

Court of Appeals No. 31738-9-II

Court of Appeals, Division II of the State of Washington

In re the Matter of JOSEPH KWIATKOWSKI, Appellant,
v.
*RALPH DREWS, JAMES FROST, SEATTLE FIRST
NATIONAL BANK (BANK OF AMERICA), PUGET
SOUND NATIONAL BANK (KEY TRUST COMPANY) and
U.S. BANK TRUST DEPARTMENT, Respondents.*

Reply of Appellant

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STATE OF WASHINGTON
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Summary of Argument. This case requires an in-depth review of the dockets and court files to pinpoint the respondents' disregard for statutory procedures and violation of their fiduciary duties. The respondents do not want the court to take the time to closely review the files, because to this point, they have been successful in defending their actions by confusing the court.¹ In fact, the legal issues are straightforward per the applicable statutes. However, the case involves intricate facts specific to each respondent. The fiduciaries failed to account for assets in excess of 19 million dollars.

The guardian Banks and Special Administrators ("Special Ad") remain liable for multiple reasons. Their statute of limitations arguments are overcome based on five statutory and common law theories. The earliest any statute of limitations began to run was when Joe regained capacity in 2001. As allowed this action was filed within three years. Further, the nondisclosure of critical information by the guardian Banks voids the Settlement Agreement ("SA"). Even if the court finds support for enforcing the SA, it was error for the lower court to disregard the need

¹ It is not the practice of appellant's attorney to point the finger. However, here the respondents have misrepresented portions of the record to the court. The lower court relied on these representations without reviewing the docket and court files to confirm whether respondents actually filed proper accountings, gave proper notice, and whether the Guardian ad Litem fulfilled the statutory obligation of investigation and written reports to the court. See Appendices ("App.") "B-E" Re: 'Objections to Banks' Responses' and App. "A" Re: Guardian Standards of Practice.

for an evidentiary hearing over the disputed defenses to the agreement.

A. Statute of Limitations.

1. **Burden.** The Statute of Limitations is an affirmative defense and the burden is on the party asserting it.² Similarly, the party asserting tolling bears that burden of proof.³

Central to this case is application of the statute of limitations, which is analyzed based on five theories. Here, the statute of limitations cannot be applied in a bright line manner. There were multiple successor guardians who failed to make their intermediate orders final. The facts implicate numerous guardianship and statute of limitations' issues, which are not addressed solely by one statute of limitations premise.

- The statute of limitations has not yet begun to run because the orders approving the respondents' final accounts are intermediate orders subject to modification at the hearing on Drews' final account, which has not yet occurred.
- The statute of limitations does not bar Joe's claims because the orders approving final account and of discharge are void for an utter disregard of statutory procedures.
- In the alternative, the statute of limitations was tolled by RCW 4.16.190 until Joe regained capacity in 2001.
- The statute of limitations was extended into 2005 based on the discovery of evidence not previously disclosed, which should have been disclosed by Respondents.
- The statute of limitations has not yet begun to run because

² Rivas v. Eastside Radiology Assoc., 134 Wn. App. 921, 925, 143 P.3d 330 (2006) (citation omitted).

³ Rivas, 134 Wn. App. at 927 (citation omitted). Respondents have argued that Joe failed to meet his burden, but it is their burden to meet with regard to the initial statute of limitations inquiry.

conditions of discharge have not been met.

2. The Statute of Limitations Has Not Yet Begun to Run Because There Was No Hearing or Order Approving Drews' Final Account.

The statute of limitations has not yet begun to run as to any fiduciary, because the last of the successor guardians, Drews, failed to follow statutory procedure set forth in RCW 11.92.053. The statute requires the guardian to petition the court for an order settling the account filed in accord with RCW 11.92.040(2); upon filing of the petition, the court shall set a hearing with notice per RCW 11.88.040; and at the hearing if the court is satisfied that the actions of all guardians have been proper, the court will enter an order approving the account.⁴

No hearing has occurred on Drews' final accounting because he never petitioned the court for a hearing. Instead, Drews assumes that he was discharged by the order returning Joe's rights to him in January 2001.⁵ That order did not approve Drews' accounting filed over fifteen months later following an order to show cause.⁶ Instead, the order

⁴ RCW 11.92.053. In defense to the lack of procedural due process, Drews questions why Joe did not file objections. The lawsuit contains Joe's objection on its face. Even so, a hearing settling the estate is not dependent upon the filing of an objection. A hearing and notice are both required by RCW 11.92.053 independent of objections.

⁵ CP 166-167. Frost & Drews ("FD") allege Joe failed to timely vacate the order of discharge per CR 60(b). At best, the order is an intermediate order and is still subject to attack. In addition, it is void and subject to attack based on the utter disregard of statutory procedure. FD Response: p. 11.

⁶ CP 1076-1096, 176-196. See Appellant's Opening Brief ("**Brief**"): pp. 27-28, 53-56.

confirmed Drews' statutory duty to account.⁷ The principle and importance of the court's review of guardians' accountings at the final hearing are longstanding. The Washington Supreme Court expounded on that role in In re Rohne's Guardianship:

When passing upon a guardian's final account, it appears that the acts of the guardian, even though approved by the court, have resulted in injustice to the ward, it is the duty of the court to scrutinize the account carefully and to disallow expenditures, even though the same were allowed by the court having immediate jurisdiction of the proceeding, if it appears that the same were improvidently approved and were manifestly in derogation of the rights of the ward, and of such a nature as to amount in the law to the exercise of bad faith on the part of the guardian.⁸

Until such time Drews' final account is approved by the court, the statute of limitations does not run and the underlying orders approving accounts and of discharge remain subject to modification.

3. The Statute of Limitations Has Not Yet Begun to Run Because Intermediate Orders of Discharge Remain Subject to Modification.

The intermediate orders approving final account and discharging BOA, KEY, USB and the Special Ad are not final orders for two reasons:

- (1) The respondents failed to comply with RCW 11.92.050 procedures for making their intermediate orders final; and
- (2) Intermediate orders remain subject to modification at a final hearing.⁹

⁷ RCW 11.92.053. When the court would have reviewed Drews' final accounting, it would have reviewed the guardians' intermediate orders potentially making them final.

⁸ In re Rohne's Guardianship, 157 Wash. 62, 74-75, 288 P.269 (1930). See also Sroufe et al. v. Sroufe, 74 Wash. 639, 134 P. 471 (1913).

⁹ In re Guardianship of Rudonick, 76 Wn.2d 117, 123-124, 456 P.2d 96 (1969).

The lack of hearing on Drews' final accounting had the effect of leaving all intermediate orders and Drews' final accounting open to scrutiny indefinitely.¹⁰ Until an order is final, it is not appealable as a matter of right and the statute of limitations does not begin to run.

In effect, RCW 11.92.050 provides an exception to the RCW 4.16.190 general rule that the statute of limitations is tolled until a person regains capacity.¹¹ In order to secure a final order, RCW 11.92.050 requires notice according to RCW 11.88.040¹² and an investigation of the guardian's report by a guardian ad litem ("GAL") with a written report submitted to the court.¹³ A guardian can utilize this option to avoid having to justify accountings years later, but if they do not, their intermediate orders are not final.¹⁴

The fiduciaries all failed to meet the RCW 11.92.050

¹⁰ Rudonick, 76 Wn.2d at 124-125.

¹¹ Respondents attempt to muddy the distinction between RCW 11.92.050 and 11.92.053. It is clear – 11.92.053 applies upon termination of the guardianship estate.¹¹ Here, RCW 11.92.050 applies to guardians BOA, KEY and USB, and de facto guardians FD, as they were discharged during a continuing guardianship. In contrast, Drews' final report at termination of the guardianship is governed by RCW 11.92.053. App. "I": (Statute text).

¹² RCW 11.88.040 sets forth that notice should be ten days prior to hearing personally served upon the incapacitated person and the guardian ad litem. Notice may be shortened to three days for good cause, but in every case at least three days notice shall be given.

¹³ RCW 11.92.050: Intermediate accounts – Hearing – Order. See Brief: App. "C".

¹⁴ Rudonick, 76 Wn.2d at 123. In the guardianship context, a 'final' and binding order approving a final account of a guardian is not assumed just because there is appointment of a successor guardian. Respondents confuse the procedure appointing a successor guardian with that approving a final accounting of a preceding guardian. A guardian being replaced does not make an order on a final accounting 'final'. Properly following statutory procedure does.

requirements.¹⁵ Review of the docket prior to entry of the Banks' final orders confirms the lack of notice, service and written GAL report. Respondents strongly resist the inclusion of the docket.¹⁶ However, they have the burden of establishing compliance with statute to secure final orders.¹⁷

- BOA's September 16, 1991 discharge on fourth/final report (CP 44-95) filed same day as order approving.¹⁸
- KEY's February 18, 1994 retroactive discharge.¹⁹
- USB's April 28, 1997 order²⁰ approved fourth report (CP 407-463) filed five years later and third report filed for the first time in 2004 as an attachment to a declaration in support of summary judgment.²¹
- FD ex parte entry of their order in August 1997. CP 393-394.

The Respondents allege that RCW 11.88.040 notice is not necessary, contrary to specific statutory language.²² Relying on the 1930 Mathieu²³ decision, BOA and USB argue that guardians do not have to follow RCW 11.88.040 notice requirements in the context of settling an

¹⁵ Respondents joined the BOA Response. For this reason, Joe has referred to the respondents as a whole where applicable.

¹⁶ See Appendix ("App.") "F": Docket of Guardianship ("Dkt. Guard.") and App. "G": Docket of Probate. Although the appellate court previously denied the motion to include the docket, Joe has included it at this point attempting to make the record clear and to prove the lack of notice along with the lack of documents filed in the probate and guardianship. Joe intends no disrespect.

¹⁷ Rivas, 134 Wn. App. at 925. (statute of limitations affirmative defense - respondents bear burden of establishing orders are not intermediate orders subject to modification).

¹⁸ App. "F": Dkt. Guard. prior to Sub No. 62 (CP 309-319). See Brief: pp. 34-45.

¹⁹ App. "F": Dkt. Guard. prior to Sub No. 94 (CP 351-353). See Brief: pp. 45-48.

²⁰ App. "F": Dkt. Guard. prior to Sub No. 133 (CP 387-390). See Brief: pp. 48-53.

²¹ Declaration of ... Wong...: Exhibit 8. CP 4831-5114.

²² Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 383, 858 P.2d 245, (1993) ("...[N]o part of the statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error.")

²³ Mathieu v. U.S. Fid. and Guar. Co., 158 Wash. 396, 399, 290 Pac. 1003 (1930).

accounting once a guardianship is established, contradicting RCW 11.92.050 and 11.92.053.²⁴

The Mathieu decision held that there was no special notice requirement for a ward when a successor guardian was appointed. The decision did not address notice required in connection with settlement of a prior guardian's account. In addition, Mathieu predated the 1967 amendments to RCW 11.92.050 that added the requirement of notice pursuant to RCW 11.88.040. Mathieu does not relieve respondents of the RCW 11.88.040 requirement, nor does the holding contradict that notice requirement.²⁵

i. Appointment of GAL. Respondents' attempts to hide behind the GAL's signature without proper investigation and report are ineffective. Parr's appointment alone does not equal court approval, especially when statutory procedure was disregarded. Similarly, respondents' fiduciary duty does not change when independent counsel represents an incapacitated person.²⁶

BOA and USB cite Rudonick for the proposition that orders

²⁴ BOA Response: p. 18 and USB Response: pp. 25-27.

²⁵ See also Jorgenson v. Winter, 69 Wash. 573, 125 P.957 (1912) (distinguishing notice required for discharge versus settlement of account).

²⁶ Brief: pp. 56-70 (GAL Parr). GAL's role is to promote the 'best interest' of an incapacitated person. Welfare of Colyer, 99 Wn.2d 114, 133, 660 P.2d 738 (1983). In contrast, the role of counsel like Donna Holt is to act as an advocate, and NOT substitute counsel's judgment regarding what might be in the client's best interests. RCW 11.88.045(2) (emphasis added).

entered where a GAL was appointed are final orders.²⁷ There, the court considered the guardian's contention that RCW 11.92.050 permits a final order to be entered without GAL appointment. The **Washington State Supreme Court not only disagreed**, but stated:

Ex parte orders entered during the pendency of guardianship proceedings are not *res judicata*, but may be modified when the interests of justice demand...[E]arlier cases all stated the rule... nothing final about interim orders entered at ex parte hearings...²⁸

...Interim order would stand without further proof if not challenged at a final hearing...[Effect of ward challenging all expenditures made from the guardianship requires]...guardian to fulfill...statutory and common law duty to fully account at...final hearing, irrespective of the orders entered ex parte at interim hearings.²⁹

Ultimately, the court required the guardian to account properly even though the requirement of corroborating evidence at such a late date places a burden on the guardian, this burden would not have existed if the guardian kept proper records and receipts.³⁰ The facts in Rudonick along with principles of a final accounting and the open-ended nature of ex parte intermediate orders are analogous to the issues in Joe's case.

ii. Waivers of Notice. BOA not only questions the point of a hearing, but asserts that a hearing was not required on its final

²⁷ (i.e. if a GAL is appointed, there is no need for a written report or notice).

²⁸ Rudonick, 76 Wash.2d at 123-124 (citations omitted).

²⁹ Rudonick, 76 Wash.2d at 124-125.

³⁰ Id. at 127. (Accountings filed were incomplete, irregular, and inaccurate.)

report because Joe and GAL Parr waived the right to a hearing.³¹ This betrays its appreciation for the court as superior guardian³² as well as the ex parte nature of guardianship. When no advance notice is provided to the court, the parties hinder the court's and interested third parties' ability to review the written GAL report and assess a guardian's accounting and all prior orders. The requirements of RCW 11.92.050 preserve the court's role and protect Joe.

The reliance on approval from an incapacitated person ignores the nature and effect of legal incapacity. It is implicit in guardianships that the incapacitated person loses his/her right to contract – waiver of notice based on Joe's signature while he was incapacitated is ineffectual.³³

A GAL does not have authority to waive any substantial rights of the incapacitated person.³⁴ A GAL simply signing off on an order does not fulfill RCW 11.92.050 and is akin to an unauthorized waiver of procedural due process by the GAL.³⁵ A procedural due process waiver

³¹ BOA Response: page 23. Brief: p. 57. See also CP 1615-1619 (GAL Parr).

³² Seattle-First Nat'l Bank vs. Brommers, 89 Wash.2d 190, 200, 570 P.2d 1035 (1977). Brief: pp. 22-25 (court's role as supervisor – retains ultimate authority to protect alleged incapacitated person). In re Hallauer, 44 Wn. App. 795, 797, 723 P.2d 1161 (1986).

³³ United Pac. Ins. Co. v. Buchanan, 52 Wn. App. 836, 840, 765 P.2d 23 (1988).

³⁴ Brief: pp. 56-70 (GAL Parr); pp. 34-45 (BOA); and pp. 70-74 (Release). See also Guardianship of K.M., 62 Wn. App. 811, 816, 816 P.2d 71 (1991).

³⁵ See In the Matter of Quesnell, 83 Wash.2d 224, 517 P.2d 568 (1974). (GAL's waiver of counsel void when GAL comported herself in a non-adversarial manner. GAL appointed for benefit of and to protect rights and best interests of ward.). Brief: page 29. RCW 11.88.040 is jurisdictional in nature and cannot be waived or stipulated away by

by a GAL was addressed in Quesnell – a case cited by BOA.³⁶ Relying on Quesnell, BOA asserts that GAL Parr had authority to bind Joe as to procedural matters when notice was provided.³⁷ This proposition is contrary to the Washington Supreme Court’s holding in Quesnell.

Although Quesnell involved a civil commitment proceeding, it is analogous to a guardianship as in both cases the incapacitated person stands to lose constitutional rights. In Quesnell, the court considered a GAL’s duties including protecting the rights of the ward.³⁸ Considering the necessity of the GAL fulfilling his duties in a ‘meaningful way’ rather than in haste, the court reasoned:

...The non-adversary guardian ad litem...does not afford realization of constitutional and statutory guarantees in regard to the assistance of counsel.³⁹

[T]o investigate contemplates ... thorough[ly] study of all the records that are available to him through the court, the hospital, and ...social agencies.⁴⁰

...[I]n his capacity as attorney, he [GAL] has no authority to waive any substantial right of his client...It will be readily admitted that

parties or GALs on behalf of parties. See also Rudonick, 76 Wash.2d at 123-124 (Requirement of GAL regarding a RCW 11.92.050 hearing is not just a matter of form).

³⁶ BOA Response: p. 16.

³⁷ USB cites RCW 2.44.010 regarding an attorney having authority to bind a client as to procedural matters. Parr was not Joe’s attorney, he was a GAL. Parr had no authority to waive Joe’s procedural due process rights – his waiver of notice is void.

³⁸ Id. (particular concern was that GAL only paid ‘lip service’ to the ward’s rights by not explaining ward’s rights and advocating for ward).

³⁹ Id. at 236.

⁴⁰ Quesnell, 83 Wash.2d at 238.

an attorney without special authority has no right to stipulate away a valuable right of the client.⁴¹

Here, in line with Quesnell, GAL Parr had no authority to waive Joe's right to a hearing. GAL Parr failed to investigate and advocate on behalf of Joe. He failed to act in a "meaningful way" and his waiver is void.⁴² If for some reason, this court finds that the waivers are effective, respondents still failed to procure a thoroughly investigated written GAL report. For this reason, their intermediate orders are still open to modification by the court today.

iii. Recitation in Order. Respondents argue that adequate notice was provided because there is a recitation in their order.⁴³ This self-serving assertion has no impact upon whether the order approving it is intermediate or final. It is not the language of a parties' order that is persuasive, but following the statute and proving it.

4. Statute of Limitations Does Not Bar Joe's Claims Because the Orders Approving Final Account and of Discharge Are Void for an Utter Disregard for Statutory Procedure.

The guardian Banks' orders on their final accounts and of discharge are also void for a lack of jurisdiction by the court based on the utter disregard for statutory procedure. There is no time limit when a void

⁴¹ Id. at 239 (quoting Wagner v. Peshastin Lumber Co., 149 Wash. 328, 337, 270 P. 1032 (1928) (emphasis added).

⁴² Brief: pp. 56-70 (GAL).

⁴³ BOA Response: p. 16.

order may be vacated.⁴⁴ For this reason, the statute of limitations was tolled as to Joe based on these void orders.

In Patchett, the court vacated the order discharging the personal representative for failure to follow statutory procedure.⁴⁵ Respondents' attempts to distinguish Patchett are misplaced. BOA asserts that the record shows the statutory procedure was followed. It was not.⁴⁶ BOA further contends arguments concerning void orders under Patchett are 'belated' ignoring that there is no time limitation for challenging void orders. Even so, Attorney Holt briefed this issue at summary judgment.⁴⁷

In attempting to distinguish Patchett, USB states specifically:

The administratrix failed to comply with any of the statutorily required steps to close an estate. As a result, the court voided the order discharging the administratrix and closing the estate.⁴⁸

USB makes an important point: if personal representatives, much like guardians, do not comply with statutory procedure, their alleged orders of discharge are void. The similarities between Patchett and the

⁴⁴ **Brief**: pp. 74-79 (Statute of Limitations). See also, Grady v. Dashiell, 24 Wash.2d 272, 163 P.2d 922 (1945); In re Marriage of Hardt, 390 Wn. App. 493, 693 P.2d 1386 (1985).

⁴⁵ **Brief**: pp. 29-30. State ex rel Patchett v. Superior Court, 60 Wash.2d 784, 787, 375 P.2d 747 (1962).

⁴⁶ For example, statutory procedure was ignored here when BOA changed the scope of the guardianship absent a hearing and failed to properly account for Joe's GAHC interest. Similarly, the BOA Response at p. 13 alleges they are out on the probate. Along with Drews, BOA also acted in a fiduciary capacity in the probate. Statutory procedure was utterly disregarded in the probate. Notice was filed in 1988 and the order entered in 1990. The order approving the Personal Representatives final report and subsequent order of discharge are void pursuant to Patchett. CP 594-599, 616-620.

⁴⁷ CP 508-534, 539-563.

