

NO. 41537-2 -II (cons.)  
NO. 41547-0-II

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

FILED  
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In re: the Matter of CAROLYN K. PLOTKE  
YVONNE POLKOW, Guardian  
Respondent

LEO K. PLOTKE  
Appellant

In re: the Guardianship of CAROLYN K. PLOTKE  
YVONNE POLKOW, Guardian  
Respondent

LEO K. PLOTKE  
Appellant

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Appeal from  
Clark County Superior Court  
Case Nos: 08-2-04996-9  
09-4-00624-8

APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....ii

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

STATEMENT OF CASE.....3

SUMMARY OF ARGUMENT.....17

ARGUMENT

I. The Respondent is Entitled to a Hearing Under the Vulnerable Adult Protection Act 9RCW 74.34) Before Imposition of a Permanent Protective Order.....17

II. Mr. Plotke has not had the hearing required by RCW 74.34.110 and RCW 74.34.120(1).....24

III. The trial court’s Order denying Mr. Plotke a hearing violates RCW74.34.110 *et seq* and warrants reversal and remand.....26

IV. Fundamental Due Process Requires that the Tribunal before which Mr. Plotke appears to present his evidence be a fair and impartial one.....30

V. RCW 7.21.030 Requires a Trial Court to Provide Notice of and a Hearing Before Finding a Person in Contempt.....35

VI. The Trial Court Violated RCW 7.21.030(1) by Holding Mr. Plotke in Contempt and Imposing Sanctions Without a Hearing.....39

VII. The Trial Court’s November 5, 2020 “ORDER ON SHOW CAUSE” Should be Reversed, The Judgment Vacated, and the Sanction Dismissed.....42

VIII. A Trial Court’s Denial of a Motion Under RCW 11.88.120 Without a Hearing Requires Written Findings That the Motion is Frivolous.....45

IX. The Court’s Failure to Comply with RCW 11.88.120 Warrants Remand  
for Further Proceedings.....48

CONCLUSION.....48

APPENDIX.....50

## **TABLE OF AUTHORITIES**

### **Washington Cases**

Bland v. Mentor, 63 Wn.2d.150 (Wash. 1963)

Bill of Rights Legal Foundation v. Evergreen State College 44 Wn. App. 690 (Wash. App. Div.2 1986)

Brown v Dept. of Social and Health Services, 145 Wn. App. 177 ( Wash. App. Div 3 2008)

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Kabbae v. Department of Social and Health Services, 144 Wn. App. 432 (Wash. App. Div 1 2008).

Morris v. Palouse River and Coulee City RR, 149 Wn. App. 366 (Wash App. Div 3 2009)

Morse v. Antonellis, 149 Wn.2d 572 (Wash 2003)

Perry v. Rado, 155 Wn.App.626 (Wash. App. Div 3 2010)

State v. Jordan 146 Wn. App. 395 (Wash. App. Div 2 2008)

State v. Martin 137 Wn. 2d 149 (Wash 1999)

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RCW 74.34.110

RCW 74.34.120

RCW 74.34.130

RCW 74.34.135

**TABLE OF AUTHORITIES (cont.)**

RCW 7.21.010

RCW 7.21.030

RCW 7.21.050

RCW 11.88.120

**Other Authorities**

Webster's Third New International Dictionary, pg. 1044 (1993)

## **ASSIGNMENTS OF ERROR**

### **Case No. 08-2-04996-9 (VAPO)**

1. The trial court erred in denying Mr. Plotke's Motion to Terminate the Vulnerable Adult Protection Order (hereinafter VAPO) without allowing him to present evidence in a hearing, as provided for in RCW 74.34.135; and 74.34.120.
2. The trial court erred by denying Mr. Plotke's Motion for an Evidentiary hearing in Support of a Motion to Terminate the Vulnerable Adult Protective Order, as provided for by RCW 74.34.110; 74.34.120(1) & (5)(a) and as previously authorized in the Court's order of July 1, 2009.

### **Case No. 08-4-00624-8 (Guardianship)**

3. The trial court erred by holding Mr. Plotke in contempt of court and incarcerating him on November 5, 2010, without affording him a hearing and the opportunity to present evidence and controvert the allegations asserted against, in violation of RCW 7.21.010 *et seq.*
4. The trial court erred by denying Mr. Plotke's Motion for Show Cause to Appoint a *Guardian ad Litem*, pursuant to RCW 11.88.120, by failing to comply with the mandatory provisions of RCW 11.88.120(3)(c).

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does the Abuse of Vulnerable Adult Act, (Chapter 74.34. RCW),

(hereinafter AVA), require that a Respondent be afforded the opportunity to have an evidentiary hearing, to present witnesses and to testify in response to a petition filed pursuant to RCW 74.34.110? [Assignments (1) and (2)]

2. If RCW 74.34.110 and 74.34.120(1) require a hearing before the imposition of a Permanent Vulnerable Adult Protection Order (hereinafter VAPO), did Mr. Plotke have the hearing required by RCW 74.34.110 and 74.34.120(1)? [Assignments (1) and (2)]

3. Did the trial court's denial of Mr. Plotke's Motion to Terminate the Permanent VAPO/and in the alternative Motion for an Evidentiary Hearing in Support of a Motion to Terminate Protective Order (hereinafter Motion to Terminate) violate RCW 74.34.110 and 74.34.120(1) & (5)(a) warranting reversal, remand and reassignment? [Assignments (1) and (2).]

4. If a violation of RCW 74.34.110 and 74.34.120(1) warrants reversal and remand to the Superior Court for further proceedings, does fundamental due process require that this and related matters (*infra*) be assigned to a new judicial department? [Assignments (1)-(4)].

5. Does RCW 7.21.030 require the trial court to provide notice of and a hearing before holding a person in contempt of court and imposing remedial sanction?[Assignment 3]

6. Did the trial court comply with RCW 7.21.030 when it found Mr. Plotke in contempt of court without affording him the opportunity to present evidence at a hearing? [Assignment 3].
7. Are reversal of and vacating the Order of Contempt and Dismissal of the sanctions imposed the appropriate remedy for the violations of RCW 7.21.030(1) in this case? [Assignment 3]
8. Does RCW 11.88.120(3) require the trial court to determine that the petitioner's motion is frivolous and make written findings of fact when denying a motion without holding a hearing? [Assignment 4].
9. Does a Court's failure to comply with the mandatory provisions of RCW 11.88.120 warrant remand for further proceedings? [Assignment 4].

### **STATEMENT OF CASE**

Leo Plotke [Appellant and hereinafter "Mr. Plotke"] appeals orders entered by the Clark County Superior Court against him in two separate but related matters, which have been consolidated for this Court's review. Case No. 08-2-04996-9 involves a Permanent Vulnerable Adult Protection Order (hereinafter VAPO case) entered against him under Adult Vulnerable Protection Act (hereinafter AVA) RCW chapter 74.34. Case No. 08-4-00624-8 involves the Guardianship established for Mrs. Plotke

(hereinafter Guardianship case). The VAPO and Guardianship cases were consolidated into Court of Appeals Case No. 41437-2-II on December 10, 2010 by order of the Court Clerk.

**VAPO—Case No. 08-2-0-4996-9**

In Case No. 08-2-04996-9 [VAPO case], Mr. Plotke appeals:

1. The trial court's November 17, 2010 Order Denying his Motion to Terminate the Vulnerable Adult Protection Order (hereinafter Motion to Terminate), RP Vol. 2 [11/17/10] 309-310, CP 60 pg.366; CP 66 pg. 392, App.1.
2. In the same order referenced *supra*, the trial court also denied Mr. Plotke's alternative Motion Seeking an Evidentiary Hearing, (hereinafter Motion for Hearing) as provided for by RCW 74.34.110 and RCW 74.34.120(1), and Motion to Vacate the July 1, 2009, Order re Evidentiary Hearing pursuant to CR60(b)(3). RP Vol 2 [11/17/10] 310.

