

FILED
Court of Appeals
Division III
State of Washington
2/18/2020 4:52 PM

NO. 36820-3-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

In re the Guardianship of:

DOROTHY HELM O'DELL,

Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION.....	1
II. REPLY TO RESPONDENT’S STATEMENT OF CASE	1
A. Calhoun’s Background (RB 9-10).	1
B. Calhoun’s Involvement with Helm (RB 10-13).....	1
C. Sale of Helm’s Property Via Service Agreement (RB 13-16).	4
D. Helm’s Move to Yakima from South Dakota (RB 16).	5
E. Helm’s Concerns About her Brothers; Her Involuntary Commitment; and the Filing of the Guardianship Action (RB 17-22).	5
1. GAL Appointment.....	8
2. Inaccuracy of Verified Guardianship Petition.....	9
3. “Scorched Earth Litigation” Attacking Calhoun.....	10
F. The Trial Court’s Finding of Good Faith and Voluntary Dismissal of the Guardianship Action (RB 22-27).	11
G. Emergency Powers/Pre-Assignment of Judge (RB 27-28).....	14
H. The Final Fight Over Fees and Helm’s Agreement to Dismissal of the Guardianship Petition (RB 28-30).	15
III. Reply to Respondent’s Arguments.....	15
A. The Trial Court Abused its Discretion in Finding that Calhoun Brought and Prosecuted the Guardianship Action in Good Faith and Upon Reasonable Basis Under RCW 11.88.030(1) (RB 31).	15
B. Substantial Evidence Does Not Support a Finding of Good Faith and a Reasonable Basis for Bringing the Action (RB 36-41).....	18
C. Calhoun’s Pre-Filing Conduct is at Issue Herein (RB 41-42).	19

D. Calhoun Failed to Fulfill her Duty to Ensure the Validity of the POA (RB 42-43).	19
E. The Service Agreement Led to a Conflict of Interest (RB 43).	20
F. The Sales of the Properties Were Made Over the Objections of Helm and Are Relevant to the Issue of Good Faith and Whether Calhoun Acted on a Reasonable Basis (RB 44).	20
G. Calhoun Did Sell Properties to Obtain Quick Cash to Pay her own Fees Without a Plan (RB 44).	21
H. Calhoun Did Charge Excessive Fees (RB 45).	21
I. The Issuance of the TRO is Relevant and is Indicative of the Lack of Good Faith and Not Acting Upon Reasonable Basis (RB 45-46).	21
J. The Motion for Emergency Powers Was Brought to Allow Calhoun to Keep Charging Fees (RB 46).	22
K. The Trial Court Erred by Not Applying the Presumption of Competence (RB 46-47).	22
L. There are Other Indicia of the Lack of Good Faith and a Lack of a Reasonable Basis to Act (RB 47).	22
M. The Amount of Attorney’s Fees and Costs Awarded Was an Abuse of Discretion (RB 47-49).	23
N. Calhoun Should Not Be Awarded Additional Fees and Costs on Appeal RB (49-50).	25
IV. CONCLUSION	25
APPENDIX A: Helm’s Response to Guardianship Petition (CP 179 – 180).	

TABLE OF AUTHORITIES

Cases

<i>Allard v. Pacific Nat'l Bank</i> , 99 Wn.2d 394, 407-408, 663 P.2d 104 (1983).....	19
<i>Allard v. Seattle-First National Bank</i> , 99 Wn.2d 394, 406, 663 P.2d 104 (1983).....	4
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	1
<i>Fred Hutchinson Cancer Research Center v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	19
<i>Guardianship of Adamec</i> , 100 Wn.2d 166, 176, 667 P.2d 1085 (1983).....	19
<i>In re Estate of Black</i> , 116 Wn. App. 476, 491, 66 P.3d 670 (2003), affirmed on other grounds, 153 Wn.2d 152, 102 P.3d 796 (2004).....	16, 17
<i>In re Guardianship of Lamb</i> , 173 Wn.2d 173, 189, 265 P.3d 876 (2011).....	16
<i>In re Guardianship of Matthews</i> , 156 Wn. App. 201, 209-210, 232 P.3d 1140 (2010).....	15, 16
<i>In re Hastings Estate</i> , 4 Wn. App. 649, 653, 484 P.2d 442 (1971).....	18
<i>In re Shaughnessy's Estate</i> , 97 Wn.2d 652, 657, 648 P.2d 427 (1982).....	18
<i>Noble v. Safe Harbor Family Pres. Trust</i> , 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).....	16
<i>State ex rel. Nelson</i> , 15 Wn.2d 407, 413, 131 P.2d 144 (1942).....	25
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003).....	16

Statutes

RCW 11.24.050 17, 18
RCW 11.88.010(1)(a) 11, 14
RCW 11.88.010(1)(b) 11, 14
RCW 11.88.030(1)..... 15, 23
RCW 11.88.030(1)(b) 14
RCW 11.88.045(3)..... 13, 18
RCW 11.88.090(5)(f)(iv) 9
RCW 11.96A.150..... 16, 17, 18

Other Authorities

*Diagnostic and Statistical Manual of Mental Disorders, Fifth
Edition (DSM-5)* 2
*Webster’s Encyclopedic Unabridged Dictionary of the English
Language 529 (Random House 1996)* 2

Rules

RAP 10.3(6) 1, 13

I. INTRODUCTION

Calhoun follows the technique of attorney Roy Marcus Cohen from the 1950's: never admit anything, divert attention away from the facts and attack your accuser. In her reply Calhoun admits nothing, mis-states Helm's arguments and attacks Helm's attorney.

II. REPLY TO RESPONDENT'S STATEMENT OF CASE

A. Calhoun's Background (RB 9-10).

Respondent provides about a page of supposed background information about Calhoun. RB 9-10. None of this information was presented to the trial court, so it should not be presented to this court. There are no citations in the record regarding this information, as required. RAP 10.3(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). This information should be disregarded.

