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SUPREME COURT OF  
OF THE STATE OF WASHINGTON

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IN RE THE MATTER OF SUSPENSION OF PROFESSIONAL  
GUARDIAN LORI A. PETERSEN CPG No. 9713

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APPEAL FROM THE DECISION OF THE CERTIFIED  
PROFESSIONAL GUARDIANSHIP BOARD  
Nos. 2010-005, 2010-006, 2010-007, 2010-008, 2009-013

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OPENING BRIEF OF LORI A. PETERSEN

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## I. INTRODUCTION

This case raises significant issues regarding violations of due process and prejudgment bias leading to an erroneous decision by the Certified Professional Guardianship Board (hereinafter “Board” or “CPGB”). The Board has been granted near absolute authority over all legislative, judicial, and executive functions of the government related to the certification and discipline of professional guardians. While this lack of separation of powers is by itself violative of constitutional due process, where, as here, it is combined with prejudgment bias and lack of apparent fairness by the Board, it creates an evil that exemplifies why the constitutional safeguards exist.

Ms. Petersen acted in conformity with all duties and responsibilities of a professional guardian. Experienced individuals, including doctors, nurses, and social workers, reported to Ms. Petersen that her wards were receiving an inadequate level of care for their particular needs. Based on her experiences with Petersen Place Adult Family Home, Ms. Petersen looked at the totality of the circumstances, including the similar care needs of each of her wards, and determined that she must move D.S. and J.S. to new care facilities. Ms. Petersen did not take her duty as guardian lightly and took actions to move the wards only after careful consideration of all factors. It is only due to the personal

biases of a judicial officer who was also a Board member, combined with the unconstitutional authority delegated to the Board, that she now faces the possibility of losing a profitable career that has been 18 years in the making. The decision of the Board to Suspend Ms. Petersen's license must be invalidated.

## **II. BOARD ERRORS AND VIOLATIONS**

1. The Board's actions are a breach of Ms. Petersen's due process rights under the "Appearance of Fairness" doctrine.
2. The Board's actions are a breach of Ms. Petersen's due process rights under the "Separation of Powers" doctrine.
3. The Board failed to apply the appropriate "clear and convincing" standard of proof to prove the alleged violations by Ms. Petersen.
4. The Board erroneously approved the hearings examiner's findings of fact, conclusions of law, and disciplinary recommendations.

## **III. BOARD PROCEDURE VIOLATIVE OF DUE PROCESS**

### **A. Certifying Professional Guardians**

Washington State Courts are tasked with the oversight and certification of professional guardians. GR 23. Through GR 23, the Washington Supreme Court has established the Certified Professional Guardianship Board to certify professional guardians. Through GR 23,

the Board has been delegated legislative, judicial, and executive authority over all matters involving professional guardians.

**B. Ms. Petersen's Background And Prior Associations With Board Members**

Lori Petersen is a well established and experienced certified professional guardian (CPG), having received her license on November 5, 2001. Exhibit 1A ("Ex."). She owns and operates Emerald City Guardianship. Ex. 13. Since receiving her license, Ms. Petersen has dedicated herself to her guardianship business and now operates one of the largest professional guardianship practices in Spokane County. Starting from nothing, Ms. Petersen has built her business into a professional guardianship practice with over sixty cases generating revenue of over \$170,000 per year.

As a well respected professional guardian, Ms. Petersen served as a member of the CPG Board for six (6) years from 2003 to 2009. While working on the Board, she was a member of the Standards Of Practice Committee (SOPC) involved with investigating disciplinary complaints against professional guardians. As such, Ms. Petersen has significant experience with the standards of practice required for CPGs.

Due to her involvement in the guardianship community, including her time with the Board, she has established relationships, both good and bad, with most of the current members of the Board. During the time that

Ms. Petersen served on the Board, many of the current board members, including Commissioner Joseph Valente, were also serving. Transcript of Proceedings (“T.P.”) 482. Until recently Commissioner Valente, now retired, was also until recently a Court Commissioner in Spokane County where Ms. Petersen’s practice is located.

During the time that Ms. Petersen and Commissioner Valente served on the Board together, they had an “argumentative” relationship. TP 482. Many of these conflicts stemmed from a pilot project, called the Guardianship Monitoring Program ( GMP), headed by Commissioner Valente. The project involved the use of volunteers by the court to monitor the actions of professional guardians through the direct review of wards’ personal medical records and guardianship financial documents. Ms. Petersen disapproved of the project due to the disclosure of highly sensitive information, and she made every attempt to end it. TP 482-483. Largely due to Ms. Petersen’s actions, Commissioner Valente was forced to significantly alter his pilot project. *Id.* Shortly thereafter, Ms. Petersen’s term as a member of the Board ended and she was no longer directly involved with the Board. TP 488.

After he was forced to alter his project, Commissioner Valente began to use his position as both a court commissioner and a member of the Board to take retaliatory actions against Ms. Petersen. TP 485. Ms.

Petersen testified that he began to *sua sponte* take each of her files home and look for minor mistakes in guardianship reports that had already been approved by the court. *Id.* She also began to receive increased scrutiny from the volunteers involved in Commissioner Valente's GMP, which, although altered against his wishes, was still ongoing. TP 487. Shortly after noticing a significant increase in the scrutiny she was receiving from the courts and the GMP, Ms. Petersen started to receive complaints filed with the Board.

When Ms. Petersen learned of the complaints, she took actions to facilitate a resolution. Where she felt there was a conflict with family members of her clients, such as with D.S. and J.S., Ms. Petersen voluntarily agreed to step down as guardian. Ms. Petersen had a large guardianship business, and it was her practice to avoid conflicts whenever possible. In instances where she and a family member did not see eye to eye, she preferred to transfer the guardianship, rather than exacerbate an ongoing conflict.

### **C. The Board's Failed Process**

After receiving the initial grievances against Ms. Petersen, the Board forwarded the grievances to Court Commissioner Steven N. Grovdahl of Spokane County Superior Court. On March 30, 2010, Commissioner Grovdahl sent a letter to Heidi Peterson (owner of Peterson

Place AFH where all three of the wards had resided, and one of the grievants), stating that he was in receipt of her complaints but that the court “no longer has any role in supervising or monitoring the activities of Empire Care and Guardianship because it is no longer serving as a guardian on any of these cases.” Ex. 39.