**Guardianship—Case No. 08-4-00624-8**

Mr. Plotke also appeals orders that the Superior Court entered in the Guardianship Case No. 08-4-00624-8 as follows:

3. Judgment on Contempt, RP Vol. 2 [11/05/10] 276 – 295 at 289 – 291; CP 154 pg. 1134, App. 2-5, based on Orders to Show Cause entered October 6, 2010, RP Vol.2[10/06/10] 261-268, CP 138 pg. 997; and October 15, 2010, RP Vol.2 [10/15/10] 268-276, CP 145 pg. 1016.
4. Order Denying Mr. Plotke’s Motion to Show Cause for the Appointment of a *Guardian ad Litem*, RP Vol.2 [11/17/10] 296-327 at 316; CP 164 p.1169, App. 6.

The issues raised for appeal in Appellant’s Notice of Appeal, Case no. 08-4-00624-8, numbered issues 3 and 4 concerning the December 3, 2010, hearing are moot and will not be briefed.

The events leading up to this appeal began on August 15, 2008. On that date, Mr. Plotke appeared in Clark County Superior Court as the Respondent in a hearing to determine whether the Temporary Vulnerable Adult Protection Order entered by the Court on August 6, 2008, would be made a permanent order. RP Vol. 1 [08/15/08] 1. The petition resulting in the August 6, 2008 Temporary Order concerned Mr. Plotke’s wife of 58 years, Carolyn Plotke [hereinafter “Mrs. Plotke”]. RP Vol. 2 [06/19/09] 209. Clark County Sheriff’s Detective Kevin Harper was the Petitioner in

this matter. RP Vol. 1 [08/15/08] 2–3.

The Petition for a Temporary VAPO against Mr. Plotke was filed and a Temporary Order entered on August 6, 2008. RP Vol.1 [8/15/08] 10, CP 1 pg.1, CP 3 pg. 31. Mr. Plotke was personally served with the Notice of Appearance for August 15, 2008 on the Motion to Make the Temporary VAPO permanent hearing on August 7, 2008. RCW 74.34.120 (5) (a-b), RP Vol. 1 [08/15/08] 10, CP 7 pg. 37.

The evidence presented in support of the Petition consisted of the testimony of Detective Harper (RP Vol. 1 [08/15/08] 3–19), and Samantha Petshow, a supervisor with Adult Protective Services (RP Vol. 1 [08/15/08] 26–33), and photographs and exhibits that Petitioner made a part of the record. RP Vol. 1 [08/15/08] 29.

At the conclusion of Detective Harper’s testimony, the Court advised Mr. Plotke that he could question Detective Harper. RP Vol. 1 [08/15/08] 20. The Court also advised Mr. Plotke that he would have an opportunity to present his case at a later time. RP Vol. 1 [08/15/08] 20. It was at this point that Mr. Plotke advised the Court that he could not understand Detective Harper’s testimony because he was hard-of-hearing (Id.). The Court took a break in the proceedings to provide Mr. Plotke

with a set of earphones. RP Vol. 1 [08/15/08] 21. The Court had Detective Harper “summarize” the testimony that he had previously proffered. (RP Vol. 1 [08/15/08] 22 – 23). Mr. Plotke did not ask Detective Harper any questions.<sup>1</sup>

Mr. Plotke did not object to the admission of any of the exhibits (RP Vol 1 [08/15/08] 29); did not cross-examine the Petitioner’s witnesses (RP Vol 1 [08/15/08] 23, 33); did not testify, and did not present any evidence in his own behalf at the hearing.

At the conclusion of Petitioner’s case, Counsel for Petitioner “requested a few minutes of argument.” RP Vol.1 [08/15/08] 33. The Court indicated that it needed to give Mr. Plotke an opportunity to testify and asked Mr. Plotke if he wanted to. RP Vol. 1 [08/15/08] 33. Mr. Plotke advised the Court that he wanted to testify, and the Court administered the oath to him. Id.

The Court then advised Mr. Plotke that because Detective Harper had expressed the belief that there was probable cause for the issuance of

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<sup>1</sup> Co-Respondent Kathleen Vanderpool, Mrs. Plotke’s daughter, also did not ask questions or challenge the evidence. (RP Vol. 1 [08/15/08] 25). She advised the Court that she did not understand the proceedings and wanted to know if she needed counsel. Id. The Court acknowledged that although Ms. Vanderpool did have an attorney, it could not advise her regarding questioning Detective Harper, but would hold her to the same standard as she would other attorneys. Id.

criminal charges, she advised him of his Constitutional rights pursuant to *Miranda v. Arizona*, 384 US 436 (1966). RP Vol. 1 [08/15/08] 34-35. In response to the Court's inquiry, Mr. Plotke indicated that he would like the Court to appoint an attorney for himself and his wife. RP Vol.1 [08/15/08] 35. The Court determined that Mr. Plotke was eligible for court-appointed counsel to provide him with advice concerning whether he should testify under the circumstances. RP Vol. 1 [08/15/08] 38.<sup>2</sup>

The record reflects that the Court appeared to be inclined to continue the case to allow Mr. Plotke sufficient time to discuss his options with counsel regarding whether he should testify. RP Vol. 1 [08/15/08] 38. However, Mr. Senescu, Petitioner's counsel, argued that the Court could and should enter a permanent order based on the preponderance of the evidence, and that Mr. Plotke could "always come back and review it at any date." Id.

The Court stated that it had "...adequate grounds on the preponderance of the evidence to sign the Permanent Order of Protection. And at some time later, Mr. Plotke or Ms. Vanderpool if you want to be heard on this, we can reopen the hearing. But you need to consult with a

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<sup>2</sup> Criminal charges did not arise as a result of this matter, and Mr. Plotke was not charged with a crime. (RP Vol. 2 [11/17/10] 308).

lawyer first...” RP Vol. 1 [08/15/08] 40, lines 3-7.

The Court entered the Permanent VAPO against Mr. Plotke, to be effective until August 15, 2013. RP Vol. 1 [08/15/08] 40, 41. It also restrained Mr. Plotke from approaching within 1000 feet of any facility that Mrs. Plotke resided in; and from having any contact with Mrs. Plotke – either personally, by telephone, or through any third party. Id.

However, the Court also told Mr. Plotke that if he wanted “to be heard” at a future time, after consulting with counsel regarding his options, she would reopen the case and take the evidence. RP Vol. 1 [08/15/08] 40.

The Court also inquired as to the status of the Petition for Guardianship under RCW 11.88 and was told that a Guardian Ad Litem had been appointed and had started his investigation. RP Vol. 1 [08/15/08] 40.

Between August 2008 and June 2009, the issue of Mr. Plotke having an evidentiary hearing regarding the VAPO was discussed in open court on several occasions. RP Vol. 1 [02/12/09] 100; RP Vol. 1 [02/27/09] 135-137; RP Vol. 1 [04/22/09] 155.

On June 12, 2009, Mr. Plotke filed a Motion to Terminate the

Protective Order, and in the Alternative Requested a Hearing to Present Evidence, pursuant to RCW 74.34.120. CP 35 pg. 270.

The parties appeared on Mr. Plotke's Motion to Terminate the Protective Order on June 19, 2009. RP Vol. 2 [06/19/09] 188-189.

Before Ms. Grubbs began her presentation, Ms. Greenen filed a written "Objection to the Motion to Terminate" that she had prepared but had not provided to the Court or counsel prior to the hearing. RP Vol. 2 [06/19/09] 195. She also objected to the hearing continuing. RP Vol. 2 [06/19/09] 192. Ms. Greenen essentially argued that there was no reason for there to be a hearing, but if the Court was considering scheduling a hearing, it should impose attorney fees in advance against Mr. Plotke, before allowing a hearing to even proceed. RP Vol. 2 [06/19/09] 195-198. The Court advised that there would be "no trial that afternoon," and that it would continue the matter – over Ms. Grubbs' objections. Id.