⁴⁸ USB Response: p. 23.

case at hand are extensive. In both cases, the fiduciary (guardian/Special Ad/personal representative) failed to follow statutory procedure. The underlying principle is the requirement of following statutory procedure at all points in a guardianship and probate administration.⁴⁹

Another case whose application is in contention is Grady v. Dashiell.⁵⁰ BOA inaccurately asserts that Grady's holding was overruled by In re Phillips' Estate.⁵¹ The Phillips' court affirmed the Grady decision on the issue of void orders...⁵²

We have, by our opinion in Grady... committed ourselves to the proposition that a compromise or settlement is rendered void if the guardian fails to comply with the statute and inform the court which appointed him of the controversy and the reasons for settlement, and fails to secure approval of the settlement by that court. With that holding we are in accord. Id.

In finding that the Phillips' case did not require a formal petition of settlement under the specific facts of Phillips', the court distinguished Grady on that issue alone...based upon the uncontroverted fact the Judge

⁴⁹ Much like the guardianship statutes, separate statutes address discharge during or at closure of the probate. Patchett, 60 Wash.2d at 787. FD try to distinguish Patchett alleging that there the court never obtained jurisdiction due to a failure to provide notice to creditors. This idea is misplaced - notice to creditors does not determine jurisdiction, and the overriding statutorily disregarded reasons the court vacated the order of discharge in Patchett included failure to file a final report and petition for distribution along with failure to give notice of hearing to heirs and devisees.

⁵⁰ Grady v. Dashiell, 24 Wash.2d 272, 163 P.2d 922 (1945).

⁵¹ In re Phillips' Estate, 46 Wn.2d 1, 278 P.2d 627 (1955). Phillips involved a guardian's and the formerly minor wards' efforts to vacate decrees of distribution and determine whether the guardian and children are bound to a settlement agreement entered into by the guardian who had the same legal interests as her children.

⁵² (Guardian was never legally discharged because order purporting to discharge was adverse to the alleged incapacitated person's interest having been entered without notice to or representation of him was void.) (emphasis added).

had detailed comprehensive knowledge of the issues involved.⁵³

An ‘indefinite period’ of requiring a guardian to account only arises when a guardian fails to account properly in the first place.⁵⁴ The court can look to TEDRA to provide a statute of repose for guardians who fail to account.⁵⁵ According to RCW 11.96A.070, guardians would then only be responsible for accounting for three years after termination of the guardianship in line with RCW 4.16.190 and the three-year statute of limitations on negligence.

The Banks repeatedly argue that the elements of negligence and breach of fiduciary duty are the same for the sole purpose of eliminating the three year statute of limitations. The standards are different – a fiduciary can be negligent without breaching a fiduciary duty.⁵⁶ The key issue is the standard of care, which is dictated by statute, case law, and common law. Another difference is that negligence normally does not allow for attorney’s fees, contrary to breach of fiduciary duty where

⁵³ Phillips, 46 Wn.2d at 25.

⁵⁴ Rudonick, 76 Wash.2d at 127.

⁵⁵ See e.g., In re Estate of Kordon, 157 Wash.2d 206, 137 P.3d 16 (2006). (There, the court held that TEDRA supplements Chapter 11.24 citing to RCW 11.96A.080(2): “The provisions of this chapter apply to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapters 11.88 and 11.92 RCW.” Similarly, for purposes of TEDRA, ‘matters’ concerns the estates and assets of incapacitated persons. RCW 11.96A.020(a) (relevant part). Based on this reasoning, TEDRA supplements RCW 11.92 et seq. here supplying a statute of repose.

⁵⁶ See e.g., In re LeFevre’s Guardianship, 9 Wash.2d 145, 113 P.2d 1014 (1941) (Breach of duty even though guardian acting in good faith. No damage to ward’s estate and guardian unaware that she was violating any law - damages limited to actual damages.).

attorney fees can be disgorged or paid.⁵⁷

In sum, the issue is whether the respondents' actions rose to the level of utter disregard. Joe submits they do. He has met his burden - the orders of discharge are void and for this reason, the statute of limitations has not yet begun to run.

5. Statute of Limitations is Tolloed During Incapacity.

RCW 4.16.190 tolls the statute of limitations as to all incapacitated persons during a guardianship. All orders Joe attempted to set aside were entered during the guardianship. USB alleges a distinction related to tolling the statute of limitations for disabled persons based on a difference between claims against third parties and discharged guardians.⁵⁸ In support, USB cites: Doe v. Finch⁵⁹ and Young v. Key Pharm.⁶⁰ Those cases do not differentiate the tolling based on parties. Doe confirms that the statute of limitations is tolled when a plaintiff can prove intentional concealment.⁶¹ Similarly, Young confirms that tolling provisions are based on incapacity and not whether a guardian is appointed.⁶² Actually, these cases support Joe's position that the statute of limitations was tolled by his incapacity, the discovery rule, and concealment.

⁵⁷ Id.

⁵⁸ USB Response: p. 32.

⁵⁹ Doe v. Finch, 132 Wash.2d 96, 942 P.2d 359 (1997).

⁶⁰ Young v. Key Pharm., 112 Wash.2d 216, 770 P.2d 182 (1989).

⁶¹ Doe, 132 Wash.2d at 101.

⁶² Young, 112 Wash.2d at 221. See also, Rivas, 134 Wn. App. at 927.

If a guardianship is terminated, the provisions of RCW 11.92.053 regarding an appeal within 30 days or within one year of reaching majority would begin. Where there are succeeding guardians, RCW 4.16.190 tolls the statute of limitations against all of the guardians until the incapacitated person regains capacity. As a result, at the minimum, the statute of limitations was tolled until January 26, 2001 when Joe regained capacity.

6. The Statute of Limitations was Extended into 2005 Based on Discovery of Evidence Not Previously Disclosed by Guardian Banks.

Based on the discovery rule, the statute of limitations was tolled until 2005 when Joe discovered evidence that should have been disclosed by the guardian Banks. Analysis of the discovery doctrine is set forth in the **Brief**: pp. 76-79 and the newly discovered evidence at pp. 79-86.⁶³

7. Statute of Limitations Has Not Yet Begun to Run Because The Fiduciaries Conditions of Discharge Have Not Been Fulfilled.

Even if the respondents fulfilled the RCW 11.92.050 requirements making their orders final, the respondents still have not met their conditions of discharge.⁶⁴ This raises yet more issues of fact and also supports the tolling of the statute of limitations. In conclusion, the five

⁶³ A Timeline referencing the newly discovered evidence with CP cites is attached hereto at Appendix "I" and at Appendix "1": to the **Brief**.

⁶⁴ Some of those include Drews' final accounting never approved, BOA never filed receipts for transfer of fees, KEY never files receipts for transfer of all assets (no receipt for stock); and USB did not file third report until it appeared as an attachment to a declaration at summary judgment in 2004.

statute of limitations inquiries defeat the fiduciaries self-serving conclusion that the statute of limitations has run.

8. Joe’s Claims are Not an Improper Collateral Attack When Orders are Intermediate or Void, the Guardianship Estate is Unsettled Based on a Lack of Final Hearing, and the Record Lacks a Judgment.

Collateral attack requires a judgment. The respondents’ all lack a judgment—their orders are intermediate and/or void. Joe’s assertions do not violate the general rule prohibiting collateral attacks because the record lacks final orders approving accounts and discharging the Special Ad and guardians.⁶⁵ Joe’s guardianship is open—all intermediate orders are subject to modification.⁶⁶

USB cites Batey for the assertion that the order of the probate court approving the guardian’s final account is a final judgment.⁶⁷ Notably, USB omits the reference to Ryan v. Plath⁶⁸ by the court in Batey. “... the settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings **upon due notice provided by statute** are final adjudications having the effect of judgments *in rem* ...”⁶⁹

Under very specific facts, the Batey court determined that there was jurisdiction to enter the final order approving the guardian’s final

⁶⁵ See Reply Sections A(1) – (3).

⁶⁶ Rudonick, 76 Wash.2d at 123.

⁶⁷ Batey v. Batey, 35 Wn.2d 791, 215 P.2d (1950).

⁶⁸ Ryan v. Plath, 18 Wash.2d 839, 140 P.2d 968 (1943).

⁶⁹ Batey, 35 Wn.2d at 796 (emphasis added).

account without notice of the hearing and no GAL report. That decision is particularly distinguishable because there the incapacitated person had regained capacity prior to the final hearing. In addition, Batey was decided in 1950, prior to the 1965 amendments to RCW 11.92.050, and creation of RCW 11.92.053, both effective July 1, 1967 requiring RCW 11.88.040 notice. For these reasons, Batey does not relieve the Respondents' obligation to provide procedural notice .

BOA's assertion that when a guardianship order recites that adequate notice was provided, that recital is "accepted as conclusive on a collateral attack" on the [o]rder is without merit.⁷⁰ This idea is rebutted squarely by current case law holding that void orders are subject to attack anytime and are specifically subject to collateral attack.⁷¹ The absence of jurisdiction appearing in the record represents a justifiable collateral attack upon a judgment.⁷² Even if the court finds the interim orders were final, the attack on those orders is justified.

B. Limited guardianship equals retention of legal rights. Absent a retention of rights, the guardianship is not limited. Joe had a full guardianship of the estate.

⁷⁰ See Reply: Section 1. In support of its assertion, BOA cites a 1928 case: Exchange Nat. Bank of Spokane v. Jumer, 150 Wash. 355, 272 P.978 (1928).

⁷¹ Patchett, 60 Wash.2d at 787; Grady, 24 Wash.2d at 290 (void order subject to collateral attack).

⁷² Batey, 35 Wn.2d at 801. FD assert that Joe's claims are an improper collateral attack citing Philbrick v. Parr, 47Wn.2d 505, 288 P.2d 246 (1955). This case did not involve the notice requirements of RCW 11.92.050 and 11.92.053 and sufficiency of notice.

Brief: p. 31, 38, 43.

Joe did not misrepresent the record when he asserts that BOA improperly changed the scope of the guardianship. When the guardianship was established, the order appointing and the letters of guardianship did not retain any rights for Joe as to his estate.⁷³ Thus, BOA was appointed full guardian. Each bank's recitation that they were limited guardians is incorrect.

A guardian cannot independently limit its role in a guardianship other than by court order.⁷⁴ Changes in a guardian's role require the show cause procedure in RCW 11.88.120.⁷⁵ A guardian's reference to itself as "limited" does not change the scope of its duties. The Banks drafted orders holding themselves harmless from the management of GAHC. However, a hold harmless clause (a compromise of rights) cannot be enforced against an incapacitated person unless SPR 98.16W procedures are satisfied.⁷⁶ The guardians cannot hide behind the guise of limited guardianship in failing to monitor and report on GAHC.

C. Settlement Agreement is Void.

1. Burden. The standard of review concerning the enforcement

⁷³ CP 6-8, 2655.

⁷⁴ RCW 11.88.010(2). See e.g., In re Guardianship of Way, 79 Wn. App. 184, 901 P.2d 349 (1995).

⁷⁵ See **Brief**: pp. 26-27.

⁷⁶ See **Brief**: pp. 72-73 and Appendix "3" for text of statute.

of the SA is de novo.⁷⁷ There were disputes about material issues of fact concerning defenses raised by Joe. The court abused its discretion when it enforced the SA without first holding an evidentiary hearing to resolve the disputed issues of fact.⁷⁸ Summary judgment standards apply to motions to enforce a SA relying on affidavits.⁷⁹ The court could have either determined to **not** enforce the SA, or it could have ordered an evidentiary hearing to resolve the issues of fact. It did neither. This was an abuse of discretion.

2. **Duty.** The Banks' failure to disclose is a defense to the enforcement of the SA.⁸⁰ The Banks' duties are based on: (1) a fiduciary relationship, and (2) a contractual duty to deal in good faith.⁸¹ "The law cannot allow contracting parties to deceive one another when there is a duty to act in good faith."⁸²

Contending information that was not disclosed is public information does not alleviate the party from its duty to disclose.⁸³

[W]rongdoers cannot shield themselves from liability by asking the law to condemn the credulity of their victims.⁸⁴

⁷⁷ Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

⁷⁸ Id. at 697.

⁷⁹ Id. (If non-moving party raises genuine issues of material fact, trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing.).

⁸⁰ Liebergessell v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980).

⁸¹ Id. at 891.

⁸² Id. at 892.

⁸³ Id. at 895.

⁸⁴ Liebergessell, 93 Wn.2d at 895 (citing Boonstra v. Stevens-Norton, Inc., 64 Wn.2d 621, 626, 393 P.2d 287 (1964)).

Attempting to distinguish the Brinkerhoff decision, the Banks' claim they owed no duty as fiduciaries to Joe when negotiating the SA because the parties were adversaries at the time. If one accepts the Banks' theory, no one could enforce the obligations of a fiduciary.

3. Misrepresentation. Innocent misrepresentation is a defense to the enforcement of the settlement agreement.⁸⁵ The Banks' failures to disclose, even if innocent, were defenses to the enforcement of the settlement agreement. The inclusion of a general 'as-is' clause that fails to identify the specific improprieties of the Banks is insufficient where the Banks know Joe will be relying on their representations in the court file.

“[W]here the fiduciary's concealment or failure to disclose prevents the person to whom the duty of disclosure is owed from presenting all the claims or defenses to which he is entitled, the failure to disclose is extrinsic fraud.”⁸⁶ Extrinsic fraud is defined as fraud, which is collateral to the issues tried in the case where the judgment is rendered.⁸⁷ In contrast, 'intrinsic fraud' pertains to issue involved in original action or where acts constituting fraud were, or could have been litigated therein.⁸⁸

Along these same lines, where parties have been induced by fraud or other unlawful means from bringing into the original action all of the

⁸⁵ **Brief:** pp. 79-88 (Settlement Agreement); pp. 83-86 (Misrepresentation).

⁸⁶ Phillips, 46 Wn.2d at 15 (citations omitted).

⁸⁷ Black's Law Dictionary, 1979.

⁸⁸ Id.

matters which might have been therein litigated, they are not then barred from introducing those matters in a subsequent lawsuit.⁸⁹

BOA states that the Banks had no duty to disclose citing Wash. Mut. Sav. Bank v. Hedreen.⁹⁰ However, that case supports Joe's position that the Banks had a duty to disclose information here based on the 'special' trust relationship between Joe the guardian Banks.

A party has engaged in fraud or inequitable conduct if it conceals a material fact from the other party. However, concealment only constitutes fraud or inequitable conduct when the party possessing the knowledge has a duty to disclose that knowledge to the other party...In general, '[s]ome type of special relationship must exist before the duty [to inform] will arise.'⁹¹

Further, respondents incorrectly attempt to distinguish Brinkerhoff by asserting that it only applies where there is dispute over the existence and material terms of the SA. The case specifically addressed disputes concerning defenses to a SA that included whether there was a misrepresentation, which would allow avoidance of the agreement.⁹² Respondents' arguments threaten and degrade the protection for incapacitated persons.⁹³ Their misrepresentations voided their carefully

⁸⁹ Phillips, 46 Wn.2d at 15 (citation omitted).

⁹⁰ Wash. Mut. Sav. Bank v. Hedreen, 125 Wash.2d 521, 886 P.2d 1121 (1994).

⁹¹ Id. at 526 (citations omitted). (developers were negligent in not disclosing a material fact – difference between a commitment letter and master lease – to bank lender).

⁹² Brinkerhoff, 99 Wn. App. at 693.

⁹³ Pages 84-85 of the **Brief** sets forth thirteen omissions and misrepresentations by the Banks.

crafted agreement.⁹⁴ If the Banks knew of a specific incident, which would serve as the basis of a claim, throwing in an “as-is” clause does not absolve them of their duty to disclose.

4. Joint Liability of the Banks under the SA. The Banks are jointly liable for breaching the SA due to their failure to disclose since they jointly prepared and included an ‘as is’ clause; concealed evidence; and induced Joe to sign knowing their hidden breaches of duty.⁹⁵

At common law, a joint contract is an agreement by all of the promissors that the act promised shall be done. It is treated as the single obligation of all jointly and the individual obligation of none. For any breach of the contract, there is but one cause of action, and the joint obligors are jointly liable for the damages suffered by the obligee.⁹⁶ The court looks to the parties’ intentions to determine whether their agreements create a joint obligation.⁹⁷ If necessary, the court can examine extrinsic evidence to determine the intentions of the parties.⁹⁸

The language in the SA and the Banks jointly moving to enforce

⁹⁴ Irregularities: CP 1032-1120, 1121-1223, 1224-1274.

⁹⁵ See CP 1857-1864 (...Joint Nature...Settlement Agree...). Banks jointly prepared the SA and jointly filed their motion to enforce. CP 1455-1470, 929-935, 1017-1025, 936.

⁹⁶ Smith v. Wash. Ins. Guar. Ass’n, 77 Wn. App. 250, 258, 890 P.2d 1060 (1995).

⁹⁷ Id.

⁹⁸ CP 1026-1027. Joe testified that at the time the settlement with the banks was offered, I had known about their activities with my companies, I would not have signed the settlement agreement. Furthermore, had I seen the documents concerning the banks’ involvement with my companies, I would not have signed...See e.g., Turner v. Gunderson, 60 Wn. App. 696, 704, 807 P.2d 370 (1991).

the agreement confirms the joint intentions of the Banks.⁹⁹ Attorney Kipling acknowledges the Banks' concerted intent in drafting the SA:

“...It's [the SA] not really boilerplate. I drafted it. It's specially drafted to avoid exactly what we've had to put up with here.”¹⁰⁰

BOA attempts to deflect the issue of the \$500,000.00 in management fees that had not been disclosed by reciting sales of the company and salary paid to Joe. The one does not impact the other. In other words, the financial performance to the estate does not excuse any type of breach of fiduciary duty.¹⁰¹ Additionally, the salary referred to by BOA interestingly does not show up in any of its accountings.¹⁰² BOA argues that since the transfer of Joe's majority interest in GAHC ultimately took place after its resignation, BOA had no duty to report on a substantial change in the guardianship assets in violation of statute.¹⁰³

This argument reflects an ongoing problem with all of the fiduciaries – too much effort was placed in protecting their own interests rather than protecting Joe's interests. It is precisely this kind of argument where responsibility was attempted to be placed on someone else, poking holes into the protection that should have been there for Joe. In sum, the

⁹⁹ In the SA, the Banks, acting collectively, indicate they will waive and release any claim for attorneys' fees pursuant to the court's order of July 7, 2004. CP 936, 941-946.

¹⁰⁰ CP 1731.

¹⁰¹ In re Montgomery's Estate, 140 Wash. 51, 55, 248 P. 64 (1926).

¹⁰² CP 278-288 (first report), 11-17 (second), 24-31 (third), 44-95 (fourth).

¹⁰³ RCW 11.92.040(3). A hearing was noted on the issue while BOA was guardian.

settlement agreement is void and should be ruled unenforceable.

D. Rule of Appellate Procedure 9.12.

RAP 9.12 generally limits the record on appeal of summary judgments to those documents considered by the trial court.¹⁰⁴ Here, the record in the guardianship, probate and civil matter is overwhelmingly large and the unique facts include not only summary judgment issues, but also the discovery doctrine evidence related to the SA. This rule does not prevent the court from considering documents and issues that support and establish that entry of the summary judgment orders was error. Also, the record as a whole is relevant to the SA analysis, especially since the fiduciary Banks failed to disclose evidence prior to the SA.

Appellate courts are directed to liberally interpret the appellate rules to promote justice and granted the authority to supplement the record on appeal.¹⁰⁵ The spirit of these rules is clear – the appellate court’s mission is justice. A reviewing court may perform all acts necessary or appropriate to secure a fair and orderly review and can waive appellate rules when necessary to serve the ends of justice.¹⁰⁶ The newly discovered evidence broadens the scope of review as a whole even though respondents’ attempt to limit the record on appeal by RAP 9.12.

¹⁰⁴ RAP 9.12 (emphasis added).

¹⁰⁵ RAP 1.2, 9.10.

¹⁰⁶ RAP 7.3. See e.g., Nguyen v. Sacred Heart Med. Ctr., 97 Wn. App. 728, 987 P.2d 634 (1999).

