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NO. 36820-3-III

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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In re the Guardianship of:

DOROTHY HELM O'DELL,

Appellant.

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APPELLANT'S AMENDED OPENING BRIEF

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## I. INTRODUCTION

Appellant Dorothy Helm asks this court to grant relief from Kristyan Calhoun's ravaging the Helm estate under the guise of "protecting" Ms. Helm. Acting under a durable power of attorney ("POA") against the instructions of Ms. Helm, Ms. Calhoun sold all the assets of the Helm estate at less than fair market value to create a cash fund from which she could overcharge for her services and those of her staff that were not needed. Ms. Helm, an elderly woman, who through a number of manual-labor-type jobs during her working life, had carefully built up through her sagacity and disciplined planning a portfolio of two rental properties in Kitsap County for which she had paid \$294,500 in 2005. Ms. Calhoun quickly dumped these properties in early to mid-2017 without appraisals for \$144,000 in breach of her fiduciary duties and not acting in good faith.

When Ms. Helm attempted to have her brother manage her financial affairs a year later, Ms. Calhoun responded by filing a verified guardianship petition falsely alleging that Ms. Helm, with whom Ms. Calhoun had barely interacted, was diagnosed with dementia. With that false petition, Ms. Calhoun simultaneously obtained an "emergency" ex parte order blocking Ms. Helm from revoking the POA. After the guardianship proceeding had been going on for some fifteen months with a jury trial set for May 28, 2019, Ms. Calhoun asked the Yakima County Superior Court to unilaterally dismiss the guardianship petition she had filed on January 23, 2018 and on which she and her attorneys had racked up over \$118,000 in fees alone since

December 2016. This petition for dismissal came on the heels of Ms. Calhoun's deposition of Ms. Helm, which deposition revealed Ms. Helm a quick-witted woman, as opposed to an incoherent and confused woman, the narrative for which Ms. Calhoun had spun in her declarations and the declarations of her staff. Rather than submit a one-page motion for dismissal, Ms. Calhoun went on at great length and at a cost of some \$9,000 to argue (a) why Ms. Helm, the AIP, really needed a guardian, (2) why Ms. Calhoun and her attorneys should be paid all the fees they milked from Ms. Helm's estate in pursuing the guardianship up to that point, and (3) why Ms. Calhoun believed the petition was filed in good faith. The reason Ms. Calhoun gave for wanting to drop the petition was that it was costing her too much and her reputation was taking a hit on social media because of the adverse criticism of her actions. This is another way of saying that there was not enough money left in Ms. Helm's estate to pay the continuing fees of Ms. Calhoun and her attorneys through a jury trial, Ms. Helm's estate having already been essentially exhausted through Ms. Calhoun's bad faith litigation tactics, and that Ms. Calhoun did not want to defend publicly what she could not defend, i.e., her multiple conflicts of interest, breaches of fiduciary duty, and bad faith actions in this case and other cases as a certified professional guardian ("CPG").

The end result is that upon dismissal of the guardianship petition, petitioner Calhoun had received some \$35,000 in fees; her attorneys had received some \$30,000 in fees and got a judgment against Ms. Helm for \$53,000 more; Ms. Helm's attorney had an outstanding unpaid bill of

\$116,000 and out-of-pocket costs of over \$10,000, none of which was paid; and Ms. Helm was left with a few thousand dollars in her estate and her \$590 per month social security income, with no ability to pay the judgment against her. This inequitable result violates the letter and spirit of the guardianship statutes and should shock the conscience of this court.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in disregarding the numerous indicia of the lack of good faith and the lack of a reasonable basis (a) in the actions taken by Ms. Calhoun under the power of attorney Ms. Helm signed and (b) in the subsequent guardianship proceeding Ms. Calhoun initiated, resulting in the trial court's erroneously finding that Ms. Calhoun acted in good faith.

2. The trial court abused its discretion in awarding excessive fees to Ms. Calhoun and her attorneys from Ms. Helm's estate without a deduction or modification of even a dollar, where Ms. Calhoun breached her fiduciary duties and did not act in good faith and upon a reasonable basis.

3. The trial court erred in entering a money judgment against Ms. Helm in the amount of \$53,000 in attorney's fees after Ms. Helm was rendered virtually penniless by Ms. Calhoun's actions.

4. The trial court erred in disregarding the presumption of Ms. Helm's capacity.

5. The trial court erred in failing to apply agency principles or the Uniform Power of Attorney Act.

6. The trial court erred in failing to conduct an evidentiary hearing, or at least in not allowing Ms. Helm to take the deposition of Ms. Calhoun, prior to making factual determinations about Ms. Calhoun's good faith *vel non*.

7. The trial court erred in denying Ms. Helm's motion to strike inadmissible portions of declarations submitted by Ms. Calhoun and her staff.

8. The trial court erred in entering Finding of Fact 6 of the 1-10-19 order (CP 572) to the implied effect that the GAL's preliminary recommendation on 4-2-18 that a guardian of the person and estate was appropriate supported the conclusion that Ms. Helm did not have the capacity to sue.

9. The trial court erred in entering Finding of Fact 13 of the 1-10-19 order (CP 573) to the effect that the Kitsap County lawsuit filed by Ms. Helm against Ms. Calhoun has or will interfere with the guardianship action.

10. The trial court erred in entering Finding of Fact 14 of the 1-10-19 order (CP 573) that Ms. Helm did not have the financial resources to pay for the Kitsap County action, when that case was taken on a contingent basis.

11. The trial court erred in entering Finding of Fact 15 of the 1-10-19 order (CP 573) to the effect that the determination of Ms. Helm's rights and capacities "is paramount to other matters" and thus justifies entry of a TRO.

12. The trial court erred in entering Finding of Fact 16 of the 1-10-

19 order (CP 573) to the effect that no evidence has been presented “of actual prejudice to AIP if she is enjoined from prosecuting litigation until a determination of her capacity.”

13. The trial court erred in entering Conclusions of Law 19 – 23, 25 and 26 of the 1-10-19 order (CP 573-574).

14. The trial court erred in entering Conclusion of Law 7 of the 5-24-19 order (CP 1118).

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Does Ms. Calhoun’s acceptance of a power of attorney (“POA”) from Ms. Helm in December 2016 while knowing, or having the ability reasonably to know, that Ms. Helm did not have legal advice before signing the power of attorney and did not have the power of attorney explained to Ms. Helm demonstrate Ms. Calhoun’s breach of fiduciary duty and lack of good faith? (Assignment 1.)

2. Does signing and filing a verified petition for imposition of a guardianship over Ms. Helm on January 23, 2018, when Ms. Calhoun had essentially been acting as a de facto guardian under the POA since December 2016 without the need for a guardianship, so as to maintain power and control over Ms. Helm’s assets and money under the false guise of “protecting” Ms. Helm’s estate, demonstrate Ms. Calhoun’s breach of fiduciary duty and lack of good faith? (Assignment 1.)

3. Does the false assertion signed by Ms. Calhoun under penalty of perjury in the verified petition for guardianship that Ms. Helm was diagnosed with dementia demonstrate Ms. Calhoun’s underlying motive

and lack of good faith? (Assignment 1.)

4. Did the failure to specify in the guardianship petition what incapacities Ms. Helm had, as required by RCW 11.88.030(1)(b), demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

5. Did the failure to set forth in the guardianship petition why petitioner Calhoun was specifically proposing as guardian ad litem Amy Clark, someone Ms. Calhoun had used previously many times, as required by RCW 11.88.030(1)(l), demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

6. Did the obtaining of an "emergency order" ex parte and without notice to Ms. Helm on January 23, 2018, based on the false dementia diagnosis in order to block Ms. Helm's revocation of the POA, when there was no real "emergency," demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

7. Did the quick sale of Ms. Helm's Rhapsody Drive property, over Ms. Helm's objections, to a real estate broker friend of Ms. Calhoun, at a grossly inadequate price without an appraisal and without "testing the market" as required by *Allard v. Pacific National Bank*, 99 Wn.2d 394, 406, 663 P.2d 104 (1983), and later sale of the Feigley Road property, constitute a breach of Ms. Calhoun's fiduciary duty and demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

8. Did the obtaining of an "emergency" temporary restraining order (the "TRO") on November 26, 2018 ex parte and without reasonable or proper notice to Ms. Helm's attorney, which TRO revoked Ms. Helm's

right to sue and halted prosecution of her Kitsap County lawsuit against Ms. Calhoun and her real estate broker friend breach Ms. Calhoun's fiduciary duty and demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

9. Did Ms. Calhoun's use of the pending guardianship proceeding as a weapon to try to extract a release of liability for the damages resulting from Ms. Calhoun's misconduct breach Ms. Calhoun's fiduciary duty and demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

10. Was Ms. Calhoun's taking control over Ms. Helm's assets and anticipated inheritance through an "emergency" order requiring such funds to be held by herself or a third party demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

11. Were Ms. Calhoun's actions contrary to the interests, needs and desires of her principal in breach of her fiduciary duty and in violation of the Uniform Power of Attorney Act demonstrative of Ms. Calhoun's lack of good faith? (Assignment 1.)

12. Was Ms. Calhoun's refusal to attend her deposition and seeking a protective order demonstrative of her lack of good faith? (Assignment 1.)

13. Did Ms. Calhoun's vigorous litigation of the guardianship petition so as to deplete Ms. Helm's estate, and subsequent motion to dismiss the guardianship petition shortly before the scheduled jury trial, breach Ms. Calhoun's fiduciary duty and demonstrate Ms. Calhoun's lack of good faith? (Assignment 1.)

14. Did the trial court abuse its discretion in revoking Ms. Helm's right to sue or be sued and granting a preliminary injunction halting Ms.

Helm's Kitsap County lawsuit against Ms. Calhoun for breach of fiduciary duty in selling Ms. Helm's properties substantially below fair market value, civil conspiracy, and CPA violations, where none of the requirements for a preliminary injunction set forth in *Kucera v. State Department of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) had been met? (Assignments 2, 8-14.)

15. Did the trial court abuse its discretion in its order entered on 1-16-19 authorizing "emergency" powers (CP 660-663), specifically paragraph 24 of that order (CP 662), giving Ms. Calhoun the authority to hold and manage all of Ms. Helm's funds and to charge fees for Ms. Calhoun's services under the Geriatric Care Management Service Agreement (CP 113), which Ms. Helm through counsel had previously terminated on November 28, 2018 (CP 326), especially where Ms. Helm obtained replacement services at substantially less cost? (Assignment 2.)

16. Did the trial court abuse its discretion in awarding substantial and excessive fees to Ms. Calhoun and her attorneys and in entering on May 24, 2019 a judgment in the amount of \$53,000 against Ms. Helm without balancing the equities or considering (1) Ms. Calhoun's breach of her fiduciary duties, lack of good faith and actions taken without a reasonable basis and (2) Ms. Helm's ability to pay the judgment, her future needs, her court-ordered obligation to pay for psychological testing, and the attorney's fees and costs owing to her own attorney defending her in the guardianship proceeding? (Assignment 3.)

17. Did the trial court err in disregarding the presumption of

competence with respect to Ms. Helm? (Assignment 4.)

18. Did the trial court err in failing to apply agency principles or the Uniform Power of Attorney Act? (Assignment 5.)

19. Did the trial court abuse its discretion in not conducting an evidentiary hearing or at least allowing Ms. Helm to take the deposition of Ms. Calhoun before deciding whether Ms. Calhoun acted in good faith? (Assignment 6.)

20. Did the trial court abuse its discretion in denying Ms. Helm's motions to strike inadmissible portions of Ms. Calhoun's declarations and in relying on such inadmissible evidence in making its rulings? (Assignment 7.)

#### **IV. STATEMENT OF THE CASE**

**1. Background.** Ms. Helm's employment history was mostly of a physical nature and included weekend cattle auction work, professional drapery making, janitorial work, running her own bakery, and long-haul truck driving (CP ¶ 1069-70). Through thrift and careful planning, she was able to save up her earnings so as to buy two properties in 2005 for \$294,500 to fund her retirement (CP 131 fn 3; CP 230, ¶ 5, ¶ 9; CP 147, ¶ 3). One property was located on Feigley Road West in Port Orchard, Washington and consisted of a 3-bedroom manufactured home and garage on 2-1/2 acres of land (CP 480). Ms. Helm had purchased this property for \$177,500 in 2005 (CP 183 fn 3). The other property was land containing a 2-bedroom manufactured home on Rhapsody Drive in Port Orchard (CP 253). Ms. Helm had purchased this property in 2005 for

\$117,000 (CP 183 fn 3). Ms. Helm was a 59-year-old single woman in 2005 (CP 147, ¶ 1) and approaching retirement age (CP 1190). Her plan was to supplement her social security with the rental income from her two houses to provide for her retirement years (CP 147, ¶ 3).

Ms. Helm had developed severe psychological issues subsequent to the murders of her two adult sons and upheavals in her life (CP 1150, lines 11-12). In 2015 she was involuntarily committed to the South Dakota Human Services Center (“HSC”) in Yankton, South Dakota, a psychiatric treatment facility, where she was treated with heavy psychotropic drugs (CP 1192) and forced electro-convulsive treatments (CP 147, ¶ 2; CP 1192; CP 875).<sup>1</sup> She was told in late 2016 that if she wanted to leave the facility, she had to sign a document (CP 147, ¶ 2). A document with a signature page attached was presented to her without explanation or legal advice. *Id.* She had already been at the HSC since October 2015 (CP 1192). Desiring to leave, she signed the document on December 16, 2016 (CP 147, ¶ 2).

The document (the “POA”) turned out to be an extremely comprehensive power of attorney in favor of Kristyan Calhoun (CP 13-18), who operated a for-profit guardianship company (“Senior Avenues”) in Yakima, Washington (CP 113, second paragraph). The POA authorized Ms. Calhoun to do virtually anything and everything that Ms. Helm could do (CP 13-18). Ms. Helm did not know Ms. Calhoun before signing the POA (CP 147, ¶ 2). The POA did not indicate that it was irrevocable (CP

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<sup>1</sup> On 12-12-16, Ms. Helm was taking lithium, clozapine, L-thyroxine, Lipitor, propranolol and rivastigmine (CP 1192 under Laboratory Testing).

242-247).

Ms. Helm also apparently executed a Geriatric Care Management Service Agreement (the “Service Agreement”) on January 3, 2017 (CP 113-114). She terminated it on November 28, 2018 (CP 233, ¶ 31; CP 326; CP 143, ¶ 2, Ex. A) in part because she could obtain the same service at a much more reasonable cost (CP 150; CP 154, ¶ 3). Ms. Calhoun was charging \$70 to \$110 per hour (CP 113, ¶ 2). June Duffy, who assisted Ms. Helm after the Service Agreement was cancelled, charged \$18 per hour (CP 156, ¶ 2).

Within three days of signing the Service Agreement Ms. Calhoun began efforts on January 6, 2017 to sell the two houses Ms. Helm owned in Port Orchard (CP 231, ¶¶ 12, 14). Ms. Calhoun obtained no appraisal of the Rhapsody Drive property and did not expose the property to the market (CP 372, ¶ 4; CP 231, ¶ 12). Instead, she sold the property under the POA on February 13, 2017 to a friend of hers, Thomas Parker, a real estate broker in Yakima, for \$28,000. *Id.* The assessed value of the property was \$64,704 in 2016 (CP 477). The Zillow range in value was \$106,761 to \$139,550 (CP 477).<sup>2</sup> Ms. Helm spoke to Ms. Calhoun on the telephone and told the latter that she objected to the sales of the properties (CP 147, ¶ 3). Ms. Calhoun netted \$103,730 from the sale of the Feigley Road property on June 27, 2017 (CP 1202), without an appraisal and with limited exposure to the

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<sup>2</sup> Zillow is an on-line real estate database company based in Seattle. It maintains a database on over a million homes in the U.S. The database provides an estimate (called a *Zestimate*) of the market value of a home and is reasonably accurate in terms of obtaining an approximate estimate of a home’s value (CP 457-58, ¶ 9).

market.<sup>3</sup> The Zillow range in value was \$115,346 to \$333,188 (CP 479). The property sales eliminated Ms. Helm's rental income, thereby reducing Ms. Helm's income to the \$590 per month she received from social security (CP 147, ¶ 3).

Ms. Helm was not released from HSC in Yankton, South Dakota until August 8, 2017 (CP 1188; CP 233, ¶ 26). Ms. Calhoun continued to charge fees every month from December 2016 through June 2017 in the total amount of \$7,345.13 (CP 923).<sup>4</sup> Ms. Calhoun ultimately made arrangements for Ms. Helm to live in Orchard Park, an independent living facility in Yakima (CP 232, ¶¶ 23-24; CP 1188) and was responsible for coordinating and taking care of Ms. Helm's medical needs there (CP 1188; CP 1195).

Within six weeks of her arrival at Orchard Park, Ms. Helm stopped taking her medications and refused to see a doctor (CP 467, entries for 9-27-17 and 9-28-17). Ms. Calhoun failed to respond appropriately and did nothing, instead of recognizing Ms. Helm's decompensation (CP 466-467, activities dated 9-20-17 through 10-9-17). On October 9, 2017 Ms. Helm was admitted to Yakima Valley Memorial Hospital (CP 1197). Ms. Helm was subjected to a 90-day involuntary detention and transferred to Eastern

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<sup>3</sup> The listing agreement required a sale "As Is" and no financing (CP 480).

<sup>4</sup> Ms. Calhoun charged the following amounts for the months indicated: \$147.50 for December, 2016, beginning on December 5, 2016, eleven days before the POA was signed (CP 905); \$2,053.60 for January 2017 (CP 909); \$353.50 for February 2017 (CP 910); \$419.33 for March 2017 (CP 912); \$1,108.50 for April 2017 (CP 914); \$1,812.00 for May 2017 (CP 919); and \$1,443.70 for June 2017 (CP 923). Ms. Calhoun's total charges for this seven-month period (including one entry in July 2017) were \$7,345.13 (CP 923).

State Hospital (CP 1197). On January 24, 2018 she was involuntarily committed for six months for treatment there (CP 151, ¶ 13; CP 560, ¶ 4).

On March 7, 2018, Ms. Helm was released early from Eastern State on a Less Restrictive Alternative (“LRA”) (CP 559, ¶ 3). Dr. Momeni, the perspicacious psychiatrist who oversaw Ms. Helm’s treatment at Eastern State, figured out how to bring Ms. Helm to a functional level by taking her off the high dosage psychiatric medications Ms. Helm was taking at the HSC in Yankton, and replacing them with a low dosage mild medication, so that Ms. Helm’s “mental state improved to the point of almost normal” (CP 1197).

After her early release from Eastern State, Ms. Helm lived in Gleed Orchard Manor, a residential treatment facility in Yakima beginning in March 2018 (CP 559-560, ¶ 3). Ms. Helm complied with the terms of the LRA in every respect (CP 560, ¶ 6). On November 1, 2018 she moved into Sun Tower, where she has her own apartment and is living independently (CP 560, ¶ 10). Ms. Helm’s peer counselor considers “Dorothy to be one of our success stories, someone who was not functional when she first came to Eastern State, but who has blossomed with help into someone who can live independently now” (CP 561, ¶ 11).

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

Calhoun received a letter on December 13, 2017<sup>5</sup> from Ms. Helm attempting to request transfer of Ms. Helm's assets to her brother, Glenn Helm, for investment (CP 12, ¶ 7; CP 19).

**2. Filing of Defective Verified Guardianship Petition.** Ms. Calhoun's response to the letter was to file the present guardianship proceeding in Yakima County Superior Court on January 23, 2018 (CP-1). See App. B. The verified petition falsely asserted that Ms. Helm had been diagnosed with "dementia" (CP 2, ¶ II), falsely stated that Ms. Helm "is suffering from dementia which causes the AIP to be at risk of serious personal and financial harm" (CP 2, ¶ VIII), and failed to include the statutorily required nature of Ms. Helm's alleged incapacities as set forth in RCW 11.88.030(1)(b) and RCW 11.88.010 (1).