Commissioner Valente, however, refused to let the matter die. He personally took it upon himself to forward the grievances to the Board where he was in charge of investigating the grievances as the head of the Standards of Practice Committee (hereinafter “SOPC”).

Then, acting as a judicial officer, Commissioner Valente scheduled a court hearing for July 15, 2010, and summoned Ms. Petersen to appear in his courtroom to be examined by him under oath. See Ex. 21. At the July 15, 2010, quasi-judicial hearing scheduled by Commissioner Valente, he sat as both judge and prosecutor. The Commissioner stated that the purpose of the hearing was to gather facts for presentation to the Board and that the Board would take those facts, “and then apply those to the standard of conduct, and make some determination whether those standards have been violated.” Ex. 21, Report of Proceedings 6:5-7. During the hearing, Commissioner Valente wore judicial robes, sat on the judicial bench, and conducted the direct examination of Ms. Petersen and other witnesses. Ex. 21.

On July 26, 2010, Commissioner Valente issued letters condemning Ms. Petersen's actions. Ex. 65, 66, 70, 71. He claimed that Ms. Petersen had a vendetta against Heidi Peterson, owner of Peterson Place Adult Family Home, which he proposed was the basis for her later decisions to remove D.S and J.S. from the facility. Ms. Petersen explained at the hearing that the reason for removing D.S. and J.S. from the home was due to the lack of "24 hour awake care"<sup>1</sup> for her clients at Petersen Place. Multiple reliable sources, including among others, a doctor (Ex. 54) and two nurses (Ex. 25, Ex. 14) had provided information to Ms. Petersen that led her to believe that her wards should be moved due to the lack of 24 hour awake care. A later report from the Department of Developmental Disabilities showed that there were many quality of care issues at Petersen Place and that Ms. Petersen's concerns were well founded. Ex. 73.

During August 2010, Commissioner Valente sent a second round of letters to the grievants, Ms. Petersen, and the Board, stating his opinion that Ms. Petersen should be disciplined and encouraging the grievants to pursue claims against Ms. Petersen. Ex. 43, 44, 69. Commissioner Valente's letters made factual and legal determinations claiming that Ms.

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<sup>1</sup> Peterson Place staff stopped care management between 11 p.m., and 7 a.m. The term "24 hour awake staff" is used in the industry to mean that staff check the wards every two hours to see if they are soiled. It is done with incontinent persons to prevent Urinary Tract Infections (UTI's) and skin breakdown.

Petersen breached her duties as guardian with respect to J.S. Ex. 43, 44. The breaches of duty alleged to be “actionable” by Commissioner Valente were speculative and lacked factual and legal basis (*see* § VI, Board Errors of Fact and Law, *infra.*). Commissioner Valente forwarded all of the July and August letters to the Board. The Findings of Fact and Conclusions of Law submitted by the hearing examiner and approved by the Board are nearly identical to the allegations contained in the July and August Valente letters, as are the allegations contained in the Board’s complaint. Ex. 43, 44, 65, 66.

On September 12, 2011, only minutes prior to voting to file the complaint against Ms. Petersen, the Board voted on Commissioner Valente’s motion to reduce the burden of proof by which the Board would have to prove the allegations against her. *See* Ex. 36. Commissioner Valente argued that the recent Supreme Court decision in *Hardee v. State*, 172 Wn.2d 1, 256 P.3d 339 (2011) allowed the Board to lower the burden of proof in disciplinary proceedings against Certified Professional Guardians. Commissioner Valente urged the Board to change the burden from “clear and convincing,” to a mere “preponderance.” *See* Ex. 36. While there were concerns raised by other Board members regarding the appropriateness of the motion to reduce the burden of proof, the motion

passed. *See* Ex. 36. Minutes later, the Board voted to file the present complaint against Ms. Petersen under its new lower standard of proof.

After having taken no action on the grievances for over a year, the Board decided to file the present disciplinary complaint against Ms. Petersen. *See* Ex. 36. The meeting minutes do not indicate who made the motion to file the complaint, nor do they indicate who seconded the motion; however, the minutes do indicated that Commissioner Valente was present for the meeting. *See* Ex. 36. As chair of the SOPC, Commissioner Valente was intricately involved with all Board discussions regarding the decision to file the complaint. At the time the complaint was voted on, there were a total of thirteen voting members of the board. *See* Ex. 36. However, three of those members were not present at the September 12, 2011, meeting, and seven of the ten present members abstained from voting because they either knew Ms. Petersen, served with her on the Board, or had other conflicts of interest. *See* Ex. 36. As a result, only three out of the thirteen Board members voted to file the complaint against Ms. Petersen. *See* Ex. 36.

Ms. Petersen received the complaint on April 25, 2012. The complaint largely mirrored the letters written by Commissioner Valente after his July 2010 “star chamber” action. Ex. 43, 44, 65, 66. Ms. Petersen timely filed a response and objected to the Boards complaint on

May 25, 2012. In addition to denying the Board's allegations regarding the specific injuries alleged, Ms. Petersen objected to the lack of constitutional due process in the Board's procedure. *See* Petersen Answer to Board Complaints ¶ VI (d).

After receiving Ms. Petersen's Answer, the Board handpicked Roderick S. Simmons as Hearings Officer to oversee the proceedings.<sup>2</sup> Mr. Simmons is not named as one of the hearings officers on the Office of Administrative Hearings website. He is an attorney practicing in Seattle, and the Board privately contracts with Mr. Simmons to procure his services to act as hearings officer on most, if not all, of its cases. *See* Contract between Roderick S. Simmons and the Certified Professional Guardianship Board attached hereto as **Appendix A**. In this case the Board flew Mr. Simmons from Seattle to Spokane to adjudicate the three day hearing from October 22-24, 2012. The Board neither disclosed the existence of this contract, nor the terms of the contract it had with Mr. Simmons until after the Motion to Allow Briefing and Oral Argument was filed in this court on March 29, 2013.

Mr. Simmons' is well paid by the Board, and he has an interest in keeping the Board happy. His contract provides him with an

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<sup>2</sup> Pursuant to Disciplinary Regulation 510.2, "In the absence of a hearings officer hired by the OAC,..." the Board Chair has discretion to appoint a hearings officer of his or her choice. DR 510.2.

