

No. 40598-9-II

IN THE COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

In re the Guardianship of SEAN RAYMOND COBB
Clark County #09-4-00700-5

CHRISTINE SCOTT and DANIEL COBB, Appellants,
v.
LORRAINE SCOTT, Respondent.

BRIEF OF APPELLANTS

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DIVISION II
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I. ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

RCW 11.88 violates the due process rights of allegedly incapacitated persons because it does not provide meaningful standards to determine their "capacities," "condition" and "needs"

SECOND ASSIGNMENT OF ERROR

RCW 11.88 violates the due process rights of allegedly incapacitated persons because it does not provide them with clear procedures to assert their rights to a jury trial

THIRD ASSIGNMENT OF ERROR

Sean Cobb's procedural due process rights were violated because his Guardian ad Litem did not file a reliable written report that identified his "capacities," "condition," and "needs."

FOURTH ASSIGNMENT OF ERROR

The trial court violated the due process rights of Christine Scott and Daniel Cobb and the appearance of fairness doctrine by finding that the act of filing a Motion for New Trial (CR 59) itself constituted grounds to deny their motion

FIFTH ASSIGNMENT OF ERROR

The trial court abused its discretion by applying the psychologist/patient privilege to testimony of the incapacitated person's psychologist, Dr. Serena Meyer, Psy.D., and to allow third-parties to assert the privilege.

SIXTH ASSIGNMENT OF ERROR

The trial court abused its discretion by denying Sean Cobb's request for a jury trial on the issues of incapacity.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do Christine Scott and Daniel Cobb have standing to assert the constitutional and procedural rights of their incapacitated brother, Sean Cobb?

2. Does RCW 11.88 violate the due process rights of allegedly incapacitated persons (AIPs) by failing to identify the standards, especially medical or psychological standards, by which the trial court is required under RCW 11.88.095 to find the "capacities," "condition," and "needs" of an AIP?

3. Does RCW 11.88 violate the due process rights of allegedly incapacitated persons (AIPs) because it does not clearly establish the time, place, or manner by which AIPs may assert their right under RCW 11.88.045 to have their incapacity tried to a jury?

4. Were Sean Cobb's the procedural due process rights violated when his Guardian ad Litem filed a written report required under RCW 11.88.045 which did not identify his "capacities," "condition," and "needs" in a meaningful way?

5. Did the trial court violate due process and the appearance of fairness doctrine by telling the Appellants, Christine Scott and Daniel Cobb, during a hearing on their Motion for New Trial that his decision to appoint another person as Sean Cobb's

guardian was correct because they were “continuing to want to litigate each and every issue in this case”?

6. Did the trial court abuse its discretion by applying the psychologist-patient privilege to the testimony of Sean Cobb’s psychologist, Dr. Serena Meyer, Psy.D?

7. Did the trial court abuse its discretion by failing to inquire into Sean Cobb’s last-minute request for a jury trial?

III. STATEMENT OF THE CASE

Sean Raymond Cobb (d.o.b August 3, 1967) is an adult with developmental disabilities and severe hearing loss. He resided with his mother, Carmen Cobb, until her death on July 18, 2009. Because of his condition, Sean received Supplemental Security Income (SSI) benefits and Veteran’s Administration benefits as the disabled child of a veteran. He had six older brothers and sisters: Susan Didrickson, Joyce Cobb, Daniel Raymond Cobb, Christine Scott, Lorraine Scott, and Dianne Gruginski. Mrs. Carmen Cobb was not Sean’s legal guardian and, at the time of her death, had not designated a guardian for Sean under RCW 11.88. On September 4, 2009, Susan Didrickson, Joyce Cobb, and Christine Scott, filed a Petition for Guardianship in Clark County Superior Court. They identified Sean as an “allegedly incapacitated person” (AIP) and sought to become his co-guardians. CP 1-5. Thomas Deutsch was appointed as the Guardian ad Litem (GAL) on September 28, 2009. See App-1. Julie Payne was appointed as Sean Cobb’s attorney on October 7, 2009. CP 28-29. Lorraine Scott

filed a "counter-petition" on November 6, 2009 in which she also sought to become Sean's guardian. CP 35-41. Mr. Deutsch, a non-attorney, withdrew as GAL on December 3, 2009, citing lack of expertise in analyzing "probate issues" affecting the guardianship action. See App-2 . Mr. Deutsch was replaced as GAL by Dee Ellen Grubbs, a Vancouver attorney. CP 44-35. Daniel Cobb filed his "Cross-Petition" to be named as Sean's guardian on December 31, 2009. CP 63-67. Susan Didrickson and Joyce Cobb withdrew as petitioners on January 15, 2010. CP 94-95. Mrs. Grubbs filed her GAL Report on January 19, 2010. CP 97-123. By the time of trial, each of the remaining petitioners had filed objections to the report. CP 140-147 (Christine Scott); CP 148-150 (Lorraine Scott); CP155-155 (Daniel Cobb).

The trial was held on February 11, 2010 before Judge Robert Lewis of the Clark County Superior Court. In preliminary discussions, Christine Scott withdrew her efforts to become guardian and stated that she supported Daniel Cobb as guardian. RP 19 (2/11/2010). Ms. Scott and her counsel nonetheless remained before the court as a party, along with Sean Cobb as AIP, Daniel Cobb, and Lorraine Scott. Eight persons testified at the trial. In order of appearance they were Christine Scott, Daniel Cobb, Dr. Serena Meyer, Psy.D. (Sean Cobb's psychologist), Craig Coic (Lorraine Scott's former husband), Amanda Coic (Lorraine Coic's daughter), Lorraine Scott, Dee Ellen Grubbs (GAL), and Sean Cobb himself. RP i-ii (2/11/2010).

Daniel Cobb subpoenaed Dr. Meyer to appear at the trial. RP 77-78 (2/11/2010). Although no objection to Dr. Meyer's testimony was on the record, the trial judge stated that he had been "advised" that Sean Cobb had not waived "physician/patient" privilege. He then instructed Dr. Meyer not to testify about any privileged communications. RP 77 (2/11/2010). Mr. Cobb's questioning of Dr. Meyer was frequently interrupted by objections of privilege, usually raised by counsel for Lorraine Scott rather than counsel for Sean Cobb. See, e.g., RP 86 (2/11/2010). Among the matters in which Dr. Meyer's answers were limited by the privilege were his relationship with his family members, RP 86 (2/11/2010) and whether she was aware of any situations which she believed to be dangerous or threatening to Sean. RP 87 (2/11/2010). Dr. Meyer was allowed to testify that there were such situations where Sean believed himself to be threatened or in danger and that she had made a report to Adult Protective Services as a result. RP 88 (2/11/2010). However, Dr. Meyer invoked privilege to stop disclosure of any details. RP 89 (2/11/2010) The trial court did not make further inquiry about Dr. Meyer's concerns for Sean.

Sean Cobb was called as the last witness in the proceedings. After a round of direct questioning by his attorney, Julie Payne, Mr. Cobb took a note from his pocket and asked the judge to read it. RP 200 (2/11/2010). It was marked as Exhibit 1 and his examination by Ms. Payne concluded. The judge asked for any further witnesses from

the attorneys, who responded in the negative. RP 200-202 ((2/11/2010).

At that point, Judge Lewis returned to Mr. Cobb's note:

THE COURT: Let me just take a minute to read what Mr. Cobb has written for me. (Pause). All right. I did have the opportunity to review it. It does have one part of it that, I guess, causes me a little concern. There's a jury demand in here, so —

(Laughter in the courtroom)

MS. PAYNE: That was just recently added.

THE COURT: -- a little late in the proceedings, but that's certainly something that Mr. Cobb -- have you talked to Mr. Cobb about that?

MS. PAYNE: Yes, we've talked a number of times on that and it has been his repeated request, first of all, that things would be able to come to an agreement outside of court, and so we have repeatedly worked on trying to come to an agreement that would work for everyone, and have not been able to.

SEAN COBB: Yeah.

THE COURT: That would have been great, yeah.

MS. PAYNE: Yeah, and that has repeatedly been his request.

THE COURT: Okay.

SEAN COBB: Yeah, because (inaudible) didn't go for that one.

THE COURT: All right. Yeah, unfortunately that happens all too often, people can't come to agreement outside of court. I wish they could, but sometimes you can't, that's why I'm here. All right.

RP, 202 - 203 (2/11/2011). At that point in the proceedings, Judge Lewis dropped the subject of Mr. Cobb's request for a jury trial and asked the attorneys if they wanted to present final arguments. RP 203 (2/10/2011).

After closing arguments, the trial court stated that all of the family members present at the trial were fit to be guardians. RP 205 (2/11/2010). However, he ruled that Lorraine Scott should become Sean's limited guardian, based on her co-residence with Sean before his mother's death. RP 210 (2/11/2010). The Order of Guardianship was entered on February 19, 2010. CP 178-185. As part of the Order, venue was transferred to Grays Harbor County, where Sean would be living with Lorraine Scott. CP 181.

On March 1, 2010, Christine Scott and Daniel Cobb filed a CR 59 Motion for New Trial in Clark County Superior Court. See App-3. They alleged that they were entitled to a new trial because 1) the alleged incapacitated person, Sean Cobb, was denied his request for a new trial, 2) the court received and considered inadmissible "written" testimony and used such matter in its decision, 3) the trial court improperly asserted testimonial privilege for witness Dr. Serena Meyer, Ph.D., 4) failure of the Guardian ad Litem to perform her statutory duties to investigate the capacities, condition, and needs of the alleged incapacitated person, and 5) failure of the court to apply the appropriate standard of proof to the evidence before it. See App-3. At the hearing on the CR 59 motion on March 12, 2010, the trial court denied relief for each claim of error. RP 22 - 26 (3/12/2010). He stated that several of the claims appeared to be frivolous, "as close to frivolous as one can get without getting sanctions," but indeed denied opposing counsel's motion for sanctions. RP 31-32 (3/12/2010). In

addition, even though he did not order sanctions, the trial court observed that “it appears to me that the Motion for New Trial is basically an attempt [by Christine Scott and Daniel Cobb]to delay these proceedings further.” RP 30 (3/12/2010). Finally, he told Scott and Cobb that “[a]nd so, continuing to attempt to delay the proceedings causes the Court a great deal of concern that – and actually strengthens my determination that I picked the right person to be guardian, someone who will start looking for– after Sean’s interests rather than continuing to want to litigate each and every issue in this case.” RP 31 (3/12/2010).

Christine Scott and Daniel Cobb timely filed a Notice of Appeal in this matter on April 9, 2010. These proceedings were delayed for almost a year by an unlawful order of Judge Dave Edwards of the Grays Harbor County Superior Court. On motion by Lorraine Scott, Judge Edwards disqualified Mark Didrickson, appellate counsel for Christine Scott and Daniel Cobb, not only from representing them in Grays Harbor County but also from any matters involving the Guardianship of Sean Cobb “anywhere in the State of Washington.” Because Judge Edwards’ order purported to extend to any court in the state, including appellate courts, attorney Didrickson obtained a continuance from Division II in the present matter while Judge Edwards’ order was appealed. The continuance was granted and then lifted after the court ruled against Judge Edwards in #41324-5-II.