B. Calhoun's Involvement with Helm (RB 10-13).

Calhoun denies (RB 20) the obvious false statement in her verified petition filed on 1-23-18 that Helm "has been *diagnosed with dementia* [italics added]." CP 2, ¶ 2.¹ The only way Calhoun can legitimately rebut Helm's assertion that the dementia diagnosis in the guardianship petition is false is to cite somewhere in Helm's medical records where she was actually given a diagnosis of dementia.

¹ The false dementia diagnosis is no casual error but is a main theme in the petition. The petition also states that "[d]ue to the AIP's dementia, she is at risk of serious personal and financial harm" [CP 2] and she "will likely be discharged to a secured dementia facility." CP 3, ¶ VII. The petition reiterates that Helm "is suffering from dementia which causes the AIP to be at risk of serious personal and financial harm." CP 3, ¶ VIII.

Calhoun has failed to provide any such citation.² Instead, using a diversion tactic, Calhoun argues that a 2016 MOCA score “demonstrated that [Helm] was suffering from a neurocognitive disorder.”³ RB at 10, citing CP 238-40. This conclusion is irrelevant, as Calhoun’s verified petition states that Helm had been *diagnosed with dementia*, not that she suffered from an unspecified neurocognitive disorder. CP 2.⁴

Furthermore, there are many neurocognitive disorders; dementia is one kind, so having an unspecified neurocognitive disorder does not suggest or imply that one has dementia.⁵ Dr. Momeni ruled out dementia on 11-18-17 following a normal score on the MMSE. CP 1198; AB 49-50. But Calhoun does not admit or concede any mistake or lack of care in the false dementia diagnosis stated in her verified petition. It necessarily follows that Calhoun’s verified statement of a false dementia diagnosis in the

² Ms. Helm’s intake diagnosis at HSC Yankton on 10-9-15 was “schizoaffective disorder, bipolar Type, Unspecified neurocognitive disorder . . .” CP 237. Her discharge diagnosis on 8-8-17 was essentially the same. CP 1190. Her diagnosis upon discharge from Eastern State Hospital on 8-7-18 was “Schizoaffective disorder.” CP 1198. There is no mention of dementia, except to rule it out. CP 1198.

³ Helm was being treated with electroconvulsive therapy through March 23, 2016, which may have affected her MOCA scores. CP 873-875.

⁴ Ma. Calhoun’s statement that in her experience “neurocognitive disorders include dementia and other injuries to the brain that cause decline in cognitive ability” (RB 10-11) contains a logical fallacy. Just because neurocognitive disorders may include dementia, it does not follow that all neurocognitive disorders are equivalent to dementia.

⁵ For example, the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5) recognizes a wide range of neurocognitive disorders, such as Parkinson’s disease (a motor system disorder resulting in trembling, especially tremor in the hands), Huntington’s disease (genetic disorder affecting mood, movement and depression), and Wernicke-Korsakoff syndrome (severely impaired memory which can result from chronic deficiency of vitamin B1). The dictionary definition of *dementia* is “severe impairment or loss of intellectual capacity and personality integration, due to the loss of or damage to neurons in the brain.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 529 (Random House 1996)

guardianship petition was calculated and is itself powerful evidence of her lack of good faith and reasonableness in filing the petition.

While the power of attorney Helm signed in favor of Calhoun was prepared by the LaCroix Law Office, there is no evidence that that law office was hired to represent Helm or did represent her, contrary to Calhoun's claim that Calhoun's requirements for representation had been met. RB at 12. As it turns out, that law office represented HSC Yankton, and drafted the POA from that perspective, so that Helm was given no legal advice or counseling about the POA before she signed it. CP 147, ¶ 2; CP 375, ¶ 14; CP 747, ¶ 6.

The Service Agreement (CP 250) also did not "clearly" outline Calhoun's duties as attorney-in-fact as alleged by respondent. RB at 12-13. Calhoun does not rebut Helm's addressing this issue and the ambiguity of the Service Agreement in AB 34-35. Helm instructed Calhoun not to sell the properties. CP 147, ¶ 3; CP 151, ¶ 13. There is no evidence that Helm ever consider or even decided to sell her properties, or communicated that to Calhoun. There is no reference in Calhoun's time entries that Calhoun ever talked to Helm at all about the sale of Helm's properties. CP 905 - 923.⁶ The ambiguous Service Agreement is too slender a reed to support a fiduciary's obligation to establish Calhoun authority to sell Helm's properties over Helm's objection.

⁶ The first documented conversation between Calhoun's office and Helm occurred on January 20, 2017, on the same day Calhoun signed Parker's offer to purchase the Rhapsody Drive property. CP 907. There is no record of any mention of that offer during the call. *Id.*

C. Sale of Helm’s Property Via Service Agreement (RB 13-16).

Calhoun asserts, without citation to the record, that Helm’s properties “would be extraordinarily difficult to sell . . .” RB at 15. Yet both properties sold, one within about two weeks on 1-20-2017. CP 907.

Calhoun uses a diversionary argument to denigrate the properties and point out their declining values for the previous seven years (CP 254 and 258) going back to the recession in 2008, yet that does not alter the fundamental problem that the Rhapsody Drive property was neither listed with a real agent nor was an appraisal obtained, contrary to the requirements of *Allard v. Seattle-First National Bank*, 99 Wn.2d 394, 406, 663 P.2d 104 (1983). Calhoun does not even have a copy of the comparative market analysis she claims she obtained. CP 231, ¶ 12. Besides, the definition of *fair market value* takes into account the condition of the property.

Calhoun objects to calling Mr. Parker a “friend” of hers (RB 15), yet that is how she referred to him. CP 147, ¶ 3. There is other evidence in the record that he is her friend. CP 807-808.