“honorarium” of \$7000 per matter assigned, plus \$100 per hour for his work performed.<sup>3</sup> Assuming eight hour days during Ms. Petersen’s three day hearing, Mr. Simmons would have made \$9,400 for three days of work. In many of the CPG cases, the matter may settle prior to the hearing, but under his contract, Mr. Simmons would still be entitled to his \$7000 “honorarium” plus \$100 per hour. While the contract is not exclusive, there is no evidence that the Board employs any individual other than Mr. Simmons as its hearing’s examiner in any of its contested matters. Mr. Simmons had a vested financial interest in pleasing the Board so that they would continue to appoint him as hearing examiner in future matters.

On November 5, 2012, Mr. Simmons submitted findings and recommendations to the Board that were nearly identical to Commissioner Valente’s July and August letters, as well as the allegations and requested relief contained in the Board’s complaint. Ms. Petersen submitted a detailed Response objecting to the hearing examiner’s findings and recommendations, which response is contained in the record before this Court. In addition to errors of fact and law, Ms. Petersen again objected to violations of her constitutional due process rights. *See* Petersen Response to Recommendations of the Hearing Examiner, Sec. VII.

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<sup>3</sup> The contract is vague as to whether Mr. Simmons receives the honorarium per case or per contract. Nevertheless, he was paid well for his services.

In a letter dated March 4, 2013, Ms. Petersen was informed that, a month earlier, the Board had voted to suspend her license. Attached hereto as **Appendix B** is a true and correct copy of the Board Meeting Minutes from January 30, 2013. While there had initially been a vote at an earlier January 15, 2013, meeting, one of the voting members from that meeting later had to recuse him or herself due to a conflict of interest. *See Id.* At the time of the January 30 meeting, there were twelve voting members of the Board, six recused themselves from voting, and only six of the twelve board members voted to suspend Ms. Petersen's license. *See Id.* For the second time in this matter, an important decision affecting Ms. Petersen's rights was made based on affirmative votes by less than a majority of the then existing Board members.

The meeting minutes indicate that the meeting lasted only twenty four minutes, and that "Staff reviewed the complaint, the Findings of Fact, Conclusions of Law and Recommendations of the Hearings Officer." *Id.* The January 30, 2013, meeting minutes do not reflect that Ms. Petersen's Hearing Memorandum, the hearing transcript, hearing exhibits, nor Ms. Petersen's Response to the Findings of Fact and Conclusions of Law were considered by the Board.

Since the Board voted to suspend Ms. Petersen's license, current and former Board members have actively involved themselves in Spokane

County Superior Court in attempts to restrict her ability to obtain new clients. The Board's own rules state that the decision of the Board is not final until after Supreme Court review. DR 513.3. Despite this fact, Board members have blacklisted Ms. Petersen in open court, forcing her to face public derision from the Spokane County Superior Court and repeated refusals from Judges and Guardians ad Litem to allow her to be appointed as a guardian.

#### **IV. STATEMENT OF ISSUES**

1. Does the Board violate Constitutional due process requirements under the "separation of powers" doctrine where it has been delegated all legislative, judicial, and executive authority over matters involving professional guardians, but fails to institute appropriate safeguards to protect professional guardians from a mistaken Board decision to take away his or her license?
2. Does the Board violate Constitutional due process requirements under the "appearance of fairness" doctrine where prejudgment bias on the part of Board members are combined with an inappropriate combination of government functions to deny Ms. Petersen a fair hearing?
3. Whether a professional guardian's property interest in his or her professional license is more analogous to that of a doctor than that

of a child care facility, such that the Board erred in applying the “preponderance of the evidence” burden of proof as opposed to the “clear and convincing” burden of proof to Ms. Petersen’s case?

4. Where Ms. Petersen acted in the best interests of her wards under the advice of numerous health care and government professionals, did the Board make errors of fact and law when it decided to suspend her license?

## V. CONSTITUTIONAL AUTHORITY

### A. The Board Actions Are A Violation Of Constitutional Due Process Protections Under The Separation Of Powers And Appearance Of Fairness Doctrines

“Procedural due process imposes constraints on government decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution.” *Washington State Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983); *citing Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901 47 L.Ed.2d 18 (1976); *also citing Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76, 41 L.Ed.2d 935 (1974). “The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society.” *Johnston*, 99 Wn.2d at

474; citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct 624, 646-47, 95 L.Ed. 817 (1951). “A professional license revocation proceeding has been determined to be ‘quasi-criminal’ in nature and, accordingly, entitled to the protections of due process.”

*Johnston*, 99 Wn.2d at 474; citing *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968); also citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796 (1957); also citing *In re Kindschi*, 52 Wn.2d 8, 11-12, 319 P.2d 824 (1958).

In the present action, the Board is attempting to take away Ms. Petersen’s license to practice as a certified professional guardian. Under *Johnston*, and the cases cited therein, such a taking is subject to the constitutional protections of due process under the fifth and fourteenth amendments of our state and federal constitutions.

1. The combination of all legislative, executive, and judicial functions within the Board is an improper delegation of authority resulting in a violation of Ms. Petersen’s due process rights under the “Separation of Powers” doctrine.

“The Washington State Constitution does not contain a formal separation of powers clause, but ‘the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.’” *Waples v. Yi*, 169

Wn.2d 152, 158, 234 P.3d 187 (2010); *citing Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (*quoting Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). “The doctrine of separation of powers divides power into three coequal branches of government: executive, legislative, and judicial.” *Waples*, 169 Wn.2d 158; *citing City of Fircrest v. Jensen*, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006). “The doctrine ‘does not depend on the branches of government being hermetically sealed off from one another’ but ensures ‘that the fundamental functions of each branch remain inviolate.’” *Waples*, 169 Wn.2d at 158; *citing Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (*quoting Carrick*, 125 Wn.2d at 135). “If ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another,’ it violates the separation of powers.” *Waples*, 169 Wn.2d at 158; *citing City of Fircrest*, 158 Wn.2d at 394 (*quoting State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002)). “The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

While an administrative agency may be delegated authority to implement directives from a particular branch of government, such agency

must meet certain requirements. First, the government branch must provide standards to indicate what is to be done and designate the agency to accomplish it. *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004). Second, procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power. *Id.* (emphasis added). When determining whether or not the delegating branch has established sufficient procedural safeguards, “it is imperative to consider the magnitude of the interests which are affected by the legislative grant of authority.” *In re Pers. Restraint of Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979).

