principles." WAC 388-96-010.

The argument that the Court can conduct a non-adversarial, or non-formal administrative proceeding to forcibly take property, including goodwill from a person, whether flesh and blood or an entity, is untenable. The Court is NOT an administrative agency; it is not a ministry. It is the judicial arm of the government; the unbiased weigher of facts, and determiner of how the law is applied. *See* CJC in general, WA Const. Art. IV.

By the amicus' own argument, due process as notice and a ***meaningful opportunity*** to be heard. This means following prescribed rules where applicable, and affording the parties the opportunity to a fair, meaningful, and unbiased hearing. Due process is no so flexible that a court may act with impunity. Because the superior court failed to provide

appropriate and timely notice, failed to ensure and provide a meaningful and unbiased opportunity to be heard, failed to follow the prescribed rules of civil procedure where applicable, and failed to substantiate its actions in the record BEFORE entering any orders, all orders and acts of the court should be reversed.

### ***Improper Assessment of Fees***

Amicus argues on page 17 of its brief that “[a]lthough Hallmark objected to being removed as guardian in most hearings, it never contested the amount of fees requested by GALS.

What the amicus fails to state, possibly because it was not present at any the hearings even though the Prosecutor’s Office filed a notice of appearance on behalf of the court, is that the hearings did not bring up the subject of fees, how much they would be, and to whom they would be assessed, at any of the hearings except to state that the issue of fees would be reviewed later or “reimbursement for guardian ad litem fees will be reserved”.<sup>14</sup> There were no hearings on the fee issue whatsoever; a fact

14 No copies of the orders were ever provided to the Appellants or counsel. *See* RP at 15 (I have no idea who “Leanne” is), 17 (I never received a copy of the Order as promised), 31, 95 (no hearing on this motion was docketed to my knowledge), 102, 108, 126, 151, 238, 242, 246, 249, 250 ( I have no idea who “Ms. Wakefield” is), 253, 257, 262, 268, 271, 274, 279, 282, 287, 291, 294, 299, 304, 309, 312, 317, 321, 325, 329, 339, 342, 343, 349, 356, 364, 365, 372, 455 (in this case, the fees were approved, although the issue of reimbursement from Ms. Petersen was reserved for a date that never came), 461

that is made poignantly clear by the glaring absence of any citation or reference by the amicus to transcript of proceedings on that issue.

Even the amicus admits that the court “indicated it was reserving the issue of reimbursement of GAL fees pending further court review.” That review never came! There was no follow-up, there was no proposed order sent out for review as was the case in *Fowler*<sup>15</sup>; there was no opportunity to respond and object to any final calculation as was the case in *Fowler*, there was no presentment hearing as was the case in *Fowler*; and, there was no legal justification for the court NOT to charge the fees to the county pursuant to the oft-cited 11.88.090(10) in the amicus brief.

The amicus states that “due process requires notice and a meaningful opportunity to be heard. *Quoting Morrison v. State Dep’t of Labor and Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675 (2012). Notice. And. A ***meaningful*** opportunity to be heard.

The appellants agree.

In this case the order removing the appellants as guardians and assessing fees was sent to all parties BEFORE any notice or hearing. It was not filed by the court, it was not recorded by the court, it was issued

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15 Amicus does refer to language in each order appointing a GAL, but fails to state that none, not a single one, of the orders was copied to the appellants or their counsel. Those orders were based on the court’s own intents, and not at all on any facts, or issues brought up in any “hearing.” This, again, is creates a problem of bias where the bench is both referee and prosecutor.

without any record or affidavit of its necessity, and NO MEANINGFUL HEARING WAS EVER HELD. Unfortunately, what the superior court kept out of the record speaks more than what was included in the record, but, any counter argument that the letters were not actual Orders, but only recommendations, is easily dispelled by the court's transcript wherein a GAL states: "I recognize that it's a burden on all the CPG individuals and the agencies to step up, in Judge O'Connor's words in her letter, and provide the continuing net for these IPs ...."

The superior court did not make findings of fact in order to derive a legal opinion and order – the superior court made findings of fact only to justify the order that it had already made, and it completely ignored any argument to the contrary. In no legitimate judicial system does that rise to the level of a "meaningful opportunity to be heard."

***Amicus Is Trying To Distill and Erase History By Asking This Court to Strike the Second Brief.***

Amicus argues to remove facts from the appellants' brief that put its client, the superior court, in a negative light. But, the facts are the facts. The facts and history provide context to the action, and the facts and history are just as relevant to the amicus' defense as they are to the appellant's appeal. If a fictional history is created where the superior court

never undertook a process to remove the appellants a guardians, then there would be no justification whatsoever for any fees for a process that never took place.