On November 2, 2006, the parties returned to the lower court on the issue of documents considered prior to the summary judgments where the judge revealed she had failed to review the court files.¹⁰⁷

Joe's memorandums of authority relating to both summary judgment hearings extensively cited the issues of fact related to the respondents alleged orders of discharge. To adequately consider the summary judgments, the court should have reviewed, at the very least, the docket and pleadings referenced by the memorandums of authority, but it did not. In line with the appellate court's desire to make rulings on the merits, the court should be aware that in guardianship proceedings, the general rule precluding supplementation of the record with material not in the trial court record will normally be deemed waived and the record supplemented with information so as to apprise the reviewing court of the most current set of circumstances.¹⁰⁸

By not reviewing the record, the trial court took the statements of respondents on summary judgment at their face value, instead of reviewing the record in the light most favorable to the non-moving party.¹⁰⁹ Based on the error of the trial court who failed to review the

¹⁰⁷ VR, November 2, 2006, p. 11, ll. 2-18.

¹⁰⁸ Way, 79 Wn. App. at 192

¹⁰⁹ Young, 112 Wn.2d at 226. See also Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986) (appellate court reviewing summary judgment

record cited by Joe, the issue of what was considered at the time of summary judgment is moot.

E. De Facto Guardian.

FD' duties and actions rose to the level of de facto guardians.¹¹⁰ A de facto guardian is subject to all duties and liabilities of a guardian and held to the heightened fiduciary standards of a guardian.¹¹¹ FD argue that the de facto guardian theory was raised for the first time in Joe's opening brief.¹¹² However, this particular issue was addressed by Joe in the trial court on FD motion for summary judgment.¹¹³ Holding FD to the fiduciary standards of guardians was argued and briefed at length prior to summary judgment. This issue is not raised for the first time on appeal.

F. Motion to Amend.

Joe sought review of the order denying his motion to amend his complaint to add the discovery doctrine theory and to add Arthur Davies and Owens Davies, P.S. as additional parties.¹¹⁴ Each are necessitated by the discovery of information not disclosed to the court.

FD contends that the approximately \$500,000 in management fees

places itself in position of trial court and considers facts in light most favorable to the nonmoving party.).

¹¹⁰ **Brief:** pp. 21-22 (de facto guardians).

¹¹¹ In re Guardianship of Bouchat, 11 Wn. App. 369, 372, 522 P.2d 1168 (1974), review denied, 85 Wn.2d 1010 (1975).

¹¹² **FD Response:** pp. 15-16.

¹¹³ CP 512-525.

¹¹⁴ **Brief:** pp. 88-91.

of Drews and Davies were disclosed to the court, as well as to Joe's counsel. The record does not support these assertions.¹¹⁵ FD refer to the Report of Special Administrators dated November 30, 1988, filed April 30, 1990. CP 605-613. The report indicates a future intent that the information be disclosed and the docket indicates it was never approved by the court.¹¹⁶

FD contends that Joe's counsel received invoices covering the 1986-1987 management fees in 2002. Correspondence specifically refers to invoices dated later than the period in question.¹¹⁷ Ms. Liekhus makes the self-serving assertion that her "clients invoices for accounting and management work performed for complainant and the Great American Herb Company total \$190,468 in 1986 and \$208,462 in 1987."¹¹⁸ However, the underlying documents are not included. The assertion does not address the extent to which the fees were attributable to services as an accountant (i.e. not as special administrator) versus management services, and what fees are attributable to Mr. Davies. In short, the record does not support the assertion that the management fees were disclosed to the court and available to Joe. Newly discovered information identifies the fees attributable to Drews and Davies. The denial of the motion to amend was

¹¹⁵ **Brief:** pp. 32-34, 40-41.

¹¹⁶ See App. "G": Dkt. Probate.

¹¹⁷ CP 2333-2337.

¹¹⁸ CP 4766.

an abuse of discretion.

G. Judge and Appearance of Fairness.

In the **Brief**, Joe raised the issue of appearance of fairness of the trial court.¹¹⁹ The law requires an impartial judge. To that end, the court has an obligation to familiarize itself with the record in proceedings. The trial court admitted to not reviewing the files prior to ruling on summary judgment motions.

This, in combination with previously cited examples, such as the court's wavering on her position concerning the award of attorney's fees beyond those relating to discovery, and her enforcing the SA after the GAL testified that he did not recall disclosure of the management fees in question, and the court enforcing the agreement based on discovery issues and without conducting an evidentiary hearing on the disputed facts concerning defenses, all support Joe's claim for a new judge.

H. Attorney's fees and abuse of discretion.

The court abused its discretion granting the summary judgment motions, lacked an appearance of fairness and failed to hold an evidentiary hearing. The award of attorneys' fees was a further abuse of discretion.¹²⁰ Respondents argue that an order for fees is appropriate under RCW 11.96A.150 and the terms of the SA. The Banks waived the SA as a basis

¹¹⁹ **Brief**: pp. 97-99.

¹²⁰ **Brief**: pp. 91-97.

for fees by bringing the action in Thurston County contrary to the venue provisions of the SA.¹²¹

Joe's action reveals that the Respondents failed to disclose information, to fulfill their fiduciary duties, and failed to protect Joe. By failing to follow statutory procedure and disclose, the respondents created this 'mess' and should be responsible for the attorneys' fees associated with 'cleaning' it up.¹²² Similarly, here the guardian Banks' conduct created the expense at the trial court and appellate level. They should be responsible for attorneys' fees and costs including Joe's.

The judge's failure, by omission, to review the files amounted to an abuse of discretion when fees were then awarded to the Banks.

Any probate judge in a guardianship proceeding who is asked to approve attorneys' fees, accountants' fees, and expenses of litigation ...in an estate whose records are part of the records of his court has the duty to familiarize himself, if he does not already know, with the issues involved in that litigation, and with what has been done to earn such fees.¹²³

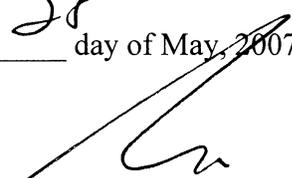
In making decisions regarding summary judgment, the court should have reviewed the files of the guardianship and probate as there were genuine issues of material fact related to those proceedings and the award of fees to the Banks was an abuse of discretion.

¹²¹ CP 941-946.

¹²² See In re Guardianship of McKean, 151 P.3d 223 (Jan. 30, 2007) (parent of minor child ordered to pay attorneys' fees of guardian for recovering/accounting for guardianship assets because his behavior created the fees and need to protect the assets).

¹²³ Phillips, 46 Wn.2d at 22-23.

Respectfully submitted this 25 day of May, 2007.



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DECLARATION OF SERVICE

I certify that on the 25th day of May, 2007 I served a copy of the **Reply of Appellant** upon the following parties to this proceeding and their attorneys or authorized representatives, as listed below, via e-mail and ABC Legal Messenger.

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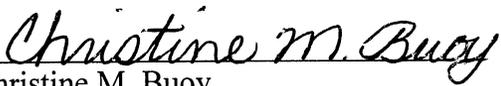
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I declare under penalty of perjury according to the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of May, 2007.


Christine M. Buoy

APPENDIX A

**CERTIFIED PROFESSIONAL GUARDIAN
STANDARDS OF PRACTICE**

APPENDIX A

*** These principles are established in caselaw and statutes and have only been reinforced over time, culminating with their inclusion in the standards of practice for certified professional guardians.**

CERTIFIED PROFESSIONAL GUARDIAN STANDARDS OF PRACTICE (selected portions below)

1. 401.1 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 statutes which govern the conduct of the guardian in the management of affairs of an incapacitated person. When a question exists between the standards and a statute, timely direction shall be sought from the court. If a guardian is aware of a court order of the court in a specific case which may lead to a conflict with these regulations, the guardian shall disclose this to the court.

Law: RCW 11.32 et seq.
RCW 11.92.040(4)

Violations: BOA, USB, KEY's failure to advise the court about GAHC and the Special Administrators' lack of reporting and fee approval.

2. 401.3 The guardian shall provide reports and accountings that are timely, complete, accurate, understandable, and in a form acceptable to the court.

Law: RCW 11.92.040(4)
In re Carlson, 162 Wash. 20, 297 P. 764 (1931)
In re Guardianship of Rudonick, 76 Wn.2d 117, 456 P.2d 96 (1969)
In re Rohne, 157 Wash. 62, 288 P.269 (1930)

Violations: FD (failure to finally account, see brief pp. 16-20)
USB (3rd and 4th Reports filed not at all and late,
respectively)
KEY (retroactive discharge)
Drews (late reporting and failure to request final
order).

3. 401.4 The guardian shall not act outside of the authority granted
by the court.

Law: RCW 11.88.120
SPR 98.16W
RCW 11.92.060

Violations: procurement of exonerating language and releases:
CP 293-5, 300-2, 309-19, 362-5, 370-2, 387-90,
18-23, 162-5
Banks claiming appointment as limited guardians in
their orders

403 Ethics. The guardian shall exhibit the highest degree of trust, loyalty,
attentiveness, and fidelity in relation to the incapacitated person.

4. 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.

Law: In re Montgomery's Estate, 140 Wash. 51, 248 P. 64 (1926)
In re Deming, 192 Wash. 190, 73 P.2d 764 (1937)
In re Eisenberg, 43 Wn. App. 761, 719 P.2d 187 (1986)

Violations: Drews acting as CPA, Special Administrator, on the
Board of Directors of GAHC, Guardian of the
Person, and Limited Guardian of the Estate: CP

578, 244-6, 616-20, 975-6, 244-6, 293-5, 377-86

Procurement of exonerating language and releases:
CP 293-5, 300-2, 309-19, 362-5, 370-2, 387-90,
18-23, 162-5

Banks claiming appointment as limited guardians

5. 403.6 The guardian shall disclose to the court and interested parties all compensation, fees and expenses requested, charged, or received in a guardianship case.

Law: RCW 11.92.040
RCW 11.92.180

Violations: Special Administrators' failure to account.

406 Financial Management. 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.

6. 406.1 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 to assure compliance with all statutes and regulations relating to the management of funds.

Law: In re Carlson, 162 Wash. 20, 297 P. 764 (1931)
RCW 11.92.040(2), (3), and (4)
RCW 11.88.120
RCW 11.92.140

Violations: Change in value of GAHC.

7. 406.9 There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.

Law: In re Montgomery's Estate, 140 Wash. 51, 248 P. 64 (1926)
Rupe v. Robinson, 139 Wash. 592, 247 P. 954 (1926)

Violations: procurement of exonerating language and releases:
CP 293-5, 300-2, 309-19, 362-5, 370-2, 387-90,
18-23, 162-5
Banks claiming appointment as limited guardians
Drews acting as CPA, Special Administrator, on the
Board of Directors of GAHC, Guardian of the
Person, and Limited Guardian of the Estate: CP
578, 244-6, 616-20, 975-6, 244-6, 293-5, 377-
86.

APPENDIX H

TIMELINE

Kwiatkowski Timeline

Updated December 21, 2006

Blue = probate file
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 Green = Joe's lawsuit

SeaFirst = BOA
 PSNB = KEY
 Sirius Enterprises = GAHC
 Frost & Drews = FD

DATE	EVENT
Prior to April 1986	FD became Great American Herb Company's CPAs. CP 578. Art Davies represents Joe & Jana Kwiatkowski. CP 101 & 606.
April 23, 1986	Jana Kwiatkowski died. CP 577.
April 23, 1986	Joe seriously injured. CP 577.
May 7, 1986	Special Administrators FD appointed in Jana's probate as Special Administrators of Sirius Enterprises d/b/a The Great American Herb Company (GAHC). CP 244-246.
May 7, 1986	BOA appointed Co-Personal Representative of Estate of Jana Kwiatkowski. CP 244 - 246.
November 13, 1986	John Parr appointed GAL in guardianship. CP 22.
December 8, 1986	Guardianship established, Full Guardian of the Estate BOA, Limited Guardian of the Person, Joe's half-brother Mark Perelmuter. CP 2655.
December 21, 1986	GAHC minutes of special meeting of shareholders: Davies and Drews elected to Board of Directors. CP 975-976.
July 7, 1987	Letter from Ross Ohashi to Arthur Davies re: Sirius Enterprises (BOA), stock and guardianship. CP 1177.
December 31, 1987	GAHC 1986 and 1987 financial statements, schedule of expenses. CP 1223.
February 19, 1988	Letter from Ohashi to Davies re: Sirius Enterprises (BOA) keep apprised of status. CP 1179-1180.
February 19, 1988	BOA memo on status of GAHC. CP 1182.
March 28, 1988	Letter from Ralph Drews to Ralph Macy (BOA) on financial statements 1987. CP 1184.
April 19, 1988	BOA interoffice memo from Macy to Ohashi on financial statements 1986-87. CP 1186.
April 26, 1988	BOA interoffice correspondence from Ohashi to Gvovaag, 5-year forecast. CP 1188-1189.
April 26, 1988	BOA interoffice correspondence from Ohashi to Macy with 1988 annual review. \$500K fees. CP 1191-1196.

Timeline-1

Kwiatkowski Timeline

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 Frost & Drews = FD

September 26, 1988	BOA interoffice correspondence from Ohashi to Macy re: decrease value of shares. CP 1198.
October 20, 1988	John Parr appointed Guardian ad Litem in probate to investigate final report of Personal Representative and actions of Special Administrators. CP 600.
November 23, 1988	Final Report of Personal Representative filed. CP 577-593.
November 29, 1988	BOA reports book value of Jana Kwiatkowski's one-half interest in Sirius Enterprises d/b/a The Great American Herb Company (250 shares) at \$9,850,000. CP 247-249.
December 14, 1988	Guardian ad Litem Report on Probate Final Accounting filed. CP 600-604.
December 14, 1988	BOA's initial inventory as Guardian of the Estate reports Joe's 250 shares in Sirius Enterprises d/b/a/ The Great American Herb Company at \$9,850,000. CP 9-10.
December 15, 1988	Notice of First Annual Accounting filed by BOA (CP 277). Parr appointed as Guardian ad Litem. CP 22.
December 15, 1988	First Report of BOA filed. Refers to self as limited guardian. CP 278-288.
December 22, 1988	Parr filed GAL Report on First Report of BOA. CP 284-288.
December 27, 1988	Order Approving BOA Accounting filed; set on regular motion calendar. Parr not present at hearing, but signed off on order telephonically. CP 2659-2661.
April 5, 1989	BOA interoffice correspondence from Ohashi to Macy, and April 6, 1989 handwritten response—lack of 1988 financial statements. CP 1200
July 12, 1989	BOA interoffice correspondence from Anthony Waltier to Macy re: 1988 financial statements. CP 1202.
July 25, 1989	Closely held asset review (BOA) shares valued at \$15,350,000. CP 1204.
December 14, 1989	Notice of Hearing on Second Report of BOA filed. CP 289.

Timeline-2

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

Updated December 21, 2006

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PSNB = KEY

Sirius Enterprises = GAHC

Frost & Drews = FD

December 14, 1989	Second Report of Guardian of Estate filed. BOA acknowledges receiving Jana's one-half interest (250 shares) valued at \$9,850,000. CP 11-17.
December 14, 1989	Parr appointed GAL to review BOA accounting. CP 290.
December 22, 1989	Guardian ad Litem Report on Second Report of BOA filed. CP 290-292.
December 26, 1989	Order on Second Report of BOA. CP 293-295.
December 26, 1989	Drews appointed limited Guardian of the Person, replacing Joe's half-brother, who had resigned. CP 293-295.
January 4, 1990	BOA interoffice correspondence from Macy to Jerry Jovaag—not required to monitor GAHC—"Rock the Boat". CP 1206.
March 19, 1990	BOA memorandum from Lundberg to Bagley—restriction of stock asset, no need to monitor. CP 1208.
March 19, 1990	BOA memorandum from Lundberg to Istrig—change market value of stock to \$1.00. CP 1210.
April 11, 1990	Order Approving Final Report and to Create Distribution entered in Jana's probate. CP 616-620.
April 12, 1990	Order Approving Special Administrators' Report, Petition for Approval of Further Authority—Special Administrators' duties moved from Jana's probate to Joe's guardianship. CP 18-23.
April 13, 1990	Report of Special Administrators filed (dated November 30, 1988); runs through December 31, 1987. In probate file only. Special Administrators FD reported in probate they paid Joe approximately \$2.8 million during 1986-1987 and that Joe is receiving an annual salary of \$60,000. There is no receipt of funds or notice of change in circumstances appearing from Guardian of Estate BOA. CP 605-613.
September 19, 1990	Correspondence from Davies to Macy with attachments of a promissory note for \$150,000, UCC 1 filed 9/17/90 with Department of Licensing, and minutes of special meeting of board of directors—60% of stock to management team. CP 1214-1221.

Timeline-3

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

Updated December 21, 2006

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February 26, 1991	Third Report of Limited Guardian of Estate: BOA reduces book value of 500 shares of Sirius Enterprises d/b/a The Great American Herb Company from \$19,700,000 to \$1.00. No explanation provided. CP 24 - 31.
February 26, 1991	Notice of Third Report of BOA filed. CP 299.
February 26, 1991	Guardian ad Litem appointed to review Third Report of BOA. CP 2685-2686.
March 7, 1991	Order Combining Promissory Notes (CP 32-43): Court orders Special Administrators to report quarterly to Guardian of Estate BOA and Guardian ad Litem on condition of GAHC. CP 37.
March 8, 1991	Third Guardian ad Litem Report on BOA. CP 300 - 302.
March 11, 1991	Order Approving Third Report of BOA. CP 2687-2689.
September 16, 1991	Fourth and Final Accounting and Report of BOA filed; reports that it has received no financial statements from GAHC (CP 46 - 50), release mentioned (CP 49 - 50). CP 44 - 95.
September 16, 1991	Ex parte Order Approving Fourth and Final Report of BOA. CP 309-319.
September 16, 1991	Waiver of Notice and Acknowledgment of Receipt of Fourth and Final Report. CP 320 - 321
September 16, 1991	BOA Release as Exhibit "A" to Civil Declaration of Michael E. Kipling in Support of Bank of America's Motion for Summary Judgment filed April 29, 2004. CP 3003-3009.
October 18, 1991	KEY petitions to be appointed Guardian of Estate. CP 322 - 328.
October 18, 1991	KEY appointed Limited Guardian of Estate. CP 329 - 331.
October 28, 1991	Letter from Macy (BOA) to Vasey (KEY)—stock transfer. CP 1283 - 1284.
November 7, 1991	At hearing, Frost reports orally that Joe's shares in GAHC were \$750 per share, giving the ownership interest of \$375,000. Not explained. CP 106. Frost tells the court there was under \$300,000 in tax refunds distributed to Joe's guardianship. Guardian of Estate did not report receipt of those funds. CP 108.

Timeline-4

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

Updated December 21, 2006

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November 13, 1991	60% of Joe's interest in GAHC was transferred to third parties. There was no consideration reported in the order. CP 96-97.
November 13, 1991	BOA discharged as Co-Personal Representative of Jana's estate. CP 621.
November 26, 1991	Letter from Macy (BOA) to Willett (KEY)—stock transfer. CP 1286-1287.
December 18, 1991	Letter from Willett (KEY) to Macy (BOA)—stock. CP 1289.
February 12, 1992	Receipt and Acknowledgement of KEY and accompanying correspondence from Macy (BOA) to Willett (KEY), acknowledging receipt of stock of GAHC. CP 1107-1111.
December 23, 1992	Note of Issue for First Annual Report of KEY. CP 340-341.
December 23, 1992	First Annual Report of KEY. CP 2713-2715.
January 13, 1993	Guardian ad Litem Report on First Report of KEY. CP 342-343.
January 19, 1993	Order Approving First Annual Report of KEY. CP 2719-2721.
March 26, 1993	Response to audit report signed by Bush (KEY)—info on GAHC. CP 1297-1298.
July 30, 1993	Commercial Guaranty signed by Bush (KEY) on behalf of the guardianship estate for KEY—not court approved. CP 1293-1295.
August 16, 1993	Order Amending Previous Order and Authorizing Signing of New Guaranty (KEY). CP 348-350.
October 1, 1993	KEY resigned as Guardian of the Estate. CP 352.
January 10, 1994	Sirius Development (new company) incorporated. Joe has 40% interest. \$85,600 was used for Joe's share of Sirius Development. A new corporation was started without court approval and without guardian KEY or USB marshalling asset. CP 977.
January 1994	Organization Consent of Directors Sirius Development Corporation. CP 980-984.