Ms. Grubbs advised the Court that Mr. Plotke wanted to waive his Constitutional rights and testify on his own behalf. RP Vol. 2 [06/19/09] 209. She also advised the Court that Mr. Plotke wanted to cross-examine the witnesses who had appeared in the "original hearing". RP Vol. 2 [06/19/09] 212. The Court responded by indicating that "if I [Judge

Woolard] do that, perhaps we're going to need attorneys' fees up front.”  
Id., lines 17-18. Ms. Greenen requested \$20,000.00. Ms. Grubbs  
objected. Id., 212-213.

The trial court required Mr. Plotke to deposit \$20,000.00 into Ms.  
Greenen's trust account, as a condition precedent to her willingness to  
schedule a hearing. The Court stated:

“Judge: Okay. Twenty-thousand dollars up front and I'll schedule  
a hearing. And it will go into trust so we're not – so we're  
reserving – you know – the fact that it's there. I'll put it in Ms.  
Greenen's trust...” RP Vol. 2 [06/19/09] 213, lines 18 – 21.

In that regard, the Court further indicated that the \$20,000.00  
deposit had to be made to Ms. Greenen's trust account, and: “...Once that's  
done you [referring to Ms. Grubbs] can do the notice to set for trial.” RP  
Vol. 2 [06/19/09] 232.

On October 29, 2010, Mr. Plotke filed the Motion to  
Terminate/Motion for Hearing. CP 60 pg. 366. In support of the renewed  
Motions, Ms. Grubbs attached exhibits reflecting that DSHS had  
dismissed the investigation and allegations of neglect that it had initiated  
against Mr. Plotke, independent of the Clark County proceedings, based  
on the discovery that Ms. Grubbs presented to the DSHS on behalf of Mr.  
Plotke. RP Vol. 2 [11/17/10] 309-312, CP 60 pg. 366.

On November 17, 2010, the parties appeared before the Court to argue Mr. Plotke's Motion to Terminate the Protective Order, and in the alternative, a Motion to have an Evidentiary Hearing in support of the Motion to Terminate. RP Vol. 2 [11/17/10] 299-310, CP 162 pg. 1167.

Also before the Court was Mr. Plotke's Motion to Show Cause for the Appointment of a Guardian *ad Litem* in the Guardianship case. RP Vol. 2 [11/17/10] 309, which had been filed October 13, 2010. CP 140 pg. 1001.

The Court denied both Mr. Plotke's Motion to Terminate and his Motion requesting an evidentiary hearing. In denying the Motion to Terminate, the Court indicated that the DSHS dismissal of proceedings against Mr. Plotke were not sufficient to warrant a "further hearing". RP Vol. 2 [11/17/10] 309. The Court found that "...the fact that DSHS modified their findings did not rise to the level of new information that would cause me [Judge Woolard] to reopen the case and have a further hearing." Id.

Ms. Grubbs had pointed out there had never been an evidentiary hearing with respect to the Vulnerable Adult Protection Order. RP Vol. 2 [11/17/10] 304. Mr. Plotke did not testify at this hearing and did not

present any evidence.

On October 13, 2010, Mr. Plotke filed the Motion for Show Cause for the Appointment of a Guardian ad Litem, pursuant to RCW 11.88.120. CP 140 pg.1001. In support of his motion Mr. Plotke filed a declaration alleging that Mrs. Plotke had experienced significant improvement in her mental and physical condition. Mr. Plotke expressed concern that Ms. Polkow, the Guardian was not accurately advocating on behalf of Mrs. Plotke for restoration of her rights. Ms. Grubbs argued that the allegation met the criteria under RCW 11.88.120 for the appointment of a Guardian Ad Litem to investigate and make recommendations RP Vol. 2 [11/17/10] 310-311.

The last neuro-psychological examination of Mrs. Plotke was performed after she was hospitalized in 2008. Id. Finally, Mrs. Plotke had qualified for Medicaid over a year previously, yet Mr. Plotke had to pay the higher private rate that Ms. Polkow charged, because she did not accept Medicaid patients. CP 140 pg. 1001.

Ms. Grubbs argued that a Guardian Ad Litem should be appointed; Ms. Greenen argued that there was no reason to change the status quo. RP Vol. 2 [11/17/10] 316.

The Court denied Mr. Plotke's Motion for Show Cause to appoint a Guardian *ad Litem*, under to RCW 11.88.120, orally "finding" that good cause had not been shown. The court did not make a written finding that Mr. Plotke's motion was frivolous and did not explain in writing why the motion was frivolous. RP Vol. 2 [11/17/10] 316, CP 164 p.1169, App.6.<sup>3</sup>

Mr. Plotke also appeals the Court's Order holding in Contempt for allegedly failing to comply with a Memorandum Agreement between the parties in July 2009. In that regard, on September 30, 2010, Ms. Greenen sought and obtained an Order for Show Cause to hold Mr. Plotke in Contempt. RP Vol. 2 [10/06/10] 261-267; CP 131 pg. 977. The Motion for Show Cause had been filed in support of the *ex parte* order. CP 130 pg.956.

Ms. Grubbs requested but was not granted a continuance of the Contempt hearing held October 6, 2010. A hearing was set for October 15, 2010, to give her an opportunity to meet with Mr. Plotke, and prepare a response to the court's determination that he was in contempt for failing to comply with the memorandum agreement. RP Vol. 2 [10/06/10] 265-267,

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<sup>3</sup> The Court told Mr. Plotke that he had credibility problems before it, and she believed that he had not filed the motions in good faith, but rather in retaliation for her finding him in contempt. (RP Vol. 2 [11/17/10] 316).

CP 138 pg. 997.

Mr. Plotke was not in court for the October 6, 2010 hearing. RP Vol. 2 [10/06/10] 265-266.

At the October 6, 2010, hearing, the trial court ordered another hearing for October 15, 2010, but it should not be construed as an extension of time because had Ms. Greenen “mark up” an Order “finding” that Mr. Plotke “failed to comply” [with the Agreement] (*parenthetical added*). RP Vol. 2 [10/06/10] 267. The Court indicated that it would incarcerate Mr. Plotke and that he would remain in jail until the contempt was satisfied, if he was found in contempt. Id.

At the October 15, 2010 hearing, Ms. Grubbs advised the Court that although she recognized that Mr. Plotke had already been found in contempt, he still wanted the opportunity to show that he had a basis to dispute the Memorandum of Agreement (CP 97 pg. 795) and Ms. Polkow’s interpretation of the Memorandum of Agreement, but there had not been adequate time to review the records and obtain additional evidence to properly controvert the allegations. RP Vol. 2 [10/15/10] 271. Mr. Plotke was present for this hearing but did not testify, and did not present evidence beyond the information contained in the Declaration in

Support of his Motion. CP 141 pg.1006.

Based on Petitioner's evidence only, the Court gave Mr. Plotke until November 5, 2010, within which to pay "Sixty-four thousand" dollars. RP Vol. 2 [10/15/10] 275. The Court stated that it would "...be very happy to put Mr. Plotke in custody until it's paid." RP Vol. 2 [10/15/10] 275, lines 21-22).

At the November 5, 2010 appearance, the Court reiterated that she had already found Mr. Plotke in contempt and ordered him to jail. RP Vol. 2 [11/05/10] 289, lines 22-23-290; ordered him to pay \$68,592.73 [of which \$4,692.15 were for attorney fees], and ordered him to be incarcerated until he had paid at least \$50,000.00 of the Judgment. RP Vol.2 [11/05/10] 290. App. 5 .