IV. LAW AND ARGUMENT

A) Christine Scott and Daniel Cobb enjoy standing to assert the constitutional and procedural rights of their allegedly incapacitated brother, Sean Cobb.

Christine and Daniel Cobb are Sean Cobb's sister and brother. They have the burden of establishing that, as close relatives, they have standing to assert the rights of an incapacitated person like Sean. In reviewing standing, the facts are considered in the light most favorable to the person asserting standing. Because standing is a matter of law, issues of standing are reviewed de novo on appeal. In re Parentage of L.B., 121 Wn.App. 460, 470, 89 P.3d 271, 276 (Div. 1, 2004).

Constitutional rights are personal and normally cannot be asserted by a third party. See, e.g., In re Marriage of Akon, 160 Wn.App. 48, 59, 248 P.3d 94, 100 (Div. 3, 2011). However, the functional needs of the adversarial system, with its premium on competent advocacy, may be served by third-party standing, depending on the "real-life" facts, including the existence of a beneficial relationship between the party and the third-party. See 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.9.3, at 734 (3d ed., 2008).

In RCW 11.88 proceedings, third-party standing is implied by the RCW 11.88 statutory scheme and by the axiomatic legal understanding that incapacitated persons are unable to assert their rights without the assistance of others. Any person, including

corporate persons, may commence a guardianship proceeding by filing a guardianship petition. RCW 11.88.010. As his closest blood relatives, Sean Cobb's brother and sisters are his "natural guardians." Cf., State ex rel. Michelson v. Superior Court for King County, 41 Wn.2d 718, 721-722, 251 P.2d 603, 605 (1952). While there is apparently no statutory requirement to give notice of guardianship proceedings to persons other than parents, spouses, and children of incapacitated persons, relatives must be identified on the guardianship petition (RCW 11.88.030(1)(f)) and, upon request, "interested persons" may obtain "special notice of proceedings" after appointment of a guardian (RCW 11.92.150). As "necessary," the guardian ad litem appointed in the proceedings is required to consult with "those known relatives, friends, or other persons the guardian ad litem determines to have had a *significant, continuing interest in the welfare of the alleged incapacitated person.*" RCW 11.88.88.090(5)(d). Furthermore, "natural guardians" have been granted standing to intervene in adoption appeals. In re Adoption of B.T., 150 Wn.2d 409, 411, 78 P.3d 634, 635 (2003). Therefore, as his siblings and "natural guardians," Christine Scott and Daniel Cobb have the "requisite personal stake in the outcome of the controversy' necessary to request an adjudication of the merits of this case." Bedford v. Sugarman, 112 Wn.2d 500, 505-506, 772 P.2d 486, 498 (1989) (quoting DeFunis v. Odegaard, 82 Wash.2d 11, 24, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968))).

Furthermore, brothers and sisters should not be barred from defending the rights of an incapacitated sibling if any member of the public is allowed under RCW 11.88.030(1) to file a petition for guardianship and take that person's rights away. The equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution require that people similarly situated under the law receive similar treatment from the State. In order to determine whether a statute violates equal protection, one of three tests is employed— strict scrutiny, intermediate scrutiny, or the rational basis test. The appropriate level of scrutiny depends upon the nature of the alleged classification and the rights involved. In re K.R.P., 160 Wn.App. 215, 229, 247 P.3d 491, 497 (Div. 1, 2011). While the interest of siblings in maintaining emotional ties with each other has never been subjected to equal protection analysis, the language used by courts in cases where those ties may be at stake strongly suggests that siblings enjoy a fundamental right to maintain and protect their relationship against intrusion by the state. For example, In re Welfare of A.G., 155 Wn.App. 578, 229 P.3d 935 (Div. 3, 2010) reviewed RCW 13.34.200, part of the dependency statutes, and found uncompromising support for sibling relationships among minor children. Id., 155 Wn.App. at 596, 229 P.3d at 943. Though far more limited in application, sibling relations strongly resemble parent-child relations in their depth and importance and therefore should likewise be accepted as a fundamental right. Because sibling relationships should be treated as

a fundamental right, state action which abridges or discriminates against sibling relationships should be subject to "strict scrutiny," meaning that the state action invidious to the fundamental right must be justified by a "compelling interest." Stated simply, the state has no "compelling interest" to allow any person, even a non-human corporation, to take away an incapacitated person's rights through an RCW 11.88 petition while denying family members, especially brothers and sisters, the right to defend him.

B) RCW 11.88 violates the due process rights of allegedly incapacitated persons because it does not provide meaningful standards to determine their "needs, capacities, and condition."

The State must provide "due process of law" whenever it deprives any person of "life, liberty, or property." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. RCW 11.88 necessarily involves the deprivation of rights from persons who are unable ("incapacitated") to exercise such rights in a manner inconsistent with their health, safety, or financial well-being. RCW 11.88.010(1). Once a person is found to be incapacitated, a guardian is appointed with powers to substitute his or her judgment for that of the incapacitated person. A guardian's powers may extend to complete control of the incapacitated person's life and property, or be limited to those aspects of the incapacitated person's life in which the IP's abilities are inadequate to his needs, thereby leaving some areas reserved to the IP. Even a limited guardianship, however, involves a loss of liberty, including possible restrictions on fundamental rights like voting and

marriage. Moreover, if the person's allegedly incapacitating condition is alleged to involve mental health or abilities, he or she has a protected interest in not being socially stigmatized as "mentally ill" or "mentally challenged." See In the Matter of Guardianship of Hedin, 528 N.W. 567, 573-574 (Iowa 1995) . Thus due process is required in an RCW 11.88 proceeding.

The heart of an RCW 11.88 proceeding is to find a legal balance between a person's inabilities and the person's residual functional capacity.¹ If an AIP is determined to be incapacitated, the statutes are intended to enable the AIP to exercise his or her legal rights to the maximum extent consistent with their functioning, such as that may be. Inasmuch as all persons, including AIPs, display unique abilities, problems, and needs, RCW 11.88 is intended to limit the power of a guardian to the minimum extent necessary to provide adequately for the AIP's health and safety, or to adequately manage the AIP's financial affairs. RCW 11.88.002. To that end, a court's guardianship orders "shall be based upon findings as to the capacities, condition, and needs of the alleged incapacitated person. RCW 11.88.095(1).

A statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct may be forbidden by the statute and which encourages arbitrary and erratic arrests and convictions

¹ "Residual functional capacity," or "RFC" is not a term used in RCW 11.88 but is instead borrowed here from Social Security disability law. Residual functional capacity is defined in Social Security regulations as the most a person can still do in a work setting notwithstanding the physical and mental limitations imposed by a person's impairment. 20 C.F.R. Sect. 1545.

violates due process rights. Such statutes are deemed “void for vagueness,” a doctrine which applies to both criminal and civil statutes where a loss of constitutional rights is at issue. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, ___ 31 L.Ed.2d 110, ___ (1972). It applies to both criminal actions and civil actions where a loss of constitutional rights is at issue. Boutilier v. INS, 387 U.S. 118, 123, 87 S.Ct. 1563, ___ 18 L.Ed.2d 661, ___ (1967). If the First Amendment is not involved, a vagueness challenge is evaluated by examining the statute as applied under the particular facts of the case. State v. Mays, 116 Wn.App. 864, 874, 68 P.3d 1114, 1120 (Div. 1, 2003). Because the guardianship statutes in RCW 11.88 contemplate a loss of constitutional rights by an allegedly incapacitated person (AIP), RCW 11.88 is subject to challenge for vagueness. A challenge to the constitutionality of a statute or ordinance must be proven beyond a reasonable doubt, but where a significant deprivation of liberty is involved, statutes must be construed strictly. Id., 116 Wn.App at 869, 68 P.3rd at 1118.

The purpose of RCW 11.88 is to give persons with mental and physical disabilities which affect their performance of basic life functions as much autonomy and as many legal rights as possible, consistent with their own health, safety, and financial well-being. RCW 11.88.005. Therefore, an incapacity determination includes findings as to the capacities, condition, and needs of the alleged incapacitated person (“AIP”). RCW 11.88.095(1)(a). A thorough understanding of the capacities, condition, and needs of the AIP is essential because a

finding of incapacity must be based a demonstration of the AIP's inability over time to sufficient manage his personal or financial affairs over time rather than on conclusory opinions or superficial facts such as age, eccentricity, poverty, or medical diagnosis. RCW 11.88.010(c). In addition to the initial determination of incapacity, however, a determination of the capacities, condition, and needs of the AIP is necessary to the court's review of the "personal care plan" to be filed by the appointed guardian after issuance of guardianship orders. RCW 11.88.095(d); RCW 11.92.043. By statute, personal care plan must include (a) an assessment of the incapacitated person's physical, mental, and emotional needs and of such person's ability to perform or assist in activities of daily living and (b) the guardian's specific plan for meeting the identified and emerging personal care needs of the incapacitated person. RCW 11.92.043(1).

It is ultimately the court's obligation to oversee the incapacitated person's interest in the management of his or her personal and financial estate. See Guardianship of Knutson, ___ Wn.App. ___. ___. 250 P.3rd 1072, 1080 (Div. 1, 2011); See also Seattle-First Nat. Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035, 1040 (Wash. 1977). Therefore, the court must have the "baseline data" from the determination of "capacities, condition, and needs" from the initial guardianship proceedings to evaluate the guardian's "personal care plan" and subsequent regular updates required under RCW 11.92. "Capacities," "condition," and "needs" are not defined in RCW 11.88 and therefore, should be understood in their plain "dictionary"

meaning. See, e.g., State v. Evans, 40258-1-II (November 3, 2011). However, statutory terms must be viewed in context, so as to create “a sensible, meaningful, and practical interpretation.” American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 613,192 P.3d 306,328 (2008). Since RCW 11.88 uses “capacities, condition, and needs” in the context of determining the legal consequences of medical or psychological disabilities, it follows that evidence regarding these matters must originate with expert opinions from physicians, psychologists, or comparable professionals. See, e.g., Matter of Disciplinary Proceeding Against Petersen, 120 Wn.2d 833, 869, 846 P.2d 1330, 1353 (1993).

Moreover, RCW 11.88 demands that such expert opinions must amount to more than a mere diagnosis. RCW 11.88.010 (c). Therefore, the terms “capacities,” “condition,” and “needs” should be applied to the facts of an individual guardianship action in the light of the medical or psychological record and prevailing medical or psychological standards. This interpretation is most obvious with “condition,” which translates more-or-less smoothly into an AIP’s diagnosis, prognosis, and symptoms. “Needs” would relate to the medical or psychological assessment of the treatment or environment necessary to optimize the AIP’s condition. Finally, “capacities” relates to the professional assessment of the AIP’s ability to function in his daily life, including personal needs, social relationships, and economic and/or educational opportunities. An IQ score is probably the best-known example of a capacity assessment. Consistent with the

legislative purpose in RCW 11.88.005, the goal of obtaining an expert determination of “capacities,” “condition,” and “needs” should be to maximize the AIP’s liberty and autonomy and to minimize the restrictions to the point necessary for the AIP’s health and safety.