Here, the Board has been delegated unprecedented authority over every government role with regard to the certification and discipline of professional guardians, and there are insufficient procedural safeguards to curb the abuse of such broad power.

*a. The magnitude of the interest involved in this matter is significant.*

Ms. Petersen’s suspension or decertification would represent the loss of a very significant property interest. Whether her license is suspended or revoked, she will lose over 18 years of work obtaining the necessary qualifications to obtain a professional guardianship license, and building a successful practice that generates revenue of over \$170,000 per

year. The magnitude of her property interest is analogous to that of a licensed physician, and is discussed in detail in section V (B) *infra*.

*b. The authority delegated to the Board is substantial and necessitates procedural protections against abuse of power.*

Under GR 23, the Board has been delegated the following government authority:

1) Legislative.

GR 23 directs that, “The Board shall adopt and implement policies or regulations setting forth minimum standards of practice which professional guardians shall meet.” GR 23 (c) (2) (ii). “The Board shall adopt regulations to implement this rule.” GR 23 (f). The Board even defines its own quorum. DR 512.4.5. These standards of practice are the rules governing the conduct of professional guardians and are the professional guardianship equivalent of criminal codes propagated by our legislature.

2) Judicial.

The Board has been delegated authority to “adopt and implement procedures to review any allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other requirement governing the conduct of professional guardians.” GR 23 (c) (2) (viii). Like the

judiciary, the Board has authority to create and implement its own disciplinary process, a process that is required to meet due process requirements of both the state and federal Constitutions.

The Board has also been delegated authority to conduct hearings, make findings, and impose disciplinary sanctions, including decertification. GR 23 (c) (2) (viii); GR 23 (c) (2) (x). As such, the Board acts as both judge and jury, first interpreting its own rules, then making factual determinations as to whether those rules have been violated. The Board then has authority to determine the degree of punishment to be inflicted, and while using a free government employee (assistant attorney general) it has authority to enter a monetary sanction for its attorney's fees and its hired judge. DR 516.

3) Executive.

Like the executive branch of our government, the Board has been delegated authority to investigate and prosecute alleged violations of the Standards of Practice. GR 23 (c) (2) (viii). Then, like a prosecutor, the Board makes a determination as to whether it will continue to prosecute the alleged violation, including the authority to determine what degree of sanctions to seek. GR 23 (c) (2) (viii). Like a prosecutor, the Board has authority to consider

and propose settlements that are the equivalent of a plea bargain. Further, the Board is then granted the authority to hand pick the judicial officer that will administer the hearing and present findings, conclusions, and disciplinary recommendations on the Board's complaint. At no time does a Superior Court judge either review any aspect of the procedure or the sentencing.

The delegation of so much authority to the Board has resulted in an unacceptable overlapping of state functions. In our government, there is a constitutionally mandated separation of powers between the legislative, judicial, and executive branches of government. Here, the board wrote the substantive rules; established disciplinary procedures; cross examined Ms. Petersen under oath; made the determination to prosecute Ms. Petersen; decided what sanctions to seek; advocated against Ms. Petersen; interpreted its own substantive rules as applied to the claims against Ms. Petersen; appointed its hand picked hearings officer; made findings of fact; and ordered disciplinary measures which resulted in the loss of Ms. Petersen's license and career and a monetary judgment. While our system allows for limited overlap between the branches of government, the lack of separation between all three branches that is present here renders the actions of the Board in this matter distasteful, invalid, and violative of the state and federal Constitutions.

- c. *There are insufficient procedural safeguards in place to prevent the type of abuse of power by the Board that is herein present.*

Having been delegated substantial authority over professional guardians, the Board has failed to establish appropriate safeguards to ensure against arbitrary administrative action and the abuse of discretionary power. To the contrary, the Board has developed procedural rules that expand the discretionary authority of the Board and serve to limit review of Board decisions by other branches of the government.

In *Simmons*, 152 Wn.2d 450 the Court analyzed what types of procedural safeguards are required to prevent abuse of power by administrative agencies. The Court applied the three pronged test from *Mathews v. Eldridge*, 424 U.S. at 335, to determine whether a statute which provided the Department of Corrections with authority to adopt rules and govern inmate behavior, provided sufficient procedural safeguards against arbitrary action and abuse of discretion. *Simmons*, 152 Wn.2d at 456. Under this approach, the Court balances the private interest to be protected; the risk of an erroneous deprivation of that interest by the government's procedures; and the government's interest in maintaining the current procedures. *Simmons*, 152 Wn.2d at 456; *citing Mathews*, 424 U.S. at 335.

Applying the *Mathews* factors to the board action in *Simmons*, this

Court held that the following procedural safeguards must be present:

- (1) The defendant must be entitled to a second look at agency action through administrative channels
- (2) Judicial review must be available under the clearly erroneous standard
- (3) The procedural safeguards that are normally afforded a defendant in a criminal prosecution must be present.

*Simmons*, 152 WN.2d at 459; citing *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 901, 602 P.2d 1172 (1979).

In determining that sufficient safeguards were in place, the *Simmons* court noted several important factors. First, the defendant in *Simmons* was entitled to a second look at agency action through administrative channels. *Simmons*, 152 Wn.2d at 457. Second, the Department of Corrections adopted rules in accordance with the Administrative Procedures Act (APA). *Id.* Those rules included providing notice of the proposed rules, requesting public comment, conducting a hearing, and publishing the adopted rules through the code reviser's office. *Id.* Third, the disciplinary code specifically provided the defendant with the opportunity to appeal any adverse disciplinary hearing finding to the prison superintendent. *Id.* Finally, the rule making process provided for public scrutiny and superior court review of disciplinary action. *Id.*

In the present case, Ms. Petersen was denied the procedural safeguards required under *Simmons*. First, the Board's disciplinary procedures do not allow for a second look at the Board's action through administrative channels. Under DR 513 *et. seq.*, Ms. Petersen was entitled only to a review of the record by the Supreme Court, without any additional briefing or argument. Only by petitioning this Court for discretionary review has Ms. Petersen been afforded the opportunity to be heard. This procedure is an insufficient safeguard because, unlike a review by the superior court, which may last one to two days, the Supreme Court does not have time to make such an extensive review of the record and facts of the case.