The court put Mr. Plotke under oath and asked him questions relative to the amount owed and his signature on the memorandum agreement, reiterated her previous finding of contempt, sternly lectured Mr. Plotke, and ordered attorney fees and then entered into discussion with Ms. Greenen regarding the amount of attorney fees the court should order. RP Vol. 2 [11/05/10] 289-291. Mr. Plotke was then taken to jail. Id. at 295.

## SUMMARY OF ARGUMENT

All Mr. Plotke seeks from this appeal is an opportunity to exercise his statutory due process rights by have a hearing and presenting his case before a fair and impartial tribunal, and he seeks relief accordingly. Mr. Plotke seeks reversal of the trial court's orders denying him a hearing in the VAPO matter. He also seeks to reverse and vacate the contempt order and dismiss the sanctions entered in the Guardianship case because he was denied a hearing as well as remanding the denial of the Guardian *ad litem* motion.

## ARGUMENT

### **1. THE RESPONDENT IS ENTITLED TO A HEARING UNDER THE VULNERABLE ADULT PROTECTION ACT (RCW 74.34) BEFORE IMPOSITION OF A PERMANENT PROTECTIVE ORDER**

The Abuse of Vulnerable Adults Act (hereinafter AVA) “Chapter 74.34 RCW was enacted to protect vulnerable adults from abuse, financial exploitation and neglect. RCW 74.34.110. App. 7. Brown v Dept. of Social and Health Services, 145 Wn.App. 177, 182 (2008). It vests the Superior Court with the authority to “order relief as it deems necessary for the protection of the vulnerable adult.” RCW 74.34.130(1), App.9.

Because of the important issues at stake, the AVA anticipates and provides that due process will be afforded to all interested parties, especially the vulnerable or potentially vulnerable adult and the respondent to the petition.

RCW 74.34.120(1) states:

“RCW74.34.120 Protection of vulnerable adults – hearing.

10. The court shall order a hearing on a petition under RCW74.34.110 not later than 14 days from the date of the filing the petition.

11. Personal service shall be made upon the respondent not less than 6 court days before the hearing. When good faith attempts to personally serve the respondent have been unsuccessful, the court shall permit service by mail or by publication...

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(4) If timely service under subsections (2) and (3) of this section cannot be made, the court shall continue the hearing until the substitute service approved by the court has been satisfied.

(5)(a) A petitioner may move for temporary relief under Chapter 7.40 RCW. The court may continue any temporary order for protection granted under Chapter 7.40 RCW until the hearing on a petition under RCW74.34.110 is held...

(b) Written notice of a request for temporary relief 'must be provided to the respondent, and to the vulnerable adult if someone other than the vulnerable adult filed the petition...'. App. 8.

RCW 74.34.135 provides for hearings when someone other than the vulnerable adult or the vulnerable adult's guardian filed the petition for protection. RCW 74.34.135(3), states as follows:

“(3) At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence.” App. 10.

A plain reading of the due process provisions of the AVA, reflect that before the Superior Court imposes a Permanent Vulnerable Protection Order [hereinafter “VAPO”] upon a Respondent, the Respondent, the Vulnerable Adult, and other interested parties are entitled to notice of and a hearing, complete with an opportunity to present witnesses and evidence.

RCW 74.34.120(2) requires personal service of a Notice of Hearing under RCW 74.34.110 at least 6 days in advance of the hearing, unless good faith attempts have been made at service and have been unsuccessful, in which case the court may authorize service by mail or by publication.<sup>4</sup> Clearly, the court has an interest in hearing what the various parties have to say before an order is imposed.

Similarly, a written notice of a Request for a Temporary Order under RCW 74.34.120(5)(a) must also be provided to the Respondent, except where the Respondent cannot be served with the Notice. RCW 74.34.120(5)(b) The court must be advised of the efforts that were made

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<sup>4</sup> The AVA provides for certain exceptions to the requirement that the parties be personally served, which do not apply in this case. There is no provision for denying a hearing under the statute where none has been held.

to serve the Respondent, and the reasons why prior notice should not be required. Id. Although this proceeding can proceed in a more summary fashion than the hearing under section (1), the statute still contemplates timely notice to the Respondent.

In addition, RCW 74.134.135(2) requires that Notice of a Hearing regarding whether a Vulnerable Adult is incapacitated must be personally served on a Respondent at least 6 days prior to the hearing, unless good faith attempts at service have been unsuccessful. In that event, service by mail or by publication may be authorized by the court upon a showing. Whether a hearing under RCW 74.134.135 is held is within the discretion of the court.

However, if a hearing is held, the court “shall give the respondent, the petitioner, and in the court’s discretion, other interested persons” an opportunity to testify. RCW 74.34.135. If a hearing is going to occur, the Respondent is entitled to notice and must be allowed to testify and present evidence.

When the plain meaning of the AVA is taken into consideration, it is clear the statute requires that the Respondent be afforded the opportunity to be heard and present evidence, in the context of whether a

permanent VAPO should be entered against a Respondent, and Mr. Plotke is entitled to such a hearing.

“Statutory interpretation is a question of law” that the Court of Appeals reviews *de novo*. Western Telepage, Inc. v. City of Tacoma, 140 Wash.2d 599, 607, 998 P2d 884 (2000). This court’s primary goal in interpreting statutes is “to ascertain and give effect to legislative intent.” State v. Pacific Health Center, Inc., 135 Wash.App. 149,158-159 (2006). If the statute’s meaning is plain on its face, we give effect to that plain meaning. Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9 – 10, 43 P.3d 4 (2002). A statute is ambiguous if it has two or more reasonable interpretations, but not “merely because different interpretations are conceivable.[citations omitted.] If a statute is ambiguous, we may resort to legislative history.” Campbell & Gwinn, 146 Wash.2d at 12, 43 P.3d 4.” Kabbae v. Department of Social and Health Services, 144 Wn. App. 432, 440 (2008).

If a statute’s meaning is plain on its face, the Court of Appeals “must give effect that that plain meaning as an expression of legislative intent.” Campbell & Gwinn, supra, 146 Wn.2d at 10. If the “statute is ambiguous or unclear, then the Court of Appeals “ascertains a statutory provision’s plain meaning by examining the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.” Morris v. Palouse River and Coulee City RR, 149 Wn. App. 366, 371 [citing City of Olympia v. Debrick, 156 Wash.2d 289, 295 (2006).]

“Where a statute is unambiguous, the court assumes the legislature

means what it says and will not engage in statutory construction past the plain meaning of the words.” Morris v. Palouse River and Coulee City RR, 149 Wn.App. at 371.

The issue before the court in “Morris” related to the interpretation of a statute that required personal service on railroads and other corporations in Washington. The trial court’s refusal to set aside a default judgment was reversed. The court held that the defendant had not been served in Washington, and the affidavits supporting the Motion for Default that was originally granted, failed to explain why service could not be obtained within the state. As a result, the statute at issue had not been followed, and the service was void. As a result, the trial court did not have jurisdiction, and by denying the petitioner’s Motion to Vacate the Judgment pursuant to CR60(b)(5), it abused its discretion.

“Unless a clear contrary legislative intent exists, the word “shall” is a “mandatory directive.” Morris v. Palouse River and Coulee City RR, 149 Wn. App. at 371. In a statute, the word “means that some action is mandatory.” Perry v. Rado, 155 Wn. App. 626, 642 (2010).

There is no ambiguity in the language of the Notice and Hearing provisions of RCW 74.34.110 and 74.34.120 (1). Furthermore, the terms

are mandatory.

The plain language of the AVA reflects the importance of the evidentiary hearing in the VAPO process. With the exception of circumstances that are not applicable in this case, the AVA requires that the respondent receive personal service of the notice of a hearing, and is clearly the preferred method of service under the statute. RCW 74.34.120(2) Furthermore, the trial court is required to schedule a hearing within 14 days of the filing of the petition. RCW 74.34.120(1). The court has the discretion to enter a temporary Order without a hearing [RCW 74.34.120(5)(b)], but the order is good only until such time as the court holds a hearing on the petition. RCW 74.134.120(5)(a).