**3. Preliminary Injunction.** Along with the defective verified petition for guardianship containing the false dementia diagnosis and relying on it, Ms. Calhoun filed an "emergency" motion for preliminary injunction (the "1<sup>st</sup> preliminary injunction") barring Ms. Helm from revoking the POA (CP 8). Nevertheless, despite the defects in the guardianship petition, the trial court granted the preliminary injunction on the same day ex parte and without notice to Ms. Helm (CP 9).

**4. Appointment of GAL.** Ms. Clark was specifically requested to be appointed GAL in the verified petition, without a statement of the statutorily required reason for requesting her specific appointment

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<sup>5</sup> The top of the letter contained the date of November 4, 2017 (CP 19).

under RCW 11.88.030(1)(l) (CP 4, ¶ XIII). Despite this omission, which was not pointed out to the court at the time, Ms. Clark was nevertheless appointed *ex parte* as the GAL (CP 20).<sup>6</sup>

**5. Mediation.** The parties engaged in mediation beginning in May 2018 over a period of many months, but by the fall of 2018 it was apparent that the mediation was ultimately going to be unsuccessful (CP 106, ¶ 13; CP 715, lines 1-6). Ms. Calhoun intimated that mediation was unsuccessful because Ms. Helm’s counsel “made a central part of those [mediation] discussions his concern over Ms. Calhoun’s actions regarding the sale of AIP’s real property [at less than fair market value]” (CP 106, ¶ 13). Ms. Helm’s counsel responded that mediation was unsuccessful because “Ms. Calhoun demanded as a pre-condition the complete release of all of her personal liability in exchange [for dismissal of the guardianship petition]” (CP 144, ¶ 4). Ms. Helm’s estate was charged for the entire cost of the mediation, Ms. Calhoun’s time and that of her attorneys (CP 1162; CP 92).

**6. Response to the Guardianship Petition.** Ms. Helm filed a response to the guardianship petition (CP 179-180). App. C. She alleged that the guardianship petition was filed in bad faith, setting forth fifteen indicia of that bad faith, including *inter alia* the timing of the filing of the guardianship petition after Ms. Helm attempted to revoke the POA; the

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<sup>6</sup> RCW 11.88.030(1)(l) provides that a petition for guardianship or limited guardianship shall state “[w]hether the petitioner is proposing a specific individual to act as guardian ad litem and, if so, the individual’s knowledge of or relationship to any of the parties, *and why the individual is proposed.*” [Italics added.]

defective nature of the petition, charging excessive fees and acting under a conflict of interest. See App. C.

**7. Petitioner Calhoun’s Filing of Four Motions.** Ultimately, on November 8, 2018, petitioner Kristyan Calhoun aggressively resumed activity in the case by filing four motions:

(1) a motion for an order authorizing “emergency” powers for administration of Ms. Helm’s estate (CP 66-69; CP 107, ¶ 18; CP 660), which sought the appointment of the GAL or a CPG in Eastern Washington to manage all of Ms. Helm’s financial affairs during the pendency of the guardianship proceeding (CP 69), which was effectively a temporary guardianship of the estate;

(2) a motion for an order authorizing limited discovery (CP 62-65), the discovery being limited to “the capacities, condition and needs of the AIP and the fitness of the proposed guardian to meet those needs[.]” with discovery into “Petitioner’s actions as AIP’s attorney-in-fact [being specifically] outside the scope of [discovery]” (CP 65);<sup>7</sup>

(3) a motion for an order approving Ms. Calhoun’s attorney’s fees and costs and authorizing payment of future attorney’s fees and costs (CP 70-72) on a monthly basis, unless Ms. Helm objected within ten days of the receipt of the invoice (CP 72); and

(4) a motion for an order to pre-assign a judge (CP 60-61), in which Ms. Calhoun through counsel made it clear at oral argument that she wanted

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<sup>7</sup> This referred to Ms. Calhoun’s sales of Ms. Helm’s properties at less than fair market value while acting under the POA.

Judge McCarthy to be pre-assigned as the judge (CP 580). The hearing on all four motions was scheduled before Judge McCarthy on November 21, 2018, the day before Thanksgiving (CP 101), but was later continued to January 10, 2019, with an order signed on January 16, 2019 (CP 660).

Ms. Helm responded to Ms. Calhoun's motions as follows:

(1) With respect to Ms. Calhoun's motion for emergency powers, Ms. Helm responded that there was no emergency (CP 550-51), the motion was merely an attempt to establish a pre-trial guardianship before Ms. Helm was determined to be incapacitated, in violation of the presumption of competency (CP 551-554), and there were other less expensive alternatives to Ms. Calhoun's charging high fees for writing a few checks per month and managing Ms. Helm's money (CP 554). Ms. Helm pointed out a case holding that the appointment of a temporary guardian is unnecessary and a waste of the ward's estate where an alternative arrangement protects the ward. *In re Barnes*, 36 Wash. 130, 134, 78 Pac. 783 (1904) (CP 554). Ms. Helm also was prophetic in her concern expressed on November 29, 2018 that "Ms. Calhoun is spending [my money] far faster than I would, and *at her current rate she will have exhausted all my funds before this guardianship matter comes to trial*" (CP 155) [italics added].

(2) Ms. Helm objected to limited discovery and argued that she should be able to depose Ms. Calhoun regarding the property sales at less than fair market value (CP 555-56).

(3) With respect to Ms. Calhoun's motion for attorney's fees,

Ms. Helm pointed out that Ms. Calhoun had already paid her attorneys \$10,566.66 in fees without any court authorization or approval (CP 536).<sup>8</sup> Ms. Calhoun's attorneys sought court approval for an additional \$20,022.59 for the period 10-16-18 through 12-28-18 (CP 442-446) for a total of \$30,589.25. Ms. Helm also objected that there were various defects in Ms. Calhoun'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); and Ms. Helm's estate was in jeopardy because only about \$30,000 was left in Ms. Helm's estate, while attorneys' and GAL fees exceeded \$75,000 as of January 6, 2019 (CP 544). In fact, at that time Ms. Helm through counsel warned everyone:

Finally, it is difficult to see how everyone's fees will be paid out of this \$13,500 which will be left in Ms. Helm's estate (\$16,500 less \$3,000), as the requested fees now total \$75,000 (\$20,000 for petitioner's attorney, \$50,000 for Ms. Helm's attorney and \$5,000 for the GAL). Even if Ms. Helm got an inheritance of \$50,000, as claimed by petitioner, that would not even satisfy the amount of fees currently sought by the attorneys and GAL. Further attorney's fees are bound to be incurred through the jury trial and any potential appeal. Petitioner's pursuance of this action makes no sense from an economic or financial point of view. It also turns on its head the protection intended by guardianship law.

(CP 545).

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<sup>8</sup> The invoices submitted as Attachment A to the Declaration of Tyler Farmer in support of attorney's fees show Ms. Calhoun's payments of her attorney's fees, without any court approval, in the amounts of \$55.00 on 7-28-17 (CP 87); \$1,601.14 on 3-21-18 (CP 90); \$5,495.64 on 5-24-18 (CP 93); \$441.00 on 7-2-18 (CP 95); \$532.38 on 7-24-18 (CP 96); \$168.00 on 9-4-18 (CP 97); \$428.50 on 10-1-18 (CP 98) and \$1,900 on 10-24-18 (CP 445). These amounts total \$10,621.66 and came out of Ms. Helm's funds held by Ms. Calhoun. This is close to the \$10,566.66 sought by petitioner's counsel in petitioner's motion for attorney's fees (CP 71 ¶ 4), but the \$55.00 difference was not explained.

These words proved to be pythonic, but petitioner Calhoun showed no sign of lessening her pursuit of imposing a guardianship on Ms. Helm, no matter what the cost, even though Ms. Calhoun stated in a reply dated January 9, 2019 that “[i]t is not the intent of Petitioner to leave AIP penniless” (CP 569, ¶ 19).

In response to a motion by the GAL (CP 563), Ms. Helm’s counsel filed a motion for attorney’s fees (CP 413) requesting \$60,635 plus \$2,387.70 in costs advanced through 2018 (CP 430). This did not include the fees of Dr. Muscatel, which the trial court ordered Ms. Helm to pay (CP 663, ¶ 30). Dr. Muscatel’s fees ultimately totaled \$4,500 (CP 1082).

The GAL also sought attorney’s fees of \$5,500.11 (CP 412).

These four motions were eventually heard on January 10, 2019, and an order was entered following a telephonic hearing on January 16<sup>th</sup> (CP 660-664) as follows:

The trial court approved the attorney’s fees and costs of \$30,592.25 requested by counsel for Ms. Calhoun; the \$60,635 plus costs of \$2,387.70 requested by counsel for Ms. Helm; and the \$5,500.11 requested by the GAL (CP 662, ¶ 23). The trial court also noted that “the AIP’s estate currently has insufficient funds to pay all of the approved fees and costs, and the Court reserves determination of how attorney’s fees and costs shall be allocated and how and if they will be paid.” *Id.* These fees and costs from Ms. Calhoun’s counsel, Ms. Helm’s counsel and the GAL

from January through the end of 2018 totaled \$99,112.06.<sup>9</sup> As of December 5, 2018, Ms. Helm’s estate had a balance of \$32,288.27 (CP 1162), so it was impossible for Ms. Helm’s estate to pay the \$99,112.06 in fees already approved by the court.

The trial court also gave authority to Ms. Calhoun “to hold and manage all of AIP’s funds during the pendency of the matter, including any additional funds that may be received” following entry of the order, and to charge Ms. Helm a fee from Ms. Helm’s own funds for paying Ms. Helm’s bills (CP 662, ¶ 24). The order also stated that Ms. Calhoun “shall not charge for incidentals” (*id.*).

The court further ordered that all parties were entitled to conduct discovery (¶ 25), Ms. Calhoun and Ms. Helm could conduct up to six depositions each (¶ 26), Ms. Helm and Ms. Calhoun may depose each other (¶¶ 27-28), Ms. Helm could hire Dr. Muscatel to evaluate Ms. Helm and provide a medical report to be paid out of Ms. Helm’s funds (¶ 30), and the GAL may conduct an in-person interview of Ms. Helm and have his law clerk present (¶ 32) (CP 663).

Ms. Calhoun, acting under her POA, had moved on January 2, 2019 for an order to have the court assign a trial date (CP 431). Judge McCarthy pre-assigned the case to himself and set the beginning of trial for May 28, 2019 (CP 662, ¶¶ 21 and 22). Ms. Helm had filed a jury demand on November 16, 2018 as authorized by statute (CP 102). RCW 11.88.045(3).

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<sup>9</sup> \$30,589.25 + \$60,635 + \$2,387.70 + \$5,500.11 = \$99,112.06. See CP 536 fn 1.

**8. Kitsap County Lawsuit.** Meanwhile, running in a parallel track, Ms. Helm through her attorney on November 19, 2018, filed a lawsuit in Kitsap County, where the Feigley Road and Rhapsody Drive properties were located, against Ms. Calhoun and Thomas Parker, the real estate broker to whom Ms. Calhoun had sold one of Ms. Helm's properties (CP 118-123). The Kitsap County complaint alleged that (a) Ms. Calhoun breached her fiduciary duties toward Ms. Helm by selling Ms. Helm's properties at less than fair market value, (b) Mr. Parker participated in the breach, (c) the pair engaged in a civil conspiracy to commit a breach of fiduciary duty, and (d) the pair violated the Washington Consumer Protection Act, RCW ch. 19.86 by engaging in other such practices and authorizing sales of real property in connection with other AIP's or people toward whom Ms. Calhoun had a fiduciary duty (CP 119-123). The complaint sought damages, enhanced damages under the CPA and attorney's fees (CP 123).

One week later on November 26, 2018, Ms. Calhoun through her attorney filed an ex parte verified motion to be heard in less than ninety minutes that very same day in the Yakima County Superior Court in the guardianship action for a temporary restraining order (the "TRO") to prevent the Kitsap County lawsuit from going forward (CP 103-110).

Ms. Calhoun stated her belief that the Kitsap County lawsuit was filed against her because of Ms. Helm's counsel's "effort to distract from AIP's demonstrated inability to provide for her personal and financial needs, and further an attempt to harass Petitioner" (CP 107 ¶ 19). The

purported legal rationale for the TRO was that permitting the Kitsap County action to proceed would “create legally significant consequences for the Kitsap County action if it is determined that AIP lacks the capacity to sue or be sued[,]” as the “direct consequence to AIP is the expense of that litigation to her estate” (CP 110, ¶ 37).

The court granted the TRO ex parte without reasonable notice to Ms. Helm’s attorney on November 26<sup>th</sup> (CP 126), despite the obvious conflict of interest in having a lawsuit against oneself enjoined.<sup>10</sup>

After being notified of the entry of the TRO, Ms. Helm filed a response seeking to dissolve the TRO (CP 181 – 198). She also filed a motion to vacate the 1<sup>st</sup> preliminary injunction (CP 130-140). Oral argument regarding dissolving the TRO and vacating the 1<sup>st</sup> preliminary injunction was heard on December 10, 2018 (CP 571).<sup>11</sup>

At the December 10<sup>th</sup> hearing the court orally denied Ms. Helm’s motion to vacate the TRO and her motion to vacate the 1<sup>st</sup> preliminary injunction (CP 571; CP 724). The court replaced the TRO with a preliminary injunction (the “2<sup>nd</sup> preliminary injunction”), which revoked Ms. Helm’s ability to sue, not only in the Kitsap County lawsuit but in any other lawsuit (CP 574, ¶1).

At the end of the December 10<sup>th</sup> hearing the trial court orally stated

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<sup>10</sup> The order provided that a “temporary restraining order is entered to halt prosecution of any law suit [sic] by AIP pending a hearing on Petitioner’s Motion seeking a preliminary injunction pending a determination . . . of AIP’s ability to sue or be sued other than through a guardian” (CP 126, ¶ 1).

<sup>11</sup> The order on these issues was not entered until January 10, 2019 (CP 571-575).

that this case should settle because there was no way that this level of litigation could be funded (CP 728-29).<sup>12</sup>

**9. Deposition of Ms. Helm.** Ms. Calhoun took the deposition of Ms. Helm on February 7, 2019 (CP 665; CP 945-1074). Ms. Helm demonstrated herself as quick and witty, and giving intelligent answers (e.g., CP1003, ln 9-14; CP 1004, ln 10-1; CP 1005, ln 14-16; CP 1008, ln 23-25, CP 1053, ln 13-25; CP 1054). Ms. Helm’s performance stood in sharp contrast to the narrative of an incoherent and confused woman that Ms. Calhoun’s declarations and those of her staff attempted to spin (e.g., CP 74, 6-7, CP 80, ln 24-25).

**10. Motion for Discretionary Review.** Ms. Helm filed a notice of motion for discretionary review of the trial court’s January 10, 2019 order denying the dissolution of the three preliminary “emergency” injunctions, and especially the order revoking Ms. Helm’s right to pursue the Kitsap County litigation (CP 731-742). Her brief was filed with this Court under cause #36607-3-III on February 22, 2019 and Ms. Calhoun filed a response on March 4, 2019. After Ms. Calhoun filed her motion to dismiss the guardianship proceeding on March 29, 2019 (CP 746), this Court dismissed the motion for discretionary review as being moot.

**11. Attempted Deposition of GAL and Ms. Calhoun.** When Ms. Helm sought to depose the GAL and noted the GAL’s

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<sup>12</sup> This theme was repeated by the trial court on January 10, 2019 (CP 578) and April 19, 2019 (CP 967), when the trial court again stated that this case should settle.

deposition, the GAL responded by flatly refusing to attend, giving as a reason that Ms. Calhoun had filed a motion to dismiss the guardianship petition (CP 896-897, ¶ 3). Ms. Calhoun also refused to attend her deposition noted for April 5, 2019 so that Ms. Helm could obtain her testimony under oath to explore whether Ms. Calhoun was acting in good faith (CP 896-897, ¶ 3). Ms. Calhoun's deposition was re-noted for the afternoon of April 19, 2019, and again Ms. Calhoun refused to attend (CP 897, ¶ 3).

**12. Petitioner Calhoun's Motion for a Protective Order.** On April 5, 2019 Ms. Calhoun filed a motion for a protective order to prevent Ms. Calhoun from being deposed (CP 826-829). Ms. Helm opposed the motion on the grounds that the good faith of Ms. Calhoun, a factual issue, was still relevant in the case, and that issue needed to be determined in order to resolve the issue of entitlement to attorney's fees under RCW 11.96A.150 (CP 871-72). The trial court stated that it did not think "that there's any evidence that Ms. Calhoun acted except in good faith" (CP 978), and that an evidentiary hearing or deposition of Ms. Calhoun would be a "waste of time" (CP 977, 978). The trial court denied the taking of Ms. Calhoun's deposition (CP 925, ¶ 5 crossed out).

**13. Dismissal of the Guardianship Petition.** On March 27, 2019 Ms. Calhoun unexpectedly filed a motion in the trial court to dismiss the guardianship petition without prejudice (CP 746-758). The reason Ms. Calhoun gave for the dismissal is that it was costing too much and her reputation was taking a hit on social media (CP 807-812) because of the

adverse criticism of her actions (CP 752-53). Ms. Helm did not object to the dismissal but requested a short evidentiary hearing regarding the issue of Ms. Calhoun's good faith and the ability to take the deposition of Ms. Calhoun (CP 869). On April 19, 2019, the trial court dismissed the guardianship petition but did not grant any of the relief requested by Ms. Helm (CP 924-25). The order entered stated that the petition was brought in good faith (CP 925). The order also awarded additional fees of \$5,000 to Ms. Calhoun and fees of \$4,500 to the GAL payable out of Ms. Helm's estate (CP 925).

**14. Petitioner Calhoun's Motion for Attorney's Fees and Costs.** On May 1, 2019 Ms. Calhoun's attorneys filed a motion for an order approving attorney's fees and costs and authorizing entry of judgment against Ms. Helm (CP 926). Ms. Calhoun's attorneys sought additional fees and costs of \$38,296 for the four-month period between December 26, 2018 and April 24, 2019 (CP 927-935).

Ms. Helm argued that Ms. Calhoun had essentially depleted Ms. Helm's estate through the charging of POA fees, her attorneys' fees and the GAL's fees (CP 1100), that such an attorney fee award would negatively impact Ms. Helm in her retirement (CP 1101-02), that the fees requested were excessive (CP 1108-1110), that such a fee award violated public policy (CP 1104-1105), that no provision was made for the payment of Ms. Helm's attorney's fees and costs (CP 1103-1104) and that it was essentially inequitable to make Ms. Helm foot the entire bill for Ms. Calhoun's litigiousness in trying to impose a guardianship over Ms. Helm

by depleting Ms. Helm's estate (CP 1097-1111).

Ms. Calhoun's attorney argued at the hearing that a "typical course for estate planning is what's called a Medicaid spend down and qualification for those state benefits. Ms. Helm will not be without resources even if she had nothing left, your Honor" (CP 977). In other words, after being rendered destitute by Ms. Calhoun's actions, Ms. Helm would still be eligible for public benefits.

The trial court approved total fees and costs incurred by Ms. Calhoun in the amount of \$68,885.39 (CP 1118 ¶ 8), with an unpaid balance of \$53,318.73. *Id.*, ¶ 9. A judgment was authorized to be entered in that amount, which judgment would not bear interest and would expire in four years. *Id.*

Ms. Helm was also ordered to "apply, within five (5) days of receipt, up to 50% of any inheritance received toward satisfaction of said judgment" (CP 1118 ¶ 10). A judgment was entered against Ms. Helm on May 24, 2019 in the amount of \$53,318.73 (CP 1120-21).

**15. Post Dismissal of the Guardianship Petition.** This Court of Appeals on May 14, 2019 issued a ruling terminating review of Ms. Helm's motion for discretionary review in case # 36607-3-II as being moot. Ms. Helm filed with this Court a motion to modify that ruling and consolidate the motion for discretionary review with the current appeal on June 13, 2019. This Court denied the motion to modify on October 8, 2019, but the order made no mention of the motion to consolidate.