RCW 11.88.045 mandates the submission by the guardian ad litem of a written report from a physician, psychologist, or advanced registered nurse practitioner with expertise in the disorder suffered by the AIP. Among other information, this written report must include the following:

-
- (d) a summary of the relevant medical, functional, neurological, or mental health history of the alleged incapacitated person as known to the examining physician, psychologist, or advanced registered nurse practitioner;;
- (e) the findings of the examining physician, psychologist, or advanced registered nurse practitioner as to the condition of the alleged incapacitated person;
- (f) current medications; and
- (g) the effect of current medications on the alleged incapacitated person's ability to understand or participate in guardianship proceedings.

RCW 11.88.045(4) (emphasis added). However, the guardian ad litem’s report, required under RCW 11.88.090(f), must include the following:

- (i) A description of the nature, cause, and degree of incapacity, and the basis upon which this judgment was made;
- (ii) A description of the needs of the incapacitated person for care and treatment, the probable residential requirements of the alleged incapacitated person and the basis upon which these findings were made;
-
- v) A description of the abilities of the alleged incapacitated person and a recommendation as to whether a guardian or limited guardian should be appointed. If

appointment of a limited guardian is recommended, the guardian ad litem shall recommend the specific areas of authority the limited guardian should have and the limitations and disabilities to be placed on the incapacitated person;
(vi) An evaluation of the person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made ;

RCW 11.88.090(f)(emphasis added). The guardian ad litem is in all likelihood an attorney or other person without expert medical or psychological credentials. Thus, while the statutory scheme requires an expert opinion as to "condition," that is, a diagnosis, it allows a lay opinion on the needs of the AIP, the abilities (i.e., capacities) of the AIP, and "mental ability" (i.e, cognitive ability) of the AIP to vote. There is no requirement, and thus no guarantee, that the guardian ad litem will base his or her conclusion on substantial medical or psychological evidence.

As a result, the trial court in the present case had little clinical "input" for its decision-making in the present case. While the medical record disclosed that the AIP suffered from developmental disabilities (mental retardation), the record developed by the guardian ad litem did not adhere to or refer to the standard reference work for evaluating and describing mental disabilities, namely, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, known as the *DSM*. In the 2000 version of the *DSM*, *DSM-IV-TR*, mental retardation is described and categorized in five levels of severity - mild mental retardation, moderate mental retardation, severe mental retardation, profound mental retardation, and mental

retardation, severity unspecified.² These distinctions are absent from the guardian ad litem's report, so while the AIP herein is probably mildly mentally retarded or mildly developmentally disabled, the distinction is not made on the record. The DSM also provides a clinical method for (relatively) consistent and comparable assessments of an individual's overall level of mental functioning. Known as the *Global Assessment of Functioning*, or "GAF," this method is an assessment of four different levels of clinical information, known as axes (*sing.*, axis) -

Axis I Clinical Disorders
Axis II Personality Disorders/Mental Retardation
Axis III - General Medical Condition
Axis IV - Psychosocial or Environmental Problems

- which allow the clinician to arrive at Axis V, the Global Assessment of Functioning.³ The GAF is a numerical scale, 0 to 100, with higher score representing superior functioning and lower scores showing increasing signs of distress and danger to self or others.⁴ The GAL report did not mention Sean's GAF score.⁵ Finally, and most indicative

² American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders, (Fourth Ed., Text Revision)" 41-49 (2000). See App-4.

³ See App-5.

⁴ Because of Social Security disability cases, there are so many references to GAF scores in federal circuit opinions that its use as basic evidence of psychological functioning (though not the evidentiary weight of individual GAF scores) may be said to be taken for granted .

⁵ Sean Cobb's psychologist, Dr. Serena Meyer, Psy.D., was subpoenaed at trial and testified that she estimated that Sean's GAF score was 50-60. CP 82. According to Dr. Meyer, "[a] GAF score is a global assessment of functioning that takes into account any kind of impairment such as employment, independent functioning, and being able to fulfill, you know, daily – you know, daily living such as bathing,

of the inadequacy of the record in this case, the GAL report did not even refer to Sean's IQ and his IQ was not part of the trial record.⁶

Thus in the present case, without substantial clinical evidence as to the degree of his condition, his level of mental functioning according to the most widely used professional measure, or his IQ, a developmentally disabled man was adjudged to be incapacitated and deprived of his right to a free life. The flawed record was possible only because the statutory scheme provides for determinations based on an AIP's "capacities," "condition," and "needs" without specifying that such terms should be interpreted as conclusions to be based on bona fide medical or psychological standards and assessments. In State v. Mays, the court found that the civil commitment statute (RCW 70.96A.140(1)) was unconstitutionally vague because without legal,

emotional distress. It's pretty comprehensive actually in terms of somebody's ability to sort of manage internal selectors, as well as external on daily responsibilities." CP 83. A GAF score of 50 translates to "serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friend, unable to keep a job)." A GAF score of 60 represents "Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders, (Fourth Ed., Text Revision)" 34 (2000). There is no indication that the trial court placed any weight on Dr. Meyer's testimony about Sean's GAF score. It is possible that he wasn't even listening to her testimony. The following exchange occurred less than a page after Dr. Meyer stated that Sean had a GAF score in the 50-60 range:

Q: What are the defining characteristics of someone with Sean's GAF?
MS. FERGUSON [counsel for Lorraine Scott]: Objection. She hasn't testified concerning Sean's GAF.
THE COURT: Sustained.

RP 83.

⁶ Dr. Meyer offered to make an estimate of Sean's IQ, but the court sustained an objection for "lack of foundation" by counsel for Lorraine Scott. RP 81.

medical, or statutory definition, it was impossible to avoid widely different opinions as to when or why a party would be in need of “a more sustained treatment program,” i.e., longer commitment. Mays, 116 Wn.App at 875, 68 P.3rd at 1120. In the present case, it is equally impossible to avoid different opinions and results as to the AIP’s “capacities,” “condition,” and “needs” unless such terms are applied according to objective, consistent, and clinically accepted medical or psychological definitions. Therefore, RCW 11.88, which allows for findings of incapacity and deprivations of rights without specifying the competent evidence to make the required findings, is also unconstitutionally vague.

C) RCW 11.88 violates the due process rights of allegedly incapacitated persons because it does not provide them with clear procedures to assert their rights to a jury trial.

An allegedly incapacitated person is, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. RCW 11.88.045(2). However, unlike other proceedings like criminal trials or civil commitment hearings where the liberty of a defendant or respondent is at issue, RCW 11.88 does not have specific procedures by which an AIP may assert his or her right to a jury trial. In the present matter, Sean Cobb, the AIP, requested a jury trial at the very end of his proceeding. RP 202-203. The court dismissed his request out of hand after directing its inquiries to his attorney rather than to the AIP himself. RP 202 -203. Appellants submit that the absence of specific procedures for an AIP to request a jury trial, especially a

requirement for an election of trial mode on the record, inevitably leads to proceedings which by-pass the wishes of AIPs⁷. Bench trials have therefore been established as the “default” trial mode in guardianship proceedings. By necessarily discouraging an AIP’s right to a jury trial, RCW 11.88 violates the procedural due process rights of allegedly incapacitated persons.

The State must provide “due process of law” whenever it deprives any person of “life, liberty, or property, including guardianship proceedings under RCW 11.88,” U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. The right of trial by jury, and of waiver of jury trial rights in civil cases upon consent of the parties is guaranteed by Article 1, § 21 of the Washington Constitution. In RCW 11.88 proceedings, the jury’s role, moreover, has been interpreted broadly to include not just the yes-no issue of incapacity as such but the question of incapacity as to the person or the estate, or both, the extent of a limited guardian’s authority and (conversely) the rights to be retained by the AIP. In re Way, 79 Wn.App. 184, 189-192, 901 P.2d 349, 351-352 (Div. 1, 1995). In other words, a guardianship jury is

⁷ Cutting constitutional corners in adjudications for the impaired and incapacitated is an old story. “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, [citations omitted] 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. *The most formidable abridgment of due process 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.*” Quesnell v. State, 83 Wn.2d 224, 233, 517 P.2d 568, 574-575 (1973)(emphasis added).

expected to receive all the evidence presented at the trial and determine every matter before the court except the identity of the guardian.

In civil cases, a jury trial demand may be made by any party “at or prior to the time when the case is called to be set for trial.” CR 38(d). Failure to make a timely jury trial demand is deemed to waive the right. CR 38(d). However, like any matter arising under RCW Title 11, a guardianship is a “special proceeding” rather than a general civil matter and procedural rules set forth by statute control over any inconsistent provisions of the civil rules. RCW 11.96A.100(1). Therefore, guardianship procedure is governed by RCW 11.88 and related case law. In addition, because allegedly incapacitated persons face loss of liberty, RCW 11.88 actions have a constitutional dimension that further distinguishes them from general civil cases.

Unlike CR 38(d), RCW 11.88 does not specify the time, place, or manner in which an AIP’s jury trial request should be made. Washington case law has not addressed the procedural pitfalls that lack of specificity creates for AIPs who want a jury trial. However, the procedural trial rights of an allegedly incapacitated person were exhaustively analyzed in In re Link, 713 S.W.2d 487 (Mo. 1986). In Link, the issue was not that the AIP had a right to a jury trial - at the time of trial (1983), Missouri guardianship law had been amended to replace the necessity to demand a jury with a guardianship “bill of rights” that included the presumption of a jury trial. Instead, the trial issue focused on the facts which would constitute a waiver of the right

to a jury. *Id.* 713 S.W. 2d at 492. The Link court concluded that, as with criminal proceedings, the weight of authority supported a requirement that waivers of constitutional rights by incapacitated persons should be made “knowingly and understandably.” Link, 713 S.W.2d at 493-494.

Quesnell v. State, 83 Wn.2d 224, 517 P.2d 568 (1973), a Washington mental commitment case cited in Link, focused on the need to give insane and incapacitated persons more than “lip service” for constitutional due process. First, it held that, if the presumption of competence in commitment proceedings was meant to be taken seriously, only the allegedly mentally ill person (being presumed competent) could waive his or her constitutional rights. Therefore, a waiver of jury trial rights by the substituted judgment of a guardian ad litem was impermissible. *Id.*, 83 Wn.2d at 238-239, 517 P.2d at 577-578. Second, it follows that a jury trial in a commitment trial may only be waived with the knowing consent of the person charged with being mentally ill. Quesnell, 83 Wn.2d at 242, 517 P.2d at 579. Finally, when, as in Quesnell, the allegedly insane person attempts to invoke his or her right to a jury trial, that request must be honored by the court. *Id.*, 83 Wn.2d at 242, 517 P.2d at 574.