Second, Ms. Petersen was not allowed any form of judicial review under the clearly erroneous standard as ordinarily required by the APA, and directed by the Court in *Simmons*. Opportunity for such a review of factual findings by a neutral judicial body is completely lacking in the Board disciplinary procedure. Without such a hearing, the checks on administrative authority which are required under *Simmons* are missing.

Third, unlike *Simmons*, the rules promulgated by the Board were not adopted after providing notice, requesting public comment, and conducting a hearing. One glaring example of this deficiency in the process was the Board's action to modify DR 511.12 to reduce the burden

of proof by which it had to prove its case against professional guardians, including Ms. Petersen. The Board modified the required standard of proof only minutes before voting on whether or not to file a formal complaint against Ms. Petersen. The vote substantially altered the disciplinary process without ensuring adequate notice as required by *Simmons*.

Finally, the procedural safeguards that are normally afforded a defendant in a criminal proceeding were not present under the Board's procedure. Ms. Petersen was not afforded the benefit of a neutral decision maker. In other state agencies, the roll of a hearings officer is to create separation of the adjudicative process from the other authority granted to administrative agencies. For example, the rules for enforcement of lawyer conduct establish a list of hearings officers available for individual hearings, with a chief hearings officer who assigns an individual from the list to each matter. *See Rules for Enforcement of Lawyer Conduct (ELC)* ¶ 2.5. In this way, the attorney discipline board minimizes its roll in the judicial aspect of disciplinary proceedings. However, the rules propagated by the CPG Board eliminate this separation of power by permitting the Board to either act as its own hearing officer, or to handpick the hearings officer of its choice.

Here, the Board has a standing contract with Roderick Simmons to act as hearings officer, and it appears that he represents the Board in all of its cases. As such, Mr. Simmons is an employee of the board, and he is well compensated for his work. He has a pecuniary interest in pleasing the board with the expectation that he will continue to receive future business in return.

Even if there had been a neutral hearings examiner, the Board remains the ultimate decision maker. The Board procedures allow the board unlimited discretion in how to interpret, prosecute, and employ discipline under the standards of practice it developed. Under DR 512, *et seq.*, the Board has the final authority to accept, modify, or dismiss the recommendations of the hearings examiner. The Board even has authority to grant itself fees, which it did in the case of Ms. Petersen. This self granted authority means that, during the investigation and prosecution of the case by the Board, the Board will prejudge a case knowing that the final outcome is never in doubt. This prejudgment is particularly detrimental to the settlement process because it gives the Board absolute authority to dictate terms. The Board has no incentive to reach a reasonable settlement, which goes against basic principals of criminal litigation. Unlike a criminal proceeding, where the prosecutor must weigh the likelihood of success or failure at trial, the Board may push forward a

prosecution with impunity knowing that, in the end, it will make the final ruling on its own complaint.

Ms. Petersen was not afforded the procedural safeguards normally afforded a defendant in a criminal case. She was not even afforded the procedural safeguards normally afforded a citizen in a proceeding under the Administrative Procedures Act. At least there, a ruling by an administrative law judge is reviewable by a superior court judge, and not solely by the complaining agency itself. RCW 34.05.514.

The procedures of the Board do not establish sufficient safeguards to meet due process requirements, and for the reasons described above, the decision to suspend Ms. Petersen's license must be invalidated.

2. Prejudgment bias on the part of Board members combined with an unacceptable concentration of powers in the Board to deprive Ms. Petersen of Due Process protections in violation of the Appearance of Fairness Doctrine.

From its very earliest existence, this Court has recognized the importance of maintaining the appearance of fairness in administrative decisions. This is of particular importance due to the lack of separation of powers inherent in such agencies. In the seminal 1898 case of *State Ex Rel. Barnard v. Board of Education of City of Seattle Et Al.*, 40 L.R.A. 317, 19 Wash. 8, 52 P. 317 (1898), the court made the following comments regarding the inherent danger of combining powers in

administrative boards and the corresponding lack of appearance of fairness:

The principal of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wend. 550, ‘next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.’”

*Barnard*, 19 Wash. at 17-18 (emphasis added).

The “appearance of fairness” doctrine applies to quasi-judicial administrative decisions enacted by an administrative board. *City of Hoquiam v. Public Employment Relations Commission of State of Washington*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982); *Buell v. City of*

*Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). Although this doctrine originated in the land use area, it has been extended to other types of quasi-judicial administrative proceedings. *Johnston*, 99 Wn.2d at 478; citing see *Chicago, M. St. P. & Pac. R.R. v. State Human Rights Comm'n.*, 87 Wn.2d 802, 557 P.2d 307 (1976).

“The intent of the doctrine is to maintain public confidence in quasi-judicial decisions made by legislative bodies.” *Harris v. Hornbaker*, 98 Wn.2d 650, 658, 658 P.2d 1219 (1983); citing *Westside Hilltop Survival Comm. v. King Cy.*, 96 Wn.2d 171, 181, 634 P.2d 862 (1981).

“Under the appearance of fairness doctrine, this court has required that the decision making process ‘not only be fair in substance, but fair in appearance as well.’” *Harris*, 98 Wn.2d at 658; quoting *Smith v. Skagit Cy.*, 75 Wn.2d 715, 739, 453 P.2d 832 (1969). “[T]he evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.” *Harris*, 98 Wn.2d at 658; quoting *Chrobuck v. Snohomish Cy.*, 78 Wn.2d 858, 868, 480 P.2d 489 (1971). “Participation in the decision making process by a person who is potentially interested or biased is the evil

which the appearance of fairness doctrine seeks to prevent.” *City of Hoquiam*, 97 Wn.2d at 488.

This Court has frequently addressed the appearance of fairness doctrine as it relates to administrative actions by boards conducting multiple government roles. In *In re the Matter of Honorable Mark S. Deming*, 108 Wn.2d 82, 736 P.2d 639 (1987) this Court analyzed the appearance of fairness doctrine as it related to the Judicial Commission’s decision to impose disciplinary sanctions against a district court judge. The *Deming* court relied heavily on the similar case of *Johnston*, 99 Wn.2d 466. While finding no violation of due process in either *Demming* or *Johnston*, the analysis in both cases is nonetheless informative in demonstrating that such violations have occurred in the present case.