Ms. Helm timely filed a notice of appeal on May 20, 2019 to this

Court regarding the order entered on April 19, 2019 dismissing the guardianship petition (CP 986-988). On May 24, 2019, Ms. Helm timely filed a notice of appeal of the order approving attorney's fees and costs and the judgment entered on May 24, 2019 (CP 1112-1116). An amended notice of appeal was filed on June 7, 2019 (CP 1127-1132).

## V. LEGAL ARGUMENT

### A. The Standard of Review is De Novo.

Issues of law are reviewed on appeal de novo. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Issues of statutory interpretation are also reviewed de novo. *Hartson Partnership v. Goodwin*, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000); *Guardianship of Matthews*, 156 Wn. App. 201, 212, 232 P.3d 1140 (2010).

Moreover, "[w]here the record at trial consists entirely of written documents and the trial court therefore was not required to 'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,' the appellate court reviews de novo." *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (internal quotation marks omitted) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)). "Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court." *Dolan*, 172 Wn.2d at 311, 258 P.3d 20. But substantial evidence may be the more appropriate standard in cases where the superior court reviewed "an enormous amount of

documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings." *Dolan*, 172 Wn.2d at 311, 258 P.3d 20. See, *Northwest Alloys, Inc. v. Department of Natural Resources*, \_\_\_, Wn. App. \_\_\_, 447 P.3d 620 (2019).

Here de novo review is appropriate, as the trial court did not review "an enormous amount of documentary evidence," did not hear any testimony or weigh the evidence, did not resolve inevitable evidentiary conflicts and discrepancies, and did not issue statutorily mandated written findings. *Dolan*, 172 Wn.2d at 311.

**B. Petitioner Kristyan Calhoun Acted Under Multiple Conflicts of Interest, Breached Her Fiduciary Duties and Did Not Act in Good Faith Nor Upon a Reasonable Basis.**

In *Morris v. Swedish Health Services*, 148 Wn. App 771, 777-78, 200 P.3d 261 (2009) the court discussed *good faith* and quoted a definition from Black's Law Dictionary as follows:

[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

BLACK'S LAW DICTIONARY 713 (8th ed. 2004).

"The standard definition of good faith is a state of mind indicating honesty and lawfulness of purpose." *Whaley v. State Department of Social and Health Services*, 90 Wn. App. 658, 669, 956 P.2d 1100 (1998) (immunity to "any person participating in good faith in the making of a

report” to CPS) (citing *Tank v. State Farm*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986).

As applied to an insurer’s duty to negotiate a settlement within policy limits, *good faith* generally means being faithful to one’s duty or obligation. *Tyler v. Grange Insurance Association*, 3 Wn. App. 167, 172, 473 P.2d 193 (1970) (insurance company’s failure to make a meaningful settlement offer constituted lack of good faith).

“The standard of good faith is objective . . .” *Sattler v. N.W. Tissue Center*, 110 Wn. App. 689, 695, 42 P.3d 440, *review denied*, 147 Wn.2d 1016, 56 P.3d 992 (2002); see also, *Morris, supra*, 148, Wn. App 771, 777-78.

*Good faith* involves a factual inquiry, and the actor’s conduct must be judged in light of all the circumstances then present. *Sattler, supra*, 110 Wn. App. 689, 697. “Whether a party has acted in bad faith or dishonestly will generally be an issue of fact.” *Koch v. Mutual of Enumclaw*, 108 Wn. App. 500, 509, 31 P.3d 698 (2001).

Conscious disregard of risks, delays in correcting a violation, deceptive behavior, and willful resistance to compliance are all indicative of a *lack of good faith*. *Danzer v. Dep’t of Labor & Indus.*, 104 Wn. App. 307, 324, 16 P.3d 35 (2000) (in the context of calculating penalty for WISHA violations).<sup>13</sup>

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<sup>13</sup> In the context of contracts, *good faith* “excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” *Restatement (Second) of Contracts*, § 205 cmt. a (1979).

Negligence may also give rise to a finding of lack of good faith. *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966) (crop processor performed "so ineptly, so inefficiently, and so negligently" that he did not comply with his implied covenant of *good faith*); *Long v. T-H Trucking Co.*, 4 Wn. App. 922, 926, 486 P.2d 300 (1971) (defendant's negligent truck dispatching procedures and difficulties in supplying the correct log loader violated implied covenant of good faith).

It begs the question why, if the concern of Ms. Calhoun was to protect Ms. Helm from financial exploitation, Ms. Calhoun was willing to deplete all or substantially all of Ms. Helm's assets in order to establish a guardianship over Ms. Helm. Such a position would benefit only those charging fees to Ms. Helm's estate, i.e., Ms. Calhoun and Ms. Calhoun's attorneys.

Ms. Calhoun, a certified professional guardian ("CPG"), brought a guardianship petition against Ms. Helm pursuant to the provisions of RCW ch. 11.88. Pursuant to the standards of practice ("SOPs") for CPGs, Ms. Calhoun "shall at all times be thoroughly familiar with RCW 11.88, RCW 11.92, GR 23, these standards, and any other regulations or laws which govern the conduct of guardians in the management of the affairs of an incapacitated person." SOP 401.3 (App A, p. 3).<sup>14</sup> "[CPGs] shall comply with the provisions of chapter 11.88 and 11.92 RCW." GR 23(d). Other applicable regulations or laws include the common law of agency and the

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<sup>14</sup> The Standards of Practice Regulations are promulgated by the Certified Professional Guardian Board of the State of Washington (App. A).

Uniform Power of Attorney Act (RCW ch. 11.125).

RCW 11.88.030(1) provides in relevant part that “[n]o liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in *good faith and upon reasonable basis*” [italics added].

RCW 11.88.090(10) provides in relevant part that “[i]f the [guardianship] petition is found to be frivolous or not brought in good faith, the guardian ad litem fee shall be charged to the petitioner.” RCW 11.96A.150 further makes it clear that the superior court or any court on appeal “may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party” from any party or the assets of the estate “as the court determines to be equitable.” See App. E. Accordingly, the right to attorney’s fees is inextricably bound to the issue of whether that party acted in good faith and upon a reasonable basis. Ms. Calhoun’s failure to act in good faith and on a reasonable basis permeates the duration of her relationship with Ms. Helm, as described below, and made the trial court’s award of attorney’s fees out of Ms. Helm’s estate to be inequitable and an abuse of discretion.

**1. Ms. Calhoun Failed to Act in Good Faith and on a Reasonable Basis in Her Conduct Under the POA Before Filing the Guardianship Petition.**

"[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970). This control of the agent by the principal is a

prerequisite of agency. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 107, 285 P.3d 34 (2012). The agent has a fiduciary duty which demands the utmost good faith. *Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997) (citing *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966)). It is generally recognized that an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency. *Cantwell v. Nunn*, 45 Wash. 536, 540, 88 Pac. 1023 (1907).

Thus, the appropriateness and equity of any award of Ms. Calhoun's fees and attorneys' fees is essentially connected to Ms. Calhoun's good faith *vel non* – both while acting as an agent under a POA and later as a guardianship petitioner. The following subsections describe how Ms. Calhoun's lack of good faith permeated her dealings as agent under a POA for Ms. Helm.

**a. Petitioner Calhoun Did Not Investigate Ms. Helm's Competency and Did Not Ensure that Ms. Helm had Legal Advice Before Signing the POA.**

“When a CPG is entering into a relationship with a principal, such as a . . . POA, the CPG should ensure that the principal has the benefit of independent legal counsel before entering the relationship.” CPG Board Ethics Advisory Opinion # 2005-003 (App. F, Opn. Sec. ¶ 2.).

Ms. Calhoun received a signed authorization to obtain all of Ms. Helm's medical records at South Dakota HSC in November 2016 (CP 768) and received significant medical records on December 5, 2016 (CP 905).<sup>15</sup>

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<sup>15</sup> There are no time entries or records showing Ms. Calhoun reviewed any of these medical

Ms. LaCroix likely drafted the POA as the attorney for SD HSC, not as the attorney for Ms. Helm, and Ms. Helm was given no legal advice or counseling about the POA (CP 147, ¶ 2; CP 375, ¶ 14; CP 747 ¶ 6). Following receipt of Ms. Helm’s medical records, Ms. Calhoun obtained a POA signed by Ms. Helm on 12-16-16.

Ms. Calhoun claims that as a prerequisite to accepting an AIP as a client, she “requires” that an attorney meet with the AIP and treating professionals to determine if the AIP has the capacity to sign a POA and advise the AIP as to its ramifications (CP 230 ¶ 7). She does not specifically claim that she satisfied this “requirement” in this particular case.<sup>16</sup>

Kristyan Calhoun accepted a power of attorney from Ms. Helm in December 2016 while knowing, or reasonably having known, that Ms. Helm did not have legal advice before signing the power of attorney and did not have the power of attorney explained to Ms. Helm. Ms. Helm apparently signed the Service Agreement on January 3, 2017 allowing Ms. Calhoun to provide services to Ms. Helm (CP 113). Ms. Calhoun accepted these legal documents and acted upon them without any inquiry or investigation as to Ms. Helm’s competence to sign such agreement.<sup>17</sup> Ms.

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records, or, for that matter, had a telephone call with or met with Ms. Helm before Ms. Helm arrived in Yakima in August 2017.

<sup>16</sup> Ms. Helm objected to the conclusory statements in Ms. Calhoun’s declaration (CP 361 ¶ 5). The trial court refused to rule on this objection and other objections to the vague, unsubstantiated and hearsay statements in Ms. Calhoun’s declaration (CP 692). Ms. Calhoun declared under penalty of perjury that “[a]n attorney was appointed to represent AIP in South Dakota who assisted AIP in executing a Durable Power of Attorney naming Petitioner as her attorney in fact” (CP 104, ¶ 3), but provided no facts, or name of the supposed attorney, to support that conclusion.

<sup>17</sup> There are no time charges in Ms. Calhoun’s billing records relating to an investigation

Calhoun did not care about Ms. Helm's competency because Ms. Calhoun's motivation was to charge fees to Ms. Helm's estate, and by using a POA Ms. Calhoun could avoid the scrutiny of a court with regard to the fees she was charging.

Ms. Calhoun failed to observe the standards required of a CPG and was not faithful to her duties and obligations as a fiduciary. Accordingly, her conduct constituted lack of good faith. *Tyler, supra*, 3 Wn. App. 167, 172; SOP 406.1 (App. D, p. 10); and CPG Board Ethics Advisory Opinion # 2005-003 (App. F, Opn. Sec. ¶ 2), *supra*.

**b. Ms. Calhoun Acted Under a Conflict of Interest in Having Ms. Helm Sign an Ambiguous Service Agreement Without Consulting with Ms. Helm.**

There is no evidence that Ms. Helm had any legal advice or even talked to Ms. Calhoun about the Service Agreement before apparently signing it (CP 249). This violates SOP 409.1 (competent management of estate property and avoiding any self-interest).

In addition, the Service Agreement contains the following ambiguous sentence: "Kristyan will address the properties being liquidated to fund Ms. Helm-O'Dell's care costs at the least restrictive alternative possible" (CP 250). This sentence could mean (1) Kristyan will in the future discuss the issue of whether properties will be liquidated to fund Ms.

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of Ms. Helm's competence (CP 905).

Helm's health care costs . . . , or (2) Kristyan will deal with the properties which will be liquidated to fund Ms. Helm's health care costs . . .<sup>18</sup> This is the sole authority Ms. Calhoun has upon which to sell Ms. Helm's properties, but such authority is insufficient for such purposes under the circumstances.

Clearly Ms. Calhoun was acting under a conflict of interest, as she wanted funds with which to pay her own fees and the least management responsibility. The interest of Ms. Helm was to keep her income-producing properties as long as possible. Ms. Calhoun resolved this conflict in her own favor.

**c. Ms. Calhoun Quickly Sold Ms. Helm's Real Property Over Objection at Grossly Inadequate Prices Without Appraisals and Without Appropriately Listing the Properties, in Breach of Her Fiduciary Duties and Against Her Obligation of Good Faith.**

Ms. Helm purchased the Rhapsody Drive property containing a manufactured home in 2005 for \$117,000 (CP 173 fn 3). Ms. Calhoun, over Ms. Helm's objection, sold it on February 17, 2017 for \$28,000, netting \$26,435 (CP 147 ¶ 3; CP 1202; CP 456 ¶ 3). The assessed value at the time

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<sup>18</sup>There is evidence that in Ms. Calhoun's mind the properties were going to be sold, as she contacted Thomas Parker on December 22, 2016, *before the Service Agreement was signed*, "regarding Bremerton properties" (CP 905). But there is no evidence that Ms. Calhoun discussed the sale of any properties with Ms. Helm. The average reader could therefore assume that the first interpretation would appear more likely, especially since the words "will address" do not indicate that a decision has already been made. Also, the words "at the least restrictive alternative possible" appear confusing and out of place. Perhaps Ms. Calhoun, the obvious drafter of the Service Agreement, meant "at the least cost possible." It is also not obvious now from reading the Service Agreement what properties are being referred to, what is "being liquidated" or how liquidation would occur.

was \$64,704 (CP 477). The quick sale of Ms. Helm's Rhapsody Drive property to Thomas Parker, a real estate broker friend of Ms. Calhoun, at a grossly inadequate price without an appraisal and without "testing the market" as required by *Allard v. Seattle-First National Bank*, 99 Wn.2d 394, 406, 663 P.2d 104 (1983) was a clear breach of fiduciary duty.

Ms. Calhoun also breached her fiduciary duty by selling Ms. Helm's Feigley Road property without an appraisal and without adequately exposing the property to market, at a price less than fair market value. *Allard, supra*, 99 Wn.2d at 406.

These breaches of fiduciary duty ultimately led to the filing of the Kitsap County lawsuit against Ms. Calhoun (CP 118-123). These breaches of fiduciary duty also led to Ms. Helm's dissatisfaction with Ms. Calhoun's services. Ms. Helm had used her life's savings to purchase the two Kitsap County properties. She used them as rentals to fund her retirement (she will be 73 years old this year). By selling the properties without consultation with Ms. Helm, Ms. Calhoun destroyed all of Ms. Helm's retirement planning and most of Ms. Helm's future retirement income. Ms. Helm now receives only \$590 per month in social security income, which is far below the poverty level and clearly insufficient to support any decent standard of living in our society during Ms. Helm's old age.

Such conduct pointedly demonstrates Ms. Calhoun's breach of fiduciary duty and lack of good faith.

**d. Ms. Calhoun Sold Properties to Obtain Quick Funds to Pay her own Fees Without a Plan for Ms. Helm's Financial Security in Retirement.**

Ms. Calhoun controlled all of Ms. Helm's property from December 16, 2016 when the POA was signed (CP 1202). Thereafter Ms. Calhoun simply charged fees without the oversight of the court, or anyone else, and provided no regular accounting statements to Ms. Helm which would show the dissipation of most of the proceeds of the real estate sales of Ms. Helm's properties.

The sales of the Rhapsody Drive and Feigley Road properties were made primarily for the purpose of providing funds to pay the fees of Ms. Calhoun and her lawyer, without a plan for Ms. Helm's financial future in retirement, at odds with the standards governing CPGs. SOP 410.1 (App. D at 16) (CPG has a duty to conserve the estate of the incapacitated person).

The rush to sell Ms. Helm's assets occurred even before January 2017, as evidenced by Ms. Calhoun's frequent contacts with her real-estate broker friend, Thomas Parker, to discuss sale of the property. See, the timeline in Appendix G (CP 898). Nor did Ms. Calhoun need the money from the sales of the real estate to move Ms. Helm back to Yakima. The proceeds from the sale of Ms. Helm's car could have been used for that purpose.<sup>19</sup>

**e. Ms. Calhoun Charged Excessive Fees.**

It is noteworthy that the largest single expense from the sales proceeds were the fees paid to Ms. Calhoun through Senior Avenues.<sup>20</sup> For

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<sup>19</sup> While Ms. Calhoun decided to ship Ms. Helm's car to Yakima, thousands of dollars could have been saved by selling the car instead of shipping it. Ironically, Ms. Calhoun returned the vehicle to Ms. Helm only after the guardianship petition was dismissed.

<sup>20</sup> Senior Avenues charged and paid itself \$17,094.67 in fees from 3-19-17 to 3-2-18) (CP

example, Ms. Calhoun charged a minimum of \$22.00 to write a check for Ms. Helm, and in one case charged \$124 to deliver a \$500 check to Ms. Helm (CP 1184, time entry for 11-29-18).<sup>21</sup> Such fees are excessive and unreasonable on their face. “[D]ecisions to provide services and incur fees shall be made in a way as to reflect [the duty to conserve the estate] . . . Services requiring a minimal degree of training, skill and experience should be billed accordingly” SOP 410.1 (App. D, p. 16). All compensation should be documented, reasonable in amount and must disclose the identity and job classification of the person performing the service. SOP 410.2. These requirements were not satisfied. Charging \$70 to \$110 per hour for filing, faxing, and routine administrative tasks is clearly excessive and unreasonable billing.

Charging excessive fees is indicative of a lack of good faith.

**f. Ms. Calhoun Filed the Guardianship Petition for an Ulterior Motive and in Bad Faith.**

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1203). Senior Avenues charged and paid itself \$7,978.32 in fees from 6-1-18 to 12-4-18 (CP 1161-62). The total charges for the two-year period exceed \$25,000. The bills for the most part consist of numerous small transactions by the more than ten people who work at Senior Avenues, all charging from \$70 to \$110 per hour. For example, on 6-21-18 Senior Avenues, Ms. Calhoun’s company, charged Ms. Helm \$27.50 to write a \$92.21 check to Genoa Health Care (.25 hours at \$110 per hour) (CP 1171); on 7-17-18 it charged Ms. Helm \$22 to write a check to Genoa Health Care in the amount of \$68.53 (.2 hours at \$110 per hour) (CP 1172); and on 9-21-18 it charged Ms. Helm \$22.00 to write a check to American Medical Response in the amount of \$84.24 (.2 hours at \$110 per hour) (CP 1175). There are many other examples (CP 1171, 1172 and 1175).

<sup>21</sup> The accounting of Senior Avenues shows that on 11-29-18 employee Lora Anderson (“LA”) went with employee Katelyn Andrews (“KA”) to deliver a \$500 check for Ms. Helm’s personal expenses. Ms. Anderson billed .75 hours at \$70/hr. for a total charge of \$52.50. An entry on the same date shows that Ms. Andrews also billed .65 hours at \$110/hr., amounting to a charge of \$71.50 for accompanying Ms. Anderson. It thus actually cost Ms. Helm \$124 (the sum of \$52.50 and \$71.50) to receive her \$500 check. This amounts to a charge of 25% (CP 1183-84). Judge McCarthy approved this fee, as he reduced no fees requested by Ms. Calhoun or her attorneys.

Ms. Calhoun learned on December 13, 2017, that Ms. Helm's brother, Glenn Helm, had encouraged Ms. Helm to transfer her money to Glenn for investment (CP 12, ¶ 7). Ms. Helm was dissatisfied with Ms. Calhoun's sale of Ms. Helm's properties at less than fair market value and was dissatisfied with the high cost of Ms. Calhoun's services (\$70 per hour for faxing, e-mailing, filing and other routine tasks) (CP 148, ¶ 3).