In the present matter, there is anecdotal evidence that the right to jury trial in RCW 11.88 cases in Clark County was largely “lip service.” After the present matter went to trial, it was reported in the local newspaper that Guardianship of Richard Morse, Clark Co. # 11-4-00370-4, was unusual because Mr. Morse was the first AIP in “recent

memory” to demand a jury trial.⁸ With several hundred guardianship cases filed per year in Clark County, the failure of even a single person other than Richard Morse to request a jury trial during “recent memory” implies at least some degree of systematic failure by the court system to support the exercise by AIPs of their jury trial rights. In the present case, the Guardian ad Litem’s report did not state whether the AIP has discussed his choice of bench trial or jury trial her, even though she stated that she met with the AIP on three different occasions and RCW 11.88 requires her to identify the trial preference in her written report. CP 97 -123; RCW 11.88.045(5)(f)(ix). Her report instead merely asserts that “Sean has an attorney who has indicated that Sean does not want a jury trial.” CP 97-123. At the beginning of the trial, the AIP’s appointed counsel, Julie Payne, made an opening statement that did not address the issue of a jury trial. RP 24-26. Sean Cobb invoked his jury trial right at the very end of the proceedings when he had been called as witness and had the opportunity to speak for himself. RP 200; RP 202.

When Sean handed the trial court a note requesting a jury trial, the court reacted sarcastically and, rather than questioning him directly about his request for a jury trial, discussed the request with Sean’s attorney instead. RP 203. Therefore, we may never know whether Sean actually told his lawyer that he didn’t want a jury trial,

⁸ Laura McVicker, Man’s Mental State At Issue in Guardianship Case, Vancouver (WA) *Columbian*, March 28, 2011 at _____, (accessed November 12, 2011 <<http://www.columbian.com/news/2011/mar/28/mans-mental-state-at-issue-in-guardianship-case/>>).

as reported by the GAL, whether he changed his mind at some point, or whether he wanted a jury trial throughout the proceedings and couldn't get the "authorities" to respect the apparently insignificant, if constitutionally mandated, wishes of an AIP. However, it should be clear that the only sure and certain way to assure that an AIP to have his trial preference honored is to get his preference explicitly on the record through established procedures that assure that an incapacitated person's preference of jury or bench trial will be put on the record. In Missouri, the constitutional right to a jury trial in guardianship proceedings is assured by statute (RSMo Sect. 475.075) and case law (In re Link, 713 S.W.2d 487 (Mo. 1986)). For Washington civil commitment cases, the constitutional right is guaranteed by case law (Quesnell, 83 Wn.2d 224, 517 P.2d 568, (1973)). By comparison, the "lip service" paid in RCW 11.88 to an AIP's right to choose a jury trial is constitutionally deficient.

D) Sean Cobb's procedural due process rights were violated because his Guardian ad Litem did not file a reliable written report that identified his capacities, condition, and needs.

The State must provide "due process of law" whenever it deprives any person of "life, liberty, or property, including guardianship proceedings under RCW 11.88." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. As part of due process, reports relied upon by the court in decision-making related to deprivation of life, liberty, or property must be reliable and the defendant must have an opportunity to refute the evidence or conclusions in such reports. See

State v. Strauss, 119 Wash.2d 401, 418-19, 832 P.2d 78, 87-88 (1992). This principle is specifically applicable to guardianship actions: “[a] guardianship limits a person’s autonomy and should not be based on unreliable evidence.” In re Guardianship of Stamm v. Crowley, 121 Wn.App. 830, 838, 91 P.3d 126,130 (Div. 1, 2004).

Guardians ad litem in a guardianship proceeding have a special place in the judicial system. They are arms of the court and enjoy quasi-judicial immunity from civil liability. Barr v. Day, 124 Wn.2d 318, 332, 870 P.2d 913, 919 (1994). The duties of a guardianship GAL are set forth in RCW 11.88.045. In particular, a guardianship GAL is required to file a report which includes the following:

- (i) A description of the nature, cause, and degree of incapacity, and the basis upon which this judgment was made;
- (ii) A description of the needs of the incapacitated person for care and treatment, the probable residential requirements of the alleged incapacitated person and the basis upon which these findings were made;
- (iii) An evaluation of the appropriateness of the guardian or limited guardian whose appointment is sought and a description of the steps the proposed guardian has taken or intends to take to identify and meet current and emerging needs of the incapacitated person;
- (iv) A description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such alternatives should be used in lieu of a guardianship, and if the guardian ad litem is recommending discontinuation of any such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person;
- (v) A description of the abilities of the alleged incapacitated person and a recommendation as to whether a guardian or limited guardian should be appointed. If appointment of a limited guardian is recommended, the guardian ad litem shall recommend

the specific areas of authority the limited guardian should have and the limitations and disabilities to be placed on the incapacitated person;

- (vi) An evaluation of the person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made;
- (vii) Any expression of approval or disapproval made by the alleged incapacitated person concerning the proposed guardian or limited guardian or guardianship or limited guardianship;
- (viii) Identification of persons with significant interest in the welfare of the alleged incapacitated person who should be advised of their right to request special notice of proceedings pursuant to RCW 11.92.150 ; and
- (ix) Unless independent counsel has appeared for the alleged incapacitated person, an explanation of how the alleged incapacitated person responded to the advice of the right to jury trial, to independent counsel and to be present at the hearing on the petition.

RCW 11.88.045(5)(f). The purpose of the GAL's report is to help the fact finder - in this case, the trial court. Stamm, 124 Wn.App at 838 , 91 P.2d at 130. A trial court has the discretion to accept or reject the results of the GAL's investigation into the capacities condition and needs of the alleged incapacitated person. Id., 124 Wn.App. at 838, 91 P.2d at 130. In the present case, the guardian ad litem's recommendation for a professional guardian was rejected by the court. RP 206. The report's characterization of the AIP's lack of interest in voting was demolished by the AIP's own testimony. RP 198. As a result, the AIP retained the right to vote, against the recommendation of the GAL. CP 179. The AIP's mental health therapist, Dr. Serena Meyer, thoroughly discredited the report's characterization of the AIP as able to feed and bathe himself, but capable of nothing more. RP 100. Several parties filed detailed objections to the GAL Report prior to the trial. CP 140-147 (Christine

Scott); CP 148-150 (Lorraine Scott); CP155-155 (Daniel Cobb).By the close of the trial, it would be difficult to argue that the court gave substantial weight to the GAL's formal opinions.

However, formulating opinions and recommendations are only part of the guardianship GAL's responsibilities. As indicated by Stamm, the guardianship GAL helps the fact finder by gathering the facts in the case. The guardianship GAL is the "eyes and the ears" of the court and, to the extent that its investigation is cursory or sloppy, an inept or lazy GAL could be said to handicap the court's own deliberations. In the present matter, the GAL's investigation, as embodied in her report, failed to disclose the following information:

- the AIP's age, place of birth, and his early developmental difficulties;
- the AIP's primary diagnosis;
- the AIP's clinical prognosis;
- the AIP's IQ;
- that the AIP had severe hearing loss in both ears;
- that the AIP suffered from a speech pathology;
- the extent of medical care for the AIP over the previous 10 years;
- the substance, if any, of the GAL's consultations with the AIP's care providers, including Dr. David David, M.D., Dr. Serena Meyer, Ph.D., and Dr. Mitchell Cohen, M.D.;
- previous efforts, if any, to mitigate the AIP's condition;
- the possibility of generally mitigating the AIP's condition in the future;
- whether mitigation of the AIP's hearing loss could improve the AIP's other conditions, such as cognitive deficits;
- the need, if any, for further assessments to determine the AIP's needs, condition, and capacity;
- when the AIP qualified for Supplemental Security Income (SSI);
- the amount of SSI benefits received by the AIP;
- where the AIP's SSI benefits were deposited and whether his benefits could be accounted for;

- whether the AIP went to public school, how long he attended public school, whether he graduated from high school, and nature of his educational program;
- where he lived for the past 10 years, and who he lived with;
- that other siblings had accused Lorraine Scott of financially exploiting their mother while Lorraine Scott and her daughter lived with Carmen Cobb and Sean Cobb and that such allegations were being actively litigated in Carmen Cobb's probate action.⁹

In other words, there was very little about Sean Cobb's condition (including his social and familial context) or capacity or the qualifications of his eventual guardian that could be gleaned from the Guardian ad Litem's report. Because the GAL report is envisioned by the Legislature as the primary tool to guide the court in a guardianship determination, there is the over-riding question whether a failure or breakdown of the GAL's role, as embodied in the GAL report, entails a breakdown of the entire guardianship adjudication process. Essentially, if the GAL Report cannot fulfill the requirements of RCW 11.88.045(5)(f) as it relates to the AIP - a) identify the nature, cause, and degree of incapacity, b) describe the needs of the AIP for care and treatment, the probable residential requirements of the AIP and the basis upon which these findings were made, and c) describe the abilities of the alleged incapacitated person - in a basic or even rudimentary way, then it is highly questionable whether the court itself can understand the AIP sufficiently to make an informed and suitably nuanced determination about guardianship that would

⁹ CP 160-166.

satisfy the legislature's intent to minimize restrictions and maximize the autonomy of the AIP. Therefore, because the court did not have sufficiently reliable information from the GAL Report to make a informed decision about the AIP's needs, condition, and capacity, as required by RCW 11.88, the AIP was denied his procedural wisdue process rights at his guardianship trial.¹⁰¹¹

- E) The trial court violated the due process rights of Christine Scott and Daniel Cobb and the appearance of fairness doctrine by finding that the act of filing a Motion for New Trial (CR 59) itself constituted grounds to deny their motion.**

This matter came to trial before the Honorable Robert A. Lewis of the Clark County Superior Court on February 11, 2010. In addition to Mr. Cobb, the allegedly incapacitated person (AIP), the parties included his brother, Daniel Cobb, his sister, Christine Scott, and another sister, Lorraine Scott. An order appointing Lorraine Scott as Sean Cobb's limited guardian was entered on February 19, 2010. CP

¹⁰ Prior to the trial, Cross-Petitioner Daniel Cobb filed a Motion for Continuance premised on augmenting the perfunctory discussion of Sean Cobb's needs, condition, and capacities in the GAL Report. The purpose of the continuance was to obtain professional psychological assessments and evaluations of the AIP, Sean Cobb. The trial court denied his motion. RP 10. By denying the Motion for Continuance, the court put its "seal of approval" on the GAL's investigation (or lack thereof) of Sean's situation. In other words, it appeared to be satisfied with the information it received, despite the risks that ignorance presented to Sean's fundamental rights.