A plain definition of a “hearing” is:

...3: opportunity to be heard, to present one’s side of a case...(the worst of men is entitled to a~... Webster’s Third New International Dictionary, pg. 1044 (1993)

By the plain meaning of the statute, a hearing, and the opportunity to be heard before a permanent VAPO is entered against a respondent is mandatory. Mr. Plotke is entitled to have a hearing and present evidence on his own behalf. The next question to be addressed is whether Mr. Plotke has been afforded the hearing mandated by the statute.

**2. MR. PLOTKE HAS NOT HAD THE HEARING REQUIRED BY RCW 74.34.110 AND RCW74.34.120(1).**

This case was initiated and a temporary protective order entered against Mr. Plotke on or about August 6, 2008, pursuant to RCW 74.34.120(5)(a) &(b). RP Vol.1[08/15/08] 1. Mr. Plotke appeared at the August 15, 2008 hearing, having been personally served to appear on that date. [RP Vol.1 [08/15/08] 10. The hearing was scheduled to determine whether a permanent order should be entered pursuant RCW 74.34.110 and 74.34.120. At the conclusion of the August 15, 2008 hearing, the Court entered a permanent order against Mr. Plotke, which was to be effective until August 15, 2013. At the hearing, Mr. Plotke was not represented by counsel; did not challenge any of the Petitioner's evidence; and did not present any evidence or witnesses on his own behalf. [RP Vol.1 [08/15/08] 23, 33, 29].

Because Detective Harper testified that a criminal investigation had been initiated, the trial court advised Mr. Plotke of his Constitutional rights, and he did not testify at the August 15, 2008 proceeding. RP Vol. 1 [08/15/08] 34 – 35.

Although the trial court made the temporary order permanent, Judge Woolard also advised Mr. Plotke that he would be entitled to reopen

the matter and testify at “later time.” RP Vol.1[08/15/08] 40. Unfortunately, as of November 17, 2010, Mr. Plotke had yet to be provided with the opportunity to present evidence or witnesses, or testify on his own behalf, against the VAPO, required by RCW 74.34.110 and 74.34.120(1) and (5).

Prior to November 17, 2011, Ms. Grubbs filed a motion to Terminate the VAPO and in the alternative, a Motion for an Evidentiary Hearing on June 12, 2009 and a hearing was scheduled for June 19, 2009. CP 25 pg. 89. The parties appeared, and Ms. Grubbs advised the court that Mr. Plotke was ready to waive his right to remain silent and wanted to testify on his own behalf, and that he also wanted to call witnesses and present evidence.

However, the trial court did not allow the hearing to proceed. RP Vol. 2 [06/19/09] 188 – 189, 209, 212,192. By the end of the proceeding the trial court required Mr. Plotke to deposit \$20,000.00 into opposing counsel's trust account before it would schedule an RCW 74.34.120(1) hearing. RP Vol. 2 [06/19/09] 213. The court entered the “Order re Evidentiary Hearing”, denying Mr. Plotke’s Motion for an evidentiary hearing on July 1, 2009. CP 35 pg. 270.

On October 29, 2010, Ms. Grubbs filed another Motion to Terminate the Protective Order and in the Alternative to Obtain an Evidentiary Hearing or to Vacate the July 1, 2009 “Order re Evidentiary Hearing”, pursuant to CR60(b)(3), based on the fact that the Department of Social and Human Services dismissed the allegations that it had initiated against Mr. Plotke, based upon further investigation. RP Vol.2 [11/17/10] 299, CP 60 pg. 366. As of October, 2010, when the motion at issue was filed, Mr. Plotke had not yet been afforded the opportunity to present evidence, testify on his own behalf or call witnesses to challenge the allegations that resulted in the imposition of the permanent VAPO, as required under RCW 74.34.120. A hearing was scheduled for November 17, 2008.

**3. THE TRIAL COURT'S ORDER DENYING MR. PLOTKE A HEARING VIOLATES RCW74.34.110, *et seq.* AND WARRANTS REVERSAL AND REMAND.**

The trial court's November 17, 2010 Order Denying Mr. Plotke's Motion to a hearing and to present evidence in the Protective Order matter is contrary to the plain-language and meaning of the AVA. The trial court's Order should be reversed and this matter remanded to the Clark County Superior Court to conduct a hearing and afford Mr. Plotke the opportunity to present evidence on his own behalf before a fair and

impartial tribunal. This is a question of simple due process.

The AVA vests the Superior Court with broad discretion to “order relief as it deems necessary for the protection of the vulnerable adult.” RCW 74.34.130. This statute provides a non-exclusive list of remedies that the court has available to it. However, the AVA requires that the vulnerable adult and the Respondent both be afforded the opportunity to have a hearing and to present evidence on the question of whether a Vulnerable Adult Protection Order should be imposed [RCW 74.34.110 and RCW 74.34.120(1-3)]. The AVA presumes that the remedies contained in the orders and decisions that the court makes regarding the modification or termination of an Order will be based on evidence.

This Court defers to the trier of fact regarding findings of fact on issues of fact. “In evaluating the persuasiveness of the evidence and the credibility of witnesses, we [the Appellate Court] must defer to the trier of fact. Burnside v. Simpson Paper Company, 123 Wash.2d 93, 108, 864 P.2d. 937 (1994), parenthetical added. “[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal. Morse v. Antonellis, 149 Wash.2d 572, 574, 70P.3d.125 (2003).” Endicott v. Saul, 142 Wn.App.899, 909 (2008) It is the province of the trial court to make

witness credibility determinations and to weigh and evaluate the evidence that is presented. Bland v. Mentor, 63 Wn.2d.150, 154 (1963).

The Court of Appeals reviews a trial court's decision following a bench trial to determine whether the trial court's findings are supported by substantial evidence and whether the findings support the conclusions of law. Endicott, 142 Wn.App. at 909. In reviewing the trial court's decision after a bench trial, the Court of Appeals “need only consider evidence favorable to the prevailing party.” Bland, 63 Wash.2d at 155. This is the general rule but presumes that the court allowed the petitioner and respondent to present evidence.

Before all of the foregoing analysis and weighing of evidence can occur, there has to be a hearing and an opportunity for each party to present the evidence that the court will weigh.

Mr. Plotke has never been afforded the opportunity to present a case, call witnesses, or otherwise challenge the allegations asserted against him and which resulted in the imposition of the Permanent Vulnerable Adult Protection Order. The Superior Court's November 17, 2010 summary denial of Mr. Plotke's Motion to Terminate/for an Evidentiary Hearing did not comply with the hearing requirements of RCW74.34.110

and 74.34.120. Effectively, the trial court's denial of Mr. Plotke's Motion to Terminate and in the Alternative, Motion for an Evidentiary Hearing has resulted in a permanent VAPO being entered against him without his ever being heard on the matter.

The trial court's decision on a matter, after hearing the evidence presented by the parties and based on the evidence presented, is generally within the discretion of the trial court to make and will be disturbed on appeal only for an abuse of discretion. [Perry v. Rado, 155 Wn.App.626, 642 (2010)].

The decision whether to conduct a hearing and to allow for the presentation of evidence under the AVA on a petition for an order of protection is not discretionary, it is mandatory. [RCW74.34.110 and RCW74.34.120]. Where a court denies a respondent the opportunity to present evidence to defend against the imposition of a VAPO, the denial does not comply with the statutory scheme provided for under the AVA. Such a denial is an abuse of the court's discretion.