While Calhoun argues that she needed liquid resources to complete Helm’s move to Yakima, Helm signed the POA on December 16, 2016 (CP 18), yet did not arrive in Yakima until August 8, 2017 (CP 1188), nearly eight months later. Meanwhile, the Rhapsody Drive property was sold on February 13, 2017, and the Feigley Rd. property sold on June 27, 2017 (CP 1202). Clearly the need for liquid funds did not require the immediate sale of Helm’s two houses at fire-sale prices that she had owned since 2005.⁷

⁷ Calhoun logs the receipt of the proceeds of the Rhapsody Drive real estate sale on 3-17-

Finally, the purported “exoneration” of Calhoun from an unspecified complaint by an anonymous complainant to APS (CP 765, ¶ 5) means nothing. Since APS complaints are as a rule confidential, there can be no determination of who complained, the specifics or substance of the complaint or even what kind of investigation APS performed. RB at 16. Thus, Calhoun gains no endorsement from the complaint’s dismissal.

D. Helm’s Move to Yakima from South Dakota (RB 16).

Jennifer Anderson, the SD HSC social worker, thought Helm would require “a supervised living environment” upon leaving Yankton, South Dakota. CP 1188. However, she noted that “Senior Avenues Staff will . . . take [Helm] to her apartment located in Orchard Park Independent Living” on North 34th Avenue in Yakima. *Id.* Helm’s preference was at Peachtree. CP 909 (entry for 2-8-17). Thus Senior Avenues obtained an inappropriate placement for Helm.

Calhoun concedes that Helm decompensated at Orchard Park and had to be placed in a 180-day hold at Eastern State Hospital. RB 18-19.

While Helm was in Eastern State Hospital, she was shocked to learn in 2017 that Calhoun had sold both Helm’s houses under the authority of the POA at what Helm considered to be “far less than fair market value, over my objections,” so as a result Helm desired to transfer management of her assets to her brother, Glenn Helm. CP 19; CP 151, ¶ 13.

E. Helm’s Concerns About her Brothers; Her Involuntary

17. CP 1202. She then paid herself \$2,565.60 in AIF (attorney in fact) fees two days later for the months of December 2016 and January 2017. CP 1202. It is clear that Calhoun was motivated to quickly sell Helm’s Rhapsody Drive property to pay her own fees.

Commitment; and the Filing of the Guardianship Action (RB 17-22).

Calhoun received a letter on September 7, 2017 from Helm. CP 321-22.; CP 233. Helm mentions in the letter that two of her brothers had abused her. CP 321-22. Helm had ten siblings. CP 593. There is no mention in the letter of Glenn Helm. It is quite a stretch and well beyond the evidence in this case to say that this letter refers in any way to Glenn Helm. It is another example of Calhoun's inventing reasons after the fact to try to support her actions.

Calhoun received another letter on December 13, 2017 from Helm (CP 762) attempting to request transfer of Helm's assets to her brother, Glenn Helm, for investment. CP 12, ¶ 7; CP 19. Calhoun tries to argue that Helm had a fear of her brothers based on the September 7th letter, but fails to consider how many brothers Helm had nor which brothers were of concern to Helm. There is also no evidence that Calhoun followed up with Helm to determine who the "evil brothers" were.

Sheri Hendon's opinion that Glenn's letter "appeared to be an attempt at financial exploitation" is pure speculation. RB 19-20; CP 759, ¶ 5. There is no evidence that Ms. Hendon knew Glenn Helm, or had ever met him or talked to him or knew anything about him. Thus, her conclusion as to his motives based solely on what the letter states is without any evidentiary basis.⁸ After Calhoun sold Helm's properties, Glenn Helm

⁸ Calhoun argues that other social workers at Eastern State had the same opinion as Ms. Hendon about the letter. RB 20. However, Ms. Hendon stated only that the consensus of her colleagues was that "Calhoun needed to be aware of the letter . . . [,]." not that they shared her opinion or that Calhoun had to take any specific action. CP 759, ¶ 5.

suggested that Helm revoke the POA to prevent any further damage. CP 158, ¶ 2-3. Helm also wanted her brother to manage her estate rather than have Calhoun charge Helm over \$1,000 per month to do the same thing. CP 155, ¶ 5. Based on Helm’s social security income of \$590 per month, Calhoun’s charges in an average month were not sustainable.

Likewise, Calhoun’s “concern” about the December 13th letter was never followed up. There is no evidence in the record that she contacted Glenn, even though she clearly had his contact information (CP 907, entry for 1-18-17; CP 912, entry for 3-19-17), nor made any effort to contact Helm about Glenn or the purpose of the letter. Moreover, while Calhoun received the letter on or about December 13, 2017 (CP 12), she did not file the guardianship petition until well over a month later, on January 23, 2018¹⁰. In other words, Calhoun did not treat whatever threat she perceived in the letter as one seriously negatively impacting Helm, or Calhoun would have made an investigation and filed the guardianship petition much earlier. Rather, the letter is a convenient excuse to file a guardianship petition to mask Calhoun’s real purpose in trying to maintain control over Helm’s assets. Calhoun obtained an ex parte order on the same date as she filed the guardianship petition barring Helm from revoking the POA in Calhoun’s favor. CP 9-10. That order necessarily preserved Calhoun’s ability to continue acting under the POA and charge fees to Helm’s estate.⁹

⁹ Calhoun’s current stated reasons for filing the guardianship petition “were the vulnerability of Helm due to her mental condition, the apparent attempt at financial exploitation by Glenn, the concerns of Hendon and her colleagues, the prior letter from

1. GAL Appointment.

While the trial court tried to suggest that there were not many GAL's on the registry in Yakima County ("We have a very short list") (CP 687), that is irrelevant. If there were only one GAL on the registry, and that person was Amy Clark, and that is why she was proposed, then that would be the reason for proposing her, and that should have been stated in the petition. Otherwise, there is an appearance of unfairness or collusion, especially where Calhoun has specified Clark as a GAL in numerous other cases (CP 874, ¶ 7). This omission, especially in light of the GAL's "interim" findings favorable to Calhoun, but which were never followed up with a final report which could be challenged, is further evidence of Calhoun's lack of good faith and the synergy between Calhoun and Clark.