¹¹ Perhaps most shockingly, Sean Cobb's psychologist, Dr. Serena Meyer, Psy.D., testified that the GAL had called her once, but did not inquire about his condition, request her notes, or ask her advice. The substance of the call was to ascertain the dates and number of his appointments. RP 89. Under RCW 11.88.090(5)(b), a GAL is required to submit written reports from professionals "as are necessary" to complete her report. To a large extent, the court not only went to trial with inadequate information but had Dr. Meyer's evidence withheld from it by this "arm of the court."

178-185. Daniel Cobb and Christine Scott filed a CR 59 Motion for a New Trial on March 1, 2010, which was heard on March 12, 2010. CP App-3. At the close of the CR 59 hearing, Judge Lewis denied the motion. In making his oral ruling, Judge Lewis stated:

THE COURT: Well, the Court considered the [CR 59] motion carefully because, frankly, it does appear to me that quite a few of these things are matters that are not well grounded in fact or law. And it appears to me that the Motion for New Trial is basically an attempt to delay these proceedings further. Proceedings which the Court will note, not all because of the present people moving for a new trial, but just in general, proceedings that were delayed far too long in the first place.

And so, continuing to attempt to delay the proceedings cause the Court a great deal of concern that – and actually strengthens my determination that I picked the right person [Lorraine Scott] to be the guardian, someone who will start looking for – after Sean’s interests rather than continuing to want to litigate each and every issue in this case.

RP 30-31 (3/12/2010) (**emphasis added**).

a) **Due Process.** As shown in his statement quoted above, Judge Lewis denied post-trial relief to Christine Scott and Daniel Cobb, at least in part, because they sought post-trial relief. It is fundamentally unfair to use a party’s exercise of procedural rights as grounds to deny the relief for which the procedural rights are asserted. Cf. State v. Anderson, 44 Wn.App. 644, 648, 723 P.2d 464, 467 (Div. 2 1986), *citing* Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). A motion for new trial may of course be denied for

cause or sanctioned if frivolous.¹² However, penalizing the mere assertion of a clearly constitutional right, like the right to seek relief from a judge's decision or a Fifth Amendment privilege, is a violation of due process rights. Cf., Maness v. Meyers, 419 U.S. 449, 472, 95 S.Ct. 584, 595, 42 L.Ed.2d 574, ____ (1975)(J. Stewart, concurring).

b) **Bias and Appearance of Fairness.** Even if the trial court has sufficient grounds to deny Christine Scott and Daniel Cobb's CR 59 motion without resorting to penalizing their efforts for post-trial relief, they could receive a new trial through the "appearance of fairness" doctrine. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Bilal, 77 Wn.App. 720-722, 893 P.2d 674-675. (Div. 2, 1995). In this matter, a reasonable person would find that the substance of the trial court's outburst reflected bias or prejudice by the court. First, the court determined that the CR 59 motion constituted a improper attempt to "delay" the guardianship proceeding. RP 30. Clearly, this opinion was incorrect because, when the court made its statement, the trial had already occurred and the guardianship order had been entered weeks earlier. No "delay" in resolving the guardianship issues through a retrial would occur

¹² Although he denied Christine Scott and Daniel Cobb's CR 59 motion, Judge Lewis found enough merit in the motion to deny the opposing party's motion for CR 11 sanctions and attorney fees. RP 31-32 (3/12/2011).

unless the moving parties, Christine Scott and Daniel Cobb, could show that the original proceedings were invalid in some way. In that case, the interests of justice, not to mention the interests of Sean Cobb, the allegedly incapacitated person, would supersede considerations of “delay” and judicial economy.

Second, and more obviously, a reasonable person would find bias in the court’s statement that its conviction in the correctness of its original decision was “strengthened” because Christine Scott and Daniel Cobb challenged the decision through a CR 59 motion, a method prescribed by court rule. In effect, the trial court told the moving parties that “you can’t be right because you said I was wrong.” In addition, if a reasonable person looked at the full context of the trial court’s statement, it would become clear that his disdain for them arose from the mere act of challenging his opinion rather than from the substance of the motion. The trial court contrasted the “good” motives he perceived in Lorraine Scott, the successful petitioner for guardianship:

[It was] my determination that I picked the right person [Lorraine Scott] to be the guardian, someone who will start looking for – after Sean’s interests...

with the invidious motives of Christine Scott and Daniel Cobb:

rather than [someone who is] continuing to want to litigate each and every issue in this case.

RP 30-31 (3/12/2011).

This statement juxtaposes those who “look after Sean’s interests” with those who seek post-trial relief, thereby making the unwarranted and offensive suggestion that Christine Scott and Daniel Cobb did not have their incapacitated brother’s best interest at heart. However, following the trial on February 11, 2010, the trial court found that all of the petitioners, including Christine Scott and Daniel Cobb as well as Lorraine Scott, were qualified to be Sean Cobb’s guardians. RP 205 (2/11/2010). In fact, his reason for appointing Lorraine Scott as guardian rather than Christine Scott or Daniel Cobb was that, for several years immediately preceding the guardianship proceeding, Lorraine Scott had resided with Sean and his mother. RP 209-210 (2/11/2011) At that point, he did not find that Lorraine Scott would “start looking after Sean’s interests” and Christine Scott and Daniel Cobb would not. The only apparent reason for his different view of the parties after the CR 59 motion was the CR 59 motion itself. In other words, in Judge Lewis’ opinion, Christine Scott and Daniel Cobb had become “bad people” who did not care about their brother because they challenged his decision.

Being second-guessed by parties, counsel, and appellate courts is part of a judge’s job description. There was no reasonable cause for the trial court to “get personal” by imputing improper or inappropriate motives to Christine Scott and Daniel Cobb because they filed a CR 59 motion. Judicial ethics require a judge to be patient,

dignified, and courteous to those with whom he deals¹³ and to handle the court's affairs in a "businesslike" and relatively impersonal fashion. Code of Judicial Conduct (WA), Canon 2.8(B). More importantly, a judge must be objective and open-minded to ensure impartiality and fairness to all parties. Code of Judicial Conduct (WA), Comment, Canon 2.2. The trial court's improper criticism of the CR 59 motion demonstrated that he was biased against Christine Scott and Daniel Cobb and thereby violated the appearance of fairness doctrine.

A final question arises as to whether judicial bias that becomes evident after trial can be imputed to earlier proceedings. First, because of the imperative to maintain the appearance of fairness and impartiality in judicial proceedings, public policy should, on the theory of "better safe than sorry," require that post-trial bias determinations relate back to trial proceedings. The common insights of human nature agree with this position. When a person shows disproportional anger or irritation at something or someone, the common assumption is that some hidden or undisclosed cause is behind the display. When a judge makes unwarranted and prejudicial comments in post-trial proceedings, it is reasonable to suppose that the prejudice was also there during the original proceedings but hadn't reached the "boiling point" where the prejudice had to be expressed. In this case, the CR 59 motion was likely to have been the

¹³ Code of Judicial Conduct (WA), Canon 2.8(B).

pretext for the trial court to “blow off steam” that accumulated during the trial or even earlier. This case shows that it makes good sense as well as good policy to assume pre-trial bias when post-trial bias is expressed.

F) The trial court abused its discretion by applying the psychologist/patient privilege to testimony of the incapacitated person’s psychologist, Dr. Serena Meyer, Psy.D., and to allow third-parties to assert the privilege.

At the time of the trial, Dr. Serena Meyer, Psy.D., had been the AIP’s psychologist since September, 2009. During that time, the AIP had seen Dr. Meyer perhaps 40 times. RP 80. She was subpoenaed to testify at the guardianship trial by Daniel Cobb. CP 171. Speaking to Dr. Meyer, the trial court stated that “I have been informed that Mr. [Sean] Cobb has not waived physician/patient privilege with regard to your communications.” RP 77 (2/11/2010) . He therefore told Dr. Meyer that “you should not testify with regard to anything in that case.” RP 77 (2/11/2010). Dr. Meyer followed the court’s instructions and repeatedly invoked testimonial privilege. See, e.g., RP 86 (2/11/2010). Most dramatically, Dr. Meyer testified that, based on statements made by the AIP to her during a therapy session, she believed that the AIP had been in “dangerous or threatening situations” since his mother died [July 18, 2009] and that, as a result, she filed a report with the Adult Protective Services of the Washington Department of Social and Health Services. RP 88 (2/11/2010). However, she then invoked privilege to avoid further

discussion of her impressions of abuse, which, in her opinion, would be subject to the privilege. RP88-89 (2/11/2010). In their CR 59 Motion, Christine Scott and Daniel Cobb alleged that Dr. Meyer's testimony was not, in fact, privileged and requested a new trial to allow her to testify fully. CP 192-193.

The standard of review for an evidentiary ruling is abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 160 (2004). An abuse of discretion occurs when a judicial decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Freeman and Freeman, 169 Wn.2d 664, 671, 239 P.3d 557, 560 (2010). the court did not consider that guardianship proceedings are an exception to the evidentiary privileges for health care providers. In Guardianship of Atkins, 57 Wn. App. 771, 790 P.2d 210 (1990), an AIP objected to introduction of medical record into evidence at her guardianship proceeding as a breach of the physician-patient privilege. Division I held that RCW 11.88.045 and RCW 11.88.090 required inclusion of the AIP's medical information in the guardian ad litem's report and thus necessarily authorized the disclosure of medical information from the treating physicians themselves. Because the physician-patient privilege in RCW 5.60.060(4) must be strictly construed as a statute in derogation of common law, and because the guardianship statutes are more recent and specific than the general evidentiary statutes, the Atkins court

held that the physician-patient privilege did not apply to guardianship proceedings. *Id.*, 57 Wn.App at 776-777, 790 P.2d at 212.

The psychologist-patient privilege is also privileged under RCW 18.83.110. It follows that, given the similar rationale of promoting candid discussion between both physicians and psychologists with their patients, the exception to physician-patient privilege in guardianship proceedings should apply to psychologists as well. Therefore, Dr. Meyer had no testimonial privilege and should have been required to testify about communications and the substance of communications with her patient, Sean Cobb. In other words, contrary to the trial court's ruling, Sean Cobb had no privilege to waive or assert with regard to Dr. Meyer.

In denying Christine Scott and Daniel Cobb's CR 59 motion to for a new trial to allow Dr. Meyer to testify without restrictions, the trial court mischaracterized the motion as pertaining only to alleged third-party assertions of Sean Cobb's privilege as Dr. Meyer's patient. RP 25 (3/12/2010). In fact, Christine Scott and Daniel Cobb stated:

More importantly [than who asserted the privilege], the court did not realize that guardianship proceedings are an exception to the physician-patient privilege. Guardianship of Atkins, 57 Wn. App. 771, 776-777, 790 P.2d 210, ___ (1990). It is logical that this exception should be extended to psychologists and their clients. Therefore, the court should have allowed questioning of Dr. Meyer without the limitations of confidentiality.