The *Johnston* Court ruled that the combination of investigative and adjudicative functions, with “something more” would violate the appearance of fairness doctrine. *See Johnston*, 99 Wn.2d at 479-480. The “something more” described in *Johnston* has been interpreted by this Court to mean prejudgment bias. *See Organization to Preserve Agricultural Lands v. Adams Cy.*, 128 Wn.2d 869, 889-890, 913 P.2d 793 (1996) (holding that prejudgment bias is necessary to show a lack of appearance of fairness). While the *Johnston* Court did not discuss prejudgment bias explicitly as the “something more” required under its

appearance of fairness analysis, the *Agricultural Lands* decision makes it apparent that, had the *Johnston* Court found the existence of prejudgment bias, such bias would have satisfied the “something more” requirement. *See Agricultural Lands*, 128 Wn.2d at 889-890.

The *Johnston* Court described three types of prejudgment bias which may lead to a deprivation of due process:

These are [1] prejudgment concerning issues of fact about parties in a particular case; [2] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and [3] ... an interest whereby one stands to gain or lose by a decision either way.

*Johnston*, 99 Wn.2d at 474; citing *Ritter v. Board of Comm’rs*, 96 Wn.2d 503, 512, 637 P.2d 940 (1981) (internal citations omitted).

Here, the unprecedented crusading on the part of Commissioner Valente is the “something more” that renders the Board decision to suspend Ms. Petersen’s license invalid. It is undisputed that Commissioner Valente rendered a prejudgment on the matter. Ex. 43, 44, 65, 66, 69, 70, 71. He conducted “investigatory” hearings and published his opinions regarding the allegations against Ms. Petersen through his letters to the parties and the Board. *Id.* It is also undisputed that Commissioner Valente and Ms. Petersen had an antagonistic relationship. TP 482. This antagonistic relationship created a personal bias and prejudiced Commissioner Valente against Ms. Petersen.

Commissioner Valente had a substantial role in the decision of the board to both file the complaint and vote to approve the hearing examiner's recommendations. Commissioner Valente, acting in a dual roll as judicial officer and board member, conducted investigatory hearings from the bench and made disciplinary recommendations supported by his own findings of fact and conclusions of law. Just prior to the board vote to file the complaint against Ms. Petersen, Commissioner Valente made the motion to lower the burden of proof by which Ms. Petersen's guilt or innocence would have to be proved by the Board. Ex. 36. As the head of the SOPC, Commissioner Valente then argued for the filing of the complaint against Ms. Petersen. Commissioner Valente did not vote on the motion to file the complaint against Ms. Petersen, and was no longer on the Board when the final disciplinary sanctions were approved. Nevertheless, Commissioner Valente was a powerful force on the board for many years, and his letters, written on Spokane Superior Court Stationary, exerted significant influence over board decisions even after he left the Board. His involvement with the process, combined with the overlapping government rolls of the Board, is "something more" that makes the Board's action invalid under the appearance of fairness doctrine.

However, Commissioner Valente was not the only additional factor that satisfied the “something more” requirement under *Johnston*. Additional prejudgment bias can be found on the part of the hearing examiner, Roderick Simmons. Mr. Simmons had a pecuniary interest in making findings and recommendations consistent with the Board’s complaint. The Board has a standing contract with Mr. Simmons whereby he is well compensated. Under the Board’s self promulgated rules, the Board has authority to appoint the hearings examiner of its choice, and chooses to hire Mr. Simmons because they like him. So long as the Board continues to like Mr. Simmons, he will continue to receive business from the Board. It stands to reason that the more frequently he rules against the Board, the less likely he is to be re-hired. As such, Mr. Simmons had a personal pecuniary bias in his role as hearing examiner. While the Board makes final determinations of law, fact, and disciplinary action, as hearing examiner and an agent of the Board, Mr. Simmons personal bias had a significant negative impact on Ms. Petersen’s ability to obtain a fair hearing. His bias is “something more” that results in invalidation of the Board’s decision.

In addition to the prejudgment biases of Commissioner Valente and the hearings examiner, the “something more” requirement is satisfied by the addition of the legislative substantive rule making function of the

Board, to its own investigative, prosecutorial, and adjudicative actions present here and in *Johnston*. This argument is supported by this Court's decision in *Beam v. Fulwiler*, 76 Wn.2d 313, 456 P.2d 322 (1969).

The *Beam* Court held that the tribunal in question faces disqualification where "it is made to appear that the hearing tribunal is composed of an individual or individuals who investigated, accused, prosecuted and would judge the controversy involved." *Beam*, 76 Wn.2d at 318. In addition to the combination of functions which were deemed a violation of due process in *Beam* and to a lesser degree in *Johnston*, here, the CPG Board also acts as the legislature, creating the substantive rules that it later investigates, prosecutes, and judges. Thus, unlike *Johnston*, where only investigatory, prosecutory, and adjudicatory functions overlapped, the Board possesses the added power of the legislative branch. Because the Board's action in this case is rife with the appearance of unfairness and partiality, its action against Ms. Petersen must be invalidated.

**B. The Appropriate Burden Of Proof To Apply To The Findings Of The Board Is "Clear And Convincing."**

On September 12, 2011, just prior to voting to file the present complaint against Ms. Petersen, the Board voted to reduce its own burden of proof in disciplinary matters from "clear and convincing," to

“preponderance of the evidence.” The Board based this decision on *Hardee*, 172 Wn.2d 1. The Board’s reliance on *Hardee* is misplaced.

*Hardee* involved the removal of a license for a child care facility, and in its analysis, compared and contrasted the two prior cases of *Ongom v. State Department of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006) (Registered Nursing License) and *Nguyen v. State Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001) (Physicians License to Practice Medicine). In both of the prior cases, the court had applied the “clear, cogent, and convincing” standard of proof. *Ongom*, 159 Wn.2d at 142; *Nguyen*, 144 Wn.2d at 534. In applying the lower burden of proof in *Hardee*, the Court overruled *Ongom* and upheld *Nguyen*. *Hardee*, 172 Wn.2d at 21.