Ms. Calhoun responded on January 23, 2018 by filing the instant verified petition to impose a guardian of the person and estate over Ms. Helm (CP 1). The reason currently given by Ms. Calhoun for filing the guardianship petition in this action is that she was *concerned* with what she alleged to be an attempt at financial exploitation by Glenn based on the above letter, given Ms. Helm's "vulnerable status while in-patient" at Eastern State Hospital (CP 749, ¶ 17).<sup>22</sup>

To block the transfer of Ms. Helm's assets to Ms. Helm's brother, Ms. Calhoun also obtained on January 23, 2018 a contemporaneous "emergency temporary" order ex parte and without notice to Ms. Helm restraining Ms. Helm from revoking the POA given to Ms. Calhoun on 12-16-16 (CP 9). These actions were not emergencies and were not needed to "protect" Ms. Helm. Ms. Calhoun took these actions solely to maintain

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<sup>22</sup> Ms. Helm did not have a "vulnerable" status at Eastern, because Ms. Calhoun controlled all of Ms. Helm's assets and it would have been impossible for Glenn Helm to exploit those assets (CP 1202). There is no evidence that Ms. Calhoun conducted any investigation to determine whether exploitation would occur, or even called Glenn to find out the purpose of the letter in question. Senior Avenues contacted Glenn by email on 1-18-17 and 1-22-17 concerning Ms. Helm's septic drain field and could easily have contacted him regarding his intentions (CP 907). In other words, Ms. Calhoun provided an after-the-fact reason for filing the guardianship petition, when the real purpose was to protect the income stream to Ms. Calhoun from Ms. Helm's estate.

control over Ms. Helm’s assets, as Ms. Calhoun was charging an average of \$1,000 per month for her services and obviously wanted that income stream to continue (CP 457, ¶ 5; CP 1164-1185).<sup>23</sup>

The indicia of Ms. Calhoun’s bad faith filing of the guardianship petition and motion for “emergency temporary” relief are compelling.

First, the verified petition falsely alleges that the “AIP has been diagnosed with dementia” and that “[d]ue to the AIP’s dementia, she is at risk of serious personal and financial harm” (CP 2, ¶ II).<sup>24</sup> There is no such diagnosis in Ms. Helm’s medical records, and dementia had been ruled out as recently as 11-18-17, some two months before the verified guardianship petition was filed (CP 1209, ¶ g).<sup>25</sup> See App. A. So, Ms. Calhoun used the false diagnosis of dementia to justify filing the verified guardianship petition and to obtain the order for “emergency temporary” relief blocking the revocation of the POA to benefit Ms. Calhoun. This tactic is the epitome

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<sup>23</sup> Thus, the statement in COL 19 (CP 573, ¶ 19) that Ms. Calhoun’s “motion for a preliminary injunction was brought for a proper purpose[.]” is not supported by substantial evidence, as there was no live testimony on the issue, there were false assertions and statutory lapses in the verified petition, and the timing of filing of the guardianship petition strongly suggests Ms. Calhoun’s ulterior motive, especially when considering that Ms. Calhoun’s fees charged under the POA without any court supervision gave Ms. Calhoun a strong financial motive to keep the cash cow in place. Ms. Calhoun’s fees over the two-year period were the largest single expense paid out of Ms. Helm’s funds, and amounted to over \$25,000 (CP 457, ¶ 5) [\$17,094 through 3-2-18]; (CP 1164-1185) [\$7,997.82 from May to November 2018].

<sup>24</sup> The verified petition also falsely alleged that the “AIP generally suffers from impairment of intellectual abilities such as attention, orientation, memory, judgment, and language” (CP 2, ¶ 2).

<sup>25</sup> “As disorganized as she was when she was in the community, a question was raised as to whether she had developed dementia. I made a Mini-Mental State Examination on 11/08/17, and she scored 26/30 which is within normal range.” Discharge Summary of Dr. Momeni (CP 1198). App. A.

of bad faith.

Second, the verified guardianship petition failed to specify what incapacities Ms. Helm had, as required by RCW 11.88.030(1)(b). That statute requires that a guardianship petition shall state “[t]he nature of the alleged incapacity in accordance with RCW 11.88.010.” RCW 11.88.030(1)(b). RCW 11.88.010 defines incapacity in terms of a significant risk of personal or financial harm. RCW 11.88.010(1)(a) and (b).<sup>26</sup> The petition filed by Ms. Calhoun contains no clue as to what Ms. Helm’s specific alleged incapacities are, as statutorily required, other than that she has (incorrectly) been diagnosed with dementia. This failure to specify Ms. Helm’s alleged incapacities supports the conclusion that Ms. Calhoun, an experienced certified professional guardian, either (a) lacked any knowledge of what those incapacities were or (b) intentionally misled the court regarding a highly significant aspect of any guardianship proceeding. Either conclusion strongly demonstrates Ms. Calhoun’s lack of good faith.

Third, the verified petition did not explain the reason for naming Amy Clark as GAL, as required by statute. The petition requested the

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<sup>26</sup> RCW 11.88.010 provides as follows: “(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

“(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.”

appointment of a specific GAL, Amy Clark (CP 4, ¶ XIII). No reason is given for the request of a specific GAL. This omission violates RCW 11.88.030(1)(l), which requires, when a specific individual is proposed as GAL, disclosure of the proposed GAL's "knowledge of or relationship to any of the parties, and why the individual is proposed." RCW 11.88.030(1)(l). This required disclosure is obviously for transparency purposes. Amy Clark has, in fact, a lengthy relationship with Ms. Calhoun,<sup>27</sup> which was never disclosed, and Ms. Clark even produced a lengthy interim report dated 4-2-18 (CP 1147-1152), which is less than a month after Ms. Helm was released from Eastern State Hospital, recommending the imposition of some form of guardianship. Ms. Calhoun has constantly throughout these proceedings referred to that interim report as supporting Ms. Calhoun's argument that a guardianship in some form was needed for Ms. Helm (CP 68 ¶ 15; CP 71 ¶5; CP 106 ¶ 12; CP 109 ¶ 30; CP 749 ¶ 19). Yet after a year the GAL had not completed her final report and in fact never completed a final report before the guardianship case was dismissed.<sup>28</sup>

Fourth, the POA was revocable (CP 242-246). Ms. Helm had the right to revoke it at any time, both under general agency principles and

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<sup>27</sup> In fact, Ms. Clark was requested and appointed as a GAL in a number of other cases in which Kristyan Calhoun was the petitioner (CP 874, ¶ 7; CP 515). These cases give rise to serious concerns about Ms. Clark's objectivity, neutrality and fairness (CP 518 fn 6). Ms. Clark also expressed concern about whether Ms. Helm understood the cost of Ms. Helm's attorney in this case, but expressed no concern about Ms. Calhoun's monthly fees and the cost of Ms. Calhoun's attorneys (CP 384), even though Ms. Helm had "grave concern about her finances . . ." (CP 384).

<sup>28</sup> The interim GAL report also failed to consider a number of factors, discussed *infra*.

under the Uniform Power of Attorney Act, RCW 11.125.160(4).

Moreover, the GAL volunteered her opinion in a response to Ms. Calhoun's motion for dismissal that the "petition [sic] was not filed frivolously, but, instead in good faith" (CP 837). It is not apparent that the GAL understands the contours of "good faith," as "good faith" is not the opposite of "frivolous." Also, the GAL, Amy Clark, is not a lawyer, so has no qualification to opine on the legal definition of "good faith."

Ms. Calhoun's failure to satisfy the important statutory requirement that a reason be given in the verified petition for the specification of a particular GAL is not only troubling but calls into question Ms. Calhoun's motives and good faith in filing the petition.

**2. Ms. Calhoun Failed to Act Reasonably and in Good Faith by Aggressively Litigating Without Regard to Expense and then Dismissing the Case Just Before the Jury Trial After Exhausting Ms. Helm's Estate.**

**a. Ms. Calhoun Did Not Mediate in Good Faith.**

The parties engaged in mediation on May 16, 2018 for an entire day (CP 106 ¶ 13; CP 144 ¶ 4; CP 406; CP 92). Ms. Calhoun failed to mediate in good faith. She conditioned a settlement, i.e., dismissing the guardianship petition, upon her receiving a complete release of liability, where Ms. Helm would not be made whole from the damages incurred through the real estate sales at less than fair-market value (CP 144 ¶ 4). Ms. Calhoun billed the entire mediation fee of \$ 4,354.32 to Ms. Helm (CP 1162).<sup>29</sup>

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<sup>29</sup> Paul Larson of Larson Berg & Perkins was the mediator.

Conscious disregard of risks is indicative of a lack of good faith. *Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 324, 16 P.3d 35 (2000). Here, Ms. Calhoun disregarded the risks and costs of the litigation approach she took, until she had virtually depleted Ms. Helm's estate. Then she voluntarily moved to dismiss the guardianship petition. This conduct clearly demonstrates the lack of good faith.<sup>30</sup>

In essence, Ms. Calhoun used the pending guardianship proceeding as a weapon to try to extract a release of liability for the damages resulting from her misconduct and then voluntarily dismissed the guardianship action a year later when there was no money left in the Ms. Helm's estate to pay Ms. Calhoun's attorney's fees (CP 144 ¶ 4).

Moreover, Ms. Calhoun should have known that her aggressive and weaponized legal strategy would soon run down Ms. Helm's estate, in stark violation of her fiduciary duty, both under the POA and as a certified professional guardian. (SOP 410.2, Appendix D, pp. 13-15).

In addition to the large attorneys' fees that Ms. Calhoun knowingly and willingly incurred with reckless abandon, Ms. Calhoun's own fees averaged over \$1,000 per month (CP 457, ¶ 5; CP 1164-1185). In contrast, Ms. Helm's income was now a paltry \$590 per month in social security since Ms. Helm no longer had her income producing properties (CP 1161). As of June 4, 2018, Ms. Helm had \$56,112.25 left in her estate (CP 1161).

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<sup>30</sup> Furthermore, not mediating in good faith, especially by using the pending guardianship proceedings as a weapon to try to extract a release of liability for the damages resulting from petitioner's own misconduct demonstrates the lack of good faith (CP 144 ¶ 4).

By the dismissal of the guardianship petition on April 19, 2019, Ms. Helm's financial position had been radically altered to a large negative net worth position of \$162,059.39: Liquid funds of only \$17,809.29 (CP 992) less the sum of money owed for \$10,385.95 in legal costs incurred (CP 1082), a judgment for Ms. Calhoun's unpaid attorneys' fees of \$53,318.73 (CP 1121), and her own counsel's fees of \$116,160 (CP 1082). There is no evidence that Ms. Calhoun considered or weighed at any time the legal costs of proceeding with litigation and the effect on Ms. Helm's estate, versus the benefit of establishing a guardianship, or whether Ms. Calhoun considered any less restrictive alternatives which would adequately protect Ms. Helm. Ms. Calhoun's lack of management and failure to realize the financial unsustainability of her actions essentially eroded Ms. Helm's entire estate, in violation of SOP 409.1, 409.2, 409.4, 409.8, 409.11, 410.2 (Appendix D, pp. 13-15).

Finally, the guardianship process was not going to be successful. The GAL stated in open court on April 19, 2019 that "any guardianship in this case would be—it would be a failure" (CP 970). She further stated that "I don't believe that this guardianship will be successful even if it is put into place. It just won't be" (CP 971). She and Ms. Calhoun, who have frequently worked together, should have come to their senses much sooner and either never filed the guardianship petition, or dismissed it much earlier.

Ms. Calhoun's course of conduct displays an obvious lack of good faith.

**b. Ms. Calhoun, Acting Under a Conflict of Interest and in Bad**

**Faith, Obtained an “Emergency” TRO Ex Parte Without Notice Blocking Ms. Helm’s Constitutional Right of Access to the Courts and Halting Prosecution of Her Kitsap County Lawsuit Against Ms. Calhoun and the Parkers for Their Breach of Fiduciary Duty.**

Ms. Calhoun obtained an “emergency” temporary restraining order (the “TRO”) on November 26, 2018 ex parte and without reasonable or proper notice to Ms. Helm’s attorney, which TRO restrained further proceedings in the lawsuit filed by Ms. Helm against Ms. Calhoun and Thomas Parker in Kitsap County Superior Court for breach of fiduciary duty, violation of the CPA and other claims (CP 103-111).

Ms. Calhoun’s actual conflict of interest in obtaining the TRO is apparent. She sought to block a lawsuit against herself for her own breach of fiduciary duty and CPA violations, and she sought the TRO as agent under the POA against the clear and contrary interest of her principal, Ms. Helm.

Such conflict of interest is egregious and improper. As noted earlier, an agent has a fiduciary duty which demands the utmost good faith. *Crisman v. Crisman, supra*, 85 Wn. App. 15, 22; *Moon v. Phipps, supra*, 67 Wn.2d 948, 956. An agent under a POA must “[a]ct so as not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest.” RCW 11.125.140(2)(b). An agent must “[a]ct loyally for the principal’s benefit. RCW 11.125.140(a). Ms. Calhoun clearly violated these principles.

Moreover, Ms. Calhoun compounded the egregiousness of her conduct by depriving Ms. Helm of her constitutional right of access to the

courts in connection with the Kitsap County lawsuit. The right to sue has been described as “is one of the highest and most essential privileges of citizenship.” *Davis v. Cox*, 183 Wn.2d 269, 291, 351 P.3d 862 (2015) (quoting *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 777 (1983) (stating that nonfrivolous lawsuits are constitutionally protected, and when a suit raises a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences drawn from undisputed facts, the First Amendment requires that the suit cannot be enjoined because that would “usurp the traditional factfinding function” of the jury). Ms. Calhoun intentionally deprived Ms. Helm of that right by having Ms. Helm’s right to sue revoked, which carried along with it Ms. Helm’s right to pursue the Kitsap County litigation against Ms. Calhoun.

Ms. Calhoun’s claim that she was only trying to protect Ms. Helm’s estate by filing a motion for a TRO, when the object all along was an attempt to protect Ms. Calhoun from personal exposure in the Kitsap County litigation, is further evidence of Ms. Calhoun’s disingenuous and selfish pursuit of her own agenda and lack of good faith in these guardianship proceedings.<sup>31</sup>

The trial court also abused its discretion by entering the TRO (CP

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<sup>31</sup> Ms. Calhoun asserted in a verified petition seeking the TRO that permitting the Kitsap County lawsuit to proceed “would create legally significant consequences for the Kitsap County action if it is determined that AIP lacks the capacity to sue or be sued. The direct consequence to AIP is the expense of that litigation to her estate” CP 110, ¶ 37). Ms. Calhoun also asserted that the “filing of [the Kitsap County] lawsuit is a calculated step to harass Petitioner and cause unnecessary delay in proceedings” (CP 110, ¶ 36).

124-126) and by failing to vacate it (CP 571-575).

First, the trial court's conclusion of law to the effect that "immediate and irreparable harm to AIP's estate exists" if the Kitsap County action is pursued while the guardianship action is pending, is manifestly incorrect (COL 21, CP 573, ¶ 21). No one has yet specified what that harm is and COL 21 is not based on substantial evidence.

Second, the trial court determined that the Kitsap County action "has and will continue to interfere with" the guardianship action (FOF 13, CP 573, ¶ 13), but neither the trial court's 1-10-19 order (CP 574) nor any argument of Ms. Calhoun<sup>32</sup> has given any example of such interference.<sup>33</sup> There are other factual findings which are not supported by substantial evidence.<sup>34</sup>

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<sup>32</sup> Ms. Calhoun made no argument that the action filed by Ms. Helm in Kitsap County would interfere with the guardianship proceedings (CP 327-334). In fact, Ms. Calhoun made exactly the opposite argument, i.e., that raising the issue of Ms. Calhoun's breach of fiduciary duty in the guardianship proceedings was improper, as being outside the narrow focus of a guardianship proceeding. "This alleged breach of fiduciary duty is not relevant to the guardianship proceeding" (CP 333 ¶ 37). "A guardianship proceeding has a very narrow and specific focus. The relevant questions pertain to the abilities of the AIP and her ability to manage her affairs and prevent self-harm" (CP 64-65 ¶ 19).

<sup>33</sup> The trial court stated, in granting the TRO (preliminary injunction), "I think that the litigation in Kitsap County is going to—already has and will continue to interfere with this proceeding, which is of paramount importance, getting the issue of Ms. Helm's capacity, whether she is an incapacitated person, get that determined by a finder of fact, jury or judge is paramount" (CP 723-724). Interestingly, the GAL in her interim report never recommended taking the right to sue away from Ms. Helm, and Ms. Calhoun, before she got sued by Ms. Helm, never sought to limit Ms. Helm's ability to sue or be sued.

<sup>34</sup> FOF 14 (CP 573, ¶ 14) states that "AIP does not have the financial resources to pay for protracted litigation." This statement is not based on any evidence, where the Kitsap County litigation is a contingent fee case (CP 458, ¶16). FOF 15 (CP 573, ¶ 15) to the effect that "determination of AIP's rights and capacities is paramount to other matters[.]" suggesting that all parties have to drop everything until Ms. Helm's capacity to sue is determined, is also incorrect. Ms. Helm is *presumed* to have capacity. See Sec. D *infra*. No reason has been given why the Kitsap County lawsuit cannot proceed on a parallel track with the guardianship proceeding. If it is later determined that Ms. Helm does not have

Third, the requirements for issuance of an injunction set forth in *Kucera v. State Department of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) were not satisfied, i.e., Ms. Calhoun cannot show that she has a “clear legal or equitable right”; that she has a “well-grounded fear of immediate invasion of that right”; and that “actual and substantial injury” will result to her. The court is also required to balance the relative interest of the parties and the public. *Id.* at 221. Finally, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. *Id.* at 209.

Here, Ms. Calhoun had no clear right not to be sued in Kitsap County for her breaches of fiduciary duty and CPA violations and she could show no actual or substantial injury, other than having to defend herself in a lawsuit, but that is not a legally cognizable injury. Ms. Calhoun also had a plain, complete, speedy and adequate remedy at law, i.e., defend herself in the Kitsap County lawsuit, just as every other defendant in a lawsuit has to do. Accordingly, it was error for the trial court to take away Ms. Helm’s right to sue Ms. Calhoun in Kitsap County and bar the prosecution of that lawsuit, particularly given the presumption of Ms. Helm’s capacity, discussed *infra*.<sup>35</sup>

Denying one’s constitutional right to access the court or delaying that access significantly burdens the litigant who is affected and constitutes

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capacity to sue, then a guardian or GAL could substitute for Ms. Helm. This is no different from what happens when a litigant dies and his PR is substituted as a party.

<sup>35</sup> Incidentally, the trial court in the Kitsap County lawsuit denied the Calhoun and Parker defendants’ CR 12(b)(6) motion to dismiss the lawsuit (CP 1224).

actual prejudice. The longer it takes for Ms. Helm to be compensated in the Kitsap County case, the higher the probability that she won't be fully compensated or won't be compensated at all. This is the actual prejudice incurred by Ms. Helm and contradicts FOF 16 (CP 573, ¶ 16), which baldly states that there is no evidence of "actual prejudice to AIP" if she cannot proceed with the Kitsap County lawsuit until her capacity is determined, and COL 23 (CP 573, ¶ 23) which states that Ms. Helm's estate will not "suffer detriment or damage" as a result of being enjoined from suing.

Finally, FOF 15 and COL 22 to the effect that the "determination of AIP's capacity is paramount to other actions at this time" (CP 573, ¶22) (1) ignores the balancing of the equities, (2) exalts a matter to be determined at trial over the presumption of Ms. Helm's competency, (3) impairs Ms. Helm's constitutional and fundamental rights, and the right of the public to be informed, and (4) frustrates the statutory mandate that because the establishment of a guardianship involves a loss of a significant liberty interest, the standard of proof in a contested guardianship case is the very high bar of "clear, cogent, and convincing evidence." RCW 11.88.045(3). The trial court abused its discretion in failing to balance the above equities, in failing to apply the *Kucera* factors and in even considering the public interest with respect to the CPA violations.

Ms. Calhoun's actions and her use of the legal system as a weapon to interfere with Ms. Helm's constitutionally protected right of access to the courts for selfish purposes further demonstrate Ms. Calhoun's pattern of conduct evidencing her lack of good faith in these proceedings.

**c. Ms. Calhoun Sought and Obtained an “Emergency” Order to Remain in Control Over Ms. Helm’s Assets, Including an Anticipated Inheritance.**

Ms. Calhoun “learned” from some unknown source that Ms. Helm was likely to inherit “tens of thousands of dollars” from the estate of Ms. Helm’s recently deceased sister (CP 68 ¶ 12). Not being satisfied with using up the estate Ms. Helm already had, Ms. Calhoun wanted to make sure she could control future monies coming into Ms. Helm’s estate to “protect” Ms. Helm. Even though there was no emergency, Ms. Calhoun filed another “emergency” motion to obtain an order to control future funds, including any inheritance, coming into Ms. Helm’s estate (CP 66-69).