The Permanent Order was entered against Mr. Plotke at the hearing on whether to make the previously-entered Temporary Order permanent. It was Mr. Plotke's first court appearance; it was the first hearing in the

matter involving more than the Petitioner; and Mr. Plotke did not have an opportunity to present evidence or testimony at that time, although the Court did make the order permanent.

In making the Order permanent, the Court correctly advised Mr. Plotke that he could have a hearing at a later time if he so chose. [RP Vol. 1 [08/15/08] 40. The trial court's summary denial of Mr. Plotke deprives Mr. Plotke of the hearing that he is entitled to by statute.

The trial court's order warrants reversal and remand to the Clark County Superior Court with instructions that Mr. Plotke be allowed to present at a fair and impartial hearsay.

**4. FUNDAMENTAL DUE PROCESS REQUIRES THAT THE TRIBUNAL BEFORE WHICH MR. PLOTKE APPEARS TO PRESENT HIS EVIDENCE BE A FAIR AND IMPARTIAL ONE.**

In addition to reversing and remanding this matter to the Superior Court, Mr. Plotke's case must also be reassigned to a new judge because the court in question has failed to ensure a fair process and has demonstrated that significant lack of impartiality. The discussion that follows focuses on the reasons why only remanding this matter for further proceedings before the same court is insufficient, and why a new judge needs to be assigned to consider the evidence.

Based on the record, at this point in the case, if the case is not reassigned, Mr. Plotke is not likely to receive the impartial tribunal that he is entitled to present evidence before. The Trial Court has made it clear that Mr. Plotke has a “credibility problem” with it (RP Vol.2 [11/17/10] 316), although Mr. Plotke has never been provided with the opportunity to testify or present evidence to controvert the allegations in the VAPO case, or the Guardianship case.

At the initial hearing on August 15, 2008, the court failed to clarify for Mr. Plotke the nature of the AVA case. As a result he thought he was in a trial to bring criminal charges. RP Vol.1 [08/15/10] 1-2. The court provided no instruction as to Mr. Plotke’s status as a pro se defendant in a civil case, held to the standard of an attorney.

At the same hearing, on August 15, 2008, the court responded to Mr. Plotke’s complaint that he had not heard the testimony of Detective Kevin Harper, by providing ear phones to him and having the detective then “summarize his testimony”. This occurred after Detective Harper had completed his testimony and Mr. Plotke had been asked if he wanted to ask him any questions, half-way through the proceeding. RP Vol. 1[08/15/08] 20-22, 23-25.

Subsequent to the entry of the permanent order, the court imposed the condition that Mr. Plotke deposit \$20,000.00 Ms. Greenen's trust account before the court would schedule a hearing. RP Vol. 2 [06/19/09] 213. There is no provision in the AVA for the court to take such action, before the parties have presented evidence, much less schedule a hearing. Among other things, the trial court's action has at least the appearance of awarding prevailing party fees before even considering the evidence.

RCW 74.34.130(7) provides that, as one of the remedies available to the trial court, it "may" require the respondent to pay for filing fees, court costs, including "reasonable attorney fees." The remedies are available after the court has had a hearing, with the presentation of evidence required by RCW 74.34.120(1), not before there has been a hearing. It is not part of the "temporary relief" contemplated by RCW 74.34.120(5).

The record reflects that the trial court has consistently refused Mr. Plotke the opportunity to present a case and be heard. The trial court has also made statements expressing its "apparent" disappointment that the State's investigation of the circumstances did not result in the filing of criminal charges, and that the Department of Social and Health Services'

investigation resulted in its dismissing the independent proceedings that it had initiated. RP Vol 2 [11/17/10] 308, lines 17-20.

The trial has taken similar action and has made similar statements in Guardianship case which also illustrate and support reassigning Mr. Plotke's matters to a new judicial department. The issues on appeal regarding the contempt matter and the Guardian *ad litem* matter are addressed *infra*.

On October 6, 2010, the trial court signed an Order to Show Cause why Mr. Plotke should not be held in contempt of court for violating a Memorandum Agreement, and scheduled the contempt proceeding to occur on October 15, 2010. RP Vol. 2 [10/6/10] 265-267, CP 138 pg. 997. Mr. Plotke appeared in court on October 15, where the court signed an additional Show Order concerning the production of records RP Vol. 2 [10/15/10] 272-275, CP 145 pg. 1016. On November 5, 2010, the trial court summarily held Mr. Plotke in coercive contempt. The trial court also ordered that Mr. Plotke be incarcerated until he had paid at least \$50,000.00. RP Vol 2 [11/5/10] 290, CP 154 pg.1134, App.5. The trial court did not allow Mr. Plotke to be heard or to present any evidence to challenge the allegations of the Show Cause at any of the dates discussed

*supra.*, and made its decisions based solely on the information provided by the Ms. Greenen.

In addition, at the October 15, 2010 appearance, the trial court had Ms. Greenen “mark-up” an Order, instructing her to include language involving incarcerating Mr. Plotke at the next hearing, although no evidence had been taken from anyone but Ms. Greenen. RP Vol.2 [10/15/10] 273-275.

Based on the foregoing, transferring this matter to a new judge will be required if Mr. Plotke is to receive a fair hearing before an impartial tribunal.

In summation, Mr. Plotke is entitled to present evidence in support of a modification or outright termination of the Vulnerable Adult Protection Order, and is entitled to the hearing that RCW 74.34.110 and RCW 74.34.120(1) afford him. The trial court erred in denying Mr. Plotke's Motion to Terminate/to have an Evidentiary Hearing, and this matter should be remanded to Clark County Superior Court and a new judge should be appointed to permit Mr. Plotke to present evidence before an impartial tribunal.

**5. RCW 7.21.030 REQUIRES A TRIAL COURT TO PROVIDE**

**NOTICE OF AND A HEARING BEFORE FINDING A PERSON IN CONTEMPT.**

On November 5, 2010, the trial court found Mr. Plotke in contempt of court, incarcerated him, and ordered him to pay a judgment of \$67,702.08, based solely on the allegations asserted by Ms. Greenen on behalf of Ms. Polkow (the Guardian), and without allowing Mr. Plotke the opportunity to present evidence to controvert the allegations.

Imposing punishment for contempt is within the sound discretion of the trial court, and this Court will not disturb a trial court's contempt finding absent finding that the trial court has abused its discretion. State v. Jordan, 146 Wn.App. 395, 401(2008). "A trial court abuses its discretion when it exercises its discretion in manifestly unreasonable manner or bases its decision on untenable grounds or reasons." [citations omitted]. Id.

The question is whether RCW 7.21.030 requires the trial court hold a hearing and allow Mr. Plotke to present evidence before it could find him in contempt of court and incarcerating him and whether the trial court's denying Mr. Plotke a hearing is a violation of the statute and an abuse of discretion.

The hearing/due process and statutory construction issues that were

present in the analysis of the meaning and interpretation of RCW 74.34.110 *et seq.*, *supra*, are equally applicable to this Court's analysis with regard to RCW 7.21.010 *et seq.*(the contempt of court statute). In the interest of brevity, and avoiding unnecessary repetition, Mr. Plotke adopts in its entirety and incorporates the discussion of statutory construction that appears in Argument No. 1, *supra.*, Brief at pp. 20-23.

For purposes relevant to Mr. Plotke's appeal, RCW 7.21.010(1) (b) defines contempt of court as follows:

- (1) "Contempt of Court" means intentional:  
... (b) Disobedience of any lawful judgment, decree, order, or process of the court;..."

RCW 7.21.030(1) empowers the court to impose remedial sanctions upon a person who is found to be in contempt of court. The statute states:

"(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, **after notice and hearing**, may impose a remedial sanction authorized by this chapter. [emphasis added]." [App.12].

A "remedial sanction" as defined by RCW 7.21.010(3) is "...a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in

the person's power to perform.”[App. 11].