In all three cases, the Court analyzed the interests to be protected using the balancing factors described in *Mathews*, 424 U.S. at 335 (described *supra* § V(A) (1) (c)). The *Hardee* court determined that, under the *Mathews* factors, the property interest in *Hardee* and *Ongom* were less significant than those in *Nguyen*. *Hardee*, 172 Wn.2d at 21.

In distinguishing *Nguyen* from *Hardee*, the Court noted several specific facts that necessitated a higher level of protection for a physician’s license than a license to operate a home child care facility.

First, physicians have to go through six to ten years of training before being permitted to obtain a license. *Hardee*, 172 Wn.2d at 13. Second, physicians must pass a test in order to obtain a license, and maintain continuing educational requirements thereafter. *Id.* Third, a physician's license is not limited to a particular location, but the physician may engage in his or her craft anywhere within the jurisdiction that issued the license. *Id.* Fourth, the license is held by the physician personally, not the facility in which the physician administers care. *Id.* Finally, upon revocation of the physician's license, he or she can no longer engage in the practice of medicine. *Id.* This is unlike the child care facility where the license attached to the facility itself, and the individual running the facility may simply find similar work at a different facility if the license is revoked.

Here, Ms. Petersen's professional guardian license is more like the physicians license in *Nguyen*, than the home child care license in *Hardee*. First, like Dr. Nguyen, Ms. Petersen had to go through more than 6 years of training prior to obtaining her license. GR 23 (d) (iv).<sup>4</sup> Second, like Dr. Nguyen, Ms. Petersen had to pass a test and maintain continuing education to obtain her license. *CPG Application Regulation 108; CPG Continuing Education Regulation 200 et. seq.* Third, like Dr. Nguyen,

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<sup>4</sup> Either a two year degree and four years of working in a discipline pertinent to the provision of guardianship services; a four year degree and two years of work experience; or a masters, J.D., Ph.D., or equivalent advanced degree and at least one year work experience.

Ms. Petersen's license is not limited to a particular location and she may act as a professional guardian anywhere in Washington State. Finally, like Dr. Nguyen, Ms. Petersen's license is held by her personally, and if revoked or suspended, she can no longer engage in the practice of guardianship. This is an important distinction from *Hardee*, where after the facility lost its license, Hardee was still permitted to work in the child care field.

In addition to the factors described above, there are additional factors that demonstrate the significance of Ms. Petersen's property interest in her license. After completing the six years of school and training necessary to obtain her license, Ms. Petersen has spent the past twelve years building her professional reputation and a network of professional contacts. As a result of her efforts, Ms. Petersen was receiving court appointment to between ten and twenty guardianship cases per year, and from adult protective services. Hearing Examiner Findings of Fact and Conclusions of Law, and Recommendations to the Board for Discipline: Mitigating Factor 3.5 (B). Her business generates income of around \$170,000 per year. If Ms. Petersen's license is suspended or revoked, she stands to lose everything she has built over the past eighteen years. Not only would she have to give up all of her guardianship cases, her reputation in the guardianship community would be permanently

tarnished. Due to the significance of her property interest, the Board erred by failing to apply the “clear, cogent, and convincing standard” from *Nguyen* to its decision to suspend Ms. Petersen’s license.

## **VI. BOARD ERRORS OF FACT AND LAW**

After a three day hearing at which the Guardian and the Board presented various witnesses, the testimony of Ms. Petersen’s witnesses was largely ignored.<sup>5</sup> Furthermore, Ms. Petersen’s carefully reasoned decisions to follow the directions and advice of doctors, nurses, and other professionals in the field, as to the care and placement of her wards was given little weight. Ms. Petersen acted in the best interest of her wards using the substitute judgment standard.

The Board made a decision to suspend Ms. Petersen’s license, which as a practical matter, will result in the end of her career as a Certified Professional Guardian. This decision was based on the Board’s following determinations: 1) Ms. Petersen failed to get a duplicate pair of reading glasses for D.S. in a sufficiently short amount of time while attempting to overcome confusion between the Adult Family Home, D.S.’s family, and the optometrist as to what needed to be done to

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<sup>5</sup> Ms. Petersen disputes the findings of the hearing examiner and the Board with specificity in her Response to the hearing examiner’s Findings of Fact, Conclusions of Law, and Recommendations to the Board for Action. Because said response is already before this Court for review, Ms. Petersen does not readdress those specific responses here.

accomplish the task; 2) after being informed of substandard care at the A.F.H. and hearing the recommendations of multiple medical and health care professionals Ms. Petersen used her substituted judgment as guardian for D.S. to move her into a new residence that provided the necessary 24 hour awake care; 3) her staff notified the family members, who were already aware of the potential for a move, within 2 hours of the actual move; and 4) pursuant to a written doctor's order; at the request of the resident manager at the AFH; at the suggestion of multiple nurses and health care professionals, and based upon his doctor's own belief that J.S. had less than two weeks to live, she moved him to Hospice House where he would receive the appropriate amount of pain medication and care. Ex. 54.

In every act that she took, Ms. Petersen was applying the substituted judgment standard, based on the information that was available to her to determine what was best for the wards. It is not a coincidence that all three wards were residing at the same A.F.H. The lack of 24 hour awake care where these wards were residing was below what Ms. Petersen felt should be provided. Instead of leaving her wards in a position that she felt was dangerous and unhealthy, she moved them to more appropriate housing. While her decision may have upset the owner of the A.F.H. (who stood to lose thousands of dollars a month), and the absentee family

members of D.S. (who lacked all the relevant information), Ms. Petersen's difficult decisions were the best for her clients, and she should not have her career taken away for these actions.

**A. Ms. Petersen Was Bound By The Substitute Decision Maker Statute To Move J.S. And D.S. Into Alternative Facilities.**

In providing informed consent to care, a guardian has the duty to reasonably determine what health care the ward, if competent, would have consented to. *Raven v. Department of Social & Health Services*, 167 Wn. App. 446, 463, 273 P.3d 1017 (2012); RCW 7.70.065 (1) (c); RCW 11.92.043 (5); SOP § 402.1. "Specific to making medical decisions, a guardian shall monitor care, treatment, and services to ensure that care is appropriate, and actively promote the health of a client by arranging for regular preventative care." *Raven*, 167 Wn. App. at 463-464.