Timeline-5

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

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February 18, 1994	KEY filed an ex parte order approving the Second and Final Report and Petition for Discharge. No notice or hearing. CP 351-352. KEY was to file receipts for transfer of assets to USB for net assets and income realized September 30, 1993. That was never done. CP 113-115.
February 18, 1994	USB appointed Successor Limited Guardian of Estate by ex parte order with order effective November 1, 1993. USB was to file receipts for transfer of estate assets from KEY. That was never done. CP 113-115. Order requiring USB to file declaration regarding Joe's guaranty for a line of credit for GAHC. No declaration was filed. CP 114.
February 25, 1994	Key filed Second and Final Report and Petition for Discharge, which says a supplemental report from October 1, 1993 to the day of transfer would be filed. It was never filed. CP 354-357.
June 21, 1994	Petition by USB to modify a prior order. USB petitioned to allow Joe to guarantee a \$720,000 SBA loan to Sirius Development. At no time did USB report Joe's ownership interest in Sirius Development as an asset of the estate. CP 758-761.
June 21, 1994	Order Granting USB's petition to modify prior court order—SBA loan signed (\$720K), reduce Centennial line from \$500K to \$250K. CP 762-764.
July 27, 1994	Petition for Authority to Reduce Personal Liability on Line of Credit. USB petitioned to allow Joe to guarantee another loan to Sirius Development. Petition requests a reduction of Joe's personal guarantee of a line of credit to Sirius Development, new business, which USB does acknowledge but does not report on. Additional \$60K liability on WA State Economic Development Grant. CP 765-767.
October 4, 1994	Customer Contact Report by Wong (USB)—promissory note. CP 1120.
February 11, 1995	Letter from Ralph Drews to Wong (USB) re: financial statements 1992, 1993, 1994. CP 1087.
February 24, 1995	Interoffice memo from Owens to Wong (USB)—discussion on financial statements. CP 1089 - 1090.

Timeline-6

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

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March 1, 1995	Letter from Wong (USB) to Arthur Davies re: renewal of note. CP 1092
March 17, 1995	Note of Issue on First Report of USB. CP 358-359.
March 17, 1995	First Report of USB stated to the court it had received no financial statements for GAHC (CP 118). CP 116 - 161.
March 17, 1995	Quit Claim Deed transferring property out of Sirius Development to Doug Groves. CP 1079.
April 4, 1995	Guardian ad Litem Report of USB's First report. CP 360 - 361.
April 10, 1995	Order Approving USB's First Report. CP 362 - 365.
December 6, 1995	Note of Issue on Second Report of USB filed. CP 366-367.
December 6, 1995	Second Report of USB. CP 2722-2798.
December 13, 1995	GAL Report on USB's Second Report filed. CP 368 - 369.
December 16, 1995	Order Approving USB's Second Report. CP 370 - 372.
February 23, 1996	GAHC & SDC combined financial statements 12/31/95 by Knight, Vale, Gregory. Table of contents, accountant's report letter (USB). Transfer of land reported value \$38,250. CP 1074-1077.
April 5, 1996	Letter re: Drews sent financial statements (USB), bonus land to president of corporation, mentions Sirius Development. CP 1069.
June 27, 1996	Memorandum from Wong to Owens (USB)—transfer of land noted in GAHC (SE) (in reality SD). CP 1081.
July 5, 1996	Interoffice correspondence dated July 5, 1996 from Owens to Wong (USB)—concerns about special administrators & GAHC, unsecured loan. CP 1117 - 1118.
December 12, 1996	Superior Court Volunteer Auditor report—questions about file. CP 1098.
January 7, 1997	Petition to Remove USB as Guardian. CP 2799.
January 7, 1997	Affidavit in Support of Petition to Remove USB. CP 2800-2802.
January 7, 1997	Order to Show Cause to Remove USB. CP 2803-2804.
January 22, 1997	Response of USB on Removal. CP 2805-2816.
January 22, 1997	Declaration of Ralph Drews in Response to USB. CP 2817-2819.

Timeline-7

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

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Frost & Drews = FD

March 3, 1997	Findings of Fact and Conclusions of Law, replacing USB with Drews as guardian of estate. CP 373-376.
March 3, 1997	Drews appointed Successor Limited Guardian of Estate. Same order appointing Drews made USB's discharge contingent upon filing Ralph Drews' receipts for transfer of assets, approval of the accounting, and approval of summary accounting. Receipts (dated May and June 1997) not filed until March of 2000. USB required by order to produce to Drews and file an accounting from date of its last period through February 28, 1997. No complete accounting was filed. CP 377-386.
April 2, 1997	Donna Holt appointed ex parte as Joe's attorney. CP 2820-2821.
April 28, 1997	Stipulated Order entered ex parte discharging USB and approving Third and Final Report. Parr, Guardian ad Litem, did not file a report approving USB's Third Annual and Fourth and Final Accountings, and did not sign the order. There was no notice to Donna Holt, Joe's court-appointed attorney. The Third Annual Report was never filed. The Fourth and Final Accounting and Petition for Discharge of USB (CP 407-463) was not filed until five years later, and it is not dated. CP 387-390.
August 15, 1997	Final Report of Special Administrators. CP 162-165.
August 15, 1997	Order Approving Final Report of Special Administrators signed; presented without notice to the court on August 15, 1997. FD discharged; Parr discharged as GAL. CP 393-394.
August 15, 1997	Order making changes in guardianship by Holt—guardian of the person removed, Parr discharged. CP 395-399.
March 23, 2000	Three years after their discharge, USB files receipts dated May 12, May 25, and June 24, 1997. CP 2822, 2823, 2824.
January 26, 2001	Order Terminating Guardianship: full capacity returned to Joe. CP 166-167.
April 12, 2002	Motion for an Order to Show Cause why Drews should not be in contempt for failure to produce documents. CP 168-175.
May 3, 2002	Final Report of Limited Guardian of Estate filed by Drews. CP 1076-1096.
May 8, 2002	Response to Order to Show Cause by Davies. CP 2826-2834.

Timeline-8

Kwiatkowski Timeline

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May 10, 2002	Told by court to resolve document dispute. CP 2835.
May 13, 2002	Fourth and Final Report of USB filed. Arthur Davies' signature not dated, but notary designation dated March 28, 1997. CP 407-463.
May 13, 2002	Final Report of Special Administrators filed by Drews. CP 197-200.
October 13, 2003	Complaint filed for damages against Frost, Drews, and three banks. CP 2840-2848.
November 21, 2003	Hearing regarding improper service—had to be personal service. CP 2849-2850.
January 21, 2004	Claim for Damages—Joe's complaint against Frost, Drews, BOA, Puget Sound, and USB (new filing). CP 213-221.
March 19, 2004	Order Compelling Discovery. CP 2895-2896.
April 5, 2004	Motion to Set Aside—Full Accounting. CP 2897-2899.
April 20, 2004	Order Denying Motion to Set Aside. CP 2900-2901.
April 21, 2004	Order Granting Summary Judgment (FD). CP 242-243.
April 30, 2004	Declaration of Wong has attached to it the Third Report of USB, filed for the first time. (Civil Subpart No. 34).
June 4, 2004	Order Granting BOA's Motion for Summary Judgment. CP 736-737.
June 4, 2004	Order Granting KEY's Motion for Summary Judgment. CP 738-740.
June 14, 2004	Order Granting USB's Motion for Summary Judgment. CP 753-756.
June 14, 2004	Order Denying Plaintiff's Motion to Set Aside Orders and for Full Accounting (as to Banks). CP 779-784.
June 14, 2004	Order Denying Kwiatkowski's Motion to Set Aside Orders and for Accounting (FD). CP 779-784.
July 7, 2004	Order Granting USB's Motion for Reconsideration on Fees. CP 785-790.
January 13, 2005	Settlement Agreement between Banks & Joe. CP 941-946.
April 5, 2005	Declaration of Donna Holt—FD. CP 535 - 538.

Timeline-9

V:\Kwiatkowski\Timeline

Kwiatkowski Timeline

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April 21, 2006	Declaration of Donna Holt—USB. CP 564-565.
May 4, 2005	Balsam letter holding off on settlement. CP 1964-1965.
May 12, 2005	Declaration of Michael Kipling—Exhibit A is release. CP 2999-3030.
May 25, 2005	Declaration of Michael Schein acknowledging newly discovered evidence. CP 1012-1016.
May 25, 2005	Declaration of Donna Holt in Response to Motion to Enforce Settlement Agreement. CP 968-970.
June 8, 2005	Declaration of Joseph Kwiatkowski. CP 1026-1027.
June 8, 2005	Declaration of Donna Holt outlining her efforts. CP 1028-1031.
Sept. 23, 2005	Declaration of Donna Holt in Response to Defendant Banks' Refusal to Produce Documents. CP 1351-1365.
Sept. 29, 2005	Order on Motion for Continuance (production of Banks' counsel's files). CP 1366-1369.
March 16, 2006	Medical Records of Joe from Parr file. CP 1865-1894.
May 10, 2006	Motion to Amend Complaint. CP 2145-2178.

Timeline-10

V:\Kwiatkowski\Timeline

APPENDIX I

RCW 11.92.050

RCW 11.92.053

(g) Any recommended changes in the scope of the authority of the guardian;

(h) The identity of any professionals who have assisted the incapacitated person during the period.

(3) To report to the court within thirty days any substantial change in the incapacitated person's condition, or any changes in residence of the incapacitated person.

(4) Consistent with the powers granted by the court, to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, assert the incapacitated person's rights and best interests, and if the incapacitated person is a minor or where otherwise appropriate, to see that the incapacitated person receives appropriate training and education and that the incapacitated person has the opportunity to learn a trade, occupation, or profession.

(5) Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. No guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in chapter 71.05 or 72.23 RCW are followed. Nothing in this section shall be construed to allow a guardian, limited guardian, or standby guardian to consent to:

(a) Therapy or other procedure which induces convulsion;

(b) Surgery solely for the purpose of psychosurgery;

(c) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in *RCW 71.05.370.

A guardian, limited guardian, or standby guardian who believes these procedures are necessary for the proper care and maintenance of the incapacitated person shall petition the court for an order unless the court has previously approved the procedure within the past thirty days. The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040. [1991 c 289 § 11; 1990 c 122 § 21.]

*Reviser's note: RCW 71.05.370 was recodified as RCW 71.05.217 pursuant to 2005 c 504 § 108, effective July 1, 2005.

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.050 Intermediate accounts—Hearing—Order.

(1) Upon the filing of any intermediate guardianship or limited guardianship account required by statute, or of any intermediate account required by court rule or order, the guardian or limited guardian may petition the court for an order settling his or her account with regard to any receipts, expenditures, and investments made and acts done by the guardian or limited guardian to the date of the interim report. Upon such

(2006 Ed.)

petition being filed, the court may in its discretion, where the size or condition of the estate warrants it, set a date for the hearing of the petition and require the service of the petition and a notice of the hearing as provided in RCW 11.88.040 as now or hereafter amended; and, in the event a hearing is ordered, the court may also appoint a guardian ad litem, whose duty it shall be to investigate the report of the guardian or limited guardian of the estate and to advise the court thereon at the hearing, in writing. At the hearing on the report of the guardian or limited guardian, if the court is satisfied that the actions of the guardian or limited guardian have been proper, and that the guardian or limited guardian has in all respects discharged his or her trust with relation to the receipts, expenditures, investments, and acts, then, in such event, the court shall enter an order approving such account. If the court has appointed a guardian ad litem, the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order; provided that at the time of final account of said guardian or limited guardian or within one year after the incapacitated person attains his or her majority any such interim account may be challenged by the incapacitated person on the ground of fraud.

(2) The procedure established in subsection (1) of this section for financial accounts by guardians or limited guardians of the estate shall apply to personal care reports filed by guardians or limited guardians of the person under RCW 11.92.043. [1995 c 297 § 6; 1990 c 122 s 23; 1975 1st ex.s. c 95 s 21; 1965 c 145 s 11.92.050. Prior: 1943 c 29 s 1; Rem. Supp. 1943 s 1575-1.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.053 Settlement of estate upon termination.

Within ninety days after the termination of a guardianship for any reason, the guardian or limited guardian of the estate shall petition the court for an order settling his or her account as filed in accordance with RCW 11.92.040(2) with regard to any receipts, expenditures, and investments made and acts done by the guardian to the date of the termination. Upon the filing of the petition, the court shall set a date for the hearing of the petition after notice has been given in accordance with RCW 11.88.040. Any person interested may file objections to the petition or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto. The court may take such testimony as it deems proper or necessary to determine whether an order settling the account should be issued and the transactions of the guardian be approved, and the court may appoint a guardian ad litem to review the report.

At the hearing on the petition of the guardian or limited guardian, if the court is satisfied that the actions of the guardian or limited guardian have been proper, and that the guardian has in all respects discharged his or her trust with relation to the receipts, expenditures, investments, and acts, then, in such event, the court shall enter an order approving the account, and the order shall be final and binding upon the incapacitated person, subject only to the right of appeal as upon a final order. However, within one year after the incompetent attains his or her majority any such account may be challenged by the incapacitated person on the ground of

fraud. [1995 c 297 § 7; 1990 c 122 § 24; 1965 c 145 § 11.92.053.]

Effective date—1990 c 122: See note following RCW 11.88.005.

Administration of deceased incompetent's estate: RCW 11.88.150.

Procedure on removal or death of guardian—Delivery of estate to successor: RCW 11.88.120.

Termination of guardianship: RCW 11.88.140.

11.92.056 Citation of surety on bond. If, at any hearing upon a petition to settle the account of any guardian or limited guardian, it shall appear to the court that said guardian or limited guardian has not fully accounted or that said account should not be settled, the court may continue said hearing to a day certain and may cite the surety or sureties upon the bond of said guardian or limited guardian to appear upon the date fixed in said citation and show cause why the account should not be disapproved and judgment entered for any deficiency against said guardian or limited guardian and the surety or sureties upon his or her bond. Said citation shall be personally served upon said surety or sureties in the manner provided by law for the service of summons in civil actions and shall be served not less than twenty days previous to said hearing. At said hearing any interested party, including the surety so cited, shall have the right to introduce any evidence which shall be material to the matter before the court. If, at said hearing, the final account of said guardian or limited guardian shall not be approved and the court shall find that said guardian or limited guardian is indebted to the incapacitated person in any amount, said court may thereupon enter final judgment against said guardian or limited guardian and the surety or sureties upon his or her bond, which judgment shall be enforceable in the same manner and to the same extent as judgments in ordinary civil actions. [1990 c 122 § 25; 1975 1st ex.s. c 95 § 22; 1965 c 145 § 11.92.056.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.060 Guardian to represent incapacitated person—Compromise of claims—Service of process. (1) **GUARDIAN MAY SUE AND BE SUED.** When there is a guardian of the estate, all actions between the incapacitated person or the guardian and third persons in which it is sought to charge or benefit the estate of the incapacitated person shall be prosecuted by or against the guardian of the estate as such. The guardian shall represent the interests of the incapacitated person in the action and all process shall be served on him or her. A guardian or limited guardian of the estate shall report to the court any action commenced against the incapacitated person and shall secure court approval prior to initiating any legal action in the name of the incapacitated person.

(2) **JOINDER, AMENDMENT AND SUBSTITUTION.** When the guardian of the estate is under personal liability for his or her own contracts and acts made and performed on behalf of the estate the guardian may be sued both as guardian and in his or her personal capacity in the same action. Misnomer or the bringing of the action by or against the incapacitated person shall not be grounds for dismissal of the action and leave to amend or substitute shall be freely granted. If an action was commenced by or against the inca-

pacitated person before the appointment of a guardian of his or her estate, such guardian when appointed may be substituted as a party for the incapacitated person. If the appointment of the guardian of the estate is terminated, his or her successor may be substituted; if the incapacitated person dies, his or her personal representative may be substituted; if the incapacitated person is no longer incapacitated the person may be substituted.

(3) **GARNISHMENT, ATTACHMENT AND EXECUTION.** When there is a guardian of the estate, the property and rights of action of the incapacitated person shall not be subject to garnishment or attachment, except for the foreclosure of a mortgage or other lien, and execution shall not issue to obtain satisfaction of any judgment against the incapacitated person or the guardian of the person's estate as such.

(4) **COMPROMISE BY GUARDIAN.** Whenever it is proposed to compromise or settle any claim by or against the incapacitated person or the guardian as such, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, the court on petition of the guardian of the estate, if satisfied that such compromise or settlement will be for the best interests of the incapacitated person, may enter an order authorizing the settlement or compromise be made.

(5) **LIMITED GUARDIAN.** Limited guardians may serve and be served with process or actions on behalf of the incapacitated person, but only to the extent provided for in the court order appointing a limited guardian. [1990 c 122 § 26; 1975 1st ex.s. c 95 § 23; 1965 c 145 § 11.92.060. Prior: 1917 c 156 § 206; RRS § 1576; prior: 1903 c 100 § 1; Code 1881 § 1611; 1860 p 226 § 328.]

Rules of court: *SPR 98.08W, 98.10W, 98.16W.*

Effective date—1990 c 122: See note following RCW 11.88.005.

Action against guardian deemed claim: RCW 11.92.035.

11.92.090 Sale, exchange, lease, or mortgage of property. Whenever it shall appear to the satisfaction of a court by the petition of any guardian or limited guardian, that it is necessary or proper to sell, exchange, lease, mortgage, or grant an easement, license or similar interest in any of the real or personal property of the estate of the incapacitated person for the purpose of paying debts or for the care, support and education of the incapacitated person, or to redeem any property of the incapacitated person's estate covered by mortgage or other lien, or for the purpose of making any investments, or for any other purpose which to the court may seem right and proper, the court may make an order directing such sale, exchange, lease, mortgage, or grant of easement, license or similar interest of such part or parts of the real or personal property as shall to the court seem proper. [1990 c 122 § 27; 1975 1st ex.s. c 95 § 24; 1965 c 145 § 11.92.090. Prior: 1917 c 156 § 212; RRS § 1582; prior: Code 1881 § 1620; 1855 p 17 § 14.]

Effective date—1990 c 122: See note following RCW 11.88.005.

11.92.096 Guardian access to certain held assets. (1) All financial institutions as defined in RCW 30.22.040(12), all insurance companies holding a certificate of authority under chapter 48.05 RCW, or any agent who constitutes a salesperson or broker-dealer of securities under the defini-

APPENDIX J

QUESNELL V. STATE OF WASHINGTON

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QUESNELL v. STATE
 WASH 1974.

Supreme Court of Washington, En Banc.
 In the Matter of Joyce Quesnell, a/k/a Joyce
 Priestman, a mentally ill person.
 Joyce QUESNELL, Appellant,
 v.
 STATE of Washington, Respondent.
 No. 42587.

Dec. 28, 1973.

As Corrected March 4, 1974.

Appeal from order of the Superior Court, King
 County, Horton Smith, J., denying motion by
 patient to vacate order entered in mental illness civil
 commitment proceeding committing patient to state
 hospital. The Supreme Court, Finley, J., held that
 right to jury trial court not be waived by guardian
 ad litem without the knowing consent of the patient,
 and that it was error to conduct the commitment
 proceedings without a jury after an attempted
 invocation of that right by the patient.

Reversed and remanded.

Hale, C.J., filed opinion concurring in the result.

Stafford, J., did not participate.

West Headnotes

[1] Constitutional Law 92 4337

92 Constitutional Law
 92XXVII Due Process
 92XXVII(G) Particular Issues and
 Applications
 92XXVII(G)15 Mental Health
 92k4337 k. Commitment and
 Proceedings Therefor. Most Cited Cases
 (Formerly 92k255(5))

Mental commitment proceedings must be conducted
 in conformity with the mandates of due process.

RCWA 71.02.210; U.S.C.A.Const. Amend. 14;
 RCWA Const. art. 1, § 3.

[2] Mental Health 257A 32

257A Mental Health
 257AII Care and Support of Mentally
 Disordered Persons
 257AII(A) Custody and Cure
 257Ak32 k. Constitutional and Statutory
 Provisions. Most Cited Cases
 Statutory provision that persons in need of care and
 treatment for mental illness shall receive humane
 care and treatment and be restored to normal mental
 condition as rapidly as possible, still preserving all
 rights and all privileges the person is guaranteed by
 the Constitution, does not mean that the primary
 purpose of civil commitment provisions is the
 guarantee of rapid "treatment" for the accused or
 that the commitment hearing is to be conducted in a
 "clinical," nonadversary atmosphere. RCWA
 71.02.010 et seq., 71.02.170, 71.02.900.