The GAL was unable to secure a medical report and after several months issued an interim report, citing CP 1146-52. However, it is the GAL's obligation to obtain a medical report, and the guardian case cannot proceed to hearing without one. RCW 11.88.045(4). In fact, it was Helm's counsel who, in the spirit of cooperation, obtained and filed the medical report from a local Yakima doctor on 1-20-19. CP 1207-1210; CP 625-26.

The GAL interim report dated 4-2-18 states that Helm "suffers an incapacity, in her care of her person and her attending to her financial and

Helm expressing fear of the brother who appeared to be attempting to financially exploit her, and the concern that Helm was not able to adequately provide for her own care and support." RB at 20. No citation to the record is given for these reasons, so these make-weight assertions, made well after the fact and without substantial evidence, appear to be nothing more than an attempted justification for what Calhoun wanted to do for her own reasons.

estate needs . . .” CP 1152. This does even come close to meeting the definition of an incapacity under the guardianship statute.¹⁰

The interim GAL report dated 4-2-18 also failed to consider a number of factors. The most glaring omission is the failure to discuss any less restrictive alternatives to a guardianship, as required by RCW 11.88.090(5)(f)(iv), i.e., a “description of any alternative arrangements previously made by the alleged incapacitated person or *which could be made*, and whether and to what extent such alternatives should be used in lieu of a guardianship . . .” [italics added]. *Id.* AB 60. Other factors the GAL did not consider include Helm’s complying with all requirements for over six months at Gleed Orchard Manor from April to November 2018 (CP 560, ¶ 6); Helm’s living independently since November 2018 in Sun Tower (CP 560-561, ¶¶ 10 and 12 [misabeled as 11]); and the confidential medical report of Dr. Wilkinson filed on January 10, 2019 (CP 1207-1210). The GAL even acknowledged at the hearing on January 10, 2019 that her interim report was incomplete. CP 648.¹¹

2. Inaccuracy of Verified Guardianship Petition.

Calhoun claims the verified petition she filed was not inaccurate:

¹⁰ RCW 11.88.010(1)(a) requires a determination that the individual “is at significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing or physical safety.” RCW 11.88.010(1)(b) requires a determination that the individual “is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.”

¹¹ The GAL stated at the hearing, “I still need that interview [with Helm]. I need it in order to present to the court what’s going on with Ms. O’Dell [Helm] now and to write a report that is giving current information and a recommendation of her best interests. My report is incomplete. That’s why I need to finish it up with the medical evaluation as well as another interview with Ms. O’Dell.” CP 648.

“Calhoun indicated in the petition that Helm suffered generally from ‘impairment of intellectual abilities such as attention, orientation, memory, judgment, and language.’” CP 2. RB at 20-21. “Calhoun noted that she suffered from dementia, which is consistent with Helm’s MOCA score of 11/30 . . .” RB at 21. These arguments are without merit.¹²

The court should not let the false dementia diagnosis in a verified guardianship petition pass by unnoticed. It is an attack on the integrity of the judicial system. Everyone knows that someone with dementia cannot function and needs help. Someone with merely an “unspecified neurocognitive disorder” cannot be immediately labelled as needing a guardian, without further elucidation of what the neurocognitive disorder is and how it affects the person.

3. “Scorched Earth Litigation” Attacking Calhoun.

Calhoun claims that Helm’s counsel engaged in “scorched earth litigation” that focused on “attacking” Calhoun rather than addressing “the real questions of incapacity and the need for a guardianship.” RB 22. There are no citations to the record and not even a single example given to support this claim. Calhoun is projecting her paranoia onto others. Filing a lawsuit against Calhoun for breach of her fiduciary duties is not an “attack” on Calhoun personally; it is merely a vehicle to obtain relief for a wrong committed by Calhoun. Calhoun is a fiduciary and should expect to be held

¹² Such MOCA score was over a year old and was contradicted by later testing which ruled out dementia. CP 1198. Also, while a testing result may be *consistent* with a diagnosis, it does not necessarily *establish* that diagnosis. That is the logical flaw in Calhoun’s analysis here, even apart from the fact that out of hundreds of pages of Helm’s medical records in Calhoun’s possession, she has none which provides a diagnosis of dementia.

accountable for her actions.

Furthermore, Helm's counsel tried to address the need for a guardianship by noting the deposition of Calhoun. She refused to attend. CP 896-97.

F. The Trial Court's Finding of Good Faith and Voluntary Dismissal of the Guardianship Action (RB 22-27).

Calhoun claims that "Helm was vulnerable to undue influence" (RB 22) but cites no examples or any portion of the record to support that statement. A lot of people need "assistance," but needing assistance is not equivalent to needing a guardian and is not part of the definition of incapacity as set forth in RCW 11.88.010(1)(a) and (b) .

Calhoun claims without evidence that there was a campaign of disparagement through social media that either Young or the AIP had something to do with. RB at 24. CP 765, ¶ 11. This is incorrect. Neither Young nor Helm had anything to do with any such campaign, if there was one. CP 868; CP 877, ¶ 4; CP 891-893.

Calhoun claims that Young raised irrelevant issues about past cases, research on Calhoun (her previous bankruptcy) and surmising of facts without any actual information, citing CP 202. RB 25. Calhoun listed her house for sale without any indication of how that was relevant to the proceeding. CP 202. Young raised these issues in connection with the adequacy of the proposed bond of \$500. CP 203, ¶ 17; CP 632.¹³ Calhoun

¹³ Calhoun admitted filing bankruptcy years earlier. CP 234, ¶ 34. She had put her house up for sale during the pendency of the current proceedings. CP 202, ¶ 15. She provided no evidence of professional liability insurance. CP. 202, ¶ 16. She was delinquent in the renewal of her business license. CP 202, ¶ 15.

never replied regarding whether she had liability insurance or not (CP 234), so it is troubling to have her in control of \$32,288.27 of a ward's funds (CP 1164) with no professional liability insurance, at least no evidence in the record that she has any, and her bond is only \$500.¹⁴ These are red flag issues helpful to the court in determining an appropriate bond amount.