Paragraph 24 of the trial court’s 1-16-19 order grants Ms. Calhoun the authority “to hold and manage all of AIP’s funds” and “charge a fee for her services” monthly (CP 662, ¶ 24). Ms. Calhoun’s fees have averaged over \$1,000 per month from December, 2016 to December, 2018 (CP 1203; CP 1161-62), mostly for ministerial functions such as scanning, faxing, filing, writing checks, running errands, etc., charged by Ms. Calhoun and her staff of ten people at rates between \$70 and \$110 per hour for what Ms. Helm considers to be unnecessary services (CP 155; CP 461-474).

Ms. Helm terminated Ms. Calhoun’s services on November 28, 2018 (CP 326), as Ms. Helm had a right to do, since the Service Agreement was expressly revocable (CP 113, ¶ 4).<sup>36</sup> Ms. Helm did not believe she could afford to pay \$1,000 each month of her social security income of \$590

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<sup>36</sup> The Service Agreement provides that the “agreement for care management services may be terminated by either party *for any reason* with notice” [italics added] (CP 113, ¶ 4).

per month (CP 147), as Ms. Helm is very thrifty (CP 561, ¶ 11) and can herself pay her bills each month (CP 148, ¶ 5). Her brother, Glenn, or her attorney could have held the remaining \$30,000 of her estate, if necessary (CP 561, ¶ 11). Ms. Helm should have had the benefit of the presumption of her competency. Moreover, the petition does not allege that Ms. Helm “is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs[,]” which is the test for establishment of a guardian of the estate under RCW 11.88.010(1)(b)) and which is required to be pleaded under RCW 11.88.030(1)(b).

Ms. Calhoun’s attempting to retain control of Ms. Helm’s assets and to take control over Ms. Helm’s anticipated inheritance through seeking an “emergency” order requiring such funds to be held by her or a third party without an adequate or reasonable basis shows Ms. Calhoun’s lack of good faith.<sup>37</sup> *Williams, supra*, 29 Wn. App. at 132.

**d. Ms. Calhoun Refused to Attend her Deposition and Misrepresented her Meetings with Ms. Helm.**

When Ms. Helm sought to depose the GAL and noted the GAL’s deposition, the GAL responded by flatly refusing to attend, giving as a reason that Ms. Calhoun had filed a motion to dismiss the guardianship petition (CP 896-897, ¶ 3). Ms. Calhoun also refused to attend her deposition noted for April 5, 2019 so that Ms. Helm could obtain her testimony under oath to explore whether Ms. Calhoun was acting in good

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<sup>37</sup> As noted *infra*, Ms. Helm is presumed to be competent, unless it is shown otherwise by clear, cogent and convincing evidence.

faith (CP 896-897, ¶ 3).<sup>38</sup>

Ms. Calhoun, in an attempt to undermine Ms. Helm's cognitive ability, stated in a declaration dated November 6, 2018 that at "a court hearing in this case earlier this year, AIP did not recognize me and told me and others that we had never met. I had met previously with AIP on a number of occasions" (CP 74, ¶ 9). Ms. Helm stated that she did "not recall ever seeing [Ms. Calhoun] or meeting with her in person before a court appearance in March, 2018 in Yakima County Superior Court. [Ms. Calhoun] fails to specify when or where she met me on all these other occasions and under what circumstances" (CP 149, ¶ 7). In answers to interrogatories, however, Ms. Calhoun stated that she had met Ms. Helm in person on only one occasion "while [Ms. Helm] was in-patient at Yakima Valley Memorial Hospital in October of 2017" (CP 901, #14). These flatly inconsistent answers under oath demonstrate calculated conduct designed to undermine Ms. Helm's credibility and confidence and make it easier to impose a guardianship over Ms. Helm. This conduct on Ms. Calhoun's part is palpable evidence of her lack of good faith.

People who are acting in good faith do not disregard the statutory requirements for the contents of a petition, do not allege under oath a false diagnosis of Ms. Helm, do not fail to disclose the reason for requesting a specific GAL, do not misrepresent how many times they have met with Ms. Helm, and do not hide from explaining their actions in an appropriate

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<sup>38</sup> Ms. Calhoun's deposition was re-noted for the afternoon of April 19, 2019, and again Ms. Calhoun refused to attend (CP 897, ¶ 3).

proceeding, such as at a deposition or in answers to interrogatories.

**C. Trial Court Abused Its Discretion in Making Various Rulings.**

A court abuses its discretion if it relies on unsupported facts, applies the wrong legal standard, or adopts a position no reasonable person would take. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). A trial court does not have discretion to apply an incorrect legal standard. *Kreidler v. Cascade Nat'l Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014) (trial court necessarily abuses its discretion by applying an incorrect legal standard).

**1. The Trial Court Abused Its Discretion in Awarding Excessive Fees to Ms. Calhoun and her Attorneys and in Entering a Judgment Against Ms. Helm in the Amount of \$53,000 for Attorney's Fees.**

The fees and costs requested by Ms. Calhoun in her motion dated May 1, 2019 (CP 926) included more than \$9,000 for drafting the motion to dismiss the guardianship petition and arguing that Ms. Calhoun acted in good faith in filing the petition (CP 1075; CP 930-934); over \$6,000 in providing answers and responses to Ms. Helm's discovery requests (CP 1075); over \$3,000 for the preparation and taking of Ms. Helm's deposition on February 7, 2019 (CP 1075), plus \$475.75 for the deposition transcript (CP 934); over \$1,000 for litigation notebook preparation (CP 1075); over \$3,000 for responding to Ms. Helm's motion for discretionary review (CP 1075; CP 932-934); and over \$6,000 preparing for, discussing with his client, driving to Seattle from Yakima (and back) and attending a settlement conference with Ms. Helm's attorney in February 2019 (CP 1075; CP

932).<sup>39</sup>

The trial court granted every dollar requested by Ms. Calhoun and her attorneys and made no provision for any payment of attorney's fees to Ms. Helm's counsel (CP 1118), even though Ms. Helm's counsel had accrued additional attorney's fees from 1-2-19 in the amount of \$55,525 and additional costs in the amount of \$7,998.25 (CP 1082). In his representation of Ms. Helm in 2018 and 2019, her counsel accrued total attorney's fees of \$116,160 and advanced costs of \$10,385.95 (CP 1082). He has not been paid any fees or costs in his representation of Ms. Helm (CP 992 ¶ 7; CP 993 ¶ 8).

The trial court did not take into account Ms. Helm's lack of resources, inability to earn more money and the need/desire to pay her attorney. This was manifestly unfair to her attorney, who essentially won Ms. Helm her freedom. In not allowing funds to be paid to Ms. Helm's attorney, the trial court did not balance the equities. Ms. Calhoun's attorneys received over \$30,000 in fees, plus a judgment for \$53,000 more. Ms. Helm's attorney has received nothing of the over \$116,000 fees he is owed.

In addition, the trial court did not consider the numerous indicia of bad faith and breach of fiduciary duties on the part of Ms. Calhoun, e.g., her failure to communicate with Ms. Helm, below market sales of Ms. Helm's real estate, false allegation of dementia in the verified guardianship petition

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<sup>39</sup> An itemization of Ms. Calhoun's attorney's fees in 2019 is set forth at CP 930-935.

she filed, disingenuous motion for a TRO to block the lawsuit against herself, blocking revocation of the POA to keep fees coming her way, and acting under a conflict of interest, to name a few. These aspects should have been considered by the trial court, as they are a basis to reduce or disgorge fees. *Eriks v. Denver*, 118 Wn.2d 451, 463, 824 P.2d 1207 (1992) (disgorgement of fees reasonable remedy for breach of fiduciary duty); *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691, 698, 469 P.2d 583 (1970) (fiduciary unfaithful to his trust may be denied compensation); *Obert v. Environment Research and Development Corp.*, 112 Wn.2d 323, 338-39, 771 P.2d 340 (1989) (agent may be denied compensation for breach of loyalty) (citing Restatement (Second) of Agency §469 (1958)).

The trial court also did not take into account the inequity of its rulings on attorney's fees. Ms. Calhoun knew in January 2019 that there was insufficient money in Ms. Helm's estate to pay the attorney's fees already awarded yet persisted in strenuously litigating the case for the next four months before suddenly moving to dismiss the case on the eve of the jury trial. The trial court had noted that "the AIP's estate currently has insufficient funds to pay all of the approved fees and costs, and the Court reserves determination of how attorney's fees and costs shall be allocated and how and if they will be paid" (CP 662, ¶ 23). It appears that Ms. Calhoun simply wanted to incur fees to make sure that Ms. Helm had no money left in her estate, and in addition obtain a judgment against her for any future funds she should get. The end result is that Ms. Calhoun and her attorneys get paid all of their fees, while Ms. Helm's attorney gets nothing,

and Ms. Helm is left with virtually no assets and a judgment against her for \$53,000.<sup>40</sup> There is no way that this result can be justified as equitable.

The trial court's rulings encourage guardianship petitioners, and their attorneys, to consume all of an AIP's assets—and then some—in an intransigent effort to impose a guardianship on someone who challenges a guardianship petitioner's attempt to take away her freedom and independence. The judgment against Ms. Helm should shock the conscience of this Court and anyone with any empathy for one's fellow human beings. The trial court abused its discretion.

**2. The Trial Court Abused Its Discretion in Denying Ms. Helm's Motion to Strike Inadmissible Portions of Petitioner's Declarations and Relying on Inadmissible Evidence in Making its Rulings.**

Ms. Calhoun's declarations and those of her workers Katelyn Andrews and Vita Parsons contain much hearsay, rank speculation, statements without adequate foundation and other inadmissible material. Ms. Helm objected to those statements and filed a motion to strike (CP 160-176). The trial court denied the motion without explanation (CP 574, ¶ 5).<sup>41</sup>

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<sup>40</sup> The judgment also makes it more difficult for Ms. Helm to settle the Kitsap County lawsuit, in case Mr. Parker offers to settle that case by offering to reconvey the Rhapsody Drive property to Ms. Helm (CP 992). Ironically, the judgment could act as an offset to damages for which Ms. Calhoun may be liable in the Kitsap County action.

<sup>41</sup> In its oral ruling, the trial court stated: "Well, what I'm going to do in regard to the motion to strike, and, Mr. Young, I think, has candidly stated that his submissions are as rife with hearsay as the other ones [Ms. Calhoun's] might be, that they're both objectionable to some degree. I think I am capable of sorting out the wheat from the chaff, and I have, in considering the statements offered by Mr. Young as well as the statements offered by your client [Ms. Calhoun]" (CP 692). Mr. Young actually did not concede that his declarations were "rife with hearsay" (CP 682), but, following a discussion of such issue in court (CP 680-681), stated that the comments Mr. Young was making "were responding to their [petitioner's and her employees] hearsay, too . . . One can strike out their hearsay and my hearsay that's fine, too, and then whatever is left would be the factual basis for the relief that they seek or the relief that they sought without giving me notice"

Clearly the trial court cannot base its rulings on inadmissible material in declarations, as happened here.

**3. The Trial Court Abused Its Discretion in Not Conducting an Evidentiary Hearing or in at Least Allowing a Deposition of Ms. Calhoun.**

The trial court should have conducted an evidentiary hearing or at least allowed a deposition of Ms. Calhoun. The issue of Ms. Calhoun's good faith cannot be determined from reading declarations. There is also an appearance of unfairness here—local attorneys and a local GAL battling an AIP not from Yakima with an attorney from Seattle. The trial court abused its discretion in not going beyond the mere reading of the declarations in evaluating whether Ms. Calhoun acted in good faith.

Ms. Helm recommended that the Court require Ms. Calhoun to attend a deposition, as previously ordered in this case and schedule a short evidentiary hearing in which the issue of Ms. Calhoun's good faith in filing the guardianship petition would be the primary issue; and defer ruling on any request for attorneys' fees, petitioner's fees and GAL's fees until after the evidentiary hearing (CP 869). The trial court abused its discretion by summarily ruling on the issue of good faith, because there were genuine issues of material fact regarding that issue. *Sattler, supra*, 110 Wn. App. at 697 (*Good faith* requires a factual inquiry). Ms. Helm should have had an opportunity to develop the facts, e.g., what conversations Ms. Calhoun had with Ms. Helm before the POA was signed regarding the sale of Ms. Helm's properties, Ms. Helm's capacity, the cost of Ms. Calhoun's services, why

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(CP 683).

Ms. Calhoun sought a TRO instead of litigating the Kitsap County action, why she filed a verified petition containing a false dementia diagnosis, why she sold both properties as less than fair market value, etc.

**D. The Trial Court Erred in Entering Various Findings of Fact in Connection with the TRO.**

After the hearing on Ms. Helm’s motion to vacate the TRO (CP 130-142), the trial court entered various findings of fact and conclusions of law (CP 571-575). Ms. Helm objected to many of these findings and conclusions (CP 499-508). The trial court’s errors, subject to de novo review, are set forth as follows:

FOF 6: “The GAL appointed in this matter, Amy Clark, has indicated in her preliminary reports and in oral presentation that a guardian of the person and of the estate is appropriate for AIP. This opinion is based upon her interview with the AIP, as well as interviews of various professionals and family members familiar with AIP and her needs.” (CP 572, FOF 6).

This “finding” ignores the legislative findings in Laws of 2017, ch 271, § 1 following RCW 11.88.120 to the effect that:

The legislature finds that less restrictive alternatives are preferred to guardianships and limited guardianships when they provide adequate support for an incapacitated person’s needs. The legislature also recognizes that less restrictive alternatives are typically less expensive to administer than a guardianship, thereby preserving state resources, court resources, and the incapacitated person’s estate. A less restrictive alternative may be in the form of a power of attorney, or a trust, or other legal, financial, or medical directives that allow an incapacitated person to enjoy a greater degree of individual liberty and decision making than for persons under a guardianship.”

Laws of 2017, ch 271, § 1 following RCW 11.88.120.

While it is true that the GAL opined in her interim report dated 4-2-18 under the heading **Recommendation (Interim)** that a “guardianship of both the person and the estate is merited for Ms. Helm[,]” the GAL also stated that “the exact nature of the rights retained and whether the guardianship should be limited in some nature is still a question that the rest of the investigation will answer” (CP 1152). Thus, the GAL report did not make any finding or recommendation as to whether Ms. Helm has the capacity to sue, and especially whether Ms. Helm should have the right to sue Ms. Calhoun for breaches of fiduciary duty and selling Ms. Helm’s properties at less than fair market value, nor exactly what incapacities Ms. Helm had.

Moreover, RCW 11.88.090(5)(f)(iv) requires the GAL to provide a report containing a “description of any alternative arrangements previously made by [the AIP] or which could be made, and whether and to what extent such alternatives should be used in lieu of a guardianship . . .” The GAL did not provide any report addressing this issue, nor did she provide any recommended less restrictive alternative. The trial court should not have assumed based on the interim GAL report that a guardianship would be imposed; rather it should have required the GAL to report on a less restrictive alternative, as required by statute. RCW 11.88.090(5)(e) and (5)(f)(iv).

Finally, an AIP is entitled to a jury trial as it relates to her alleged incapacity. RCW 11.88.045(3). The standard of proof in a contested case is that of “clear, cogent, and convincing evidence.” *Id.* Where a jury trial

has been requested, as here, the trial court should not be finding incapacity on the motions calendar supported or opposed by competing declarations, particularly given the fundamental rights of Ms. Helm at stake and the presumption of competence. The trial court erred and abused its discretion in doing so.

**E. The Trial Court Erred in Completely Disregarding the Presumption of Competence.**

Ms. Helm is presumed to be competent until expressly found to need a guardian. In *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) the Washington Supreme Court stated:

It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented. 29 Am.Jur. Insane and Other Incompetent Persons § 132, p. 253. In Washington we have held that the standard of proof required to overcome this presumption, in civil cases, is that of clear, cogent and convincing evidence. *Page v. Prudential Life Ins. Co. of America*, 12 Wash.2d 101, 120 P.2d 527 (1942); *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 160 P. 965 (1916).

*Grannum*, 70 Wn.2d at 307. Accord, *Morinaga v. Vue*, 85 Wn. App. 822, 830, 935 P.2d 637 (1997) (presumption of competency may be rebutted by clear, cogent and convincing evidence). Accordingly, Ms. Helm is presumed to have the capacity to sue someone who sold her properties—constituting her life’s savings—at bargain basement prices and is presumed to have the capacity to manage her own affairs.<sup>42</sup>

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<sup>42</sup> Even when a person has mental health issues, “an adult is presumed to have capacity.” RCW 71.32.040. Even where a person is placed under a limited guardianship, a “person

Furthermore, because the establishment of a guardianship involves a loss of a significant liberty interest, the standard of proof in a contested guardianship case is the very high bar of “clear, cogent, and convincing evidence.” RCW 11.88.045(3). While the GAL made an interim recommendation based on an incomplete report dated April 2, 2018 that Ms. Helm needed a guardian of the person and the estate, the GAL stated that “the exact nature of the rights retained and whether the guardianship should be limited in some nature is still a question that the rest of the investigation will answer” (CP 1152). The GAL relied on selective information which was nearly a year old, and inexplicably did not include, or update her report to include, other key and contra-indicating information *available to her*, namely (i) Dr. Momeni’s discharge summary from Eastern State (CP 1197); (ii) Dr. Wilkinson’s medical report (CP 1209); (iii) Ms. Helm’s compliance with all requirements of the LRA while at Gleed Orchard Manor from March to November 2018 (CP 373, ¶ 6); (iv) Ms. Helm’s doing well at an independent living facility at Sun Tower for six months starting November 1, 2018 (CP 561, ¶ 11; CP 157, ¶ 5; CP 145, ¶ 7); and, *very importantly, because it is the law to include*, (v) whether there are any less restrictive alternatives that would avoid the need for a guardianship.<sup>43</sup> FOF 6 of the

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shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities . . . except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship.” RCW 11.88.010(2). No one has determined that Ms. Helm lacks capacity to sue or is incompetent under the standards set forth in RCW 11.88.010(1)(a) or (1)(b).

<sup>43</sup> This last factor is required to be considered by the GAL and included in the GAL’s report. RCW 11.88.090(5)(e).

1-10-19 order (CP 572) was therefore incorrect to the extent it implies that the GAL's preliminary report contains valid conclusions.<sup>44</sup> Thus Ms. Calhoun could not have established by clear, cogent and convincing evidence that Ms. Helm was incapacitated in any way that provides a basis for the granting of the 2<sup>nd</sup> preliminary injunction in this case.

COL 20 (CP 573, ¶ 20) to the effect that "AIP's capacity is compromised and there is a strong likelihood that a guardianship, in some form, will be established for AIP" is not supported by substantial evidence, as Ms. Helm's hospitalizations, diagnoses years earlier and unspecified "recent events" do not establish the basis for a guardianship. COL 20 (CP 573, ¶ 20) is also irrelevant, because the question was not whether "a guardianship, in some form, will be established for AIP" (*id.*), but whether if a guardianship were established, would Ms. Helm lose her right to act as plaintiff in the Kitsap County case and would any such guardian substitute for Ms. Helm as plaintiff so as to obtain a recovery for Ms. Helm's estate.<sup>45</sup> COL 20 also usurps the function of the jury, as RCW 11.88.045(3) provides that Ms. Helm is "entitled to a jury trial on the issues of his or her alleged

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<sup>44</sup> The GAL never filed a final report in this case. Her Recommendation (Interim) filed on April 2, 2018, stated that a guardianship "is merited," but the "exact nature of the rights retained and whether the guardianship should be limited in some nature is still a question that the rest of the investigation will answer" (CP 1152). That question was never answered.

<sup>45</sup> Even if Ms. Helm's right to sue were taken over by a guardian or limited guardian, that guardian could substitute for Ms. Helm in the Kitsap County lawsuit, just as a PR substitutes for a decedent in a pending lawsuit. Ms. Calhoun's acting as *de facto* guardian of Ms. Helm's estate has not paid anything out of Ms. Helm's estate for the bringing of the Kitsap County lawsuit, as it is being handled on a contingent basis by Ms. Helm's attorney (CP 458, ¶16).

incapacity” with the concomitant standard of proof being that of “clear, cogent, and convincing evidence.” RCW 11.88.045(3).