Here, Ms. Petersen applied the substituted judgment rule and determined that, had they had the capacity to do so, D.S. and J.S. would have agreed to the move from Peterson Place AFH. All three of Ms. Petersen's clients at Peterson Place were suffering from repeated Urinary Tract Infections (hereinafter "UTI"). Ms. Petersen first realized the significance of this fact after the incident with E.R. when Peterson Place staff refused to take him back into the house after he had been admitted to the hospital with a severe UTI. TP 526-528. Ms. Petersen was informed

by staff at Petersen Place at that time that they could not care for E.R. because they did not have 24 hour awake staff. TP 46; TP 78-79; TP 260; TP 263; TP 387-389; TP 586; Ex 14; Ex. 92; Ex. 93. After the incident with E.R., Ms. Petersen realized that her other wards were getting repeated UTI's because they were laying in their own waste for hours on end due to the lack of 24 hour awake staff. Ms. Petersen felt that her wards needed to be moved to a location that provided a higher level of care. Additionally, there were further incidents at Peterson Place AFH that caused Ms. Petersen concern.

Ms. Petersen had received disturbing reports that while he was at the facility, E.R. had been locked in a dark room, with dried feces on the wall, and no way to communicate with staff for assistance with finding the bathroom. TP 276-277. There were other additional problems, including staff failures to provide proper medication to D.S. (TP 281) and statements by Petersen Place staff that J.S. needed to be moved because he was a disruption to the facility (TP 260-261). All of these issues raised red flags in the mind of Ms. Petersen, who felt that it was her duty to move the Wards, who were all in need of 24 hour awake staff, to a facility that had the capabilities to provide the necessary care.

In addition to the general concerns with Petersen Place, there were other concerns specific to J.S. that resulted in his being moved. Most

significantly, Ms. Petersen had a physician's order. Ex. 54. J.S.'s doctor felt that he was in the end stages of life and that he could die within weeks. As such, Ms. Petersen felt that J.S. required a higher level of care than could be provided at Petersen Place. The doctor wrote an order to this effect and sent it to Ms. Petersen. Ex. 54. J.S. had been made aware of the potential move by both Ms. Petersen and his doctor prior to the move. TP 257; TP 560. When Ms. Petersen moved J.S., she was merely following doctor's orders. Under the substituted judgment standard she was right to presume that J.S. would have wanted to follow the medical recommendations of his doctor.

Ms. Petersen had to make her decisions based on the information that was before her at the time, and it is wrong to second guess her decision based on facts that were not then available to her. While we now have the advantage of knowing that J.S. would make a recovery, at the time the decision to move him was made, Ms. Petersen was operating with a doctor's order and under the impression that he would be dead within two weeks. With regard to D.S., Ms. Petersen saw the repeated UTI's as a threat to her health, and felt that it was the prudent thing to do to move her to a facility with a higher level of care.

In the end, it is impossible to say what would have happened had Ms. Petersen decided to leave her wards in Petersen Place. Had one of

them died from complications of a UTI, or other skin failure related to lack of 24 hour awake staff, Ms. Petersen may have been found negligent like the guardian in *Raven*. See *Raven*, 167 Wn. App. 446. However, in *Raven* the ward had repeatedly manifested a desire to remain in her home and refused medical care despite the consequences. Here, Ms. Petersen's wards had not expressed a desire to refuse medical treatment.<sup>6</sup> Ms. Petersen used her best judgment to make the decision for her wards that she thought was in their best interest considering the totality of the circumstances and applying the substituted judgment rule. It is inappropriate for the Board to now act as a "Monday Morning Quarterback," nitpicking every minor detail of her decisions.

**B. The Punishment Instituted By The Board Does Not Fit The Crime Alleged.**

The Board primarily alleges that Ms. Petersen 1) moved J.S. without properly consulting with him until the day of the move; 2) moved D.S. without properly consulting with her family until several hours after the move had taken place; and 3) took several weeks longer than she should have to obtain a second pair of reading glasses for D.S.<sup>7</sup> Even if

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<sup>6</sup> While there was testimony that J.S. did not want to move from Petersen Place, during his prior move from his family home he had also expressed initial concern despite the dangerous living conditions that had resulted in the appointment of Ms. Petersen. Despite his initial trepidation for the first move, he was not unhappy with the move after it had taken place.

<sup>7</sup> Ms. Petersen disputes the validity of all of these allegations.

accepted as true, these, allegations boil down to miscommunications between family members and care providers. Ms. Petersen was acting in what she felt was the best interests of her wards, and there were no allegations that she intended to harm them in any way. If the Board actions are approved, Ms. Petersen will lose her business and her career. Significantly, the professional guardianship community will lose one of its most important members. If Ms. Petersen's license is suspended, she will have to transfer more than 60 guardianships to new guardians. Such actions will be disruptive for her wards, and be a significant burden on the judicial system. It would be unjust for Ms. Petersen to lose her license based on the severity of allegations levied by the Board. As the Mikado sang in the Gilbert and Sullivan musical:

His object all sublime  
He will achieve in time —  
*To let the punishment fit the crime —  
The punishment fit the crime;*  
And make each prisoner pent  
Unwillingly represent  
A source of innocent merriment!  
Of innocent merriment!

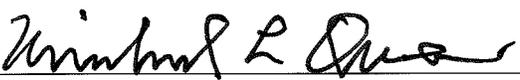
*The Mikado; or, The Town of Titipu*, by Arthur Sullivan and W.S. Gilbert, 1884.

## VII. CONCLUSION

Ms. Petersen faces the deprivations of a significant property interest if the Board's actions are approved. Ms. Petersen's actions to

move her wards to alternate facilities were a direct result of her own observations and the observations and recommendations of professionals around her. The Board has been vested with an inappropriate combination of powers that has allowed it to take away Ms. Petersen's license without due process of law. The Board's factual and legal determinations are wrong, and the process by which it made those determinations is constitutionally invalid. The Board's decision should be overturned.

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## PROOF OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on the date written below, I caused to be served a true and correct copy of the foregoing document upon counsel listed below by electronic mail:

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Dated this 20<sup>th</sup> day of June, 2013, at Seattle, Washington.

  
Michelle Wimmer