[3] Constitutional Law 92 4337

92 Constitutional Law
 92XXVII Due Process
 92XXVII(G) Particular Issues and
 Applications
 92XXVII(G)15 Mental Health
 92k4337 k. Commitment and
 Proceedings Therefor. Most Cited Cases
 (Formerly 92k255(5))

State's obligation of parens patriae does not permit
 deviation from according an accused in a mental
 illness civil commitment proceeding the full
 guarantee of due process. RCWA 71.02.210;
 U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, §
 3.

[4] Mental Health 257A 41

257A Mental Health
 257AII Care and Support of Mentally

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Disordered Persons

257AII(A) Custody and Cure

257Ak37 Admission or Commitment
 Procedure

257Ak41 k. Hearing and Determination
 in General. Most Cited Cases

No meaningful form of representation of accused in mental illness civil commitment proceeding can occur if the guardian ad litem does not provide the accused with the adversarial services of an attorney, either in his capacity as guardian ad litem or with the assistance of another attorney, and if the guardian believes the best interests of the accused will be served but the hearing is devoid of any instance of discussion between guardian and accused to determine the best interests of the accused. RCWA 71.02.210; U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, § 3.

[5] Mental Health 257A 41

257A Mental Health

257AII Care and Support of Mentally
 Disordered Persons

257AII(A) Custody and Cure

257Ak37 Admission or Commitment
 Procedure

257Ak41 k. Hearing and Determination
 in General. Most Cited Cases

Right of accused in mental illness civil commitment proceeding to the assistance of counsel must be considered and afforded in a meaningful way rather than in form only. RCWA 71.02.210.

[6] Mental Health 257A 495

257A Mental Health

257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, Duties, and
 Liabilities. Most Cited Cases

The guardian ad litem of an accused in mental illness civil commitment proceeding is appointed for the benefit of and to protect the rights and best interests of the accused, and for these purposes, it is essential that he act as an advocate on behalf of the accused. RCWA 71.02.210; U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, § 3.

[7] Mental Health 257A 495

257A Mental Health

257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, Duties, and
 Liabilities. Most Cited Cases

It is the duty of the guardian ad litem of an accused in mental illness civil commitment proceeding to submit to the court all relevant defenses or legal claims the accused may have.

[8] Mental Health 257A 495

257A Mental Health

257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, Duties, and
 Liabilities. Most Cited Cases

Guardian ad litem of accused in mental illness commitment proceeding has duty to investigate the charges against the accused and the facts upon which they are based, and prior to the hearing must make a thorough study of all records that are available to him through the court, the hospital, and, at times, social agencies and he must communicate with the accused and where possible, family and friends. RCWA 71.02.210; U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, § 3.

[9] Mental Health 257A 495

257A Mental Health

257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, Duties, and
 Liabilities. Most Cited Cases

A full investigation of charges against the accused in mental illness civil commitment proceeding by the guardian ad litem entails a meaningful consultation with the accused, explaining the legal consequences of commitment and exploring all relevant factors in his defense. RCWA 71.02.210; U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, § 3.

[10] Mental Health 257A 495

257A Mental Health

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257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, Duties, and

Liabilities. Most Cited Cases

The guardian ad litem of an accused in a mental illness civil commitment proceeding may not waive any fundamental rights relative to the proceeding in the absence of knowing consent by the accused. RCWA 71.02.210; U.S.C.A.Const. Amend. 14; RCWA Const. art. 1, § 3.

[11] Constitutional Law 92 947

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(B) Estoppel, Waiver, or Forfeiture

92k947 k. Waiver in General. Most Cited

Cases

(Formerly 92k43(1))

Statutory presumption of mental competence of accused in mental illness civil commitment proceeding is accompanied by presumption against waiver of fundamental rights. RCWA 71.02.650.

[12] Mental Health 257A 41

257A Mental Health

257AII Care and Support of Mentally Disordered Persons

257AII(A) Custody and Cure

257Ak37 Admission or Commitment Procedure

257Ak41 k. Hearing and Determination in General. Most Cited Cases

The fundamental rights of the accused in mental illness civil commitment proceeding include confrontation and cross-examination as well as a transcript of the proceedings to permit effective review on appeal. RCWA 71.02.110, 71.02.210; RCWA Const. art. 1, § 21.

[13] Jury 230 19(6.5)

230 Jury

230II Right to Trial by Jury

230k19 Civil Proceedings Other Than Actions; Special Proceedings

230k19(6.5) k. Mental Health Determinations. Most Cited Cases

(Formerly 230k19(1))

Court acts in excess of its jurisdiction where mental illness civil commitment proceedings are conducted without a jury after a timely demand has been made for trial by jury either by, or on behalf of the accused. RCWA 71.02.110, 71.02.210; RCWA Const. art. 1, § 21.

[14] Jury 230 28(5)

230 Jury

230II Right to Trial by Jury

230k27 Waiver of Right

230k28 In Civil Cases

230k28(5) k. Form and Sufficiency of

Waiver. Most Cited Cases

Right to trial by jury in mental illness civil commitment proceedings is fundamental and cannot be waived by guardian ad litem without the knowing consent of the accused. RCWA 71.02.110, 71.02.210; RCWA Const. art. 1, § 21.

[15] Jury 230 28(5)

230 Jury

230II Right to Trial by Jury

230k27 Waiver of Right

230k28 In Civil Cases

230k28(5) k. Form and Sufficiency of

Waiver. Most Cited Cases

Abridgment of fundamental right of trial by jury of accused in mental illness civil commitment proceeding could not be sanctioned on basis of what may have been a well-intentioned waiver of that right by the guardian ad litem. RCWA 71.02.110, 71.02.210; RCWA Const. art. 1, § 21.

[16] Mental Health 257A 41

257A Mental Health

257AII Care and Support of Mentally Disordered Persons

257AII(A) Custody and Cure

257Ak37 Admission or Commitment Procedure

257Ak41 k. Hearing and Determination in General. Most Cited Cases

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257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak495 k. Powers, Duties, and Liabilities. Most Cited Cases
Authority of guardian ad litem of the accused in mental illness civil commitment proceeding does not exceed that of the accused and the accused's private counsel; the duty of and authority for full representation of the accused shall, upon request, be vested in a private attorney. RCWA 71.02.190, 71.02.210.

[17] Mental Health 257A 41

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak41 k. Hearing and Determination in General. Most Cited Cases

Mental Health 257A 494

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak494 k. Termination of Authority and Appointment of Successor. Most Cited Cases
Court in mental illness civil commitment proceeding has plenary power to revoke the appointment of a guardian ad litem and to substitute more effective counsel. RCWA 71.02.190, 71.02.210.

[18] Jury 230 28(5)

230 Jury
230II Right to Trial by Jury
230k27 Waiver of Right
230k28 In Civil Cases
230k28(5) k. Form and Sufficiency of Waiver. Most Cited Cases
Where accused in mental illness civil commitment proceeding and her attorney made timely demand for a jury, court exceeded its jurisdiction in conducting the proceeding without a jury on theory

of waiver by guardian ad litem. RCWA 71.02.190, 71.02.210.

***225 **570** Lundin, Estep, Sindell & Haley, Inc., P. Landon R. Estep, Abraham A. Arditi, Legal Services Center, Seattle, for appellant. Christopher T. Bayley, King County Pros. Atty., Michael L. Cohen, Carolyn P. Garbutt, Deputy Pros. Attys., Seattle, for respondent. FINLEY, Associate Justice.

This appeal concerns a mental illness civil commitment proceeding brought against the appellant, Joyce Quesnell, pursuant to RCW 71.02.120. The appeal is taken from a lower court order denying a motion by the appellant to vacate an earlier order of hospitalization committing her to Western State Hospital. The appellant charges that the commitment proceeding below was conducted in violation of her constitutional guarantees to due process of law and trial by jury.

The facts underlying this appeal are as follows: On January 13, 1971, the parents of Joyce Quesnell executed and filed with the King County Clerk an application seeking to have Joyce civilly committed as an insane person. An order for the appellant's immediate apprehension and detention pending hearing and examination, and an order fixing the time of hearing were entered the same day. On January 17, 1971, the appellant was apprehended, served with a copy of the application and notice of hearing, and detained at Harborview Medical Center in Seattle until January 19, 1971, when a hearing was held on this application. Jerry Spoonemore, an attorney, was appointed guardian ad litem for the appellant as well as for all other persons on the January 19, 1971, mental illness calendar. Mr. Spoonemore did not provide the appellant with an attorney other than himself, ***226** although he later stated that he was uncertain of the degree of advocacy contemplated by his role as guardian ad litem. Ms. Quesnell was not made aware of the specific allegations pertaining to mental illness until after the hearing commenced. At the hearing, Mr. Spoonemore called no witnesses on behalf of the appellant. The record further indicates that the appellant was absent throughout the hearing except for a few minutes when she was

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questioned; she was then removed from the hearing room before the recommendations for commitment or release were made by the psychiatrists on the case, and was not apprised of the nature of these recommendations until after the hospitalization order was entered. Mr. Spoonemore had no opportunity to discuss the proceedings with the appellant during the hearing. No record of the hearing was made by court reporter. At the conclusion of the hearing, the appellant was committed to Western State Hospital. On January 27, 1971, the appellant filed a Motion for Order Reviewing Act of Court Commissioner which was ultimately heard by Judge Horton Smith of the King County Superior Court. On March 23, 1971, Judge Smith entered an order vacating the commitment. He supported the vacation order with findings of fact and conclusions of law. The application came before Commissioner Niles on remand for a new hearing on March 30, 1971. Even though the appellant was represented by private counsel, the King County Superior Court (Mental Illness Division) appointed Peter Lind, an attorney, as guardian ad litem for the appellant at this hearing, as well as for all others appearing on the commitment calendar that day. With the assistance of her private counsel, the appellant timely filed a demand for a jury trial pursuant to RCW 71.02.210. Per Lind, guardian ad litem, wrote upon the jury demand: 'In the best interest of the patient and in her behalf, I do not request or permit a jury demand.' Commissioner Niles rejected the demand for a jury trial and proceeded with the hearing. An adjournment was then obtained by appellant's private counsel to allow him an opportunity to employ a court reporter for the purpose of *227 documenting the reasons for the court's refusal to grant the demand for jury trial. On April 1, 1971, the hearing reconvened and a record of the proceedings was taken. Present **571 were the appellant's private attorney and also Edward Langenbach, Jr., an attorney who had been appointed by the superior court to act as guardian ad litem for the appellant and all others appearing on the commitment calendar that day. In response to a reassertion by appellant's private counsel of the demand for trial by jury, Commissioner Niles rules that such procedural right had been effectively waived by the appellant's former guardian ad litem.

Subsequently, an Order of Hospitalization was entered. On April 9, 1971, the appellant filed a Motion for Revising Act of Court Commissioner. Judge Horton Smith heard the motion and entered an Order Denying Motion to Vacate.

On appeal, we are asked to determine whether the appellant's second court-appointed guardian ad litem had sufficient authority to refuse and effectively override a timely demand made by the appellant and her private counsel pursuant to RCW 71.02.210 for a trial by jury. Initially, however, we shall consider and review the subject proceedings in terms of due process of law as guaranteed the appellant by U.S. Const. Amend. 14, and Wash.Const. art. 1, s 3.

With the advent of state-supported asylums in the middle of the eighteenth century, and for some time thereafter, the procedure for involuntary commitment of an alleged mentally ill person amounted to an informal request made by the subject's friend, relative, or even enemy, for an order of admission, and the immediate response of some member of the hospital staff in issuing the requested order as a matter of course.[FN1] With the advance of psychiatry, the involuntary patient began to receive treatment;[FN2] with the *228 measured progression of the law, and a growing awareness that such patients were often wrongfully incarcerated, the 'railroading' techniques characteristic of earlier commitment proceedings came under legislative scrutiny and judicial review. Today the astounding rate of involuntary admissions to the nation's mental hospitals poses for our courts the difficult task of establishing a process of evaluation and administration that is not merely efficient, but fair to the individuals involved.[FN3] These ends of fairness and efficiency can be antagonistic or complementary depending upon the nature of this judicial process. In this regard, the recent development of certain constitutional guarantees in the protection of those of our citizens alleged to be mentally ill are significant and encouraging.

FN1. See S. Brakel & R. Rock, *The Mentally Disabled and the Law* 34 (1971);

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T. Szasz, *Law, Liberty, and Psychiatry* 57-58 (1963).

FN2. The effectiveness of institutional treatment, however, even under current standards, is the subject of several challenges:

According to a recent survey, eighty per cent of mental institutions are purely custodial, providing no treatment of any significance even to their law-abiding patients for whom they are run. A good proportion of the remaining twenty per cent provide adequate treatment only for well-paying private patients.

Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 Nw.U.L.Rev. 19, 22 (1962).

FN3. Dr. Thomas S. Szasz has observed an annual mental institution commitment rate of 250,000, with the total number of committed patients at any one time in excess of one million. He further notes that of the 7,000 committed mental patients at St. Elizabeth's Hospital, Washington, D.C., in 1960, only 265 had been admitted voluntarily. T. Szasz, *Law, Liberty, and Psychiatry*, *Supra* n. 1 at 40, 60. See also Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65, 67 (1969).

[1] In 1967, the U.S. Supreme Court undertook a difficult and major review of the extent to which civil proceedings which could result in some form of incarceration were subject to judicial scrutiny and testing on constitutional grounds. Addressing itself to the procedural consequences of an alleged distinction between civil and criminal actions, the Court, in *re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), observed the following characteristics of juvenile court proceedings:

The rules of criminal procedure were therefore altogether inapplicable. The **572 apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through

institutionalization, were to be 'clinical' rather than punitive.

*229 These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *Parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.

In *re Gault*, *Supra*, 387 U.S. at 15-16, 87 S.Ct. at 1437. In piercing the civil veil of the juvenile commitment proceeding, the Court closely examined the consequences of involuntary incarceration: The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence-and of limited practical meaning-that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however, euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees. . . .

In *re Gault*, *Supra*, 387 U.S. at 27, 87 S.Ct. at 1443. Because of this confinement, the Supreme Court rejected the characterization of the proceedings as 'civil' in nature, and concluded that the juvenile defendant was entitled to the guarantees of due process of law, stating: To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'

In *re Gault*, *Supra*, 387 U.S. at 49-50, 87 S.Ct. at 1455. Consistent with *Gault*, the Supreme Court has held that the mental illness commitment proceeding, 'whether denominated civil or criminal,' is subject to the constitutional guarantee of due process of

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*230 law. *Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).[FN4] Upon this basis, and in the same manner of judicial scrutiny utilized in *Gault*, the following comparative observations were made concerning the involuntary commitment of persons alleged to be mentally ill:

FN4. Though perhaps abused through neglect, the requirement that the mental commitment proceeding be conducted in conformity with the mandates of due process has been a part of our law for three-quarters of a century. *Simon v. Craft*, 182 U.S. 427, 21 S.Ct. 836 45 L.Ed. 1165 (1901).

We do not have the distinction between the procedures used to commit juveniles and adults as in *Gault*. But, like *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration-whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent**573 -which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, It has the inescapable duty to vouchsafe due process. . . . Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowingly and understandingly waived. (Italics ours.)

Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). Accord: *Commonwealth v. Gomes*, 355 Mass. 479, 245 N.E.2d 429 (1969); *Millard v. Harris*, 132 U.S.App.D.C. 146, 406 F.2d 964 (1968); *Holm v. State*, 404 P.2d 740 (Wyo.1965); *People v. English*, 31 Ill.2d 301, 201 N.E.2d 455 (1964); *Denton v. Commonwealth of Kentucky*, 383 S.W.2d 681 (Ky.1964); *In re Lambert*, 134 Cal. 626, 66 P. 851 (1901).[FN5] Since each *231

person accused of mental illness is guaranteed the full protection of due process of law before he may be subjected to any deprivation of his liberty, the Supreme Court in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 276-277, 60 S.Ct. 523, 527, 84 L.Ed. 744 (1940) has emphasized and condemned the constitutional insufficiency of mere promises of a 'fair hearing':

FN5. See also S. Brakel & R. Rock, *The Mentally Disabled and the Law*, *Supra* n. 1 at 55; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 *Tex.L.Rev.* 424, 448-49 (1966); Curran, *Hospitalization of the Mentally Ill*, 31 *N.Car.L.Rev.* 274, 277 (1953); Comment, *California's New Mental Commitment Legislation: Is It Legally Sufficient?*, 6 *Calif. Western L.Rev.* 146, 158 (1969); Comment, *Civil Commitment of the Mentally Ill*, 30 *U.Pitt.L.Rev.* 752, 762-69 (1969); Comment, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 *Yale L.J.* 87, 100-01 (1967); Comment, *Due Process for All-Constitutional Standards for Involuntary Civil Commitment and Release*, 34 *U.Chi.L.Rev.* 633, 636-37 (1967); Note, 10 *Duq.L.Rev.* 674 (1972).

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

With these guidelines before us, we undertake a close examination of the Washington procedure for the involuntary commitment of persons alleged to be mentally ill, as well as the practical application of this procedure in the case of the appellant, *Joyce Quesnell*.[FN6]

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FN6. 'Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's wellbeing or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling reasons.'

F. Allen, *The Borderland of Criminal Justice* 37 (1964).

[2] The Washington statutory scheme for commitment of the mentally ill embraces certain basic elements of procedural due process of law. [FN7] The defendant must **574 be provided notice *232 of the hearing, and advised of his rights to representation by counsel and trial by jury.[FN8] Additional provisions specifically guarantee this right to counsel,[FN9] and the duty of the court to grant a timely demand for jury trial.[FN10] Finally the defendant is entitled to produce witnesses and evidence in his own behalf during the hearing. [FN11] That these statutory rights are to be preserved inviolate is evinced by the state intent of the legislature in RCW 71.02.900:

FN7. For a comparative study of statutory commitment procedures in other jurisdictions, See Comment, *Involuntary Civil Commitment in Oregon*, 9 Will.L.J. 63 (1973); Comment, *Involuntary Civil Commitment and the Right to Treatment in Pennsylvania*, 15 Vill.L.Rev. 951 (1970); Comment, *Contemporary Studies Project: Facts and Fallacies About Iowa Civil Commitment*, 55 Iowa L.Rev. 895 (1970); Comment, *The Language of Involuntary Mental Hospitalization: A Study in Sound and Fury*, 4 U.Mich.J.L.Ref. 195 (1970) (statutory procedure in Michigan examined); Comment, *Civil Commitment Procedure in Louisiana*, 31 La.L.Rev. 149

(1970); Brofman, *Civil Commitment of the Mentally Ill in the Denver Probate Court*, 46 Denver L.J. 496 (1969); Johnson, *Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?*, 46 Denver L.J. 516 (1969); Comment, *Civil Commitment of the Mentally Ill in Nebraska*, 48 Neb.L.Rev. 255 (1968); Tao, *Civil Commitment of the Mentally Ill in the District of Columbia*, 13 How.L.J. 303 (1967); Comment, *Involuntary Commitment of the Mentally Ill in Pennsylvania*, 5 Duq.L.Rev. 487 (1967); Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for Reexamination*, 51 Marq.L.Rev. 1 (1967); Note, 16 N.Y.L.F. 165 (1970) (involuntary commitment procedure in New York).

FN8. RCW 71.02.140.

FN9. RCW 71.02.190.

FN10. RCW 71.02.210.

FN11. RCW 71.02.170.

The provisions of this chapter shall be liberally construed so that persons who are in need of care and treatment for mental illness shall receive humane care and treatment and be restored to normal mental condition as rapidly as possible with an avoidance of loss of civil rights where not necessary, and with as little formality as possible, Still preserving all rights and all privileges of the person as guaranteed by the Constitution. (Italics ours.)

The respondent construes the intent of this section as authority for its contentions that the primary purpose of Chapter 71.02 RCW is the guarantee of rapid *233 'treatment' for the accused; that, as a 'civil' proceeding, the commitment hearing is to be conducted in a 'clinical', non-adversary atmosphere; and that, in ensuring that the hearing has no psychologically damaging effect upon the defendant, and in pursuance of the single duty of acting in the best interest of the accused the guardian ad litem is empowered with sufficient

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authority to reject and override a demand made by the accused and her private attorney for trial by jury. We disagree.