The court erred and abused its discretion in making these conclusions of law without substantial evidence and without permitting the jury to determine the extent of Ms. Helm’s capacity.

**F. Plaintiff Should be Awarded Attorney’s Fees and Costs.**

On equitable grounds, a party may recover attorneys' fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997). Attorney’s fees are also awardable to Ms. Helm under RCW 11.96A.150. Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. *Standing Rock v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520 (2001). Such fees should be awarded here to appellant pursuant to RAP 18.1.

**VI. CONCLUSION**

This Court should reverse the trial court’s finding that Ms. Calhoun acted in good faith, or at least remand for a hearing, on this issue of good faith. This court should also reverse the judgment of \$53,000 against Ms. Helm, reverse the award of fees and attorney’s fees to Ms. Calhoun and her attorney and award attorney’s fees and costs to Ms. Helm.

RESPECTFULLY SUBMITTED this 20th day of November 2019.

**Law Offices of Dan R. Young**

By Dan R. Young

Dan R. Young, WSBA # 12020

Attorney for Appellant Dorothy Helm

## **APPENDICES**

- A. Removed - See CP 1197
- B. Guardianship Petition (CP 1)
- C. Ms. Helm's Response to Guardianship Petition (CP 179-180)
- D. SOP Regulations
- E. RCW 11.96A.150
- F. CPG Board Ethics Advisory Opinion #2005-003
- G. Timeline (CP 898)
- H. Uniform Power of Attorney Act (RCW 11.125.140)
- I. Order on Four Motions Heard on 1-10-19 (CP 660-663)
- J. FOF/COL for TRO entered 1-10-19 from 12-10-18 Hearing (CP 571-575)

## **APPENDIX A - REMOVED**

FILED  
JANET L. RIDDLE, CLERK

'18 JAN 23 P2:21

SUPERIOR COURT  
YAKIMA COUNTY

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

In the Guardianship of:

No. **1840005439**

DOROTHY HELM O'DELL,

PETITION FOR FULL GUARDIANSHIP  
OF PERSON AND ESTATE

An Alleged Incapacitated Person.

RCW 11.88.030

COMES NOW, KRISTYAN CALHOUN, attorney in fact for Dorothy Helm O'Dell under that certain Durable Power of Attorney dated December 16, 2016 ("Petitioner"), by and through Tyler S. Farmer of the law firm of Pratt Boutillier Kirkevold & Farmer, PLLC, and respectfully petitions the Court as follows:

**I. INFORMATION OF ALLEGED INCAPACITATED PERSON.**

The name, age, residence and post office address of the Alleged Incapacitated Person (herein "AIP") are as follows:

A. Name: Dorothy Helm-O'Dell

B. DOB: 07/23/1946

C. Residence Address: Eastern State Hospital, 1451 W Maple, Medical Lake, WA  
99022

D. Mailing Address: Same

PETITION FOR FULL GUARDIANSHIP  
OF PERSON AND ESTATE  
RCW 11.88.030

1

**PRATT BOUTILLIER  
KIRKEVOLD & FARMER, PLLC**  
3901 Fairbanks Avenue  
Yakima, WA 98902

Tel. (509) 453-9135 FAX (509) 453-9134

1 **II. NATURE OF ALLEGED INCAPACITY.**

2 The AIP has been diagnosed with dementia. The AIP generally suffers from impairment  
3 of intellectual abilities such as attention, orientation, memory, judgment, and language. Due to  
4 the AIP's dementia, she is at risk of serious personal and financial harm.

5 **III. APPROXIMATE VALUE AND DESCRIPTION OF PROPERTY.**

6 The approximate value and descriptions of the property owned by the AIP are as follows:

7	A. Bank Deposits:	\$89,000.00
8	B. Stocks and Bonds:	\$0.00
9	C. Real Property:	\$0.00
10	D. Life Insurance	\$0.00
11	E. Misc. Furniture, Jewelry	\$3,000.00
12	Total Approximate Value of Assets:	\$92,000.00

13 There are periodic compensation, pension, insurance, and allowances as follows:

14	A. Social Security Benefits:	\$590.00
15	B. Veterans Benefits:	\$0.00
16	C. Washington State Assistance:	\$0.00
17	D. Other (Interest, Dividends, Pensions):	\$0.00
18	E. Annuity Payments:	\$0.00
19	Approximate Total Monthly Income:	\$590.00

20 **IV. EXISTING OR PENDING GUARDIANS.**

21 To the best of Petitioner's knowledge and belief, no guardian or limited guardian of the  
22 Person and/or Estate of the AIP has been appointed or qualified in any state, nor are there any  
23 existing or pending actions for the appointment of a Guardian of the Person and/or Estate of the  
24 AIP.

25 **V. NOMINATION OF GUARDIAN.**

26 Petitioner requests that a certified professional guardian be appointed.

27 **VI. RELATIVES.**

28 The name, address and nature of the relationship of the persons most closely related by  
29 blood or marriage to the AIP are as follows:

30 Glen O'Dell – Address Unknown – (509) 941-8619

31 Pete O'Dell – Address Unknown – (509) 972-2968

1 **VII. CARE AND CUSTODY OF ALLEGED INCAPACITATED PERSON.**

2 The AIP is currently residing at Eastern State Hospital in Medical Lake, Washington.  
3 The AIP receives regular assistance and direction from caregivers and will likely be discharged  
4 to a secured dementia facility.

5 **VIII. REASON FOR GUARDIANSHIP.**

6 As set forth above, the AIP is suffering from dementia which causes the AIP to be at risk  
7 of serious personal and financial harm. The AIP is very susceptible to influence, and needs close  
8 supervision. Petitioner received the attached letter which Petitioner believes was prepared by  
9 Glenn O'Dell giving instructions to the AIP to revoke her Power of Attorney and deliver all assets  
10 to Glenn. Petitioner believes there is significant potential for financial exploitation by Glenn  
11 O'Dell. Petitioner believes a full guardianship of the person and estate of the AIP is necessary to  
12 provide the AIP with adequate protection.

13 **IX. ALTERNATE ARRANGEMENTS MADE BY ALLEGED INCAPACITATED**  
14 **PERSON.**

15 The AIP executed a Durable Power of Attorney on December 16, 2016 (the "POA"),  
16 naming Petitioner as the Attorney in Fact. The POA allows Petitioner to manage the AIP's  
17 finances and make medical decisions on the AIP's behalf. The POA does not, however, protect  
18 the AIP against the financial exploitation, or potential financial exploitation, including revocation  
19 of the POA. Petitioner recommends that the POA should be revoked upon appointment of a full  
20 guardian of the AIP's person and estate.

21 **X. AREAS OF ASSISTANCE.**

22 The AIP needs a Guardian to generally provide for the AIP's personal and financial  
23 decisions, as well as to protect the AIP from possible financial exploitation.

24 **XI. GUARDIAN TRAINING.**

25 If a certified professional guardian is appointed, no additional training is required.  
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1 **XII. TERM OF GUARDIANSHIP.**

2 The Full Guardianship of the AIP's Person and Estate should be valid until the AIP's death  
3 or earlier termination of the Guardianship by order of the Court.

4 **XIII. GUARDIAN AD LITEM.**

5 Petitioner requests Amelia Clark be appointed as Guardian ad Litem in this matter. Ms.  
6 Clark's address is 2612 W Nob Hill Blvd, Ste 101, Yakima, WA 98902, and her telephone  
7 number is (509) 823-3986.

8 **XIV. BONDS AND FEES.**

9 It is proposed that a guardian be appointed without bond but that all funds in excess of an  
10 amount determined by the Court be set aside in blocked accounts subject to withdrawal only by  
11 court order.

12 Petitioner's attorney's fees, Guardian ad Litem fees, and Guardian fees (if any) should be  
13 paid from the AIP's estate.

14 **XV. REQUEST FOR RELIEF.**

15 The Petitioners request the following immediate relief:

16 A. A finding that based on the facts as presented herein, reasonable cause exists for  
17 appointment of a Guardian ad Litem to investigate the need to appoint a Full Guardian of the  
18 Person and Estate of Dorothy Helm O'Dell;

19 B. An Order appointing Amelia Clark as Guardian ad Litem at her normal hourly  
20 rate and directing an investigation and report be made within forty-five (45) days, or as soon after  
21 appointment as possible, regarding the necessity of appointing a Full Guardian of the AIP's  
22 Person and Estate for the purposes set forth herein;

23 C. Waiving the requirement that the AIP be present at the hearing on this petition  
24 due to the AIP's incapacity if good cause is set forth in the Guardian ad Litem's report and if the  
25 Guardian ad Litem appears in the AIP's place.

26 The Petitioner requests the following relief be granted upon the hearing of this Petition  
27 for Full Guardianship of Person and Estate:

28 D. An Order appointing a certified professional guardian as Full Guardian of the  
29 Person and Estate of Dorothy Helm O'Dell, to serve without bond, for the purposes set forth  
30 herein, and that Letters of Guardianship be issued to such certified professional guardian upon  
31 filing an Oath of Guardian;

1 E. An Order authorizing the guardian to make all necessary decisions regarding the  
2 AIP's, financial and medical needs until the earlier of the AIP's death or the termination of this  
3 guardianship by the Court, and further authorizing the Guardian to invest and reinvest the  
4 guardianship assets in accordance with RCW 11.100 et seq. and to do anything that a trustee can  
5 do under the provisions of RCW 11.98.070 for periods not to exceed one year from the date of  
6 an order granting such authorization or until the filing of the next intermediate report, whichever  
7 is longer, and authorizing the Guardian to make such expenditures from the AIP's estate as are  
8 permitted by law or otherwise authorized by the Court;

9 F. An Order approving payment of reasonable attorney's fees and costs incurred in  
10 this guardianship proceeding to be paid from the AIP's estate; and

11 G. An Order fixing and authorizing payment of the amount of the Guardian ad  
12 Litem's fee, which shall be paid from the AIP's estate, and discharging the Guardian ad Litem  
13 from further duties and responsibilities.

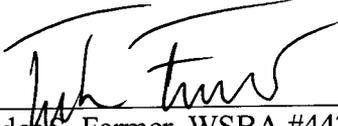
14 **CERTIFICATE**

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

17 DATED this 23 day of January, 2018.

18  
19   
20 \_\_\_\_\_  
Kristyan Galhoun

21 Prepared by:

22   
23 \_\_\_\_\_  
24 Tyler S. Farmer, WSBA #44202  
25 Pratt Boutillier Kirkevold & Farmer, PLLC  
26 Attorneys for Petitioner

FILED  
PANEL RIDDLE

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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 - 1

LAW OFFICES OF DAN R. YOUNG  
ATTORNEY AT LAW  
1000 SECOND AVENUE, SUITE 3200  
SEATTLE, WASHINGTON 98104  
(206) 829-9947  
(206) 641-3208 (fax)

ORIGINAL

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.

LAW OFFICES OF DAN R. YOUNG

25 By: Dan R. Young

26 Dan R. Young, WSBA #12020

27 Attorney for Plaintiff

# Guardianship Program Rules Regulation 400 Standards of Practice Regulation

**Effective January 31, 2012**  
**Revised April 11, 2011, May 14, 2012, and October 14, 2013**

## **Contents:**

- 400 General
- 401 Guardian's Duty to Court
- 402 Guardian's Relationship to Family and Friends of Incapacitated Person and to Other Professionals
- 403 Self Determination of Incapacitated Person
- 404 Contact with the Incapacitated Person
- 405 General Decision Standards
- 406 Conflicts of Interest
- 407 Residential Decisions
- 408 Medical Decisions
- 409 Financial Management
- 410 Guardian Fees and Expenses
- 411 Changes of Circumstances Limitation Termination
- 412 Sale or Purchase of Guardianship Practice

## Guardianship Program Rules

### 401 Guardian's Duty to Court

401.1 The guardian shall perform duties and discharge obligations in accordance with applicable Washington and federal law and the requirements of the court.

401.2 The guardian shall not act outside of the authority granted by the court and shall seek direction from the court as necessary. If the guardian is aware of a court order that may be in conflict with these standards, the guardian shall bring the conflict to the attention of the court and seek the court's direction.

401.3 The guardian shall at all times be thoroughly familiar with RCW 11.88, RCW 11.92, GR 23, these standards, and, any other regulations or laws which govern the conduct of the guardian in the management of the affairs of an incapacitated person.

401.4 The guardian shall seek legal advice as necessary to know how the law applies to specific decisions.

401.5 The guardian shall provide reports, notices, and financial accountings that are timely, complete, accurate, understandable, in a form acceptable to the court, and consistent with the statutory requirements. The financial accounting shall include information as to the sustainability of the current budget when expenditures exceed income during the reporting period.

401.6 All certified professional guardians and guardian agencies have a duty by statute to appoint a standby guardian.

401.6.1 All certified professional guardians shall appoint a standby guardian who is a certified professional guardian who accepts the appointment and has the skills, experience and availability to assume responsibility as court appointed guardian per statutory requirements. (Revised 10-14-13)

401.6.2 The certified professional guardian will make available to the standby guardian those records and information needed to address the needs of the incapacitated person in the event of a planned or unplanned absence. (Revised 10-14-13)

## Guardianship Program Rules

### 402 Guardian's Relationship to Family and Friends of Incapacitated Person and to Other Professionals

402.1 When the guardian has limited authority the guardian shall work cooperatively with the incapacitated person or with others who have authority in other areas for the benefit of the incapacitated person.

402.2 The guardian, where appropriate, shall consider the views and opinions of professionals, relatives, and friends who are knowledgeable about the incapacitated person.

402.3 The guardian shall seek independent professional evaluations, assessments, and opinions when necessary to identify the incapacitated person's needs and best interests.

402.4 The guardian shall recognize that his or her decisions are open to the scrutiny, criticism, and challenge of others. Subject to orders of the court, the guardian alone is ultimately responsible for decisions made by the guardian on behalf of the incapacitated person.

402.5 A guardian shall not disclose personal or other sensitive information about the incapacitated person to third parties except: (a) when necessary and relevant to the needs of the incapacitated person or (b) as required by these standards or other applicable laws or when directed by the court or the CPG Board.

402.6 The guardian must know and acknowledge personal limits of knowledge and expertise and shall engage appropriate professionals to provide services to the incapacitated person to the extent reasonable and necessary.

402.7 The guardian shall develop and maintain a working knowledge of the services, providers, and facilities available in the community. The guardian shall act to coordinate and monitor services needed by the incapacitated person to ensure that the incapacitated person is receiving the appropriate care and treatment.

## Guardianship Program Rules

### 403 Self-Determination of Incapacitated Person

403.1 The civil rights and liberties of the incapacitated person shall be protected. The independence and self-reliance of the incapacitated person shall be maximized to the greatest extent consistent with their protection and safety. The guardian shall protect the personal and economic interests of the incapacitated person and foster growth, independence, and self-reliance.

403.2 Whenever appropriate a guardian shall consult with the incapacitated person, and shall treat with respect, the feelings, values, and opinions of the incapacitated person. The guardian shall acknowledge the residual capacity and preferences of the incapacitated person.

403.3 When making decisions on behalf of the incapacitated person, the guardian shall evaluate the alternatives that are available and choose the one that best meets the needs of the incapacitated person while placing the least restrictions on the incapacitated person's freedom, rights, and ability to control his or her environment.

403.4 When appropriate, the guardian will defer to an incapacitated person's residual capacity to make decisions.

403.5 Unless otherwise directed by the court, the guardian shall provide copies of all material filed with the court and notice of all hearings in the guardianship to the incapacitated person.

403.6 The guardian shall, whenever appropriate or required by law, provide other requested information to the incapacitated person unless the guardian is reasonably certain that substantial harm will result from providing such information. This information shall include, but not be limited to, regular reports on: (a) the status of investments and operating accounts, (b) the costs and disbursements necessary to manage the incapacitated person's estate, and (c) medical and other personal information related to the care of the incapacitated person.

403.7 The guardian shall determine the extent to which the incapacitated person identifies with particular ethnic, religious, and cultural values and shall consider those values in the guardian's decision-making to the extent appropriate.

### 403.8 Sexual Expression:

403.8.1 The guardian shall acknowledge the incapacitated person's right to interpersonal relationships and sexual expression. The guardian shall take reasonable steps to ensure that a private environment conducive to this expression is provided. The guardian shall take reasonable steps to protect the incapacitated person from victimization.

403.8.2 The guardian shall ensure that the incapacitated person is informed of birth control methods when appropriate.

403.8.3 The guardian shall take reasonable steps to protect the rights of the incapacitated person with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the incapacitated person's values and customs.

## Guardianship Program Rules

### 404 Contact with the Incapacitated Person

404.1 Guardians of the Person shall have meaningful in-person contact with their clients as needed, generally no less than monthly. If contact is not made monthly, the reasons for less frequent contact shall be documented and included in the periodic reporting to the court. Living in a staffed residential facility or at home with a paid caregiver is not sufficient justification for reducing the frequency of in-person contact.

404.1.1 The guardian should, when appropriate, assess the incapacitated person's physical appearance and condition (taking into account the incapacitated person's privacy and dignity) and assess the appropriateness of the incapacitated person's current living situation and the continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct services, health and personal care needs, as well as the need for any additional services.

404.1.2 The guardian shall maintain regular communication with service providers, caregivers, and others attending to the incapacitated person.

404.1.3 The guardian shall participate in care or planning decisions concerning the residential, educational, vocational, or rehabilitation program of the incapacitated person.

404.1.4 The guardian shall request that each residential care professional service provider develop an appropriate service plan for the incapacitated person and take appropriate action to ensure that the service plans are being implemented.

404.1.5 The guardian shall ensure that the personal care plan is being properly followed by examining charts, notes, logs, evaluations, and other documents regarding the incapacitated person at the place of residence and at any program site.

404.2 Guardians of the Estate only shall maintain meaningful in-person contact with their clients generally no less than quarterly absent court order, but in any event, at a frequency as appropriate and as necessary to verify the individual's condition and status and the appropriateness of financial arrangements.

404.3 A certified professional guardian of the person, as a sole practitioner or agency, must ensure that the initial in-person visit and then one visit every three months is made by a certified professional guardian, unless otherwise approved by the court. For other meaningful in-person visits, a certified professional guardian, as a sole practitioner or agency, may delegate the responsibility for in-person visits with a client to: (a) a non-guardian employee of the certified professional guardian, sole practitioner or agency, (b) an independent contractor or (c) any individual who has been specifically approved by the court. In all cases, before the delegation, a certified professional guardian with final

decision making authority on the case must document the suitability of the delegation, having considered: (a) the needs of the client, and (b) the education, training and experience of the delegate. (Revised 10-14-13)

404.4. Each certified professional guardian or certified professional guardian agency shall conduct a criminal history check on any guardian or agency employees who come into contact with the person or estate of an incapacitated person prior to any contact. No guardian or agency shall knowingly allow an employee who has been convicted of a felony or has been adjudicated by any court or administrative agency of a having engaged in abuse, neglect or financial exploitation of a vulnerable adult or child to have contact with the person or estate of an incapacitated person.

## Guardianship Program Rules

### 405 General Decision Standards

All decisions and activities of the guardian shall be made according to the applicable decision standard.

405.1 The primary standard for decision-making is the Substituted Judgment Standard based upon the guardian's determination of the incapacitated person's competent preferences, i.e. what the incapacitated person would have decided when he or she had capacity. The guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person when the incapacitated person had capacity.

405.2 When the competent preferences of an incapacitated person cannot be ascertained, the guardian is responsible for making decisions which are in the best interests of the incapacitated person. A determination of the best interests of the incapacitated person shall include consideration of the stated preferences of the incapacitated person and defer to an incapacitated person's residual capacity to make decisions.

## Guardianship Program Rules

### 406 Conflicts of Interest

406.1 The guardian shall exhibit the highest degree of trust, loyalty, and attentiveness in relation to the incapacitated person and the incapacitated person's estate.