CP, 192-193. By ignoring the primary issue and the requirements of Atkins, the trial court "doubled-down" on untenable grounds, namely

its belief in the existence of a psychologist-patient privilege in a guardianship trial. Therefore, this matter should be reversed and remanded for a retrial consistent with the Atkins decision. Furthermore, Dr. Meyer's full testimony would help immeasurably with the court's paramount statutory obligation to determine the capacity, needs and condition of the AIP. RCW 11.88.095(2)(a).

The trial court also abused its discretion by allowing, and then sustaining, privilege objections by Ms. Ferguson, the attorney for Cross-Petitioner Lorraine Scott. See, e.g., RP 86. Privileges belong only to the communicator (e.g., patient) but may be asserted either by the communicator (patient/client) or the recipient of the communication (e.g., attorney or physician). See, e.g., Olson v. Haas, 43 Wn.App 848, 718 P.3d 1 (1986). The privilege may not be asserted by a third-party. State v. Emmanuel, 42 Wn.2d 799, 816, 259 P.2d 845, 855 (1953). In this case, by allowing privilege objections by a third-party, the trial court allowed the third-party to assert the privilege belonging to Sean Cobb. Neither Daniel Cobb, appearing pro se, nor Christine Scott, represented by counsel, opposed Ms. Ferguson's repeated privilege objections. RP 77-104. Ordinarily, evidentiary issues must be raised in a timely way. See, e.g., Lundberg v. Baumgartner, 5 Wn.2d 619, 106 P.2d 566. However, in a guardianship, the court retains ultimate responsibility for protecting the ward's person and estate. Guardianship of Hallauer, 44 Wn.App. 795, 798, 723 P.2d 1161 (Div. 1, 1986). Therefore, rules and statutes should be

interpreted broadly in the interest of the incapacitated person, including the rules of fact-finding. Because the testimony of Dr. Meyer could have remedied the absence of substantial and reliable evidence regarding required findings on Sean Cobb's "capacities," "condition," and "need," the court should exercise its discretion under RAP 2.5(a) regarding failure to find facts upon which relief can be granted, find that the trial court's allowance of third-party privilege objection was improper, and remand the matter for trial consistent with State v. Emmanuel.

G) The trial court abused its discretion by denying Sean Cobb's request for a jury trial on the issues of incapacity.

Allegedly incapacitated persons are entitled, upon request, to a jury trial on issues of incapacity. RCW 11.88.045(2). In this proceeding, neither Sean Cobb, the allegedly incapacitated person, nor his attorney, Julie Payne, made a jury trial request prior to the opening of trial on February 11, 2011. However, during his testimony at the close of his guardianship trial, Sean Cobb produced a note from his pocket and gave it to the trial court. CP 200. The note was his request for a jury trial. CP 203. Rather than questioning Sean Cobb about the request, the trial court questioned his attorney who responded equivocally:

Judge: Did you talk to Mr. Cobb about that [his jury demand]?

Attorney: Yes. We, we talked a number of times on that and it has been his repeated request, first of all,

that things would be able to come to an agreement outside of court. And so we have repeatedly worked on trying to come to an agreement that would work for everyone.

Judge: That would have been great.

Attorney: And that has repeatedly been his request.

Mr. Cobb: Yeah, my cousin Gene can vouch for that.

Judge: Yeah. Unfortunately, that happens all too often. People can't come to an agreement outside of court. I wish they could but sometimes you can't. That's why I'm here. Alright. Argument [closing argument]?

RP 203-204.

An abuse of discretion occurs when a judicial decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Freeman, 169 Wn.2d at 671, 239 P.3d at 560. In this instance, the trial court did not actually make a ruling for or against Sean Cobb’s request for a jury trial. Moreover, it did not invite or receive facts which would necessitate a ruling. In effect, it allowed itself to ignore the request and move along. Arguably, especially because of the constitutional nature of the request, the trial court’s decision not to ask the obvious questions about Sean Cobb’s interest in a jury trial was in itself a “manifestly unreasonable” decision which constituted an abuse of discretion.

More clearly, the trial court did not ask the questions or receive the answers which would tell an appellate court whether Sean Cobb had made previous requests to his counsel or the guardian ad litem which, for some reason, had been disregarded. If he had made prior requests, his constitutional right to a jury trial would have been

blatantly ignored and these proceedings herein made a prime example of the “lip service” decried in Quesnell, 83 Wn.2d at 233, 517 P.2d at 574-575. But no one may ever know, because the trial court couldn’t, or wouldn’t get to the point. In their CR 59 Motion, Christine Scott and Daniel Cobb alleged that the court had violated Sean Cobb’s statutory and due process right to a jury trial by denying his request. CP 187-189. The court denied the motion:

[I]t was clear to me from the letter [the trial note] and the consultation I had with Sean and his counsel at the time that he was in fact not requesting a jury trial, that he had had an opportunity to speak with his attorney about that, was not requesting a jury trial and that his use of that phrase was actually a way that he was trying to indicate that he wanted people to get along and settle this matter out of court without the need for a jury trial. Or any trial at all, for that matter.

RP 22-23 (3/12/2010). Of course, the trial court never actually asked Sean himself about his note. Furthermore, in the trial court’s own contemporaneous words, “[t]here’s a jury demand in here [i.e., the note].” RP 202. In absence of actual questions to Sean about the note and what made him write it and give it to the judge, the trial court’s conclusions about Sean’s intentions are little more than impermissible (if convenient) judicial mind-reading.

Ordinarily, when the record is inadequate and does not furnish an appellate court with enough information to make a decision, the remedy is to remand the case to the trial level with an instructions to fill the gap. See, e.g., Powell v. Sphere Drake Ins. P.L.C., 97 Wn.App. 890, 988 P.2d 12 (Div. 1, 1999). In this case, “filling the gap” would

mean asking Sean Cobb about his desire for a jury trial. However, because 1) the subject is the exercise of a constitutional right, 2) the affected person suffers from diminished capacity and cannot be expected to represent his own interests forcefully, and 3) because the trial court had a responsibility under parens patriae in the initial proceeding to protect the rights and interests of this incapacitated person, prejudice should be presumed in the court's failure to inquire adequately about Sean's trial request. Therefore, Sean Cobb should be given a new trial to make certain that he can exercise his constitutional rights to a jury trial.

V. ATTORNEY FEES AND COSTS

Counsel for Appellants is appearing pro bono, so no fees or costs are sought.

VI. CONCLUSION

Christine Scott and Daniel Cobb have standing to assert the interests of their incapacitated brother, Sean Cobb, in an appellate proceeding. The statutory scheme in RCW 11.88 unconstitutionally denies the procedural due process rights of allegedly incapacitated persons by 1) failing to establish clear standards to determine the capacities, condition, and needs of allegedly incapacitated persons and 2) by failing to set forth adequate procedures for allegedly incapacitated persons to assert their right to a jury trial. Sean Cobb's due process rights were violated when Dee Ellen Grubbs, the guardian ad litem, produced a written report, as required by statute,

which nonetheless did not identify Sean Cobb's capacities, condition, and needs in a meaningful way. The trial court violated the appearance of fairness doctrine by stating during a hearing on a Motion for New Trial made by Christine Scott and Daniel Cobb that his decision to appoint another person as Sean Cobb's guardian was correct because they were "continuing to want to litigate each and every issue in this case." The trial court abused its discretion by applying the psychologist-patient privilege to the testimony of Sean Cobb's psychologist, Dr. Serena Meyer, Psy.D. Finally, the trial court abused its discretion by failing to inquire into a request for a jury trial made by Sean Cobb, the allegedly incapacitated person at the close of proceedings. Christine Scott and Daniel Cobb therefore request that the court review these issues and remand these proceedings for a new trial.

RESPECTFULLY SUBMITTED THIS 16TH DAY OF NOVEMBER, 2011



MARK DIDRICKSON, WSB #20349,
ATTORNEY FOR APPELLANTS CHRISINE SCOTT AND DANIEL COBB

APPENDIX

ORIGINAL

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FILED
2009 SEP 28 PM 4: 28
Sherry W. Parker, Clerk
Clark County

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

In re the Guardianship of:
SEAN RAYMOND COBB,) No. 09-4-0700-5
An Alleged Incapacitated Adult.) ORDER APPOINTING GUARDIAN
AD LITEM
RCW 11.88.090

The Petition For Appointment of a Guardian ad Litem for SEAN RAYMOND COBB, having come on for hearing this day before the undersigned, The Court Orders as follows:

I. FINDINGS OF FACT

1. The facts set forth in the Petition include those necessary to give the Court jurisdiction over this matter.
 2. Pursuant to RCW 11.88.090, a Guardian ad Litem should be appointed.
 3. The Guardian ad Litem should be Thomas Deutsch, who is on the Clark County Guardian ad Litem registry. Thomas B. Deutsch is a guardian ad litem on the Clark County Court Registry that has completed the mandated Annual Guardian Ad Litem training in Seattle, Washington as required by the Model Guardian Ad Litem Program.
- Mr. Deutsch is on the Court Registries in Cowlitz, Lewis, Wahkiakum, Pacific, Klickitat and Skamania Counties. To date he has participated in more than 700 guardian ad litem actions. He holds a Master Degree from Columbia University School of Public Health

Mark Didrickson, Attorney at Law,
400 Columbia Street, #110,
Vancouver, WA 98660
(360) 694-4727

1 and Administrative Medicine in Health Care Administration. He is currently licensed as a
2 Nursing Home Administrator in Washington State.

3 For the past 35 years Mr. Deutsch has worked as a Regional Administrator and
4 Administrator in both nursing home and assisted living facilities and has practiced in five
5 Western States. In addition at one time he owned and operated four adult family homes.
6 He currently serves as the President of the Board of Community Home Health and Hospice
7 with offices in Longview and Vancouver, Washington. In addition Mr. Deutsch has attended
8 to date in excess of 700 hours in continuing education in Elder Issues.

9 He has recently been asked to serve by Attorney General Rob McKenna on the
10 newly formed Vulnerable Adult Summit Workgroup. In October of 2007 he spoke at the
11 Regional Workshop for Adult Protective Service workers in Olympia, Washington. He was
12 recently invited to speak to the Cowlitz Wahkiakum Bar Association on Vulnerable Adults.
13 He has further been recognized in Clark and Wahkiakum Counties as an expert witness.
14 He is uniquely qualified to serve in the current proceeding which necessitates his
15 participation to ensure protection of the alleged incapacitated person.

16 Because of the complex and likely contentious nature of this Guardianship Thomas
17 B. Deutsch should be appointed as the Guardian ad Litem. Because of Thomas B. Deutsch's
18 extensive knowledge of financial and real estate issues and his extensive experience in cases
19 involving similar allegations of possible financial exploitation, his appointment is in the best
20 interests of the AIP and will be cost effective for the AIP's estate.

21 II. ORDER

22 The Court orders:

23 1. The Guardian ad Litem shall be appointed at the expense of the Guardianship
24 Estate. The Guardian ad Litem shall be paid at a rate of \$95.00 per hour not to exceed
25 \$1,800.00 without prior Court Approval and notice to all parties.
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1 2. The hearing on the Guardianship petition shall occur on a date to be set by
2 separate notice.