[3][4][5] The subtle, paternalistic contention that the state's obligation as *Parens patriae* contemplates and permits some deviation from according an accused the full guarantee of due process was forcefully rejected in *In re Gault*, *Supra*, and *Specht v. Patterson*, *Supra*.^[FN12] Further, the use of beneficent, self-serving labels such as 'civil', 'clinical', and 'treatment' as a means of supporting procedural aberrations in the mental illness hearing constitutes an intolerable abuse of the duty to ensure stringent protection of constitutional and statutory rights.^[FN13] The most formidable ****575** abridgment of due process ***234** guarantees however occurs where 'lip service' is paid to certain rights of the accused as a mere formality, with the consequence that any substantive protection is woefully lacking. In this regard, the facts of the instant case suggest the practical degree to which the Washington defendant charged with mental illness is accorded the 'letter of the law'. Here, pursuant to RCW 71.02.190, a guardian ad litem was appointed to represent the appellant. However, the 'assistance of counsel', as guaranteed by both Federal and State Constitutions, amounted to a 15-minute conversation by the guardian ad litem with the appellant. No meaningful form of representation can occur (1) if the guardian ad litem does not provide the accused with the adversarial services of an attorney, either in his capacity as guardian ad litem or with the assistance of another attorney, (2) if the guardian honestly believes the 'best interests' of the defendant will be served but the entire hearing is devoid of any instance of discussion between guardian and client to determine the best interests of the defendant. Such a passive role of an attorney as guardian ad litem becomes even more critical and suspect where this guardian must represent all other persons on the courts' calendar for that day, and where on subsequent days different guardians ad litem are appointed for the accused, whose only actions on her behalf comprise waiving her right to trial by jury contrary to her timely demand therefor. It is evident from these circumstances of record that the right of the allegedly mentally ill person to the assistance of

counsel must be considered and afforded in a meaningful way rather than in form only. Meaningful legal representation in the instant case is as slight as that reported in and condemned in ***235***Hultquist v. People*, 77 Colo. 310, 236 P. 995, 998 (1925), where the Supreme Court of Colorado reversed an order of commitment for failure of the guardian ad litem to provide the accused with the effective assistance of counsel, and stated:^[FN 14]

FN12. The frequent use of the 'parens patriae' excuse is observed in Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 Rutgers L.Rev. 405, 406-07 (1971):

Statutory authority for involuntary hospitalization of the mentally ill has usually been derived from the state's police power or obligation as *Parens patriae*. Legislatures pretending to be humane tend to rely on the state's obligation as *Parens patriae*, and consider suspending due process guarantees in involuntary commitment laws an act of generosity toward the mentally ill. Consequently, notice, hearing, right to counsel, and jury trial have been variously provided for or not according to the source of statutory authority emphasized. See also N. Kittrie, *The Right to be Different* 8-11 (1971); Taylor, *A Critical Look Into the Involuntary Civil Commitment Procedure*, 10 Washburn L.J. 237, 239-40 (1971); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 Mich.L.Rev. 945, 956-60 (1959).

FN13. On technique for denying that commitment is punishment is to clothe it in a mantle of therapeutic paternalism. . . .

In examining the constitutional rights of the mentally ill, we must remember that, until now, the courts have regarded involuntary 'hospitalization' and involuntary mental 'treatment' as therapeutic, not punitive. Accordingly, legal proceedings authorizing these abominations have been considered civil rather than criminal. Hence, the constitutional guarantees so jealously guarded by the courts in criminal proceedings have failed to apply to the victims of psychiatry precisely because they have been defined as Patients!

T. Szasz, *Law, Liberty, and Psychiatry*, *Supra* n. 1

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at 43, 185.

FN14. That the conduct of the guardian ad litem in both Hultquist and the instant case is not uncommon is apparent from the descriptive presentation set out in Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, *Supra* n. 5 at 428-29.

The undisputed facts, and as we have found them to be, clearly show that the defendant did not have the kind of a hearing which she is entitled to under the statute. The guardian ad litem did nothing whatever to protect her rights. He attempted to waive them before he had ever seen or conversed with her or knew her condition.

It is apparent that meaningful representation of the person alleged to be mentally ill as provided by RCW 71.02.190, and the practical application of that statutory right may be considerably at odds in the day-to-day grinding of the wheels of justice. Much of this ambivalence is created by the lack of judicially enunciated, appropriate standards or guidelines defining the role of the guardian ad litem and the scope of his authority.[FN15]

FN15. The lawyer representing a prospective patient in a typical civil commitment proceeding is a stranger in a strange land without benefit of guidebook, map, or dictionary. Too often he shows no interest and makes no effort to learn his way about his foreign environment. As a result, free citizens of a free country are frequently deprived of their liberty for an indefinite duration.

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, *Supra* n. 5 at 424. Additionally, however, we cannot escape the observation that this conflict may be partially caused by the current inadequacy of remuneration for effective services. See J. Paul, *Involuntary Commitment in King County: The Guardian Ad Litem* 19, n. 5 (1972); Johnson, *Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?*, *Supra* n. 7 at 536-37.

****576** [6][7] It is well-settled that the guardian ad litem is appointed for the benefit of and to protect the rights and best interests of the alleged incompetent to whom he is assigned. *Mood v. Mader*, 162 Wash. 83, 298 P. 329 (1931); ***236** *Mattson v. Mattson*, 29 Wash. 417, 69 P. 1087 (1902). For these purposes, it is essential that he act as an advocate in behalf of the accused.

Direct observation of commitment hearings and extensive interviews with participating attorneys lead to the conclusion that unless the proceeding is adversary in nature (and here that equates with a jury trial), the attorney does not engage in any preparation and does not effectively participate in the hearing.

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 *Tex.L.Rev.* 424 (1966). This view was recently sustained in *Lessard v. Schmidt*, 349 F.Supp. 1078, 1103 (E.D.Wis.1972) where the court held, in part, that the Wisconsin civil commitment procedure was 'constitutionally defective' insofar as it 'permits commitment based upon a hearing in which the person charged with mental illness is not represented by Adversary counsel.'[FN16] (Italics ours.) Accordingly, '(i)t is the duty of a guardian ad litem to submit to the court all relevant defenses or legal claims his client may have.' In *re Manning's Estate*, 85 Neb. 60, 122 N.W. 711, 713 (1909). [FN17] In the absence of an affirmative effort to provide protection as indicated for the fundamental rights of the alleged mentally ill ward, the appointment of the guardian and litem can become a 'mere formality' and a meaningless gesture. *Kroot v. Liberty Bank of Chicago*, 307 Ill.App. 209, 30 N.E.2d 92, 94 (1940). The non-adversary guardian ad litem necessarily does not afford realization of constitutional and statutory ***237** guarantees in regard to the assistance of counsel. *Sorter v. Austen*, 221 Ala. 481, 129 So. 51 (1930). [FN18]

FN16. Nowhere is there any indication of the role which the guardian is to play in the proceedings. The record in this case makes clear, however, that the guardian does not view his role as that of an adversary counsel, and thus cannot take the

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place of counsel unless his role is restructured.

Lessard Schmidt, 349 F.Supp. 1078, 1097 (E.D.Wis.1972).

FN17. The rights of the involuntarily held mental patient can never be fully protected unless he is represented by a lawyer who carefully tests each element of the case presented against his allegedly mentally ill client.

Harris, *Mental Illness, Due Process and Lawyers*, Supra n. 3 at 66.

FN18. See, also Comment, Contemporary Studies Project: Facts and Fallacies About Iowa Civil Commitment, Supra n. 7 at 922-23; Comment, California's New Mental Commitment Legislation: Is It Legally Sufficient?, Supra n. 5 at 163. The lack of adversary representation leaves the burden of refuting the charge to the accused ward:

To me, it is unfair to demand of a psychiatric patient-especially if he is poorly educated and indigent-that he prove his sanity or nondangerousness. We would not ask that he prove his innocence of a criminal charge, and then consider his mere opportunity to do so adequate protection against false or unfair accusations by a district attorney. Yet, this is exactly what we ask the mental patient to do. To make matters worse, such a person must rebut charges of mental illness, charges as amorphous as anything with which K., Kafka's protagonist in *The Trial*, had to contend. It is obvious that such a 'defendant' is almost completely helpless and has small chance of winning his battle. . . .

T. Szasz, *Law, Liberty, and Psychiatry*, Supra n. 1 at 69.

[8][9] Inherent within the requirement of affirmative advocacy is the duty of the guardian ad litem to actively investigate the charges against the accused and the facts upon which they are based. [FN19] In this regard, the U.S. Supreme Court, in *Powell v. Alabama*, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932) held the following:

FN19. See Brofman, *Civil Commitment of the Mentally Ill in the Denver Probate Court*, Supra n. 7 at 501.

It is not enough to assume that counsel thus precipitated into the case **577 thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: 'The record indicates that the appearance was rather pro forma than zealous and active.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.

*238 In preparation for the commitment hearing, the duty to investigate contemplates the following:

Prior to the hearing the attorney must make a thorough study of all the records that are available to him through the court, the hospital, and, at times, social agencies. He must always communicate with the proposed patient and, where possible, family and friends. The attorney should work toward an understanding of the events that led up to and contributed to the filing of the petition. Only in this way can he attempt to develop possible alternatives to hospitalization.

Cohen, Supra, 44 Tex.L.Rev. at 452. As noted immediately above, a full investigation necessarily entails a meaningful consultation with the client, explaining the legal consequences of commitment and exploring all relevant factors in his defense. [FN20]

FN20. See S. Brakel & R. Rock, *The Mentally Disabled and the Law*, Supra n. 1 at 55, 62. One commentator has concluded as follows:

It is not adequate to have a public attorney or public defender appear merely at the court hearings. From

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our observations, this type of legal representation proves ineffectual in practice. I feel that the patient needs a much different type of representation. He needs someone to 'listen to his case'; someone who can give him advice about the legal consequences of hospitalization.

R. Janopaul, Problems in Hospitalizing the Mentally Ill 13 (1962).

[10][11][12] Of utmost importance, and consistent with the earlier-stated duty of the guardian ad litem to actively protect the rights of his client, is the prohibition against waiver of such rights:

As an attorney, he is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing. However, in his capacity as attorney, he has no authority to waive any substantial right of his client. Such waiver, to be binding upon the client, must be specially authorized by him. As stated in *Wagner v. Peshastin Lumber Co.*, 149 Wash. 328, 337, 270 P. 1032, 1036 (1928), 'It will be readily admitted that an attorney without special authority has no right to stipulate away a valuable right of his client.' . . .

Even if the appointment is one made after hearing and determination of incompetency, the guardian ad litem is no more permitted to waive a substantial right of the *239 ward than is an attorney for a competent client. *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.Ed.2d 182 (1949); *Fox v. Starbuck*, 115 W.Va. 39, 174 S.E. 484 (1934); *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N.W. 144 (1941); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931).

In *re Houts*, 7 Wash.App. 476, 481, 482, 499 P.2d 1276, 1280 (1972). The rationale in support of this rule was stated by this court in *Graham v. Graham*, 40 Wash.2d 64, 67-68, 240 P.2d 564, 566 (1952) as follows: There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment **578 and intelligence substituted relative to the litigation affecting the alleged incompetent. Furthermore, there is something fundamental in a party litigant being able to employ an attorney of his voluntary choice to represent him in court and in being free to reject or accept the advice of such

attorney.

See Note, 79 Harv.L.Rev. 1288, 1295, 1297 (1966). Before proceeding further, however, we are faced with a contention by the respondent that, owing to the 'serious mental illness' of the accused, the guardian ad litem is in a better position to determine the advisability of waiver. However, it being the very function of the mental illness hearing to adjudicate the issue of sanity, the legislature specifically has accorded the accused all presumptions of mental competence in RCW 71.02.650: Any person complained against in any application or proceedings started by virtue of the provisions of this chapter shall not forfeit or suffer any legal disability by the reason of the pendency of proceedings under this chapter, until an order declaring such person to be mentally ill has been entered. . . .

Accompanying this presumption of competency is a presumption against waiver of fundamental rights: It has been pointed out that 'court indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is *240 ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Johnson v. Zerst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 82 L.Ed. 1461 (1938). Accord: *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). Therefore, in the absence of knowing consent by the person alleged to be mentally ill, a guardian ad litem may not waive any fundamental right relevant to the mental illness commitment proceeding. See *Hagen v. Rekow*, 253 Minn. 341, 91 N.W.2d 768, 771 (1958); *Anderson v. Anderson*, 133 N.J.Eq. 311, 32 A.2d 83 (1943); *Hodges v. Hale*, 20 Tenn.App. 233, 97 S.W.2d 454 (1936); *Rausch v. Cozian*, 86 Colo. 389, 282 P. 251 (1929).[FN21] In the case before us, it is apparent from the fact of the appellant's demand for trial by jury that she had no intention of relinquishing this right. The only remaining question in this regard then is whether the right to trial by jury is sufficiently 'fundamental' as to fall within the rule prohibiting waiver without the consent of the

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alleged mentally ill person. In this there can be no doubt.

FN21. Such fundamental rights pertinent to the mental illness proceeding include confrontation and cross-examination (See *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Elliott, *Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness*, 42 U.Colo.L.Rev. 231, 261 (1970)), as well as a transcript of the proceedings to permit effective review on appeal (*State v. Adams*, 196 Md. 152, 75 A.2d 839 (1950); See *Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)). The argument of the respondent that the appellant 'would have been determined to be mentally ill with or without a court reporter being present,' essentially obviating the need for a written record of the proceedings, is totally without merit. Since the mental illness proceeding is to be handled as a probate matter (RCW 71.02.110), and since an appeal may be had from any order, judgment or decree of the probate court (RCW 11.96.010), it is essential for purposes of effective review on appeal that a transcript of the contested lower court proceedings be made available to the appellate court. See *State v. Collman*, 9 Or.App. 476, 497 P.2d 1233, 1239-1240 (1972).

[13][14][15] First, the right to trial by jury in Washington mental illness proceedings is guaranteed by constitution (Wash.Const. art. 1, s 21) and statute (RCW 71.02.210). Second, a court *241 acts in excess of its jurisdiction where such proceedings are conducted without a jury after a timely demand has been made for trial by jury either by, or on behalf of, the accused. In *re Ellern*, 23 Wash.2d 219, 160 P.2d 639 (1945); *Strickland v. Peacock*, 209 Ga. 773, 77 S.E.2d 14 (1953); **579 In *re Cash*, 383 Ill. 409, 50 N.Ed.2d 487 (1943); *Johnson v. Nelms*, 171 Tenn. 54, 100 S.W.2d 648

(1937); *White v. White*, 108 Tex. 570, 196 S.W. 508 (1917). Third, the jury plays an essential role in guarding against wrongful commitment:[FN22]

FN22. Those who object to the use of a jury trial in such procedures usually base their objection on the fact that laymen are placed in the position of evaluating expert testimony as to the mental condition of the proposed patient, a job which it is doubtful they can handle. This argument overlooks the fact, however, that the jury in such a case is not required to make a medical diagnosis of the allegedly mentally ill person. They are required only to decide, on the basis of expert medical testimony, whether the condition of the proposed patient is such that his commitment is justified under the statute.

Comment, *Civil Commitment of the Mentally Ill in Nebraska*, *Supra* n. 7 at 270. See *Ross, Commitment of the Mentally Ill: Problems of Law and Policy*, *Supra* n. 12 at 970. As indicated earlier, the respondent attempts to justify the guardian ad litem's rejection of appellant's jury demand on the ground that this manner of trial may subject the accused to traumatic experience. In this regard, one commentator has observed the following:

Arguments exist for and against the use of a jury. But even though a jury may subject and allegedly mentally ill person to additional trauma, it is an additional buffer against wrongful deprivation of liberty.

Comment, *Involuntary Civil Commitment in Oregon*, *Supra* n. 7 at 75. Indeed, this beneficent and protective attitude may be misdirected:

Jury trials are time consuming and frequently traumatic for the testifying doctor, notwithstanding the fact that doctors emphasize the supposed trauma to the patient. If the patient appears at the hearing, the doctor may have to take the time to fully explain the case, and to do so in the presence of the patient may be uncomfortable.

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, *Supra* n. 5 at 447.

(T)he jury serves the critical function of introducing into the process a lay judgment, reflecting values

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generally held in the community, concerning the kinds of potential *242 harm that justify the State in confining a person for compulsory treatment.

Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Upon similar reasoning, the Supreme Court characterized the deference and respect to be accorded the right to trial by jury in Jacob v. New York, 315 U.S. 752, 753, 62 S.Ct. 854, 86 L.Ed. 1166 (1942) as follows:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of . . . jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Upon these bases, the right to trial by jury in civil commitment proceedings is clearly fundamental. As such, this right cannot be waived by a guardian ad litem without the knowing consent of the person charged with being mentally ill. Heryford v. Parker, Supra. Therefore, under the facts of the case at bar, we hold that it was error to conduct the immediate proceedings without a jury after an attempted invocation of this right by the appellant. [FN23] We cannot sanction the abridgement of a fundamental constitutional and statutory right upon the basis of what may have been a well-intentioned waiver of that right by a guardian ad litem.

FN23. Our ruling in this case is limited strictly to the single issue involved. This is simply that the right to trial by jury must be granted upon timely demand in incompetency proceedings. Beyond the scope of this case is the issue of whether the Superior Court (under given circumstances and subject to procedural due process safeguards) may assess the competency of an alleged mentally ill person to comprehend and participate in a jury trial on the question of commitment. Perhaps any such special inquiry may be part of the hearing relative to competency and commitment.

Finally, it is charged by the respondent that the jury

demand made by the appellant and her private counsel was justifiably rejected since the appointed guardian ad litem, *243 in overriding this demand, was exercising**580 superior authority in behalf of the appellant. We disagree.

[16][17][18] No statutory basis exists in support of the suggestion that the authority of the guardian ad litem exceeds that of an alleged mentally ill person and her private counsel which was the situation in the instant case. Rather, the pertinent statute provides the following:

At commencement of hearing The person filed against, his guardian, Attorney or guardian ad litem, may request a trial by jury. Such request shall be in writing and filed with the court accompanied by the required fee. The court shall then enter an order directing the alleged mentally ill person to be detained pending trial and shall set a date for such trial.

(Italics ours.) RCW 71.02.210. Clearly, the right to trial by jury may be invoked by any one of these designated parties. Concerning provision for the vesting of primary powers of representation, RCW 71.02.190 states the following: If no guardian of the person has been appointed, the court May appoint a guardian ad litem to represent the patient during proceedings. The person filed against shall have the right to be represented by an attorney if requested.

(Italics ours.) Thus, the appointment of the guardian ad litem being discretionary and subject only to the constitutional guarantee that the accused be accorded the effective assistance of counsel, the duty of and authority for full representation of the defendant alleged to be mentally ill shall, upon request, be vested in a private attorney. See In re Ervay, 64 Wash. 138, 139, 116 P. 591 (1911). Further, consistent with the language and intent of RCW 71.02.190, this statutory right to exclusive representation by private counsel may be invoked at any stage of the proceedings against the accused. [FN24] Since a major factor conducive to *244 ineffective representation by the guardian ad litem has been shown by the record in this case to be the heavy caseload of appointments per calendar day, elementary logic dictates that a reduction in

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assigned cases through the substitution of private counsel will permit the guardian ad litem more time to spend in meaningful representation of his remaining clients. Therefore, under the facts of the instant case, the lower court erred in concluding that one of appellant's court-appointed guardians ad litem had effectively waived her right to trial by jury. Since timely demand for a jury was properly made by the appellant and her private attorney, and since full authority for the representation of the appellant was exclusively vested in this attorney concurrent with the request of the appellant, the court exceeded its jurisdiction in conducting the proceedings without a jury.

FN24. The court has plenary power to revoke the appointment of a guardian ad litem and to substitute more effective counsel. See *Crockett v. Crockett*, 27 Wash.2d 877, 181 P.2d 180 (1947); *In re Hemrick*, 187 Wash. 21, 59 P.2d 748 (1936); *In re Dodson*, 135 Wash. 625, 238 P. 610 (1925); *In re Shapiro's Estate*, 131 Wash. 653, 230 P. 627 (1924); *State ex rel. Barnard v. Superior Court*, 74 Wash. 559, 134 P. 172 (1913); *Jorgenson v. Winter*, 69 Wash. 573, 125 P. 957 (1912). See also Note, 28 Wash.L.Rev. 75 (1953).