RCW 7.21.030(1) is not ambiguous. Unless one of the exceptions provided for in RCW 7.21.050 [pertaining to summary contempt] applies, the language appears to require a court to provide a contemnor with both notice of and a hearing before it can impose an order or judgment of contempt. None of the exceptions provided for in RCW 7.21.050 in Mr. Plotke's case. Under these circumstances, it stands to reason that the statute entitles Mr. Plotke to a hearing.

There are no cases in Washington that address RCW 7.21.030(1) directly. However, two Court of Appeals cases interpreting RCW 7.21.050 [concerning summary contempt proceedings] provide support for the cited proposition.

In pertinent part, “RCW 7.21.050(1) provides...

...(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt...The person committing the contempt of court **shall be given** an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.” [App.pg.13]. (Emphasis added.)

In Templeton v. Hurtado, 92 Wn.App. 847 (1998), the Court of

Appeals reversed a Superior Court Order affirmation of a municipal court judge's imposition of a contempt order and jail sanction and vacated the contempt. The municipal court failed to comply with RCW 7.21.050 because it refused to allow the contemnor to present evidence to mitigate the contempt before it was imposed.

“Ordinarily, a court may impose a sanction for contempt **only after notice and hearing**. The exception is that when contempt is committed in the presence of the court, a judge may summarily impose either a punitive or remedial sanction. In such a case, the court **must** give the person committing contempt an opportunity to speak in mitigation, and the order of contempt must recite the facts...” Templeton v. Hurtado, 92 Wn.App. 847, 851(1998).[Emphasis added].

The Court also held that after a person has been held in contempt, allowing a person to testify in mitigation before the sanction is imposed is a “basic” right. Id. at 854.

In State v. Jordan, 146 Wn.App.395 ( Div. 2 2008) this Court interpreted the hearing requirements of RCW 7.21.050 [App. pg.13] relating to summary contempt proceedings in a similar fashion. This Court stated

“RCW 7.21.050(1) provides in pertinent part: “The person committing the contempt of court *shall* be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.”(Emphasis added). The legislature’s use of the term “shall” is mandatory and a court acting

without having complied with the statutory mandate does so without authority. *State v. Martin*, 137 Wash.2d 149, 154-55, 969 P.2d 450 (1999). Here the trial court's imposition of two days in jail occurred Before (*sic*) Nagle was provided an opportunity to explain or mitigate the sanction; thus, the contempt was punitive and the error could not be cured by the show cause hearing conducted after the sanction was imposed." State v. Jordan, 146 Wn.App. at 403.

In Jordan, the Court reversed a trial court's finding of contempt and imposition of a jail sanction against an attorney (Nagle). The court had done so without providing Nagle with notice and a hearing before doing so. The Court held that the Superior Court had abused its discretion and had violated Nagle's "constitutional and statutory procedural prerequisites to a valid finding of contempt", vacated the trial court's contempt order and dismissed the sanctions that had been imposed.

A plain reading of RCW 7.21.030(1) is that a court may hold a person in contempt only after providing notice and the opportunity of a hearing. A trial court's denial of a hearing is an abuse of the trial court's discretion.

#### **6. THE TRIAL COURT VIOLATED RCW 7.21.030(1) BY HOLDING MR. PLOTKE IN CONTEMPT AND IMPOSING SANCTIONS WITHOUT A HEARING**

Ms. Greenen initiated the contempt proceeding on September 30, 2010, when she sought a Motion to Show Cause why Mr. Plotke should

not be held in contempt for violating a Memorandum Agreement (CP 131 pg.977) for allegedly failing to make deposits to the Guardian's account for nine (9) months, as of the time of filing. The Judgment of Contempt (App. pg. 5) was entered against Mr. Plotke on November 5, 2010. There were "Show Cause" court appearances on October 6, 2010 (RP Vol. 2 [10/06/10] 261-271, App. 3; October 15, 2010 (RP Vol.2 [10/15/10], App. 4; and November 5, 2010 (RP Vol. 2 [11/05/10], App. 5.

At the October 6, 2010 appearance, Ms. Greenen advised the trial court that Ms. Polkow had only "recently" advised her that Mr. Plotke had allegedly failed to make payments agreed upon in the Memorandum of Agreement to the Guardian for ten months. Notwithstanding this apparently new information Ms. Polkow was seeking the immediate payment of "\$60,000.00. RP Vol. 2 [10/06/10] 262-264.

This was the first setting regarding the appearance and Mr. Plotke was not present. Ms. Grubbs had not had an opportunity to review the allegations, the documents allegedly supporting the allegations, or consult with Mr. Plotke, and was seeking a continuance to allow an for an opportunity to address the issues. RP Vol. 2[10/06/10] 265.

Although the trial court did acknowledge that it was

“...sorry...that Ms. Polkow didn’t let us know a little bit sooner...” (Id. at 265) about the allegations, it denied Ms. Grubbs’ continuance motion, and instructed Ms. Greenen to “mark up” a contempt order finding Mr. Plotke in violation of the agreement. The trial court instructed Ms. Greenen to include language regarding incarcerating Mr. Plotke if he was not in compliance by October 15, 2010. Id. at 267.

Mr. Plotke was present for at the October 15, 2010 appearance, but was not permitted to present evidence. RP Vol.2 [10/15/10] 272-273. The trial court told Mr. Plotke that it intended “to impose jail sanctions in this case unless you [Mr. Plotke] come up with some money. And I can do that.” RP Vol. 2 [10/15/10] 273. The trial court then proceeded to have Mr. Simpson (who was appearing for Ms. Greenen) prepare a “blank order” with some “very specifics” regarding the judge’s intended finding of contempt and intent to incarcerate Mr. Plotke. Id. at 273-274.

At the November 5, 2010 hearing, the trial court allowed Ms. Greenen to argue in a summary fashion that Mr. Plotke had violated the agreement, and owed the Guardian in excess of \$67,000. Id. 276-285. It also allowed Ms. Greenen to call Ms. Polkow as a witness to attest to the accuracy of a summary that she had prepared and provided to Ms. Grubbs

in court that morning. (Id. at 287). Ms. Grubbs advised the trial court that she had not had an adequate opportunity to review the records and needed time to analyze the information in order to respond. Id. at 287.

The trial court stated that it also had not reviewed the summary (Id. at 287), advised Ms. Grubbs that she could “reserve any objections to the summary”, and could have a forensic accounting performed as long as it was “not to be a disadvantage to...Mrs. Plotke”. At that point, the trial held Mr. Plotke in contempt of court and incarcerated him. Id. at 289.

The trial court violated RCW 7.21.030(1) by refusing to allow Mr. Plotke to have the hearing required by the statute before holding him in contempt of court and sanctioning him. Furthermore, the trial court does not have the discretion under these facts to deny Mr. Plotke a hearing. The trial court’s denial of a hearing is an abuse of the court’s discretion, and a violation of Mr. Plotke’s due process rights.

**7. THE TRIAL COURT’S NOVEMBER 5, 2010 “ORDER ON SHOW CAUSE” SHOULD BE REVERSED, THE JUDGMENT VACATED, AND THE SANCTION DISMISSED.**

The statutory requirements that a person who might be held in contempt of court be provided with both notice and a hearing before the court can impose a contempt order and sanction serves fundamental due

process considerations. Templeton v. Hurtado, *supra*, 92 Wn.App. at 854-855. Under RCW 7.21.030(1) the hearing requirement before the imposition of a contempt order serves the purpose of allowing a person the opportunity to challenge the allegations and avoid being held in contempt. The requirement that the person be heard before the imposition of the sanction, serves to allow the person to mitigate the potential sanction.

“...[T]he...requirement essentially provides a check on the heightened potential for abuse posed by the summary contempt power by providing an opportunity for the contemnor to apologize or to defend or explain the contumacious behavior....” Templeton v. Hurtado, *supra* 92Wn.App. at 854, discussing RCW 7.21.050.