3 3. Thomas Deutsch is found or known by the Court to be a suitable disinterested
4 person with the requisite knowledge, training or expertise, who is hereby appointed as
5 Guardian ad Litem for the above-named person. The address and/or phone of the Guardian
6 ad Litem are:

7 Name: Thomas Deutsch
8 Address: 100 Inglewood Park
 Longview, WA 98632
9 Telephone: 360-423-0335

10 **Duties and Authority of the Guardian Ad Litem**

11 The Guardian ad Litem shall have the following duties as mandated by statute:

12 (a) To file within five days of receipt of Notice of Appointment, and serve all
13 parties personally or by certified mail with return receipt requested, his or her
14 written statement required by RCW 11.88.090(2)(b), which shall include: his or her
15 history as defined in RCW 9.94A.030 for the period covering ten years prior to the
16 appointment; his or her hourly rate, if appointed at private expense; whether the
17 Guardian ad Litem has had any contact with a party to the proceeding prior to his
18 or her appointment; and whether he or she has an apparent conflict of interest.

19 (b) To meet and consult with the Alleged Incapacitated Person as soon as
20 practicable following appointment and explain, in language which such person can
21 reasonably be expected to understand, the substance of the petition, the nature of the
22 resultant proceedings, the person's right to contest the petition, the identification of
23 the proposed Guardian or Limited Guardian, the right to a jury trial on the issue of
24 his or her alleged incapacity, the right to independent legal counsel as provided by
25 RCW 11.88.045, and the right to be present in court at the hearing on the petition;
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1 (c) To obtain a written report according to RCW 11.88.045; and such other written
2 or oral reports from other qualified professionals as are necessary to permit the
3 Guardian ad Litem to complete the report required by RCW 11.88.090 and to advise
4 Alleged Incapacitated Person of the identity of the health care professional selected
5 by the Guardian ad Litem to prepare the medical report. If Alleged Incapacitated
6 Person opposes said health care professional selected by the Guardian ad Litem , the
7 Guardian ad Litem shall use the health care professional selected by Alleged
8 Incapacitated Person , but may obtain a supplemental examination by a different
9 physician or psychologist or advanced certified nurse practitioner;

10 (d) To meet with the person whose appointment is sought as Guardian or Limited
11 Guardian and ascertain:

12 (i) The proposed Guardian's knowledge of the duties,
13 requirements, and limitations of a Guardian;

14 (ii) The steps the proposed Guardian intends to take or has taken
to identify and meet the needs of Alleged Incapacitated Person; and

15 (iii) Ensure the proposed professional guardian's Statement of Fees
16 is filed.

17 (e) To consult as necessary to complete the investigation and report by this
18 section with those known relatives, friends, or other persons the Guardian ad Litem
19 determines to have had a significant, continuing interest in the welfare of Alleged
20 Incapacitated Person:

21 (f) To investigate alternate arrangements made or which might be created, by or
22 on behalf of the Alleged Incapacitated Person, such revocable or irrevocable trusts,
23 durable powers attorney or blocked account; whether good cause exists for any such
24 arrangements to be discontinued; and why such arrangements should not be
25 continued or created in lieu of a Guardianship:
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1 (g) To provide the Court with a written report which shall include the following:

2 (i) A description of the nature, cause and degree of incapacity, and
3 the basis upon which this judgment was made;

4 (ii) A description of the needs of the Incapacitated Person for care
5 and treatment, the probable residential requirements of the Alleged
6 Incapacitated Person and the basis upon which these findings were
7 made;

8 (iii) An evaluation of the appropriateness of the Guardian or
9 Limited Guardian whose appointment is sought and a description of
10 the steps the proposed Guardian has taken or intends to take to
11 identify and meet current and emerging needs of the Incapacitated
12 Person;

13 (iv) A description of any alternative arrangements previously made
14 by the Alleged Incapacitated Person or which could be made, and
15 whether and to what extent such alternatives should be used in lieu of
16 a Guardianship, and if the Guardian ad Litem is recommending
17 discontinuation of any such arrangements, specific findings as to why
18 such arrangements are contrary to the best interest of the Alleged
19 Incapacitated Person;

20 (v) A description of the abilities of the Alleged Incapacitated Person
21 and a recommendation as to whether a Guardian or Limited Guardian
22 should be appointed. If appointment of a Limited Guardian is
23 recommended, the Guardian ad Litem shall recommend the specific
24 areas of authority the Limited Guardian should have and the
25 limitations and disabilities to be placed on the Incapacitated Person;

26 (vi) An evaluation of the person's mental ability to rationally
27 exercise the right to vote and the basis upon which the evaluation is
28 made;

(vii) Any expression of approval or disapproval made by the Alleged
Incapacitated Person concerning the proposed Guardian or Limited
Guardian or Guardianship or Limited Guardianship;

(viii) Identification of persons with significant interest in the welfare
of the Alleged Incapacitated Person who should be advised of their
right to request special notice of proceedings pursuant to RCW
11.92.150; and

(ix) Unless independent counsel has appeared for the Alleged
Incapacitated Person, an explanation of how the Alleged Incapacitated
Person responded to the advice of the right to jury trial, to independent
counsel, and to present at the hearing on the petition.

1 (h) Within forty-five days after notice of commencement of the Guardianship
2 proceeding has been served upon the Guardian ad Litem, and at least fifteen days
3 before the hearing on the petition, unless an extension or reduction of time has been
4 granted by the Court for good cause, the Guardian ad Litem shall file a report and
5 send a copy of the Alleged Incapacitated Person and his or her counsel, spouse, all
6 children not residing with a notified person, those persons described in (g)(viii) of
7 this subsection, and persons who have filed a request for special notice pursuant to
8 RCW 11.92.150. If the Guardian ad Litem needs additional time to finalize his or her
9 report, then the Guardian ad Litem shall petition the Court for a postponement of the
10 hearing or, with the consent of all other parties, an extension or reduction of time for
11 filing the report. If the hearing does not occur within sixty days of filing the petition,
12 then upon the two-month anniversary of filing the petition and on or before the same
13 day of each following month until the hearing, the Guardian ad Litem shall file
14 interim reports summarizing his or her activities on the proceeding during that time
15 period as well as fees and costs incurred.

16 (i) To advise the Court of the need for appointment of counsel for the Alleged
17 Incapacitated Person within five court days after the meeting described in (a) of this
18 subsection unless (i) counsel has appeared, (ii) the Alleged Incapacitated Person
19 affirmatively communicated a wish not to be represented by counsel after being
20 advised of the right to representation and of the conditions under which court-
21 provided counsel may be available, or (iii) the Alleged Incapacitated Person was
22 unable to communicate at all on the subject, and the Guardian ad Litem is satisfied
23 that the Alleged Incapacitated Person does not affirmatively desire to be represented
24 by counsel.

25 (j) The Guardian ad Litem shall provide the Court with a working copy of the
26 Guardian ad Litem report pursuant to local rule or custom.
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1 (k) The Guardian ad Litem shall have access to all information regarding the
2 Alleged Incapacitated Person. Such information may contain, but is not limited to
3 the following: medical, psychiatric/psychological, financial records or
4 documentation, matters of legal representation of the Alleged Incapacitated Person,
5 and trust accounts for or on behalf of the Alleged Incapacitated Person. By this
6 Order, copies of information regarding the Alleged Incapacitated Person shall be
7 released to the Guardian ad Litem.

8 (l) **Informed Consent/Release of Medical Information:** The Guardian ad Litem
9 shall have the power and authority to serve as SEAN RAYMOND COBB'S personal
10 representative for all purposes of the Health Insurance Portability and Accountability
11 Act of 1996, (Pub. L. 104-191), 45 C.F.R. Section 160-164. The guardian, shall have the
12 power to review, release, consent to the release of, and use as appropriate all
13 education, medical, mental health, psychological, psychiatric, social work records,
14 charts, and evaluations, and any and all other public or private records concerning
15 SEAN RAYMOND COBB.

16 (m) The Guardian ad Litem shall maintain any information as confidential and
17 shall not disclose said information except in oral or written reports to the court, the
18 parties and their counsel.

19 (n) In the event Adult Protective Services has any information pertaining to Sean
20 Raymond Cobb, they shall provide a copy of their file to Thomas Deutsch, Guardian
21 Ad Litem, at his expense, subject to reimbursement by the Estate of the Alleged
22 Incapacitated Person or such other order by the Court, within a reasonable time,
23 provided that APS shall not be required to release the identities of persons making
24 reports under RCW 74.34.030 and shall have the right to reserve other privileged or
25 confidential information as it deems appropriate to protect the Alleged Incapacitated
26 Person, who is named in the record, pending notification that release of the record
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1 has been requested, pursuant to RCW 42.17.330. The APS records initially produced
2 shall be sealed and not otherwise released, except pursuant to Court order and prior
3 notice provided to the Attorney General's Office. The documents released to the
4 GAL are provided for the purpose of assisting the GAL in his investigation and
5 report to the Court. To the extent the GAL uses information from the APS file at a
6 contested guardianship hearing, it shall be the responsibility of the GAL, and not
7 APS, to provide discovery to the other parties. The APS documents released to the
8 GAL shall be used in the guardianship proceedings only, and shall not be further
9 disseminated.

10 **The Court also ORDERS:**

11 A. The Guardian Ad Litem is authorized to make emergency placement decisions
12 and emergency medical decisions with regard to Sean Raymond Cobb in the event
13 this becomes necessary during the pendency of this guardianship action, provided
14 that nothing contained in this Order shall be construed to authorize the Guardian ad
15 Litem to involuntarily commit Sean Raymond Cobb for mental health treatment,
16 observation, or evaluation, if she is unwilling or unable to give informed consent for
17 same unless the proper legal processes are followed.

18 B. The Guardian ad Litem is authorized to investigate the AIP's financial and
19 Real Estate matters, including but not limited to accessing personal financial
20 information, bank accounts, including but not limited to bank accounts into which
21 his Supplemental Security Income benefits have been deposited at Sterling Savings
22 Bank, Social Security disability entitlement and payment records, investment
23 accounts, and title company records.

24 C. Emergency Financial Authority: The Guardian ad Litem is authorized to contact
25 any and all banking or other financial institutions holding the alleged incapacitated
26 person's funds or assets, under whatever name held including under a Power of
27
28

1 Attorney as the attorney in fact or held in trust for the benefit of the Alleged
2 Incapacitated Person, including, but not limited to, Sterling Savings Bank, and obtain
3 from them access to and/or copies of all the alleged incapacitated person's financial
4 records in their possession, including, but not limited to bank statements, computer
5 printouts, cancelled checks, signature cards, and any other information necessary for
6 the purpose of determining whether or not he/she has been the victim of financial
7 exploitation or is otherwise at risk for substantial financial injury.