For the reasons indicated above, the Order Denying Motion to Vacate is reversed, and the cause is remanded for proceedings consistent with the opinion of this court.

ROSELLINI, WRIGHT, UTTER and BRACHTENBACH, JJ., concur.
 STAFFORD, J., not participating. HALE, Chief Justice (concurring in the result).

Mental illness is undeniably one of the most tragic and persistent facts of life. That it is difficult to define does not make it impossible to recognize. That it does not readily yield to scientific classification does not mean that people suffering from severe manifestations of it cannot be helped by the state.

****581** One thing, however, is certain: Mental illness will not be prevented nor alleviated nor cured by

preachments about due process of law. No dissertations on constitutional theory, whether definitive or amorphous, nor a delineation of legislative history on the subject of mental illness nor an increase in the tempo of bureaucratic paper shuffling will help the patient.

***245** There has yet to be invented or discovered a judicial process which in one way or another is not susceptible of some abuse, and procedures for the involuntary confinement and treatment of mentally ill persons are no exception. A major function of the judiciary, therefore, in matters of mental illness is to prevent the abuse of such process but at the same time provide a workable system under which the mentally ill, for the protection of themselves and others, may be sequestered for care and treatment.

A workable procedural system allowing for isolation of the mentally ill, whose protection, care and treatment require hospitalization, means that the judicial process must be clinical and not penal. This demands a system affording a maximum of medical research, examination and treatment, and a minimum of adversary procedures. Wherever possible and consistent with the fundamental ideals that no one shall be held or confined anywhere by anyone against his will nor subjected to medication without his consent save upon the lawful orders of a court of competent jurisdiction, the adversary trappings of the judicial process should be avoided lest they do more harm to than good for both patient and public.

Authoritative estimates show that, during the 1960's, 25 per cent of all hospital beds in the United States were occupied by schizophrenic patients; and that these schizophrenic patients represented one half of the three-fourths million patients hospitalized for various kinds of mental illness. See Alexander & Selesnick, *The History of Psychiatry* (Harper & Row 1966). The trial courts, unlike courts of review, are confronted daily with conditions rather than theories; they must meet the felt necessities of the times. Each day there come before the superior courts persons alleged to be very mentally ill, presenting then and there mental illness cases for speedy determination and which must be decided-and which cannot be theorized

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away by resort to detailed analyses about the basic rights of man.

Although I agree with the court's decision to remand the instant case for a jury trial, I dissent from the rationale *246 which engenders it. The remand should be done not because this record shows any hint whatever of what the court describes as 'railroading' or a breach of duty on the part of the guardian ad litem, but simply because the guardian ad litem and the patient's private attorney disagreed on whether the circumstances would warrant a jury trial. The only question before us, then, is whether the prospective patient did effectually demand a jury trial. Through her private attorney, I think she did; and I think that the request thus made should have been allowed. Beyond that I would not go.

The state does not question here the right to a jury trial on demand nor that the patient's private counsel of record made such a demand. But after demand was first made by plaintiff's counsel in accordance with RCW 71.02.210, the question then arose whether the demand was properly denied for the reason that the guardian ad litem, differing with private counsel, sought to waive the jury trial. Under these circumstances, with both counsel and guardian ad litem apparently acting sincerely and responsibly for the best interests of the patient, but holding different views as to what those best interests required procedurally, I would resolve that difference as the majority has done by holding that the denial of the jury trial was in error. Where timely demand for a jury trial is made by the patient, his attorney, his guardian ad litem, or any one of the three, **582 the statute ought to be construed so as to provide it.

There the matter should end. No earthshaking implications of constitutional due process inhere in this case. It presents no more than a problem of whether the trial court, under the statute, was presented with a timely and effective demand for a jury trial. Thus, after one cuts through layers of obiter dicta to discern its essential holding, *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), relied on by this court but which avoids the issue of trial by jury, has little or no application to and is of little precedential value in the case before

us.

What are the ingredients of due process of law in mental *247 illness hearings? As in all judicial proceedings effecting a restraint upon the person, they start with the premise that some kind of curtailment of personal liberty is involved. It is impossible effectively to examine a person against his will except by detaining him; and all of the judicial rhetoric compiled on the subject will not alter this singular fact. There is no known way to detain a person without his consent except to detain him. But because the detention and eventual treatment may be done without the patient's consent and are, therefore, involuntary, there is no reason judicial proceedings, fully comporting with due process requirements, cannot be speedy, efficient, fair, and conducted in a clinical rather than punitive atmosphere.

Aside from emergent situations when reasonable minds could not help but agree that, to protect the putative patient or society from imminent danger, the individual should be taken into immediate custody, all constitutional requirements, I think, may be met by detention in a clinical-type quarter, speedy reference to the superior court, early examination by competent medical examiners acting under the auspices of the superior court and early hearing on the question of commitment with counsel acting for the patient either as guardian ad litem or, as in the instant case, private counsel of record at all critical stages of the proceedings. But in any event, counsel, whether as guardian ad litem or as attorney of record or in a dual capacity, should in good conscience feel free to exercise his judgment whether it would be bad for the patient to expose him to the delay and ordeal of a jury trial and that the right to trial by jury should be waived.

The court, relying on the *Gault* rationale, now assumes that, because the confinement for and treatment of mental illness may be involuntary, the procedure necessary to assure due process of law must inevitably be suffused with all of the accusatory trappings of the criminal courts, and that the procedural scheme in mental illness cases must, therefore, under the constitutions, be squared with the codes of criminal procedure and submitted to

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the same *248 constitutional standards as criminal trials. If, as the court implies, Gault is read to convey that principle, then we have left neither distinctive juvenile courts nor civil mental illness proceedings but simply additional criminal courts-some for young criminals and others for those thought to be mentally ill. To declare that Gault asserts the basic principles for the operation of juvenile courts and mental illness proceedings, will, I think, lead inevitably to the conclusion that children and the mentally ill, except for requiring a unanimous verdict, shall be forced to stand trial in the same manner as persons charged with crime.

I would reject this application of that case. Gault-like opinions should be limited to their precise fact pattern as was done in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), expressly declaring that there existed no constitutional right to jury trial and sustaining the statutes of Pennsylvania and North Carolina denying a jury trial in juvenile court. It is impossible to apply the dicta of Gault rationally to the complex and infinitely varied situations arising daily in juvenile and mental illness proceedings without abridging those proceedings and **583 crippling the benign purposes for which the juvenile and mental illness courts were established. We should not, I think, as this court now seems to do, employ the Gault yardstick as a measure here. If Gault is to be the rule of decision, then both attorney and guardian ad litem will be duty bound to demand a jury trial both in all juvenile delinquency cases and in all mental illness involuntary commitment proceedings. These will be the inevitable consequences of the Gault rationale, and are to be avoided lest they destroy the juvenile courts and convert mental illness hearings into criminal trials.

The court places great weight, too, I think, upon what it deems to be a holding in *Heryford v. Parker*, 10 Cir., 396 F.2d 393, 396 (1968), that jury trial cannot be waived by a guardian ad litem without the knowing consent of the person charged with being mentally ill. Aside from the apparent absurdity of such a proposition-a truly mentally ill *249 person could not volitionally waive anything-it should be remembered that, outside of Washington, D.C., that

court has little responsibility for the prompt resolution of mental illness cases. Moreover, Heryford does not, as I read it, contribute to the paradox engendered by this court now in requiring the knowing consent of the Patient to a waiver of jury trial by one who turns out to be mentally ill. Heryford holds no more, I think, than that 'Fourteenth Amendment due process requires that the infirm person, Or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.' (Italics mine.)

State trial courts, confronted daily as they are with the tragic problems of mental illness cases, cannot luxuriate in legal abstractions; they are compelled to take care of this urgent business quickly and to provide for the early sequestration and treatment of mentally ill persons, or in the alternative speedily discharge them from custody. In the administration of the mental illness code, trial courts face conditions which have to be dealt with; theirs is the momentous function of providing for the sequestration, detention, protection and custody of the mentally ill or of speedily discharging the subject of the hearing from detention.

The legislature recognized this judicial role, it will be seen, in the enactments now in force and has not, I assume, sought to relieve the courts of these responsibilities in those statutes soon to supersede them, Laws of 1973, 1st Ex. Sess., Ch. 142, p. 1014, effective January 1, 1974, and a newer statute already substantially amending the latter statute before its effective date, Laws of 1973, 2nd Ex. Sess., Ch. 24, p. 59. In neither statute, however, has the legislature intended to make the waiver of jury trial obsolete. All of the current legislation in effect at the time of this case made it procedurally possible to avoid the inevitable anguish, distress and mental damage frequently produced by militant adversary contests in mental illness trials.

Accordingly, the statutes in force at the time of the instant application prescribe that applications for involuntary *250 hospitalization begin, not by claim, complaint, information or indictment, but in the blandest of all possible ways-by application, as in probate matters. RCW 71.02.110. With the

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filing of this application for involuntary hospitalization under oath (RCW 71.02.090), under the existing statutes due process of law sets in, for the Court and not administrative officers must issue an order for setting a date for hearing and examinations. Emergencies are provided for, if necessary, 'to safeguard the lives and property of the alleged mentally ill person . . .' The court shall direct that the persons 'be immediately apprehended and detained for care, treatment and custody pending hearing and examination.' RCW 71.02.120. That the superior court has constitutional duties and powers in mental illness cases is undoubted. *State ex rel. Richey v. Superior Court*, 59 Wash.2d 872, 371 P.2d 51 (1962).

****584** Early safeguards against the abuse of process are set up in statutes in force at the time of the instant application. Before the application for involuntary hospitalization could even be filed, the prosecuting attorney or another designated to do so by the court, had to make an endorsement on it showing that the patient had been personally examined, that the applicant for the order queried, and that the examiner had 'investigated the merits of the application and believes reasonable grounds exist for filing the same.' RCW 71.02.090.

Statutes now in force, and presumably those to be in force after January 1, 1974, contemplate that the atmosphere and psychology of the mental illness proceedings shall be clinical-not penal. The stark trappings of the courtroom, the jailhouse, and adversary trial are to be avoided. Persons detained pursuant to court order for examination must be taken to hospitaltype facilities. RCW 71.02.130. Judicial process is always provided. Notice of hearing on the application for involuntary hospitalization must be given by the clerk of the superior court to the guardian spouse or next of kin of the allegedly mentally ill person and upon the patient unless the court finds that such *251 notice might be injurious to the patient in which case it must be served upon the guardian ad litem. RCW 71.02.140. If the patient has no guardian, the court shall appoint a guardian ad litem for him; there must be a hearing before a judge of the superior court, with the general public excluded unless the patient's guardian, attorney, or guardian ad litem

demands an open hearing, or unless a jury is demanded. RCW 71.02.160.

At least two examining physicians must be appointed by the court and they must file 'a written report of the facts and circumstances upon which their testimony is based,' and state their conclusions in writing as to whether or not the patient is mentally ill. RCW 71.02.170. There must be a guardian ad litem and the patient has the right to be represented by counsel if he wishes. Finally, before the court can properly order involuntary commitment and treatment, it must find that the allegedly mentally ill person is suffering from psychosis or other disease impairing his mental health, the symptoms of which are of a suicidal, homicidal or incendiary nature, or of a kind which makes the patient dangerous to himself or to the lives and property of others. Only after this detailed procedure and with all of these safeguards can the court order hospitalization-unless, of course, a jury is demanded. RCW 71.02.200-210. In either event, whether to court or jury, the trial is a civil proceeding and not a criminal one. *State ex rel. Richey v. Superior Court*, *Supra*.

While the courts must exercise constant vigilance that procedures for involuntary hospitalization are employed neither to deprive one of his freedom for insubstantial, illusory and transient reasons nor to compel confinement where none is medically warranted under law, they are, nevertheless, not required to view applications for involuntary hospitalization with suspicion and treat them as prima facie attempts to deprive the person whose hospitalization is sought as a victim either of personal malice or rampant police power. A patient, in person, or by guardian ad litem, or through counsel, has every right to waive trial by jury, *252 and if it appears to the court that trial by jury in the patient's best interest be waived and his personal representative so indicates, this court ought not construe the mental illness statutes so that either counsel or guardian ad litem are fearful of being held to a breach of duty in declining to demand a jury trial.

Even in criminal cases, a jury trial or a trial itself

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may be waived (State v. Kratzer, 70 Wash.2d 566, 424 P.2d 316 (1967)); and so, too, may the right to counsel. One may plead guilty with or without the advice and assistance of counsel and where the accused's decision is competently made and entirely voluntary he may refuse to accept the appointment of counsel. For a statistical table of the percentages of pleas of guilty entered in the courts functioning in twelve of the nation's largest cities, See 56 Judicature 56, 61 (1972).

****585** Accordingly, in the instant case when the guardian ad litem wrote upon the jury demand that he, 'In the best interests of the patient and in her behalf . . . do(es) not request or permit a jury demand' there is a strong presumption that he acted in the best interests of the patient, and there is no stigma whatever to be attached to this action. That this court now overrides that waiver to direct a jury trial as requested by the patient's private counsel does not imply either that the guardian ad litem's waiver of or the attorney's demand for a jury trial were contrary to the plaintiff's best interest. All that the court's opinion here should be deemed to hold is that both actions were sincerely and responsibly undertaken for the patient's welfare and that where there is an ambivalence between court-appointed guardian ad litem and private counsel with respect to trial by jury, the views of the latter should prevail even though that decision ultimately may turn out not to be in the patient's best interests.

HAMILTON and HUNTER, JJ., and RUMMELL,
J. pro tem.
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APPENDIX K

IN RE GUARDIANSHIP OF RUDONICK

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IN RE GUARDIANSHIP OF RUDONICK
 WASH 1969.

Supreme Court of Washington, Department 2.
 In the Matter of the GUARDIANSHIP OF Laura
 Linda RUDONICK, a Minor.

Laura Linda Rodonick WILCOX, Appellant,
 v.

Vita P. MATHEWS and Metropolitan Casualty
 Insurance Company of New York and Firemen's
 Insurance Company of Newark, New Jersey,
 Respondents.

No. 39291.

June 5, 1969.

Rehearing Denied Oct. 3, 1969.

Ward filed petition against guardian for an accounting and for recovery of guardianship funds allegedly misapplied or unaccounted for. The King County Superior Court, Story Birdseye, J., entered judgment for the ward, who appealed. The Supreme Court, Neill, J., held, inter alia, that as there had never been a final, binding settlement of the guardian's accounts and actions during California administration, and as the Washington courts presently had jurisdiction over the parties and the subject matter, it was improper for the Superior Court to limit the hearing to matters occurring during the Washington guardianship, and the Superior Court had jurisdiction to rule upon whether the guardian's bond covered the activities of the California guardianship.

Judgment vacated and case remanded for further proceedings.

West Headnotes

[1] Guardian and Ward 196 144

196 Guardian and Ward
 196VI Accounting and Settlement
 196k144 k. Jurisdiction of Courts. Most Cited
 Cases

Nothing prevents a Washington court from reviewing a guardian's management of an estate while in California, provided those matters have not been the subject of a final adjudication in California.

[2] Guardian and Ward 196 144

196 Guardian and Ward
 196VI Accounting and Settlement
 196k144 k. Jurisdiction of Courts. Most Cited
 Cases

Superior courts, under general equity powers, have jurisdiction to require a guardian to account for funds coming into her possession prior to her appointment as guardian.

[3] Guardian and Ward 196 144

196 Guardian and Ward
 196VI Accounting and Settlement
 196k144 k. Jurisdiction of Courts. Most Cited
 Cases

Fact that funds came into guardian's possession while she was under jurisdiction of California court was immaterial as long as courts of Washington presently had jurisdiction to require an accounting.

[4] Guardian and Ward 196 175

196 Guardian and Ward
 196VIII Liabilities on Guardianship Bonds
 196k175 k. Functions and Acts Covered.
 Most Cited Cases

In a proper case, a surety may be held for misappropriations occurring before execution of guardian's bond.

[5] Guardian and Ward 196 144

196 Guardian and Ward
 196VI Accounting and Settlement
 196k144 k. Jurisdiction of Courts. Most Cited
 Cases

As there had never been a final, binding settlement

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of the guardian's accounts and actions during California administration, and as the Washington courts presently had jurisdiction over the parties and the subject matter, it was improper for the trial court to limit hearing to matters occurring during the Washington guardianship, and the trial court had jurisdiction to rule upon whether the guardian's bond covered the activities of the California guardianship.

[6] Pleading 302 370

302 Pleading

302XVII Issues, Proof, and Variance

302k370 k. Nature and Requisites of Issue.

Most Cited Cases

Issues are no longer framed exclusively by the pleadings.

[7] Guardian and Ward 196 146

196 Guardian and Ward

196VI Accounting and Settlement

196k146 k. Actions for Accounting. Most Cited Cases

Pleadings of ward, who filed petition against guardian for an accounting and for recovery of guardianship funds allegedly misapplied or unaccounted for, were sufficient to raise question of expenditures which occurred during California guardianship, particularly in view of fact that the ward pleaded she was "entitled to and demands a complete and final accounting of the guardianship estate."

[8] Guardian and Ward 196 163

196 Guardian and Ward

196VI Accounting and Settlement

196k163 k. Operation and Effect. Most Cited Cases

Ex parte orders entered during pendency of guardianship proceedings are not res judicata and may be modified when the interests of justice demand. RCWA 11.92.050.

[9] Guardian and Ward 196 158

196 Guardian and Ward

196VI Accounting and Settlement

196k158 k. Hearing or Reference. Most Cited Cases

In the event a court decides to hold a hearing in accordance with statute providing a method by which a guardian's intermediate accounts may receive judicial approval in the form of a final order, the court must appoint a guardian ad litem before an order resulting from such a hearing will be final. RCWA 11.92.050.

[10] Guardian and Ward 196 163

196 Guardian and Ward

196VI Accounting and Settlement

196k163 k. Operation and Effect. Most Cited Cases

Ex parte interim orders, though prima facie correct, may be modified at final hearing on guardianship accounting. RCWA 11.92.050.

[11] Guardian and Ward 196 160

196 Guardian and Ward

196VI Accounting and Settlement

196k160 k. Opening or Vacating. Most Cited Cases

Ward who raised challenge to ex parte interim accounts of guardian was not obliged to come forward with evidence challenging said accounts, since it would be manifestly unfair to require the ward to produce evidence challenging expenses which were made years before when the ward was a mere child.

[12] Guardian and Ward 196 58

196 Guardian and Ward

196III Custody and Care of Ward's Person and Estate

196k58 k. Expenditures. Most Cited Cases
Guardian's duty to account obligated her to establish both the necessity of her expenditures and the fact that they were actually made; and some corroborating evidence in addition to the guardian's testimony was necessary to prove that expenditures were, in fact, made; and although such corroborating evidence would normally be supplied by vouchers and receipts, other forms of evidence

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could be sufficient.

[13] Child Support 76E 108

76E Child Support

76EIII Factors Considered

76EIII(C) Factors Relating to Child

76Ek108 k. Use of Child's Estate to Support Child. Most Cited Cases

(Formerly 285k3.1(1))

It is the duty of parents to support their children, and courts will allow expenditures from a child's estate for its support only in extreme cases when the parents are unable to provide support.

[14] Guardian and Ward 196 154

196 Guardian and Ward

196VI Accounting and Settlement

196k154 k. Vouchers and Proof of Payment.

Most Cited Cases

Guardian need not record every item purchased with ward's support allowance; and a reasonable amount each month for general petty cash type category out of a support allowance is properly credited to the guardian without further evidence, as long as the amount is neither extravagant nor obviously being misused.

[15] Guardian and Ward 196 30(1)

196 Guardian and Ward

196III Custody and Care of Ward's Person and Estate

196k30 Support and Education

196k30(1) k. In General. Most Cited Cases

Notwithstanding fact that expenditures of the ward's funds were for support of whole family rather than just for the ward personally, the trial court had before it sufficient evidence, including fact that parents' income would have been inadequate to support whole family without a support allowance from the ward's funds, to justify finding that \$250 monthly support payment for the ward was reasonable.

[16] Guardian and Ward 196 58

196 Guardian and Ward

196III Custody and Care of Ward's Person and Estate

196k58 k. Expenditures. Most Cited Cases

Miscellaneous expenses for ward's support should have been included within lump sum support allowance.