Calhoun argues that the GAL found the actions of Helm's counsel troubling, quoting the record at CP 973-74. This is another example of a lack of specifics on the part of the GAL and her not citing the record anywhere to support her conclusion. The GAL's comments are purely argumentative assertions with no substance.¹⁵

Amy Clark is not listed as an active member of the Washington State Bar Association and has neither any right nor basis to opine about either whether someone has acted in good faith or whether a lawyer has acted in an unprofessional manner.

It is hard to see how Calhoun "expended substantial effort maintaining the action in the best interests of Helm." RB at 26. Spending all of Helm's money, and then some, in petitioner's fees and attorney's fees does not promote the best interests of Helm. Not only is there no citation of any kind for this statement, but Calhoun fails to explain why, knowing at least by December, 2018 that Helm's estate was insufficient to pay all the

¹⁴ Calhoun argues that she responded "to all of Mr. Young's statements in her own declaration." RB 25. However, she did not respond to the issue raised as to whether she had professional liability insurance. CP. 203, ¶ 16. CP 234.

¹⁵ If there were any basis for the GAL's comments, she should be able to cite examples or places in the record where such conduct occurred. Or Calhoun could point to such places in the record. Calhoun points to no such evidence.

fees that were accruing (CP 143, ¶ 3; CP 675-676; CP 544-545), nevertheless she continued on with motions in January 2019 to have six depositions approved (CP 606-07), a deposition of Helm in February 2019 (CP 607-08; CP 994), and further legal proceedings until the very eve of trial, when Helm's estate was exhausted, then moved to dismiss the guardianship action.

Calhoun's counsel stated at the hearing on January 10, 2019 that "We're preparing for trial." CP 605. A reasonable person could well conclude that Calhoun did "suck dry" the estate of Helm, in the words of the GAL (CP 973-74), as that is exactly what was predictable, exactly what the trial court recognized (CP 651) and exactly what happened.

Calhoun tries to shift the blame onto Helm's counsel, arguing that Helm's counsel maintained a campaign to "attack" Calhoun rather than focus on the guardianship issues, and engaged in a "scorched earth" litigation strategy increasing the attorney's fees. RB 22, 27. Yet no citation to the record is provided for these arguments and no examples are given. RAP 10.3(6). Furthermore, most of the motions filed in the case were filed by Calhoun. CP 60-61; CP 62-65; CP 66-69; CP 70-72; CP 103-123; CP 431-32; CP 825; CP 826-29; CP 926. Helm merely responded to them.

What Calhoun does not recognize is that she was the petitioner in the guardianship proceeding. Helm was opposing the guardianship, much like a defendant in a civil lawsuit, to protect her freedom, as she had a statutory and constitutional right to do. Calhoun had the burden to prove her claims by clear, cogent and convincing evidence. RCW 11.88.045(3).

Yet it is impossible to tell from reading Calhoun's petition (CP 1-5) what the nature of the incapacity is that needs to be defended as required by RCW 11.88.010(1)(a) and (b) . Helm's attorney cannot be faulted for not focusing on issues which were never raised in the guardianship petition, even though required by statute to be contained in the petition. RCW 11.88.030(1)(b).

Finally, Calhoun claims that "Helm's attorneys significantly outspent Calhoun's attorneys, yet Calhoun was forced to incur \$83,000 in fees." RB 26-27. Helm's attorney's fees were higher only because her attorney's hourly rate was nearly double that of Calhoun's attorneys; they actually spent more time on the case than Helm's attorney did. Nor was Calhoun "forced" to spend \$83,000 in fees. She could have decided at any time that there was no benefit to anyone—except herself and her attorneys—in incurring fees exceeding the value of Helm's estate and filed a petition to dismiss the proceedings. Helm was not in a position to do that as the AIP. Calhoun has offered no explanation as to why she did not move to dismiss the guardianship petition three to six months earlier than she did.

G. Emergency Powers/Pre-Assignment of Judge (RB 27-28).

Helm does not argue that Calhoun's motion for emergency powers to manage Helm's estate was the result of malice (RB 27), but rather from the desire to keep charging Helm's estate the average \$1,000 per month in fees largely for clerical functions--writing a few checks, faxing documents, sending emails, making phone calls, scanning receipts and other clerical tasks-- for which \$70 to \$110 per hour was charged. CP 1171 – 1185.¹⁶

¹⁶ Senior Avenues charged Helm \$8,188.25 for 85.39 hours of work for the six-month

Nor does Helm argue that there was a “vast conspiracy” to milk Helm of her limited resources. RB 28. Neither Helm nor her counsel mentioned the word “conspiracy.” Yet the undeniable result of the total of Calhoun’s actions was to milk Helm of what was left of her resources.

H. The Final Fight Over Fees and Helm’s Agreement to Dismissal of the Guardianship Petition (RB 28-30).

The GAL opined without providing any reasons or support in the record that Calhoun brought the guardianship action in good faith. CP 837-38. Helm filed a response to the guardianship petition on December 4, 2018, supporting her position that the petition was not filed upon a reasonable basis and in good faith, and setting forth fifteen indicia of such bad faith. CP 179-180. *See*, Appendix A.

Yet the GAL never raised or discussed any of the assertions of bad faith raised by Helm in her response to the guardianship petition. Nor did the trial court specifically address any of these fifteen indicia of bad faith.

III. Reply to Respondent’s Arguments

A. The Trial Court Abused its Discretion in Finding that Calhoun Brought and Prosecuted the Guardianship Action in Good Faith and Upon Reasonable Basis Under RCW 11.88.030(1) (RB 31).

Here the standard of review is *de novo*. *See*, AB 27-28. RCW 11.88.030(1) provides that “[N]o liability for filing a petition for guardianship or limited guardianships shall attach to a petitioner acting *in good faith and upon reasonable basis*” [italics added]. *In re Guardianship of Matthews*, 156 Wn. App. 201, 209-210, 232 P.3d 1140 (2010).

period 6-4-18 to 12-11-18, averaging \$1,364 per month and \$98.00 per hour. CP 1185.