406.2 There shall be no self-interest in the management of the estate or the management of the person by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest or conflict of interest. An appearance of conflict of interest is a situation that a reasonable person might perceive as self-serving or adverse to the interest of the incapacitated person.

406.3 A conflict of interest arises when the guardian has some personal, family or agency interest that is self-serving or adverse to the interest of the incapacitated person. If the guardian intends to proceed in the face of a conflict of interest, a guardian shall disclose the conflict of interest to the court and seek prior court approval in accordance with the steps outlined in 406.4. (Revised 1-9-12)

406.4 The role of a guardian is primarily that of a decision-maker and coordinator of services. The guardian or agency (or an entity in which a guardian has a financial interest) shall not directly provide services such as housing, medical, personal care, or therapeutic services to the incapacitated person or profit from any transaction made on behalf of the incapacitated person's estate. In exceptional circumstances some direct services may be approved by the court provided written permission of the court is given in advance of the service being provided. When requesting court approval the guardian must demonstrate in writing and with prior notice to notice parties that all alternatives have been identified and considered and that no alternative is available that is reasonable or practical. (Revised 1-9-12)

406.5 A guardian who is an attorney may provide legal services to the incapacitated person only when doing so best meets the needs of the incapacitated person and is approved by the court following full disclosure of the conflict of interest. (Adopted 1-9-12)

406.6 A guardian shall not accept a gift from an incapacitated person or their estate other than ordinary social hospitality.

406.7 Payment of fees or other compensation for guardianship services by a party other than the incapacitated person is a potential conflict of interest which shall be fully disclosed.

406.8 The guardian shall protect the incapacitated person's rights and best interests against infringement by third parties.

## Guardianship Program Rules

### 407 Residential Decisions

407.1 The guardian shall ensure that the incapacitated person resides in the least restrictive environment that is appropriate and available.

407.2 The guardian shall acknowledge the need to allow all persons the opportunity to engage in activities and live in conditions which are culturally and socially acceptable within the context of the incapacitated person's cultural and life values.

407.3 The guardian shall take reasonable measures to effectuate the incapacitated person's residential preferences.

407.4 The guardian shall know the current state of the law regarding limits on the guardian's authority as to residential decisions.

407.5 The guardian shall not remove the incapacitated person from his or her home or separate the incapacitated person from family and friends unless such removal is necessary to prevent significant harm or because of financial constraints. The guardian shall make reasonable efforts to ensure the incapacitated person resides at the incapacitated person's home or in a community setting.

407.6 The guardian shall, to the extent possible, select residential placements which enhance the quality of life of the incapacitated person, provide the opportunity to maximize the independence of the incapacitated person, and provide for physical comfort and safety.

407.7 Before relocating the incapacitated person to a new residence, the guardian shall consult the incapacitated person, and should consult professionals, notice parties, and other third parties involved with the incapacitated person's care to the extent doing so does not put the incapacitated person, guardian, or guardian's staff at risk of personal harm. Emergency residential decisions to protect the incapacitated person may be made without prior consultation.

407.8 The guardian shall, as necessary, thoroughly research and evaluate the incapacitated person's residential alternatives.

407.9 Should the only available residential placement not be the most appropriate or least restrictive, the guardian shall regularly review alternatives to that placement and shall make reasonable efforts to arrange an appropriate and least restrictive residential alternative.

407.10 The guardian shall regularly monitor the incapacitated person's residential placement to ensure that it is appropriate and that such placement is the least restrictive alternative. The guardian should consent to changes, as they become necessary,

advantageous, or otherwise in the incapacitated person's best interests. The guardian should consider that even changes within an existing residential facility may have an impact on the quality of life of the incapacitated person.

## Guardianship Program Rules

### 408 Medical Decisions

408.1 The guardian shall provide informed consent on behalf of the incapacitated person for the provision of care, treatment and services and shall ensure that such care, treatment and services represents the least invasive form of intervention that is appropriate and available. The components of informed consent include, but are not necessarily limited to, an understanding by the guardian of: (1) the reason for, and nature of, the treatment (2) the benefits of and necessity for the treatment; (3) the possible risks, side effects and other consequences of the treatment and (4) alternative treatments or measures that are available and their respective risks, side effects, and benefits.

408.2 The duty to provide informed consent does not prevent a guardian from electing to make code status decisions in advance of need.

408.3 The guardian shall be familiar with the law regarding the withholding or withdrawal of life-sustaining treatment.

408.4 The guardian shall actively promote the health of the incapacitated person by arranging for regular preventative care including but not limited to dental care, diagnostic testing, and routine medical examinations to the extent preventative care and resources are available.

408.5 The guardian shall be available to respond to urgent need for medical decisions. The guardian shall provide instructions regarding treatment or non-treatment to be followed by medical staff in emergencies.

## Guardianship Program Rules

### 409 Financial Management

409.1 The guardian shall assure competent management of the property and income of the estate. In the discharge of this duty, the guardian shall exercise the highest level of fiduciary responsibility, intelligence, prudence, and diligence and avoid any self-interest. The management of the estate shall be documented by means of accurate and complete records of all transactions.

409.1.1 The guardian shall meet with the incapacitated person and gather information from family, friends and other collateral sources, as soon as practicable after appointment, to determine the current wishes of the incapacitated person and to obtain historical information about the incapacitated person's prior management of financial affairs.

409.1.2 The guardian shall, subject to court direction, allow the incapacitated person to manage funds to his or her ability when appropriate.

409.2 The guardian shall know and obey the law related to managing an incapacitated person's estate. Such knowledge shall include statutes relating to the investment of assets, restrictions imposed on investing and expenditures by RCW 11.88 and 11.92, and laws relating to employment, income, and taxes. The guardian shall hire competent professionals as appropriate and financially feasible to assure compliance with all statutes and regulations relating to the management of funds.

409.3 The guardian shall maintain all bonding, blocking, and insurance requirements as may be required by the court.

409.4 The guardian shall manage the estate with the primary goal of providing for the needs of the incapacitated person.

409.5 In certain cases, guardian shall consider the needs of the incapacitated person's dependents for support or maintenance, provided appropriate authority for such support is obtained in advance. The wishes of the incapacitated person as well as past behavior can be considered, bearing in mind both foreseeable financial requirements of the incapacitated person and the advantages and disadvantages to the incapacitated person of such support or maintenance.

409.6 When the available estate of the incapacitated person is sufficient, the guardian may petition the court for authority to make such gifts as are consistent with the wishes or past behavior of the incapacitated person, bearing in mind both foreseeable requirements of the incapacitated person and the advantages and disadvantages to the incapacitated person of such gifts, including tax consequences.

409.7 The guardian shall apply for all public and insurance benefits for which the incapacitated person is eligible. When implementing necessary changes in the

incapacity person's lifestyle, the guardian shall seek to minimize the stress of any transition.

409.8 The guardian shall exercise prudence in investment, shall periodically review the incapacitated person's situation and assets, and make recommendations regarding appropriate investments. In the exercise of prudence the guardian shall:

409.8.1 Not allow assets to sit idle except for good reasons.

409.8.2 Consider the tax consequences of decisions.

409.8.3 Consider the incapacitated person's long term ability to sustain costs of arrangements made by the guardian.

409.8.4 Consider the incapacitated person's ability to gain the benefits of specific decisions.

409.8.5 Consider the costs incurred in managing investments, including the costs of the guardian, those specialists hired by the guardian, and the costs of the investment vehicles.

409.8.6 Consider the incapacitated person's historical investment pattern and tolerance for risk, lifestyle needs, care and medical needs, estate considerations, tax consequences, and life expectancy.

409.9 A guardian shall not commingle the funds of an incapacitated person with funds of the guardian or the funds of staff. A guardian may consolidate client accounts, using appropriate accounting software and procedures, including pro-rata assignment of interest earned and fees paid and accurate individual accounting for each client's funds, provided the guardian has received specific authority from the court to do so. Each payment from a consolidated account shall be from funds held in the account on behalf of the individual for whom the payment is made.

409.10 The guardian shall not borrow from an incapacitated person. A guardian shall not lend funds at interest to an incapacitated person.

409.11 The responsibility to protect and preserve the guardianship estate rests with the guardian appointed by the court. When the guardian is an agency, this responsibility is that of the agency and the guardians identified with the Certified Professional Guardian Board as the responsible guardians for the agency. While it may be appropriate and necessary to retain and reasonably rely upon the services of knowledgeable individuals or entities to assist in the performance of duties, it is the responsibility of the guardian to provide appropriate oversight and review, in order to preserve the guardianship estate.

409.12 At the death of the incapacitated person, the guardian shall comply with RCW 11.88.150.

409.13 The guardian shall obtain insurance coverage, as appropriate and feasible, for guardianship property.

## Guardianship Program Rules

### 410 Guardian Fees and Expenses

410.1 The guardian is entitled to reasonable compensation for services rendered on behalf of the incapacitated person. The guardian has a duty to conserve the estate of the incapacitated person. Accordingly, decisions to provide services and incur fees shall be made in such a way as to reflect this duty. Services requiring a minimal degree of training, skill and experience should be billed accordingly.

410.2 All compensation for the services and expenses of the guardian shall be documented, reasonable in amount, and incurred for the incapacitated person's welfare. The guardian shall not pay or advance himself/herself fees or expenses from any source except as approved by the court. The guardian shall review each of the following factors in determining the reasonableness of his/her fee: (a) the necessity of the service, (b) the time required, (c) the degree of skill and experience required to perform the service, and (d) the cost of any reasonable alternative.

410.3 When requesting court approval, the guardian shall disclose all compensation, fees and expenses requested, charged, or received in a guardianship case to the court and parties entitled to notice. The guardian shall maintain contemporaneous time and billings records for services which shall state: (a) date and time spent, (b) service performed, (c) the identity and job classification of the person performing the service, (d) expenses incurred, and (e) subject matter of conferences, staffing, or telephone calls of significant duration.

410.4 The duties of a guardian to an incapacitated person are not conditioned upon the person's ability to compensate the guardian.

410.5 If the guardian is also an attorney, billings shall be in accordance with RCW 11.92.180.

## Guardianship Program Rules

### 411 Changes of Circumstances/Limitation/Termination

411.1 The guardian has an affirmative obligation to be alert to changes in the incapacitated person's condition or circumstances and report to the court when an increase or reduction in the authority of the guardian should be considered.

411.2 The guardian shall seek out information that will provide a basis for termination or limitation of the guardianship.

411.3 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall request court action.

411.4 The guardian shall assist the incapacitated person to terminate or limit the guardianship and arrange for independent representation for the incapacitated person when necessary.

411.5 If the guardianship is a limited guardianship, the guardian shall report to the court when there are circumstances in which the incapacitated person appears to require assistance which exceeds the authority of the guardian.

411.6 If the guardianship is of the person only, the guardian shall report to the court when protection of the incapacitated person's estate may be necessary.

411.7 If the guardianship is of the estate only, the guardian shall report to the court when protection of the person may be necessary.

## Guardianship Program Rules

### 412 Sale or Purchase of Guardianship Practice

412.1 A certified professional guardian may choose to sell all or substantially all of a guardianship practice to another certified professional guardian, including goodwill, subject to the following guideline: to the extent that the sale of the practice contemplates a substitution of guardian for any of the guardian's current clients, court approval, with notice to all incapacitated persons and all notice parties, shall be obtained at least 60 days before completing the sale. Regardless of whether any sale or transfer occurs, a guardian remains subject to all of these standards with respect to any incapacitated persons the guardian is appointed for, including the duty to ensure continuity of care, until the guardian is discharged by the court.

## Guardianship Program Rules

### 413 Responsibilities of Certified Professional Guardian Agencies

413.1 The designated Certified Professional Guardian (CPG) is responsible for the actions of the agency for which they serve as designated CPG.

413.2 A CPG is bound by the Standards of Practice notwithstanding that the professional guardian acted at the direction of another person.

413.3 A designated CPG shall make reasonable efforts to ensure that the conduct of non-guardian agency employees is compatible with the professional obligations of the professional guardian.

**RCW 11.96A.150****Costs—Attorneys' fees.**

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW **11.68.070** and **11.24.050**, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of \*RCW **11.88.090**(10).

[ **2007 c 475 § 5**; **1999 c 42 § 308**.]

**NOTES:**

\***Reviser's note:** Chapter **11.88** RCW was repealed in its entirety by 2019 c 437 § 801, effective January 1, 2021.



## Ethics Advisory Opinions

### Opinion 2005-003 Preappointment Conduct

#### CERTIFIED PROFESSIONAL GUARDIAN BOARD ETHICS ADVISORY OPINION

#### PREAPPOINTMENT CONDUCT

#### OPINION NUMBER # 2005- 003

Date: November 13, 2006

#### Brief Restatement of Question(s) posed:

Should a certified professional guardian (CPG) provide services to an alleged incapacitated person (AIP) after a petition for the appointment of a guardian has been filed, or immediately prior to the filing of such a petition, prior to a determination of incapacity by the court, where no contractual or legal relationship existed between the certified professional guardian and the AIP prior to the filing of a guardianship petition, and the guardian expects to be compensated for those services?

#### Directly applicable standards of practice (SOP's), statutes, and other law or standards:

401.4 The guardian shall not act outside of the authority granted by the court.

403.1 The guardian shall avoid self-dealing, conflict of interest and the appearance of a conflict of interest. Self-dealing or conflict of interest arise when the guardian has some personal, family, or agency interest from which a personal benefit would be derived. Any potential conflict shall be disclosed to the court immediately.

401.1 The guardian shall at all times be thoroughly familiar with RCW 11.88, RCW 11.92, General Rule (GR) 23, and any other regulations or statutes which govern the conduct of the guardian in the management of affairs of an incapacitated person.

RCW 11.88.005 Legislative intent: It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

RCW 11.88.030 (1): A petition for guardianship or limited guardianship shall state:.....(i) A description of any alternate arrangements previously made by the alleged incapacitated person, such as trusts or powers of attorney, including identifying any guardianship nominations contained in a power of attorney, and why a guardianship is nevertheless necessary.

RCW 11.88.045(5) During the pendency of an action to establish a guardianship, a petitioner or any person may move for temporary relief under chapter 7.40 RCW, to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020, or to address any other emergency needs of the alleged incapacitated person.....

RCW 11.88.090 [ The Guardian ad litem shall have the following duties..][to ascertain]

(5)(c)(ii) The steps the proposed guardian intends to take or has taken to identify and meet the needs of the alleged incapacitated person;

(5)(e) to investigate alternate arrangements made or which might be created, by or on behalf of the alleged incapacitated person, such as revocable or irrevocable trusts, durable powers of attorney, or blocked accounts; whether good cause exists for any such arrangements to be discontinued; and why such arrangements should not be continued or created in lieu of a guardianship;

(5)(f) To provide the court with a written report which shall include the following:

(iv) 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, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;

(9) The court appointed guardian ad litem shall have the authority to move for temporary relief under chapter 7.40 RCW to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation, as those terms are defined in RCW 74.34.020m or to address any other emergency needs of the alleged incapacitated person. Any alternative arrangement executed before filing the petition for guardianship shall remain effective unless the court grants the relief requested under chapter 7.40RCW, or unless, following notice and a hearing at which all parties directly affected by the arrangement are present, the court finds that the alternative arrangement should not remain effective.

#### RCW 74.34 Abuse of Vulnerable Adults

.005(1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;

.005(6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

#### Analysis

Guardianships are commonly sought in situations in which there is an immediate problem affecting a principal prior to the decision by a Court as to whether or not the person is, in fact, incapacitated. Certified Professional Guardians are often asked to develop and implement a plan of care in such situations which precede a decision by the Court as to the need for the establishment of a guardianship.

Certified professional guardians commonly offer a spectrum of services which are recognized by statute as less restrictive alternatives to guardianships. Some of these services require the written consent of the principal, such as powers of attorney, creation of a Trust, signatures on consent forms relating to health care, and signatures and agreements in regards to contracts and financial service agreements.

Some less restrictive alternatives may not necessarily require the written agreement of the principal. Situations in which such agreement(s) commonly occur include competent acceptance by the principal of the provision of care management and in-home assistance services.

#### Opinion

At any time, including the period immediately preceding or subsequent to the filing of a petition for the appointment of a guardian, certified professional guardians (CPG) are encouraged to provide forms of assistance that are least restrictive and that have the potential to avoid the need for a guardianship when that assistance is consented to by the principal, provided that the principal has the requisite capacity to consent and, if needed, access to legal counsel. Forms of assistance often needed include arranging for in-home care, home maintenance, and assistance in organizing and paying bills.

When a CPG is entering into a formal legal relationship with a principal, such as a living trust or power of attorney, the CPG should assure that the principal has the benefit of independent legal counsel before entering the relationship. A CPG who is also an attorney should not prepare or assist in the preparation of power-of-attorney, living trust, a Will, or similar legal documents which appoint themselves to a fiduciary relationship with the principal.

During the period immediately preceding or subsequent to the filing of a petition for the appointment of a guardian there is a conflict of interest or the appearance of a conflict of interest and self dealing when any person enters into an agreement for services with an alleged incapacitated person that requires consent. While recognizing that the alleged incapacitated person has the legal capacity to enter into contracts until a guardian is appointed or otherwise restricted at the time a guardianship is established, the certified professional guardian should exercise caution when entering into any arrangement with the alleged incapacitated person immediately preceding or subsequent to the filing of a guardianship petition.

During the period immediately preceding to or subsequent to the filing of a petition for the appointment of a guardian, the CPG may be asked by family or friends of the principal, or may contract with family or friends of the principal, to provide case management assistance such as help with living arrangements and in-home care, or assistance with immediate financial matters such as the payment of rent or utility bills, during the period immediately preceding or subsequent to the filing of a guardianship petition. The CPG should decline to provide such services unless the principal has the capacity to consent to the services or the court has authorized the guardian to provide services. In such a circumstance, the principal's acceptance and/or cooperation with services can be reflective of the principal's consent.

Any fees that are charged by the certified professional guardian should be carefully documented. No fees should be accepted from the funds of the principal subsequent to the filing a petition for the appointment of a guardian unless approved by the court in the same manner as guardian fees.

The certified professional guardian should avoid the appearance of assuming the formal duties of a guardian in advance of appointment. The certified professional guardian should not marshal assets, become a signature to financial accounts, make medical decisions or financial commitments, or otherwise engage in the activities commonly associated with the powers of a guardian for an alleged incapacitated person subsequent to the filing of a petition for the appointment of a

guardian or during the period immediately preceding the filing of such petition.