[17] Guardian and Ward 196 163

196 Guardian and Ward

196VI Accounting and Settlement

196k163 k. Operation and Effect. Most Cited Cases

Although minor ward was given no notice of 1962 hearing, held to determine whether corporate shares of the ward could be pledged as collateral on a loan to the guardian and her husband, the guardian ad litem for the ward was given notice and appeared, and under those circumstances, actual notice to the ward was not a prerequisite to the res judicata effect of the hearing; accordingly, allowance of \$150 guardian ad litem's fee was res judicata and, absent a showing of fraud, could not be collaterally attacked; however, remaining expense incurred during the hearing was improperly approved at an ex parte hearing.

[18] Guardian and Ward 196 147

196 Guardian and Ward

196VI Accounting and Settlement

196k147 k. Charges. Most Cited Cases

Guardian should normally be charged with interest on all funds for which he has failed to account or which he has converted to his own use; however, the imposition of interest in judgments against guardians is governed by general equitable principles.

[19] Guardian and Ward 196 147

196 Guardian and Ward

196VI Accounting and Settlement

196k147 k. Charges. Most Cited Cases

Interest would not be imposed on those guardianship expenditures which were approved by interim orders but disallowed in instant action brought by ward against guardian for an accounting and for recovery of guardianship funds allegedly

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misapplied or unaccounted for; however, interest would be charged on that portion of the judgment not arising from expenditures approved by interim orders.

*118 Nickell, Quinn & Tuai, Liem E. Tuai, Seattle, for appellant.

**98 Merges, Brain & Hilyer, G. Robert Brain, Karr, Tuttle, Campbell, Koch & Campbell, Coleman P. Hall, Seattle, for respondents.

NEILL, Judge.

This litigation arises, almost foreseeably, in a guardianship estate wherein there is an untrained and inexperienced parent-guardian dealing with her ward's funds without regard to her fiduciary responsibility; incomplete, *119 irregular and inaccurate accountings; and family discord. In fact, just about everything that could be done wrong in a guardianship is in this record with one notable exception—there is no evidence of wilful misappropriation of the ward's funds.

The ward, Laura Linda Rudonick Wilcox, filed a petition against her mother and guardian, Vita P. Mathews, for an accounting and for recovery of guardianship funds allegedly misapplied or unaccounted for by the guardian.

The ward's father, Mr. Rudonick, was a fireman with the San Francisco Fire Department. The pension system of the department includes survivor benefits for the support of widows and dependents. Mr. Rudonick died in June, 1947, but his wife was not eligible for the widow's pension, not having been married to Mr. Rudonick for the 2 years necessary to qualify. However, their daughter, Laura Linda Rudonick, was eligible for dependent's benefits.

Mrs. Rudonick was duly appointed guardian of the person and of the estate of Laura Linda by the Superior Court in San Francisco County, California. The guardianship was later transferred to San Diego County, California. Payments of the pension benefits for the ward commenced in 1948 and terminated on her 16th birthday in November, 1962. These payments were the sole source of funds in the guardianship estate.

Mrs. Rudonick remarried and had four children by her second husband. They were divorced and, in 1956, she married Mr. L. A. Mathews. In 1957, the family moved to Seattle, where Mrs. Mathews petitioned the King County Superior Court for appointment as guardian. She was appointed on October 11, 1957. Upon her qualification as guardian in Washington, she caused an order to be entered in the California court transferring the guardianship assets to Washington.

The ward married a man of full age on March 17, 1965, without her mother's consent, and since that date has lived away from the family home.

The California court had authorized the guardian to withdraw \$125 per month for the ward's support. In November, *120 1957, without court authorization, the guardian began withdrawing \$250 per month for support of the ward.

No inventory has been filed in compliance with RCW 11.92.040(1) nor has the guardian complied with the accounting requirements of the statute. She did file three reports between the time of her appointment in 1957 and the filing of the present action. A report filed July 15, 1960, listing \$9,380.57 in expenses, including \$7,750 for the ward's support, was approved by the court *ex parte*. That order authorized the guardian to continue spending \$250 per month for the ward's support. On May 13, 1963, the court approved *ex parte* a second report listing expenses of \$6,973.80, including \$6,000 for the ward's support. That order authorized continued withdrawals for support of \$250 per month for a 12-month period. On May 25, 1965, a third report was approved *ex parte* showing \$9,276.91 expenses, including \$7,000 for the ward's support for for 28 months. The ward was not represented by a guardian *ad litem* at the hearings on any of these reports.

The pension payments to the guardian totaled \$62,559.77, of which \$27,991.10 was received during the Washington guardianship. Due largely to sales of securities purchased with guardianship funds in California, the actual cash received by the **99 guardian during the Washington guardianship totaled \$37,639.21.

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Following the trial on the issues raised by the ward's petition, the court found that the guardian had indiscriminately used guardianship funds and that she kept few records of expenditures from the guardianship estate. No record at all was kept of how the support allowance was spent and it was apparently commingled with the general household funds. Only two receipts for expenditures were submitted at the trial, but corroborating evidence of expenditures for attorneys fees was introduced. The parties stipulated that \$942 in surety bond premiums had been paid.

The court limited the hearing to transactions and activities which occurred during the Washington guardianship. The expenses and disbursements as stated in the guardian's *121 reports, excluding \$3,207 for the purchase of a cabin and related expenses, and excluding \$2,000 of a \$2,500 expenditure for the purchase of a Volkswagen bus, were approved by the court and the guardian given credit therefor. Judgment was entered against the guardian and her sureties for \$8,075.73. The ward appeals.

Error is assigned to (1) the trial court's limitation of the hearing to matters occurring during the Washington guardianship; (2) the approval of the \$250 monthly support allowance; (3) the approval of various other expenditures totaling \$3,620.48; (4) the approval of a \$453.80 expense incurred during a special proceeding in March, 1962; (5) the failure of the court to include in its judgment an accountant's fee incurred by the ward in this action; and (6) the failure of the court to include interest in the judgment.

[1][2][3] First, with respect to the California guardianship, there is nothing which prevents a Washington court from reviewing the guardian's management of the estate while in California, provided that these matters have not been the subject of a final adjudication in California. We have previously held that the superior courts, under their general equity powers, have jurisdiction to require a guardian to account for funds coming into her possession prior to her appointment as guardian. *Woepfel v. Simanton*, 53 Wash.2d 21, 330 P.2d 321 (1958); *In re Williamson*, 75 Wash. 353, 134 P.

1066 (1913). The fact that the funds came into the guardian's possession while she was under the jurisdiction of the California court is immaterial as long as our courts now have jurisdiction to require an accounting. See *Ong. v. Whipple*, 3 Wash.T. 233, 3 P. 898 (1882). As there has never been a final, binding settlement of the guardian's accounts and actions during the California administration, and Washington courts have jurisdiction over the parties and the subject matter, it would be a meaningless and unnecessary burden to require the parties to return to California for final settlement of those activities of the guardian.

[4][5] Whether the present sureties may be held for any misappropriation*122 which occurred in California is not before us. We only note in passing that in a proper case a surety may be held for misappropriations occurring before execution of the bond. See *Owens v. McMahan*, 122 Wash. 191, 210 P. 200 (1922); *In re Kelley's Guardianship*, 193 Wash. 109, 74 P.2d 904 (1938). The trial court has jurisdiction to rule upon whether the guardian's bond in this case covers the activities of the California guardianship.

[6][7] The guardian, however, claims that the pleadings are not sufficient to raise the question of the expenditures which occurred during the California guardianship because they give no notice to either the guardian or the sureties of any claim based upon the California proceedings. We first point out that issues are no longer framed exclusively by the pleadings. We note that paragraph 5 of the petition by which the ward initiated these proceedings reads as follows:

Petitioner is entitled to and demands a complete and final accounting of the **100 guardianship estate, a distribution of said estate and to have a judgment entered on her behalf against the said guardian and her sureties as hereinbefore named in an amount shown to have been by the said guardian misapplied, wrongfully spent and/or unaccounted for and interest thereon, as well as a termination of the subject guardianship.

(Italics ours.) The prayer of the petitioner is manifestly broad enough to include the California proceedings.

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Furthermore, this same question was raised at a pretrial hearing 5 months before trial. The pretrial order specified that its purpose was 'to establish the scope of the issue at trial' and that 'the parties shall be controlled by this order in determining the extent of the accounting in the preparation and trial of this matter.' With respect to the California proceedings, that order states:

5. If, at the trial of this matter, neither party has pleaded any allegations as to the California law or the effect of that California order under the California law, then the Washington law shall apply and that California order shall be treated at the trial as an ex parte order and the matters covered thereby may be modified and *123 reviewed upon the final settlement of the account with the ward.

The above language certainly gave notice to the guardian and her sureties that the California proceedings were going to be subject to the same review as the Washington proceedings.

Neither party has pleaded California law and it is assumed it is the same as Washington law, which is, as we next discuss, that ex parte orders are not final.

The guardian contends that the ex parte interim orders approving her expenditures are res judicata, and if not res judicata at least prima facie correct. RCW 11.92.050 provides a statutory method by which a guardian's intermediate accounts may receive judicial approval in the form of a final order. That statute provides for a hearing on the guardian's actions and accountings at which a guardian ad litem is appointed to represent the ward. The result of such a hearing is a final order which is res judicata.

The guardian contends that RCW 11.92.050 permits a final order to be entered without the appointment of a guardian ad litem. We do not agree.

[8][9] The statute provides that 'in the event such a hearing be ordered, the court shall also appoint a guardian ad litem,' and at 'such hearing' the court may enter an order, and 'such order' shall be final. Ex parte orders entered during the pendency of guardianship proceedings are not res judicata, but may be modified when the interests of justice

demand. E.g., see *Grady v. Dashiell*, 24 Wash.2d 272, 163 P.2d 922 (1945). If the legislature had intended to change the rule and allow final orders to be entered ex parte, it would have used more specific language. Further, even had the legislature expressly provided for final orders without representation of the ward, an obvious constitutional issue would be presented. Rather, by enacting RCW 11.92.050, the legislature has offered the guardian some relief from the problem of justifying expenditures years after the fact, but has only done so after the interests of the ward have been protected by the appointment of a guardian ad litem. Under these circumstances, we cannot say that a guardian *124 ad litem is required only as a matter of form. Such representation is an essential prerequisite to the finality of the resulting order. Therefore, we hold that in the event a court decides to hold the hearing provided for by RCW 11.92.050, it must appoint a guardian ad litem before orders resulting from 'such hearing' will be final. The orders approving the guardian's interim reports entered in 1960, 1963, and 1965 are not res judicata as the ward was not represented by a guardian ad litem at those hearings.

[10] What effect, then, should be given to these interim reports? In our most recent opinions on the subject, we stated **101 that ex parte interim orders are prima facie correct but may be modified at the final hearing. In *re Deming's Guardianship*, 192 Wash. 190, 73 P.2d 764 (1937); *Grady v. Dashiell*, *Supra*. The guardian argues that this rule places the burden upon the ward to come forth with evidence challenging the interim accounts.

[11] Our earlier cases all stated the rule to be that there is nothing final about interim orders entered at ex parte hearings. See *In re Gardella*, 152 Wash. 250, 277 P. 846 (1929); *In Rohne's Guardianship*, 157 Wash. 62, 288 P. 269 (1930); *Mathieu v. United States Fid. & Guar. Co.*, 158 Wash. 396, 290 P. 1003 (1930); *In re Carlson*, 162 Wash. 20, 297 P. 764 (1931); *Goodwin v. American Sur. Co.*, 190 Wash. 457, 68 P.2d 619 (1937). Our use of the words 'prima facie' in *In re Deming's Guardianship*, *Supra*, did not signal a deviation from these earlier cases, but merely meant that an interim order would stand without further proof if

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not challenged at a final hearing. Disallowances of expenditures approved at interim hearings were affirmed in both *In re Deming's Guardianship*, *Supra*, and *Grady v. Dashiell*, *Supra*, without mention of a presumption favoring the interim reports which required the ward to come forward with evidence. To require the ward to come forward now with evidence challenging expenses which were made years ago when the ward was a mere child would be manifestly unfair. The ward is entitled to her day in court without this unusual burden.

[12] The ward by her prayer for an accounting has challenged all the expenditures made from the guardianship *125 estate. The effect of this challenge is to require the guardian to fulfill her statutory and common law duty to fully account at the final hearing, irrespective of the orders entered ex parte at interim hearings. The guardian's duty to account obligates her to establish both the necessity of her expenditures and the fact that they were actually made. Some corroborating evidence in addition to the guardian's testimony is necessary to prove that expenditures were, in fact, made. *Disque v. McCann*, 58 Wash.2d 65, 360 P.2d 583 (1961). Although this corroborating evidence would normally be supplied by vouchers and receipts, [FN1] other forms of evidence may be sufficient.

FN1. Note that the 1965 act (effective July 1, 1967 eliminates the prior statutory requirement that vouchers be filed to substantiate expenditures. RCW 11.92.040 . This change merely conforms to our holding in *Disque v. McCann*, 58 Wash.2d 65, 360 P.2d 583 (1961).

The second general issue raised by the ward concerns the expenditures made from the guardianship estate, including the \$250 per month support allowance. Expenditures totalling \$27,173.48 were approved by the trial court. Many of these expenditures were also reviewed and approved in the three earlier ex parte hearings.

[13] We have repeatedly stated that it is the duty of

parents to support their children, and courts should allow expenditures from a child's estate for its support only in extreme cases when the parents are unable to provide support. *In re Rohne's Guardianship*, *Supra*; *In re Deming's Guardianship*, *Supra*; *In re Guardianship of Ivarsson*, 60 Wash.2d 733, 375 P.2d 509 (1962).

There is evidence that Mr. Mathews, the ward's stepfather, earned between \$4,000 and \$5,000 a year throughout his marriage to the guardian. With this he would have had to support the guardian and her five children. Mr. Mathews testified that the guardian occasionally took part time sales and babysitting jobs in an effort to supplement the family income. There is ample evidence to support the conclusion that the parents' income would have been inadequate to support the family without a support allowance from the ward's funds.

[14] The guardian did not keep records of how the support *126 allowance was spent, and it was evidently mixed with the general household funds. It is not necessary, however, that the guardian record every item purchased with the support allowance. **102 See *In re Guardianship of Ivarsson*, *Supra*, at 743, 375 P.2d 509. A reasonable amount each month for general petty cash type category out of a support allowance is properly credited to the guardian without further evidence, as long as the amount is neither extravagant nor obviously being misused. *In re Guardianship of Ivarsson*, *Supra*.

[15] We cannot place or blanket disapproval upon expenditures of a ward's funds for the support of the whole family rather than just for the ward personally. The maintenance of one child on a higher standard of living than the others could promote family discord. See *In re Guardianship of Ivarsson*, *Supra*. We hold that the trial court had sufficient evidence before him to justify the finding that the amount of the monthly support payment was reasonable. The approval of the support allowances as listed in the guardian's reports is affirmed, subject to the corroborating proof of expenditures as to all except such portion thereof as the court finds is properly within a reasonable petty cash category.

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[16] In addition to the support allowances, the trial court approved and gave the guardian credit for expenditures of \$3,620.48.[FN2] Some of these expenses, such as the Washington attorney's fees, appear to have been corroborated by independent testimony. The surety bond premiums were stipulated as correct at trial. Other expenses, however, do not appear to be corroborated by evidence in addition to the guardian's testimony. We are especially dubious of the 'miscellaneous' accounts totaling more than \$400. Miscellaneous expenses for the ward's support should have been included within the lump sum support allowance. Other expenses to make this total should be definitely identified and substantiated.

FN2. This amount represents the total expenses allowed by the trial court in its conclusions of law, less the support allowances discussed above, expenses of a hearing in March, 1962, (discussed later), the ward's share of the cost of a Volks-wagen as adjusted by the trial court, and the cost of some Boston Trust stock. The latter two items are not here challenged by the ward.

*127 Although, as we noted in *Disque v. McCann*, *Supra*, we do not ordinarily give a litigant two opportunities to prove his case, since this case must be remanded, the guardian will be allowed, upon remand, to introduce evidence in support of these various expenditures. Any such expenditures not corroborated by evidence other than the testimony of the guardian either at the first trial or upon rehearing should be disallowed.

The requirement of corroborating evidence at this late date may place a heavy burden upon the guardian. However, we need only point out that this burden would not exist if the guardian had kept proper records and receipts. The papers which the guardian has presented to the trial court and during the interim hearings hardly rise to the dignity of an accounting. The evidence corroborating the necessity for and the actual spending of all the expenses listed on the guardian's interim reports, including the support allowances, has been skimpy

or nonexistent. However, it appears that this state of affairs is not the result of any deliberate plan to defraud the ward, but is just the result of incredible carelessness by the guardian. Therefore, while we do not condone these methods of accounting, proper expenses should be approved upon the receipt of some corroborating evidence.

[17] The court also approved a reported expenditure of \$453.80 which the ward claims should have been disapproved. In March, 1962, a special hearing was held to determine whether corporate shares of the ward could be pledged as collateral on a loan to the guardian and her husband. During this hearing, the ward was represented by a guardian ad litem. The resulting order granted approval to pledge the stock and granted \$150 in fees to the guardian ad litem. Later, the interim order entered in May, 1963, reapproved the fee for **103 the guardian ad litem and approved an expense of \$303.80 for attorney's fees incurred for the 1962 hearing. It is clear that these funds were expended for the guardian's benefit and not the ward's. However, \$150 of this amount was approved at a hearing at which the ward *128 was represented by a competent guardian ad litem. Although no notice of the 1962 hearing was given the ward, the guardian ad litem was given notice and appeared. Under these circumstances we do not consider actual notice to a minor ward a prerequisite to the res judicata effect of the hearing. Therefore, the allowance of the \$150 guardian ad litem's fee is res judicata and, absent a showing of fraud, may not be collaterally attacked in this action. E.g., see *Farley v. Davis*, 10 Wash.2d 62, 116 P.2d 263, 155 A.L.R. 1302 (1941). The remaining \$303.80, however, was improperly approved at an ex parte hearing and the trial court's approval of this expense is reversed.

The ward next contends that the judgment should have included the accountant's fee incurred in preparing this action. The trial court stated in its oral opinion that the services of a certified public accountant were not justified in preparing this action. We will not disturb that ruling.

[18][19] The ward also claims that interest should have been added to the judgment against the guardian. As a general rule a guardian should be

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charged with interest on all funds for which he has failed to account or has converted to his own use. In re Anderson, 97 Wash. 688, 167 P. 71 (1917); In re Kelley's Guardianship, 193 Wash. 109, 74 P.2d 904 (1938); In re Deming's Guardianship, Supra; See Annot. 72 A.L.R.2d 757 (1960). However, the imposition of interest in judgment against guardians is governed by general equitable principles. We do not believe interest should be imposed upon those amounts which were approved by the interim orders, but disallowed in this action. The guardian could not know for certain that these amounts were wrongfully spent until judgment is entered in this case. It would be unfair to charge her with interest prior to final judgment. See In re Deming's Guardianship, Supra, 192 Wash. at 228-230, 73 P.2d 764. Therefore, no interest should be charged on that portion of the judgment resulting from expenses which were approved in interim reports, but disallowed at the final hearing. The judgment *129 includes \$4,278.73 in unaccounted funds. [FN3] The guardian would have been aware of this shortage if she had maintained proper accounts. She should be charged interest on such amount. The cause of this shortage is unexplained and thus there is no 'time of conversion' from which to assess the interest. See In re Deming's Guardianship, Supra. The guardianship estate, however, contained more than the missing amount at the beginning of the Washington guardianship, and poor record keeping practices of the guardian which contributed to the loss have evidently continued for the duration of the guardianship. Therefore, interest on that portion of the judgment not arising from expenditures approved by interim orders should be included. The guardian may show a time or times of conversion from which date or dates interest shall run, but if she fails so to do, such interest shall commence October 11, 1957. See 71 A.L.R.2d 787 n. 9 (1960).

FN3. This amount is the difference between the receipts and expenditures shown in the guardian's reports, less cash on hand. It is a raw, unexplained shortage. The actual amount is subject to the court's final determination on remand.

The judgment is vacated and the case remanded for further proceedings consistent with this opinion.

HUNTER, C.J., HILL and HAMILTON, JJ., and RUMMEL, J. pro tem., concur.
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