8 D. Other Orders: _____
9 _____
10 _____
11 _____
12 _____

13 DATED this 28th day of September, 2009.

14 
15 JUDGE/COMMISSIONER

16 Presented by:

17
18 
19 _____
20 Mark Didrickson, WSB #20349
21 Attorney for Petitioners
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Sherry W. Parker, Clerk
Clark County

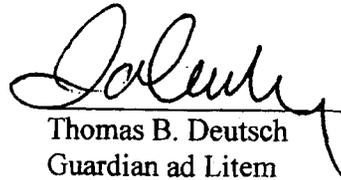
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IN THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF CLARK

In the Guardianship of)
) No. 09 4 00700 5
SEAN RAYMOND COBB,)
) MOTION AND DECLARATION FOR
) ORDER APPOINTING SUBSTITUTE
) GUARDIAN AD LITEM
An Alleged Incapacitated Person.)

COMES NOW Thomas B. Deutsch, appointed Guardian ad Litem for Sean Raymond Cobb and moves the Court for an Order substituting a Guardian ad Litem for Sean Raymond Cobb in this matter. This Motion is based upon the following Declaration and the records and files herein.

DATED this 2 day of 12, 2009.


 Thomas B. Deutsch
 Guardian ad Litem

DECLARATION

Thomas B. Deutsch, the court-appointed Guardian ad Litem for Sean Raymond Cobb, declares as follows:

Motion for Order Substituting Guardian ad Litem
Page 1

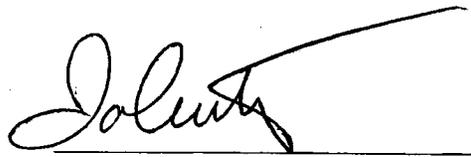


1 I was appointed Guardian ad Litem for Sean Raymond Cobb on September 28, 2009.
2 Shortly thereafter, I met with Mr. Cobb and began my investigation. As I believed it was in his
3 best interests, attorney Julie Payne was appointed to represent Mr. Cobb.
4

5 Early during my investigation, it became apparent there were probate issues that could
6 potentially affect this guardianship action. I believe it would be in the best interests of Sean
7 Cobb for the Court to appoint a Substitute Guardian ad Litem who is an attorney with the
8 expertise necessary to take all factors into consideration, including the probate issues, when
9 making a recommendation herein.
10

11 With the agreement of legal counsel of the parties herein, I respectfully request the
12 Court to enter an Order appointing Dee Grubbs as Substitute Guardian ad Litem for Sean
13 Raymond Cobb and dismissing me as Guardian ad Litem.
14

15 DATED this 2 day of December, 2009.
16

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19 _____
20 Thomas B. Deutsch
21 Guardian ad Litem
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Sherry W. Parker, Clerk
Clark County

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IN THE SUPERIOR COURT OF CLARK COUNTY

In re the Guardianship of:

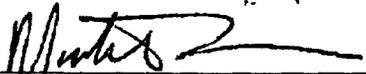
SEAN RAYMOND COBB,
An Alleged Incapacitated Adult.

No. 09-4-0700-5

MOTION FOR NEW TRIAL

COMES NOW Petitioner Christine Scott and Cross-Petitioner Daniel Cobb, by and through their attorney of record, and move the court for a new trial in the above-captioned action. The moving parties allege that they are entitled to a new trial because 1) the alleged incapacitated person, Sean Cobb, was denied his request for a new trial, 2) the court received and considered inadmissible "written" testimony and used such matter in its decision, 3) the trial court improperly asserted testimonial privilege for witness Dr. Serena Meyer, Ph.D., 4) failure of the Guardian ad Litem to perform her statutory duties to investigate the capacities, condition, and needs of the alleged incapacitated person, and 5) failure of the court to apply the appropriate standard of proof to the evidence before it. This motion is based on CR 59, the files and records herein, and the moving parties' Memorandum in Support of Motion for a New Trial, filed with this motion.

Dated: March 1, 2010


Mark Didrickson, WSB #20349,
Attorney for Christine Scott and Daniel Cobb

Global Assessment of Functioning (GAF) Scale

Consider psychological, social, and occupational functioning on a hypothetical continuum of mental health–illness. Do not include impairment in functioning due to physical (or environmental) limitations.

Code (Note: Use intermediate codes when appropriate, e.g., 45, 68, 72.)

- 100 **Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.**
91
- 90 **Absent or minimal symptoms** (e.g., mild anxiety before an exam), **good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns** (e.g., an occasional argument with family members).
81
- 80 **If symptoms are present, they are transient and expectable reactions to psychosocial stressors** (e.g., difficulty concentrating after family argument); **no more than slight impairment in social, occupational, or school functioning** (e.g., temporarily falling behind in schoolwork).
71
- 70 **Some mild symptoms** (e.g., depressed mood and mild insomnia) **OR some difficulty in social, occupational, or school functioning** (e.g., occasional truancy, or theft within the household), **but generally functioning pretty well, has some meaningful interpersonal relationships.**
61
- 60 **Moderate symptoms** (e.g., flat affect and circumstantial speech, occasional panic attacks) **OR moderate difficulty in social, occupational, or school functioning** (e.g., few friends, conflicts with peers or co-workers).
51
- 50 **Serious symptoms** (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g., no friends, unable to keep a job).
41
- 40 **Some impairment in reality testing or communication** (e.g., speech is at times illogical, obscure, or irrelevant) **OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood** (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).
31
- 30 **Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment** (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) **OR inability to function in almost all areas** (e.g., stays in bed all day; no job, home, or friends).
21
- 20 **Some danger of hurting self or others** (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) **OR occasionally fails to maintain minimal personal hygiene** (e.g., smears feces) **OR gross impairment in communication** (e.g., largely incoherent or mute).
11
- 10 **Persistent danger of severely hurting self or others** (e.g., recurrent violence) **OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.**
1
- 0 Inadequate information.

The rating of overall psychological functioning on a scale of 0–100 was operationalized by Luborsky in the Health-Sickness Rating Scale (Luborsky L: "Clinicians' Judgments of Mental Health." *Archives of General Psychiatry* 7:407–417, 1962). Spitzer and colleagues developed a revision of the Health-Sickness Rating Scale called the Global Assessment Scale (GAS) (Endicott J, Spitzer RL, Fleiss JL, Cohen J: "The Global Assessment Scale: A Procedure for Measuring Overall Severity of Psychiatric Disturbance." *Archives of General Psychiatry* 33:766–771, 1976). A modified version of the GAS was included in DSM-III-R as the Global Assessment of Functioning (GAF) Scale.

Man's mental state at issue in guardianship case

Nursing home is seeking third-party intervention



Photo by Troy Wayrynen

Richard Morse, 72, in plaid shirt, listens to his attorney, Jim Senescu, right, ask a witness questions during the opening day of his guardianship trial in Clark County Superior Court Judge Diane Woolard's courtroom on Monday. A jury Friday ruled Morse needs a guardian.

By Laura McVicker

As of Monday, March 28, 2011

A 72-year-old man increasingly displayed odd behavior, eccentric beliefs and signs of hoarding, prompting the concern of several neighbors and his family. Concerned whether he could care for himself, his Vancouver nursing home filed a petition for a third-party professional guardianship, an attorney told jurors Monday.

"We're not alleging Mr. (Richard) Morse is not intelligent," Rachel Brooks, attorney for Vancouver Health and Rehabilitation Center, told jurors. "We are concerned there is a mental illness."

But as jurors heard in opening statements, Morse's attorney, Jim Senescu, painted a much different picture of the case.

There was a motive for the petition, the attorney said. Morse is "land rich but cash poor," and was not keeping up with his bills to stay at the center, Senescu said. To collect, a social worker at the center filed the guardianship petition.

Since this case is about individual rights, Senescu told jurors, his client wanted the case to be decided by a jury, a rare avenue for guardianship cases that, when contested, are typically heard by a judge.

"You are going to hear that he's entitled to the same constitutional rights that we are all entitled to," Senescu said. "We (wanted to) take someone without any agenda to make the decision. You are the judges on the case."

It's apparently the first time in recent memory that 12 Clark County citizens will decide a guardianship case.

In her opening statement, Brooks said Morse was treated at Southwest Washington Medical Center in February 2010 for infected leg wounds. He was discharged to the nursing home, where he has been living ever since.

Brooks said center staff became increasingly concerned about his behavior, which she described as schizophrenic. She said Morse's neighbors around his home in Yacolt described him as a hoarder. Thirty cats had to be put down as a result of his behavior, she said.

Morse had extreme religious beliefs that manifested in his odd behavior, she said, and he also made odd decisions in what to wear — or not to wear — when it was cold outside. She didn't provide specifics.

The center filed the petition for a professional guardian to be appointed for Morse. Under Washington law, a care facility cannot become a guardian, as it would be a conflict of interest.

Odd behavior doesn't mean he is incapacitated, which is the issue that the jury is deciding, Senescu countered in his opening statement. By law, guardians are appointed to handle personal and financial affairs when a person has demonstrated an inability to do so. A person is deemed "incapacitated" when he cannot provide for his safety and health.

Senescu told jurors that his client is not incapacitated, a term that would better describe a person suffering from Alzheimer's disease or dementia or someone in a coma.

Senescu said Morse served 10 years in the Navy as a young man and then worked as a logger. With a strong conviction of individual freedom, Morse wants to keep his rights over his affairs and his property just like any citizen would, Senescu said.

"He's entitled by the United States, by the state of Washington and by Clark County to have those rights," the attorney said.

The trial is expected to conclude Wednesday.

Laura McVicker: 360-735-4516 or laura.mcvicker@columbian.com.

Mark Didrickson, WSB #20349,
Attorney for Appellants,
400 Columbia Street, Suite 110,
Vancouver, WA 98660
(360) 694-4727

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

**COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON**

In re the Guardianship of)
SEAN RAYMOND COBB,)
An Incapacitated Person,)
NO. 40598-9-II
DECLARATION RE SERVICE OF
BRIEF OF APPELLANTS

I, Mark Didrickson, declare:

On November 16, 2010, I served Lorraine Scott, Respondent, in her own capacity and as Guardian of Sean R. Cobb, an incapacitated person, with a copy of the Brief of Appellants herein by causing a full, true, and exact copy of the same to be deposited in the U.S Mail, postage prepaid, for delivery to Lorraine Scott at her address of record, to-wit:

Lorraine Scott
P.O. Box 1118,
Elma, WA 98541

Further, on November 16, 2010, I served Rob McKenna, Attorney-General of the State of Washington, with a copy of the Brief of Appellants herein by causing a full, true, and exact copy of the same to be deposited in the U.S Mail, postage prepaid, for delivery to Rob McKenna, at his address of record, to-wit:

Rob McKenna,
c/o Office of the Solicitor General,
PO Box 40100
Olympia, WA 98504-0100

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

Signed at Vancouver, Washington on November 16, 2011



Mark Didrickson, WSB #20349,
Attorney for Appellants