The superior court, its counsel, and the amicus have attempted, from the start, to redefine the history of this action. From when then court stated that it did not order the removal of any guardian when citing an order that was specifically entered “to *oversee the transition to and appointment of successor guardians*”; to the superior court citing alleged “massive instances of Hallmark’s mismanagement and misconduct of its duty”, none of which were ever adjudicated; to the superior court demanding a GAL appoint a successor guardian despite the fact of that GAL finding no errors (*See Supra*); to this court removing the superior court as a party and instead allowing an amicus to act on behalf of the GMP, a fictional entity for which there is no record of its creation, its duties, powers, and responsibilities.

The facts are the facts, and all parties have the same facts on which they can argue their case. That is the very definition of fairness given the RAP are to be liberally interpreted to promote justice... RAP 1.2

### ***Conclusion***

RCW 11.88.120 does grant the superior court power to replace a guardian for good reason. But it does not give the court the power to act

with impunity nor to disregard due process, to disregard the established safeguards of the American legal system, nor to disregard the rights of a party to have access to a legitimate and unbiased hearing. In this case, the Spokane County Superior court commenced an action that quickly snowballed out of control. Unfortunately, many of the questions that were posed at the beginning of this action remain unanswered.

As I stated to the mediator in a federal action questioning the constitutionality of these issues:

If the court could show where their actions were specifically authorized in state statute, the WA State Rules of Civil Procedure, the US Constitution, and the American judicial process, then I would be inclined to apologize for my ignorance and explain to my client where we were incorrect in believing that:

- \* the court was supposed to act as a neutral party rather than an instigator or prosecutor;
- \* that the judicial process is intended to be a transparent one held in open court with a party's right to defend;
- \* that judges and commissioners are not intended to self-investigate and prosecute actions as is stated in the code of judicial conduct states otherwise; or,
- \* that goodwill and going concern of a business is a property interest, as stated by the US government (through the IRS), and the State of Washington (in its RCWs).

Maybe this local court could also explain why it was the only county in the State of Washington that acted in this manner (noting that my client had clients in multiple counties throughout the state).

Because the Spokane County Superior Court failed to provide any meaningful due process for the appellants in the appealed action, this court should reverse all of the orders of the lower court, and remand the

proceedings back to that court to calculate costs, damages, and losses incurred by the appellants as a result of these improper acts.

Or.

If this court determines that the superior court acted constitutionally, and within its powers, then any holding should address the following issues:

- That “for good reason”, as it is stated in RCW 11.88.120 means “with impunity”, or at the complete discretion of the lower court which will not be reviewable;
- That the superior court is not required to adjudicate complaints, and that it may accept any allegations at face value in its own discretion (contrary to RCW 11.88.120(2));
- That guardians, whether professional or otherwise, work at the convenience of the courts, and that, in doing so, they waive any rights to due processes with regard to those activities;
- That the superior court has no requirement to comply with the civil rules in any action it takes under RCW 11.88, contrary to the requirements of CR 81;
- That the court may act as investigator, prosecutor, and finder of fact in any guardianship action;
- That the court is not required to legally substantiate or justify

any charge of GAL fee to “the petitioner, the alleged incapacitated person, or any person who has appeared in the action; or may allocate the fee, as it deems just.” under RCW 11.88.090.

- The court may enter any judgment or order against a guardian or party without having to comply with CRs 54, 56, or 58.

After over two years of dealing with this set of cases, I am still unable to find a legal and constitutional justification for the court’s actions. Even if the court’s heart and intent were in the right place, our trust and confidence must be in the system, in the procedures, and in our due process rights – not in the members of the court.,

James Madison wrote in defense of a proposed national constitution that would establish a structure of “checks and balances between the different departments” of the government and, as a result, constrain the government’s oppression of the public. *The Federalist No. 51*

The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. ([1788] n.d., 337)

The same can be said for the courts – that arm of government whose vested power is judicial – not executive. U.S. Const. Art. III. If all members of the court were angels, who would hold steadfast to ensuring blind, and impartial fairness, cold logic, and rock-solid equity, then civil rules would not be necessary. But they are. As is due process.

Appellants ask this court to correct the wrongs of the lower court to help ensure that this type of action does not come up again. And, regardless of the outcome, someone needs to remove the dead people from my office.

Respectfully Submitted on this 11<sup>th</sup> day of October, 2017.

By:           s/JOHN PIERCE/          

John Pierce, WSBA # 38722  
Attorney for Appellants

Law Office of John Pierce, P.S.  
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**EXHIBIT A. LETTER FROM COURT OF APPEALS RE  
APPEALABILITY**

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

July 23, 2015

Steven J. Kinn  
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skinn@spokanecounty.org

John Pierce  
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CASE # 333566  
In re the Guardianship of: Judith Diane Holcomb  
SPOKANE COUNTY SUPERIOR COURT No. 4-104191

Counsel:

We have received the motion to dismiss Hallmark and Peterson as parties, motion to compel appellant to identify and serve current guardians, motion permitting Steven Kinn special amicus status and responses to those motions filed by counsel in this matter.