The legal basis for an award of fees or costs is reviewed de novo. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 531, 128 P.3d 128 (2006). Review of a decision relating to the determination of the amount of reasonable attorney's fees is based on abuse of discretion. A trial court's decision will be reversed for abuse of discretion if it is "manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *In re Guardianship of Lamb*, 173 Wn.2d 173, 189, 265 P.3d 876 (2011) (quoting *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Lamb*, 173 Wn.2d at 189 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

"The real party at interest in a guardianship proceeding is the alleged incapacitated person and it is the trial court's duty to ensure that his interests are protected." *In re Guardianship of Matthews, supra*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010). It is hard to see how Helm's interests are protected by the trial court's essentially awarding the bulk of her estate to the guardianship petitioner and the petitioner's attorneys, and not allowing any fees to Helm's attorney. In *In re Estate of Black*, 116 Wn. App. 476, 491, 66 P.3d 670 (2003), *affirmed on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004), the court of appeals held that in interpreting RCW 11.96A.150 in the context of which of two wills was valid, the trial court erred by awarding fees to one side out of the estate, but not the other, and

the trial court should have either awarded both sides “their fees from the estate, or awarded neither their fees.” 116 Wn. App. at 490. It was inequitable here for the trial court to ignore the fees of Helm’s attorney, who provided a substantial benefit to her, and make full provision for the fees of Calhoun and her attorneys, who, considering all the circumstances, at best provided highly questionable benefit to Helm and her estate.¹⁷

Here Calhoun did not end up protecting Helm’s estate, as she claimed her motivation was, but rather used up the entire estate. There was obviously no benefit to Helm’s estate in the totality of Calhoun’s actions, which include selling Helm’s properties at less than fair market value. Ultimately, no guardianship was established, so whatever protection would have been realized was not actually realized.

It is also significant that Calhoun was willing to put all of Helm’s assets at risk in these proceedings but was not willing to put any of her own assets at risk.

Calhoun cites RCW 11.24.050, dealing with will contests, as applicable by analogy.¹⁸ RB 35. However, will contests are vastly different from guardianship cases. Will contests are much narrower in scope, as they focus on the intent of the testator and the validity of a particular document.

¹⁷ RCW 11.96A.150 provides that the court may order costs and reasonable attorney’s fees “in such amount and in such manner as the court determines to be equitable.” The award thus must be “equitable.” Here the net result is not equitable.

¹⁸ RCW 11.24.050 states: “If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney’s fees as the court may deem proper.”

A guardianship petition encompasses broader personal, medical and property issues, and furthermore significantly affects the liberty interest of the AIP. Moreover, there is no right to a jury trial in a will contest. *In re Shaughnessy's Estate*, 97 Wn.2d 652, 657, 648 P.2d 427 (1982). There is such a right in guardianship cases. RCW 11.88.045(3). RCW 11.24.050 is also very different from RCW 11.96A.150 in its wording. Whatever rules have developed in construing RCW 11.24.050 should not be applied to guardianship cases.¹⁹

B. Substantial Evidence Does Not Support a Finding of Good Faith and a Reasonable Basis for Bringing the Action (RB 36-41)

The five “facts” here (RB at 37) which Calhoun claims are not “legitimately in dispute” actually are in dispute. These are manufactured reasons developed after the fact to support Calhoun’s actions and do not explain why she inserted the false diagnosis of dementia in the guardianship petition, why she failed to include the statutory requirements regarding the nature of Helm’s alleged incapacity, why Calhoun waited so long to file the petition, why Calhoun acted amid a swirl of conflicts of interest and why Calhoun kept pressing the guardianship proceedings far beyond the factors supposedly giving rise to the filing and far beyond what was reasonable. Calhoun also translates the vague and speculative “concerns” of herself and others into trying to adduce a reasonable basis for filing the petition. The

¹⁹ The cases cited by Calhoun in connection with RCW 11.24.050 are therefore not applicable under RCW 11.96A.150. For example, *In re Hastings Estate*, 4 Wn. App. 649, 653, 484 P.2d 442 (1971) involved a good faith and probable cause challenge in a will contest which ultimately was not successful. The trial court’s refusal to award fees against the challenger was affirmed.

reasons now given also contradict the reasons given in RB 20. See, fn 9.

Furthermore, Helm did not argue that Calhoun should have immediately dismissed the guardianship action when Helm objected to the guardianship. RB at 39. Rather, Calhoun should have dropped the action when she saw that Helm's estate would be consumed by Calhoun's and her attorney's fees in prosecuting the action, thus contradicting the proffered rationale that Calhoun filed the guardianship action to "protect" Helm.

Helm filed a response to the guardianship petition setting forth fifteen indicia of Calhoun's lack of good faith. These grounds were supported with argument. CP 853-862. See Appendix A. Calhoun has failed to rebut these indicia.

C. Calhoun's Pre-Filing Conduct is at Issue Herein (RB 41-42).

In the exercise of its general powers in guardianship proceedings, "the court has authority to enquire into transactions which occurred prior to the guardianship." *Guardianship of Adamec*, 100 Wn.2d 166, 176, 667 P.2d 1085 (1983). The superior court could therefore consider the propriety of Calhoun's sales of Helm's properties while acting under a POA before the guardianship petition was filed. *Id.*²⁰

D. Calhoun Failed to Fulfill her Duty to Ensure the Validity of the POA (RB 42-43).

Calhoun misses the fact that just because an attorney's name is at the top of a POA does not mean that the attorney was representing the donor

²⁰ Prefiling conduct may also have a bearing on the award of attorney's fees. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987); *Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 407-408, 663 P.2d 104 (1983).

of the power of attorney. See AB 32-34. There is no evidence that Calhoun made any effort to inquire as to whether Helm had legal representation before signing the POA. CP 230, ¶ 7. Attorney LaCroix was actually representing HSC Yankton, which was looking for a way to move Helm out of its facility. CP 375, ¶ 14; CP 147, ¶ 2; CP 747, ¶ 6.