**RECORDS**

- Case Records
- Caseload Reports
- Court Dates
- Judicial Information System (JIS)
- JIS LINK
- Odyssey Portal
- Records Requests

**RESOURCES**

- Civic Learning
- Court News
- Court Program Accessibility
- Jury Duty
- Procurement Opportunities
- Resources, Publications, and Reports
- Self Help
- State Law Library
- Whistleblower Policy

**QUICK LINKS**

- Court Closures
- Court Forms
- Court Opinions
- Court Rules
- Domestic Violence Forms
- Emergency Procedures
- eService Center
- Pattern Jury Instructions

**TRANSLATIONS**

- 中文形式/Chinese
- 한국어서류/Korean
- Русский/Russian
- Español/Spanish
- Tiếng Việt/Vietnamese

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<b>Date</b>	<b>Description</b>
7-29-15	Dorothy Helm admitted to South Dakota Human Services Center (HSC), Yankton, South Dakota on an involuntary commitment
8-26-15	Dorothy discharged from HSC, Yankton
10-19-15	Dorothy admitted to HSC, Yankton on an involuntary commitment
11-6-15	Dorothy given 1st of 23 electroconvulsive treatments
3-23-16	Dorothy given 23 <sup>rd</sup> of 23 electroconvulsive treatments
12-16-16	Dorothy signs Power of Attorney in favor of Kristyan Calhoun. No legal advice or explanation given to Dorothy.
12-22-16	Kristyan Calhoun calls Thomas Parker regarding Dorothy's Kitsap County properties
12-26-16	Kristyan Calhoun sends emails to T. Parker about Dorothy's properties
12-27-16	Kristyan Calhoun emails to T. Parker regarding Kitsap County Assessor's website which contains information about Dorothy's properties
1-3-17	Dorothy apparently signs Geriatric Care Management Service Agreement with Senior Avenues
1-3-17	T. Parker sends emails to Kristyan Calhoun regarding the location of Dorothy's rental properties
1-6-17	Kristyan Calhoun contacts T. Parker regarding the listing of Dorothy's properties
1-13-17	Kristyan Calhoun & T. Parker go to Port Orchard to view Dorothy's properties
1-18-17	T. Parker and Kristyan Calhoun discuss T. Parker's offer to buy property at 3752 Rhapsody Drive SE, Port Orchard
1-20-17	Kristyan Calhoun reviews offer on 3752 Rhapsody Dr. and signs purchase offer & then emails to T. Parker
2-13-17	Kristyan Calhoun sells Dorothy's Rhapsody Dr. property for \$28,000 to T. Parker Assessed value was \$64,704. 3 <sup>rd</sup> Sup. Young Dec., Ex. E.
6-09-17	Kristyan Calhoun sells Dorothy's Feigley Rd. property for \$116,000
8-8-17	Dorothy released from 22-month commitment at HSC, Yankton, SD
8-9-17	Dorothy moves to Orchard Park independent living, Yakima, as selected by Ms. Calhoun, in spite of HSC Yankton recommendation against independent living. Sup. Calhoun Dec., ¶ 23
9-28-17	Dorothy stops taking medications; no response from Senior Avenues
10-9-17	Dorothy admitted to Yakima Valley Hospital/Virginia Mason Memorial Hospital for "grave disability" due to decompensation
10-30-17	Dorothy under 90-day detention
11-1-17	Dorothy transferred to Eastern State Hospital

<b>Date</b>	<b>Description</b>
12-13-17	Kristyan Calhoun receives letter from Ms. Helm asking Ms. Helm's funds to be transferred to her brother, Glenn Helm, for investment. 3 <sup>rd</sup> Sup. Young Dec., Ex. B at 9-10
1-22-18	Kristyan Calhoun meets with Amy Clark and attorney Tyler Farmer for 1.43 hours to review the guardianship petition to be filed the next day, 3 <sup>rd</sup> Sup. Young Dec. Ex. B, 14.
1-23-18	Kristyan Calhoun files petition for guardianship alleging Ms. Helm has "dementia" and "[d]ue to the AIP's dementia, she is at risk of serious personal and financial harm." Pet. ¶ 2. Nature of alleged incapacity per RCW 11.88.010 not stated. Specific GAL requested, but no reason given as required by RCW 11.88.030(1)(I). Relationship between Amy Clark and Ms. Calhoun not disclosed.
1-23-18	Kristyan Calhoun ex parte without notice to Dorothy obtains a preliminary injunction barring Dorothy from revoking the DPOA signed on 12-16-16
1-25-18	Court enters order for 180-day commitment under RCW ch. 71.05, expiring 7-24-18
3-2-18	Kristyan Calhoun (Senior Avenues) has charged fees to Dorothy of \$17,094.67 from 3-19-17 through 3-2-18. 3 <sup>rd</sup> Sup. Young Dec., Ex. A at 2
3-5-18	Amended findings on Less Restrictive Alternative (LRA) and order of involuntary treatment releasing Dorothy from Eastern State Hospital
3-7-18	Dorothy discharged from Eastern State Hospital to Glead Orchard Manor, residential treatment facility, where she lived without incident through October 2018 and complied with all requirements of the LRA. Dana Hill Dec.
4-2-18	GAL submits Interim Report, which she states "is incomplete and based only on some records reviewed and some interviews made, to date. The investigation is continuing." GAL's Recommendation (Interim) is that a guardianship of both the person and estate is merited, but "whether the guardianship should be limited in some nature is still a question that the rest of the investigation will answer." Interim report does not address any less restrictive alternative, as required by RCW 11.88.090(5)(f)(iv)
7-24-18	Dorothy's 6-month LRA expires
11-1-18	Dorothy left Glead Orchard Manor and moves into Apt. #615 at Sun Tower to live independently (where she continues to live independently without incident)
11-28-18	Kristyan Calhoun receives letter terminating the service agreement. Sup. Calhoun Dec., ¶ 31
12-4-18	Kristyan Calhoun (Senior Avenues) charges Dorothy \$7,998.32 in fees ("AIF Fees") from 6-4-18 to 12-4-18. 3 <sup>rd</sup> Sup. Young Dec., Ex. C, 2-3

**RCW 11.125.140****Agents—Duties—Liability—Disclosures.**

- (1) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
- (a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
  - (b) Act in good faith; and
  - (c) Act only within the scope of authority granted in the power of attorney.
- (2) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
- (a) Act loyally for the principal's benefit;
  - (b) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
  - (c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
  - (d) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
  - (e) Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
  - (f) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
    - (i) The value and nature of the principal's property;
    - (ii) The principal's foreseeable obligations and need for maintenance;
    - (iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
    - (iv) Eligibility for a benefit, a program, or assistance under a statute or rule.
- (3) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.
- (4) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.
- (5) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.
- (6) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
- (7) An agent that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person, provided however that the agent shall not be relieved of liability for such person's discretionary acts, that, if done by the agent, would result in liability to the agent.
- (8) Unless RCW 11.125.110(1) applies, an agent may only delegate authority to another person if expressly authorized to do so in the power of attorney and may delegate some, but not all, of the authority granted by the principal. An agent that exercises authority to delegate to another person the authority granted by the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person, provided however that the agent shall not be relieved of liability for such person's discretionary acts, that, if done by the agent, would result in liability to the agent.
- (9) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested in writing by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. Such request by a guardian, conservator, or another fiduciary acting for the principal must be limited to information reasonably related to that guardian, conservator, or fiduciary's duties. If so requested, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

[ 2016 c 209 § 114.]

FILED  
TRACEY M. SLAGLE, CLERK

19 JAN 16 P12 :05

SUPERIOR COURT  
YAKIMA CO. WA

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

In the Guardianship of:

DOROTHY HELM O'DELL,

An Alleged Incapacitated Person.

No. 18-4-00054-39

ORDER ON MOTIONS HEARD  
JANUARY 10, 2019

*(CLERK'S ACTION REQUIRED)*

THIS MATTER coming before the undersigned this date on the motions of Petitioner for and order 1) preassigning the case, 2) allowing for limited discovery, 3) authorizing emergency powers for the administration of AIP's estate and 4) approving attorney's fees and costs and authorizing payment of future attorney's fees and costs; the motion of the AIP for attorney's fees and costs; and the motion of the GAL for an order 1) requiring the AIP to disclose the attorney's fees her counsel has incurred, 2) permitting the GAL to interview the AIP and 3) awarding attorney's fees to the GAL; the Court having considered the motions, the opposition of the AIP and the reply of Petitioner, the AIP's objections to inadmissible material in supplemental declaration of Kristyan Calhoun, the AIP's motion to strike inadmissible material in verified motion, the Declaration of Kristyan Calhoun, the Supplemental Declaration of Kristyan Calhoun, the Declaration of Vita Parsons, the Declaration of Katelyn Andrews, the Supplemental Declaration of Katelyn Andrews, the Declaration of Amy Clark, the Declaration of Tyler Farmer, the Supplemental Declaration of Tyler Farmer, the Declaration of Dan R. Young, the Supplemental Declaration of Dan R. Young, the Second Declaration of Dan R. Young, the Third Supplemental Declaration of Dan R. Young, the Declaration of Dorothy Helm, the Supplemental

ORDER ON MOTIONS HEARD  
JANUARY 10, 2019

1

**PRATT BOUTILLIER  
KIRKEVOLD & FARMER, PLLC**  
3901 Fairbanks Avenue  
Yakima WA 98902

Tel. (509) 453-9135 Fax (509) 453-9134

1 Declaration of Dorothy Helm, the Declaration of Glenn Helm, the Declaration of Dana Hill, the  
2 Medical Report of Dr. Wilkinson, the arguments of counsel and GAL, and the records and files  
3 in this action, and makes the following:

4 Findings of Fact

5 1. This is a complicated case, there will be expert testimony involved and multiple  
6 motions have been presented and heard.

7 2. The fees presented to the Court by counsel for Petitioner, counsel for AIP and  
8 GAL are reasonable and appropriate.

9 3. AIP has been diagnosed with schizoaffective disorder as well as an unspecified  
10 neurocognitive disorder.

11 4. AIP has demonstrated confusion in the management of her affairs.

12 5. AIP's counsel sent a letter to Petitioner purporting to terminate Petitioner's  
13 services under the Care Services Agreement.

14 6. The GAL report demonstrates concern by medical professionals and social  
15 workers with AIP's ability to manage her finances. GAL's opinion is that AIP needs someone to  
16 handle her finances.

17 7. Petitioner has been managing AIP's finances since AIP appointed Petitioner as  
18 attorney-in-fact on December 16, 2016.

19 8. It is in AIP's best interests that Petitioner continue managing AIP's finances  
20 during the pendency of this matter.

21 9. AIP has requested she be examined by Dr. Muscatel in preparation for trial.

22 10. GAL has requested AIP be examined by a qualified medical professional  
23 specializing in psychiatry or psychology.

24 Conclusions of Law

25 11. This is a case that warrants and requires pre-assignment under LCR 40(f).

26 12. An emergency situation exists that warrants Petitioner continuing to manage  
27 AIP's funds during the pendency of the guardianship.

28 13. The Court is authorized to grant emergency relief during the pendency of the  
29 guardianship pursuant to RCW 11.88.090.

TRL

1 14. An award of fees is authorized under RCW 11.96A.150 as well as a determination  
2 of how and by whom those fees are paid. The Court will defer a determination of how and by  
3 whom fees are paid until later proceedings.

4 15. Court oversight of the AIP's finances and estate is appropriate and authorized by  
5 RCW 11.88.045(5).

6 16. Discovery is permissible under RCW 11.96A.115.

7 17. A medical examination by a medical provider that has experience in mental health  
8 and neurocognitive disorders is appropriate given AIP's diagnoses.

9 18. GAL is entitled to have AIP examined by a qualified medical professional of  
10 GAL's choosing in connection with the preparation of the GAL report.

11 19. GAL is not limited to a single visit with AIP in connection with the preparation  
12 of the GAL report.

13 20. No constitutional issues exist prohibiting the deposition of AIP or solicitation of  
14 testimony from AIP.

15 Order

16 The Court, having made the foregoing findings of fact and conclusions of law enters the  
17 following:

18 21. This case shall be preassigned to Judge Michael McCarthy.

19 22. Trial date is set to begin May 28, 2019 and end no later than June 7, 2019.

20 23. The Court approves the attorney's fees and costs requested by counsel for  
21 Petitioner, counsel for AIP and the GAL. However, the AIP's estate currently has insufficient  
22 funds to pay all of the approved fees and costs, and the Court reserves determination of how  
23 attorney's fees and costs shall be allocated and how and if they will be paid.

24 24. Petitioner shall have authority to hold and manage all of AIP's funds during the  
25 pendency of the matter, including any additional funds that may be received after the date of  
26 entry of this Order. Petitioner shall provide \$400 by check, sent by mail, to AIP at the beginning  
27 of the month, and shall pay from AIP's funds AIP's rent, utilities, medical bills and other  
28 miscellaneous expenses, if any. Petitioner is entitled to charge a fee for her services and to be  
29 paid on a monthly basis from AIP's funds. Petitioner shall not charge for incidentals. Petitioner  
30 shall file monthly accountings of receipts and disbursements of AIP's funds with an itemization  
31

1 of activities performed by Petitioner on behalf of AIP, and provide such accountings to AIP's  
2 counsel and the GAL. No hearing needs to be noted on the accountings.

3 25. All parties are entitled to conduct discovery.

4 26. Petitioner and AIP may conduct up to six (6) depositions each.

5 27. AIP may be deposed by Petitioner.

6 28. Petitioner may be deposed by AIP.

7 29. The Court will be available telephonically to make rulings on the scope of  
8 deposition questions if necessary.

9 30. AIP is permitted to hire Dr. Ken Muscatel to evaluate the AIP, provide a report  
10 and testify at trial. Dr. Muscatel's fees are to be paid by Petitioner from AIP's funds.

11 31. GAL <sup>is authorized to obtain</sup> ~~may request~~ an additional examination of <sup>AIP</sup> ~~GAL~~ if she is unsatisfied with the  
12 selection of Dr. Muscatel. PRL

13 32. GAL may conduct an in-person interview of AIP. AIP's counsel may be present  
14 along with one other witness, but may not interfere in the interview. The interview may be  
15 recorded. GAL and AIP will make best efforts to have the interview no later than February 1,  
16 2019.

17  
18 DONE IN OPEN COURT this 16th day of January, 2019.

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JUDGE / COURT COMMISSIONER  
MICHAEL G. MCCARTHY

23 Prepared and presented by:

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26 Tygh R. Lybbert, WSBA #38859  
27 Attorney for Petitioner, Kristyan Calhoun

28 Approved as to form:  
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ORDER ON MOTIONS HEARD  
JANUARY 10, 2019

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Dan Young, WSBA #12020  
Attorney for AIP

Approved as to form:

  
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Amy Clark  
Court Appointed GAL

ORDER ON MOTIONS HEARD  
JANUARY 10, 2019

**PRATT BOUTILLIER  
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3901 Fairbanks Avenue  
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19 JAN 10 AM 11:51

SUPERIOR COURT  
YAKIMA CO. WA

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

In the Guardianship of:

DOROTHY HELM O'DELL,

An Alleged Incapacitated Person.

No. 18-4-00054-39

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AND ORDER GRANTING  
PRELIMINARY INJUNCTION PENDING  
ADJUDICATION OF GUARDIANSHIP  
PETITION

*(CLERK'S ACTION REQUIRED)*

This matter having come before the Court on December 10, 2018 on Petitioner's Verified Motion for Preliminary Injunction Pending Adjudication of Guardianship Petition and AIP's Motion to Vacate Order Granting Emergency Temporary Relief Filed January 23, 2018 and AIP's Motion to Strike Inadmissible Material in Verified Motion, Tygh Lybbert having appeared on behalf of Petitioner, Dan Young on behalf of AIP, and Amy Clark as GAL, the Court, having considered the evidence, pleadings and records filed herein and the oral argument of parties, makes the following:

Findings of Fact

1. Petitioner is the attorney-in-fact for AIP under a Durable Power of Attorney dated December 16, 2016.
2. Petitioner filed the guardianship petition seeking to appoint a full guardian of the person and estate of AIP on January 23, 2018.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AND ORDER GRANTING  
PRELIMINARY INJUNCTION PENDING  
ADJUDICATION OF GUARDIANSHIP  
PETITION

1 3. An emergency order was entered January 23, 2018 prohibiting AIP from making  
2 any changes to her existing Durable Power of Attorney during the pendency of this proceeding.  
3 This order was based upon a declaration submitted by Petitioner outlining attempts<sup>gn</sup> by AIP's  
4 brother to encourage AIP to transfer all of her assets to his control.

5 4. AIP has a significant history of inpatient commitments for psychiatric treatment.  
6 Such a commitment led to the nomination of Petitioner as attorney-in-fact.

7 5. AIP <sup>was</sup> is diagnosed with schizoaffective disorder. AIP <sup>was</sup> is also diagnosed with a  
8 ~~neurocognitive disorder.~~ <sup>unspecified</sup>

9 6. The GAL appointed in this matter, Amy Clark, has indicated in her preliminary  
10 reports and in oral presentation that a guardian of the person and of the estate is appropriate for  
11 AIP. This opinion is based upon her interview with the AIP, as well as interviews of various  
12 professionals and family members familiar with AIP and her needs.

13 7. AIP continues to need assistance with compliance with medication regimens and  
14 management of her affairs. She has demonstrated confusion regarding from which pharmacy  
15 she obtains her medications as well as difficulty in picking up her medications without help. She  
16 could not remember the name of her doctor or the location of the doctor's office.

17 8. Mr. Young sought appointment as attorney for AIP ~~in the instant case in March~~  
18 ~~of 2018 seeking to remove a prior appointed attorney.~~ An order was entered March 20, 2018  
19 appointing Mr. Young as attorney for AIP.

20 9. Mr. Young has sought prior to and during his appointment to direct the  
21 proceedings to issues regarding the sale of AIP's real property conducted by Petitioner. He has  
22 done this in his pleadings, unauthorized requests for discovery and during mediation.

23 10. AIP does not know the market value of the real properties at the time they were  
24 sold or have substantiating evidence of their value.

25 11. Ms. Clark has not obtained a medical evaluation and report as required by statute  
26 due to the litigious nature of this proceeding and requirements placed upon the evaluation by Mr.  
27 Young. Further, Ms. Clark has requested additional visits with AIP and this request has been  
28 denied by Mr. Young.

1 12. Mr. Young filed a lawsuit on behalf of AIP in Kitsap County Superior Court on  
2 November 19, 2018 alleging, among other things, that Petitioner has breached her fiduciary duty  
3 to AIP regarding the sale of the properties.

4 13. The action in Kitsap county has and will continue to interfere with the instant  
5 guardianship action.

6 14. AIP does not have the financial resources to pay for protracted litigation.

7 15. The instant case will determine AIP's legal rights to sue or be sued other than  
8 through a guardian. The determination of AIP's rights and capacities is paramount to other  
9 matters.

10 16. No evidence has been presented of actual prejudice to AIP if she is enjoined from  
11 prosecuting litigation until a determination of her capacity.

12 17. Notice of Petitioner's intent to seek the temporary order was provided to Mr.  
13 Young and Ms. Clark, by email, prior to the ex-parte hearing on November 26, 2018. Mr. Young  
14 called the Court as soon as he learned of the motion and hearing and could have done so in time  
15 if he had checked his email earlier in the day.

16 18. A bond, or payment to be held in the court registry, in the amount of \$500 has  
17 been posted by Petitioner.

18 Conclusions of Law

19 19. Petitioner's motion for a preliminary injunction was brought for a proper purpose.

20 20. Evidence of AIP's past mental health history and hospitalizations, diagnoses of  
21 schizoaffective disorder and neurocognitive disorder and recent events convince the Court that  
22 AIP's capacity is compromised and there is a strong likelihood that a guardianship, in some form,  
23 will be established for AIP.

24 21. Potential for damage and immediate and irreparable harm to AIP's estate exists if  
25 allowed to pursue the action in Kitsap County while the instant case is pending.

26 22. A determination of AIP's capacity is paramount to other actions at this time.

27 23. Neither the AIP nor her estate will suffer detriment or damage as a result of  
28 enjoining AIP's right to sue or be sued during the pendency of this proceeding, including  
29 enjoining further prosecution of the action filed in Kitsap County.



1 DONE IN OPEN COURT this 10 day of January, 2019.

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5 JUDGE / COURT COMMISSIONER  
6 MICHAEL MCCARTHY

7 Prepared and presented by:

8  
9 Tygh R. Lybbert, WSBA #38859  
10 Attorney for Petitioner, Kristyan Calhoun

11 Approved as to form:

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14 Dan Young, WSBA #12020  
15 Attorney for AIP

16 Approved as to form:

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19 Amy Clark  
20 Court Appointed GAL

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31 FINDINGS OF FACT AND CONCLUSIONS  
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ADJUDICATION OF GUARDIANSHIP  
PETITION

**LAW OFFICE OF DAN R. YOUNG**

**November 21, 2019 - 8:47 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36820-3  
**Appellate Court Case Title:** In re the Guardianship of Dorothy Helm O'Dell  
**Superior Court Case Number:** 18-4-00054-4

**The following documents have been uploaded:**

- 368203\_Briefs\_20191121084223D3256793\_2754.pdf  
This File Contains:  
Briefs - Appellants - Modifier: Amended  
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**A copy of the uploaded files will be sent to:**

- kkirkevold@helsell.com

**Comments:**

This brief replaces the one filed yesterday in order to remove confidential Appendix A and the reference to Appendix A on page 13.

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Sender Name: Camille Minogue - Email: camille@truthandjustice.legal

**Filing on Behalf of:** Dan Robert Young - Email: dan@truthandjustice.legal (Alternate Email: camille@truthandjustice.legal)

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