The Court also has determined that this matter might not be appealable as a matter of right. Therefore, it is has set its own motion to determine appealability for **August 12, 2015 at 9 a.m.** by telephone conference call. The parties' motions and their responses will be considered on that same date and time.

In accordance with RAP 6.2(b), counsel should be prepared to argue both (1) finality, and (2) in the event the order is not final, whether discretionary review should be accepted. See RAP 2.3(b).

Counsel must file a memorandum addressing the finality issue no later than **August 5, 2015**. Counsel should file the original and one copy of the memorandum along with proof of service upon opposing counsel.

The Court also requests that alignment of the parties be considered on that same date and time.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

Bridget-Anne Lochelt  
Commissioners' Administrative Assistant

RST:bal

**EXHIBIT B. LETTER FROM KATHLEEN M.  
O’CONNOR TO THE GUARDIANS AD LITEM  
DATED APRIL 7, 2015**



SPOKANE COUNTY COURT HOUSE

**Superior Court of the State of Washington  
for the County of Spokane**

**Department No. 4**

**Kathleen M. O'Connor**  
**Judge**

**Lisa Gurkowski**  
**Judicial Assistant**

**Mark Sanchez**  
**Court Reporter**

**1116 W. BROADWAY AVE, SPOKANE, WA 99260-0350**  
**(509) 477-4707 • FAX: (509) 477-5714**  
**dept4@spokanecounty.org**

April 7, 2015

Dear Guardians ad Litem:

As you know, the Washington State Supreme Court suspended CPG Lori Petersen effective April 28, 2015. This action affects 125 cases in Spokane County.

The court recognizes the good work you do in the guardianship process and the difficulty in locating guardians or successor guardians in some cases. The Spokane County hourly rate you receive to do the work necessary to help protect this vulnerable population is low. The court also recognizes the role of the CPG with respect to our vulnerable citizens and have reached out to them in a separate email which is attached.

This pending suspension requires immediate action from all those involved in our guardianship community. The court will appoint a Special Master to oversee the transition of the 125 cases currently assigned to Ms. Petersen and/or agencies with which she is involved.

The court will assign Guardians ad Litem to each case to investigate the appointment of a guardian, successor guardian and/or standby guardian. Of the 125 cases seven are already assigned to Mr. William Dodge to investigate specific complaints and those cases need for guardian(s). Currently, there are 34 persons on our Guardianship Registry. Excluding Mr. Dodge and Mr. James Woodard who is Ms. Petersen's prior attorney, there are 32 Guardians Ad Litem for 118 cases or 3-4 cases per person.

The court knows all of you are busy and may also have pending cases. However, time is of the essence. The court believes the vast majority of you would step up to help our vulnerable citizens and Ms. Ana Kemmerer will assign a group of cases to each of you so the work can begin. If you have a conflict in a particular case please file a motion and the Special Master will review it. If the Special Master concurs, Ms. Kemmerer will arrange a trade between two Guardians ad Litem to eliminate the conflict and keep the caseload balanced.

Ms. Kemmerer cannot review each case to determine if it is county or private pay. At a minimum your reasonable fees will be covered at the county pay rate. Because generally the only

issue in these cases will be appointment of a successor guardian and/or standby guardian, the maximum fee will be \$500.00 without further court approval. In addition, for all of those who actively participate in this project the court will waive your fee for the 2015 Mandatory Guardian ad Litem Training.

We are faced with an extraordinary situation which demands much from us all. Your help at this critical time is greatly appreciated.

Yours truly,

A handwritten signature in cursive script, appearing to read "Kathleen", is written above a horizontal line.

Kathleen M. O'Connor  
Superior Court Judge

**CERTIFICATE OF SERVICE**

I certify a copy of the foregoing Appellants' Response Brief to

Amicus' Brief was served by the method below, and addressed to the following:

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 Hand Delivered  
 Overnight Mail  
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DATED, this 11<sup>th</sup> Day of October, 2017.

By:           s/JOHN PIERCE/            
JOHN PIERCE, WSBA # 38722  
LAW OFFICE OF JOHN PIERCE, P.S.  
Attorney for Appellants

**LAW OFFICE OF JOHN PIERCE, PS**

**October 11, 2017 - 6:09 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 33356-6  
**Appellate Court Case Title:** In re the Guardianship of: Judith Diane Holcomb  
**Superior Court Case Number:** -4-04191-

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Appellants' Reply to Amicus Brief with Declaration of Service

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