E. The Service Agreement Led to a Conflict of Interest (RB 43).

Calhoun cites no evidence and no part of the record which supports her argument that there was no conflict of interest in the signing of the Service Agreement. The conflict of interest was the ambiguity of the agreement in relation to whether the properties would be sold, and Calhoun would receive pecuniary gain in the form of fees by the sale of Helm's properties, as upon sale there would be plenty of money to pay Calhoun's fees. Keeping the properties, or at least investigating that option, would serve Helm's long-term interest and obvious desire. Calhoun chose the action which benefitted her the most, i.e., quickly selling Helm's properties.

Calhoun does not rebut the solid evidence from her own time entries that she contacted Tom Parker multiple times about the sale of the properties before the Service Agreement was signed. CP 905 (she contacted him on 12-22-16, 12-26-16, 12-27-16, and 1-3-17); CP 906 (she received the signed Service Agreement on 1-4-17).

F. The Sales of the Properties Were Made Over the Objections of Helm and Are Relevant to the Issue of Good Faith and Whether Calhoun Acted on a Reasonable Basis (RB 44).

Calhoun cites no evidence and no portion of the record supporting her argument that Helm did not object to the sales of her properties. The

Service Agreement cannot be construed as an “instruction” that the properties be sold, as argued by Calhoun. RB 44. Helm stated that she told Calhoun of Helm’s objections to the sale of the properties. CP 147, ¶ 3; CP 1032 (lines 5-6).

G. Calhoun Did Sell Properties to Obtain Quick Cash to Pay her own Fees Without a Plan (RB 44).

It cannot be disputed that Calhoun sold the Rhapsody Drive property quickly: she received an offer on the property on 1-20-17 and signed it that day. CP 907. This was some two weeks after receiving the signed Service Agreement from Helm. The only reason for the quick sale was the funding of Calhoun’s fees.

H. Calhoun Did Charge Excessive Fees (RB 45).

Calhoun claims that her fees were not excessive but cites no support in the record for such argument. Helm gave examples of such excessive fees: charging \$70 to \$110 per hour for ministerial work. AB 51.

Charging unreasonable or excessive fees is unethical, a breach of fiduciary duty, an indicator of a lack of good faith, and is by definition not acting upon a reasonable basis. Such factor is a basis for reducing or disgorging fees. AB 56. Calhoun in her role as a fiduciary and holder of a power of attorney without court supervision could not take advantage of that position to charge Helm excessive fees.

I. The Issuance of the TRO is Relevant and is Indicative of the Lack of Good Faith and Not Acting Upon Reasonable Basis (RB 45-46).

Calhoun cites no portion of the record for her statements and does not even try to defend the trial court’s issuance of the TRO blocking Helm’s

lawsuit against Calhoun. This is an obvious conflict of interest that Calhoun completely disregarded. AB 46-50. A fiduciary's proceeding in the face of a known and obvious conflict of interest with her principal under a POA clearly calls into question the fiduciary's *bona fides*.

J. The Motion for Emergency Powers Was Brought to Allow Calhoun to Keep Charging Fees (RB 46).

Calhoun claims without citation of authority that she sought emergency powers to manage Helm's estate "to protect Helm's estate out of concern that funds would otherwise be wasted." RB 46. It is certainly ironic that under Calhoun's management, all of Helm's funds were indeed wasted—on the fees of Calhoun and her attorneys.²¹

K. The Trial Court Erred by Not Applying the Presumption of Competence (RB 46-47).

Calhoun agrees that "individuals are presumed competent until proven otherwise." RB 46. She claims that there is no evidence that "the Trial Court in any way ignored the presumption of competence." *Id.* These claims are without merit. See, AB 61 – 64; CP 960 (asking Helm's counsel whether there are people living at the residential treatment center [Glen Orchard Park, where Helm lived for some six months] "who are not mentally ill." See, generally, the colloquy at CP 959-964.

L. There are Other Indicia of the Lack of Good Faith and a

²¹ Calhoun claims she did not ask to be appointed to manage Helm's funds, but only asked that a certified professional guardian do so. However, there are only three certified professional guardians in Yakima County, so Calhoun had at least a 1/3 chance of being appointed if the selection were made at random. CP 897, ¶ 6. Of course, Calhoun was the only one who benefitted from this appointment, as she could continue to charge fees of over \$1,000 per month. See AB 51-52.

Lack of a Reasonable Basis to Act (RB 47).

Calhoun's conduct at mediation is also indicative of her lack of good faith. Calhoun acting under a conflict of interest improperly conditioned the dismissal of the guardianship petition on the petitioner's being released from liability. See, AB 43-44.

The GAL's opinion about Calhoun's good faith is also irrelevant. The GAL has worked with Calhoun many times as a GAL on Calhoun's cases. The GAL has a pecuniary interest in continuing those referrals. The GAL also never explained what factors she did or did not look at to conclude that Calhoun acted in good faith.²² Nor is there any indication that the GAL even understood the definition of good faith. And, of course, good faith is only half of the requirement; the other half is acting upon reasonable basis under RCW 11.88.030(1).

M. The Amount of Attorney's Fees and Costs Awarded Was an Abuse of Discretion (RB 47-49).

Helm complained about a number of attorney's fees which she claimed were unreasonable. AB 54. Calhoun provides no evidence or argument as to why the specific fees listed were reasonable. Helm also pointed out that there were various defects in the petitioner's attorney-fee motion, such as block billing, vague entries, billing by two attorneys and non-legal work, with examples of each category (CP 536-540).

Moreover, the issue of attorney's fees should be considered in light

²² When the GAL stated that she did not find any lack of good faith (CP 972), she did not state how hard she looked or whether she considered Helm's response to the guardianship petition. CP 179-180. In addition, the claim that the GAL would have notified the court if she felt Calhoun was negotiating in bad faith is simply rank speculation.

of all the factors, including equity. Here Helm started out with two properties and ended up having the properties sold out from under her and the entire sales proceeds primarily used to fund the fees of Calhoun and her attorneys, leaving Helm with nothing. The trial court also ordered Helm pay all the costs of the proceeding, including all of the mediation, all filing fees, the cost of her own deposition and the fee of the psychologist (CP 1117-1118), all under the guise of protecting Helm's estate.

Calhoun claims that Helm's attorney "outspent Calhoun's attorneys by approximately \$33,000 (about 40% more)." RB 48. While it is true that Helm's attorney's fees were more than Calhoun's, the reason is because Helm's attorney charged at his higher Seattle rate (where his office is) of \$400 per hour, rather than Calhoun's attorneys' Yakima rate of \$210 per hour (Tyler Farmer) and \$185 per hour (Tygh Lybbert). CP 930; CP 935. On an hourly basis, Helm's attorney spent less time on the case than Calhoun's attorneys, even though Helm's counsel had a five-hour drive roundtrip from Seattle to Yakima for each hearing.²³

Calhoun talks about the public policy concern in guardianship proceedings "to ensure that people are encouraged to bring *meritorious* guardianship actions." RB at 40 [italics added]. But is the result in this case—a senior woman owning two houses at the beginning of the POA relationship is left penniless and a judgment of \$53,000 against her following the dismissal of the guardianship petition—a result that should be

²³ Young spent 133.6 hours on the case in 2019 and 148.25 hours in 2018. CP 1082, 1091. Calhoun's attorneys and paralegal spent 209.4 hours in 2019 (CP 934) and 146.25 hours in 2018 (CP 445).

encouraged and duplicated in other cases? Clearly not, but Calhoun does not address what went wrong and how this inequitable result could have been avoided other than to generally blame Helm's counsel.

The Washington Supreme Court has noted that a "petition for the appointment of a guardian on the ground of mental incompetency may be filed against any person at any time." *State ex rel. Nelson*, 15 Wn.2d 407, 413, 131 P.2d 144 (1942). Public policy should encourage *meritorious* guardianship actions, not actions which cost everyone a lot of money with no real gain for anyone, such as happened here. RB 31. It is unfair to impose the entire burden on the AIP, as happened here.

N. Calhoun Should Not Be Awarded Additional Fees and Costs on Appeal RB (49-50).

For the same reason that Calhoun is not entitled to the fees already awarded, she is not equitably entitled to additional fees on appeal.

IV. CONCLUSION

This court should reverse the award of attorney's fees and remand the case to the superior court for further proceedings regarding the issue of Calhoun's good faith and reasonableness in filing the guardianship petition.

Respectfully submitted this 18th day of February 2020.

Law Offices of Dan R. Young

By 
Dan R. Young, WSBA #12020
Attorney for Dorothy Helm

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'18 DEC -4 P3:59

SUPERIOR COURT
YAKIMA CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

In the Guardianship of:
DOROTHY HELM O'DELL,
An Alleged Incapacitated Person.

NO. 18-4-00054-39
AIP'S RESPONSE TO GUARDIANSHIP
PETITION

Ms. Helm, the AIP, hereby submits the following response to petitioner Kristyan Calhoun's guardianship petition. Ms. Helm alleges that Ms. Calhoun has filed this petition in bad faith, some of the indicia of which are:

1. The timing of the filing, as Ms. Calhoun filed the guardianship petition on January 23, 2018, after Ms. Helm in December 2017 sent a letter to Ms. Calhoun revoking the power of attorney signed in December, 2016.
2. The false claim in the petition that Ms. Helm was diagnosed with dementia.
3. The failure to specify in the guardianship petition what incapacities Ms. Helm had, as required by RCW 11.88.030(b).
4. The failure to set forth in the petition why petitioner was proposing Amy Clark, someone petitioner had used previously, as guardian ad litem, as required by RCW 11.88.030(1)(l).
5. The obtaining of an "emergency order" ex parte and without notice to Ms. Helm blocking the revocation of the power of attorney on January 23, 2018.
6. The quick sale of Ms. Helm's Rhapsody Drive property to Thomas Parker, a real estate

AIP'S REPSONSE TO GUARDIANSHIP PETITION - I

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1 broker friend of Ms. Calhoun, at a grossly inadequate price without an appraisal and without
2 "testing the market" as required by *Allard v. Seattle-First National Bank*, 99 Wn.2d 394, 406, 663
3 P.2d 104 (1983).

4 7. The payment out of Ms. Helm's property controlled by Ms. Calhoun of substantial,
5 excessive fees to herself and her attorney.

6 8. The failure to provide regular accounting statements and the dissipation of most of the
7 proceeds of the real estate sales.

8 9. The obtaining of a temporary restraining order (the "TRO") on November 26, 2018 ex
9 parte and without reasonable notice halting proceedings in a lawsuit filed by Ms. Helm against
10 petitioner (and others) in Kitsap County Superior Court, cause #18-2-0324-18.

11 10. Acting under a conflict of interest and against her principal in obtaining the TRO.

12 11. Not mediating in good faith, especially by using the pending guardianship proceedings
13 as a weapon to try to extract a release of liability for the damages resulting from petitioner's
14 misconduct.

15 12. Petitioner was involved in Ms. Helm's signing of the power of attorney in December,
16 2016, and was aware, or reasonably should have been aware, that Ms. Helm did not have legal
17 advice before signing the power of attorney and did not have the power of attorney explained to
18 Ms. Helm.

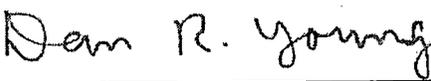
19 13. Petitioner was aware that Ms. Helm was competent yet has used the guardianship
20 proceedings to maintain power and control over Ms. Helm's assets and money.

21 14. Attempting to take control over Ms. Helm's anticipated inheritance through seeking an
22 emergency order requiring such funds to be held by a third party.

23 15. Violating the Uniform Power of Attorney Act.

24 Dated: December 4, 2018.

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25 By: 

26 Dan R. Young, WSBA #12020

27 Attorney for Plaintiff

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February 18, 2020 - 4:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: In re the Guardianship of Dorothy Helm O'Dell
Superior Court Case Number: 18-4-00054-4

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