The failure of a trial court to hold a hearing before holding a person in contempt and imposing sanctions under (RCW7.21.030(1), is a violation of the statute, constitutes a denial of fundamental due process and constitutes reversible error. State v. Jordan, *supra*, 146 Wn.App. 395(2008) and Templeton v. Hurtado, *supra*.

In Jordan, this Court held that the trial court had abused its discretion, and violated the attorney’s statutory and constitutional rights holding the lawyer in contempt and imposing a two day jail sanction without notice. It also held that the subsequent show cause proceeding, where the attorney testified in mitigation and the contempt order was modified, was not sufficient to remedy the violations. State v. Jordan,

*supra*, 146 Wn.App. at 401 (2008). The Court held that because the contempt proceeding failed to comply with the statute and violated due process rights, it vacated the contempt order and dismissed the sanctions that it imposed.

Mr. Plotke urges this Court to order likewise. Although the record reflects that Mr. Plotke had several court appearances, he never had a hearing where he could contest the allegations. The trial court did not have the discretion to deny Mr. Plotke the opportunity to be heard in the contempt matter, and abused its discretion by doing so.

In addition, there is evidence in the record that reflects that the trial court appeared to be inclined to find Mr. Plotke in contempt for violating the Memorandum Agreement from the outset, based the statements and actions that the court took in each of the proceedings preceding the November 5, 2010 appearance. This court should reverse and vacate the trial court's order and dismiss the sanctions that were imposed.

While the remedy discussed above and provided for in the Jordan case is the preferred remedy, at minimum, the record is clear that Mr. Plotke is entitled to a hearing, before a fair and impartial tribunal and trial court should be reversed and the matter remanded to Clark County

Superior Court for further proceedings. However, reversal and remand alone will not be an effective remedy here. Because Mr. Plotke is entitled to present his case before an impartial tribunal, and for the reasons set forth in Section 4 *supra*, Brief at 29-34 and Section 6 *supra*, Brief at 39-42, this matter needs to be reassigned to a new judicial department.

**8. A TRIAL COURT'S DENIAL OF A MOTION UNDER RCW 11.88.120 WITHOUT A HEARING REQUIRES WRITTEN FINDINGS THAT THE MOTION IS FRIVOLOUS**

Because guardians are afforded extraordinary authority over the persons for whom they are responsible, RCW 11.88.120(2) provides that “any person” including an “incapacitated person” has standing to bring issues of concern to the court. The statute states in pertinent part:

- (1) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian...

The options available to the trial court are addressed in RCW 11.88.120(3), which states in pertinent part:

- (2) ...The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. Any denial of an application without a hearing **shall** be in writing with the reasons for the denial explained.”[Emphasis

added].App.14.

It is within the court's discretion to schedule a hearing, appoint a guardian ad litem or "take emergency action if necessary to protect the incapacitated person **until** a hearing can be held." [Emphasis added]. Id. However, the trial court may deny a motion without holding a hearing only when it finds that the motion is frivolous and the denial "**shall** be in writing with the reasons for the denial explained." Id.

This raises the issue of statutory construction regarding what the language of RCW 11.88.120(2) and (3) mean. The principles of statutory construction are addressed in Section 1 of Argument, Brief, *supra*, at pp. 20-22, and are adopted in their entirety here.

The plain language of 11.88.120 makes it clear that the threshold that must be met by an applicant to obtain an order for a guardian ad litem or for an evidentiary hearing is very low. The applicant must file a claim that is not frivolous.

"A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts". Daubner v. Mills, 61 Wn.App. 678, 684 (1991), Bill of Rights Legal Foundation v. Evergreen State College, 44 Wash.App. 690, 696-97(1986).

Mr. Plotke filed a declaration in support of his motion outlining

with specificity the reasons why the court should grant his motion to appoint a guardian ad litem and to order a psychological exam or at least allow him the opportunity to be heard on the matter. CP 140 pg. 1001. Mr. Plotke raised issues of concern regarding the Guardian's exercise of the fiduciary and personal duties that she owes to Mrs. Plotke, as well as also seeking an independent review of Mrs. Plotke's mental and emotional health, based on evidence reflecting that Mrs. Plotke's had improved since 2008. CP 140 pg. 1001, App. 15.

The court reviewed Mr. Plotke's declaration, summarily found that "good cause" had not been shown, and denied the motion. RP Vol. 2 [11/17/10] 316, CP 164 pg. 1169, App. 1. The court erroneously applied the standard of "good cause" and did not analyze Mr. Plotke's declaration on the "frivolous" standard required by the statute. In addition, the trial court did not adhere to the clear language of the statute. The decision dismissing Mr. Plotke's motion to appoint guardian ad litem and order a psychological exam for Mrs. Plotke without a hearing and written findings violates the clear language of RCW 11.88.120(2) and (3).

**9. THE COURT'S FAILURE TO COMPLY WITH RCW 11.88.120 WARRANTS REMAND FOR FURTHER PROCEEDINGS**

The provisions of RCW 11.88.120(2) and (3) are not ambiguous.

The trial court's failure to comply with the mandatory language of the statute is an abuse of discretion that warrants reversal and remand to the Superior Court for further proceedings. As a practical matter, on the face of Mr. Plotke's pleadings alone, it appears as though the threshold standard has been met.

The remedy in an ordinary case would be for this Court to remand the case to the trial court to make written findings of fact, as required by the statute. Mr. Plotke requests that the matter be remanded consistent with the relief sought in Section 4, *supra*, Brief at pp.20-22 and Section 6, *supra*, Brief at pp.39-42.

### **CONCLUSION**

In conclusion, and based on the foregoing, and because the trial court violated RCW 74.34.110 and Mr. Plotke's statutory due process rights, this Court should reverse and remand the trial Court's Order Denying Termination/ and in the alternative denying Mr. Plotke an evidentiary hearing in the Vulnerable Adult Protection Order Case No. 41537-2 (Assignments 1-2) for further proceedings, including reassignment to a new judicial department.

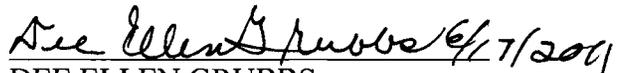
In the Guardianship case, No. 41547-0, in the Contempt Matter, Assignment 3], Mr. Plotke seeks an order reversing and vacating the trial

court's November 5, 2010 Order on Contempt and dismissing the sanction for violating RCW 7.21.030(1). At a minimum, Mr. Plotke requests that the trial court's order be reversed, remanded and reassigned for further proceedings. In addition, and also in the Guardianship Case, Mr. Plotke seeks a remand for further proceedings with regard to the denial of a hearing on the Motion for the Appointment of a Guardian *ad litem*, consistent with the above sought after relief.

Respectfully Submitted this 17<sup>th</sup> day of June, 2011.



CHRISTOPHER RAY HARDMAN  
WSBA # 21237  
909 SW Saint Clair Avenue  
Portland, OR 97205-1300  
Phone: (503)916-1787  
Fax: (503)916-1789



DEE ELLEN GRUBBS  
WSBA # 26381  
1409 Franklin Street, Suite 215  
Vancouver, WA 98660-2826  
Phone: (360)694-1472  
Fax: (360)695-1804

APPENDIX

1. ORDER DENYING LEO PLOTKE'S MOTION TO TERMINATE VULNERABLE ADULT PROTECTION ORDER, November 17, 2010
2. ORDER TO SHOW CAUSE, September 30, 2010
3. ORDER ON SHOW CAUSE, October 6, 2010
4. ORDER TO SHOW CAUSE RE: CONTEMPT, October 15, 2010
5. ORDER ON SHOW CAUSE RE: CONTEMPT/JUDGMENT, November 5, 2010
6. ORDER DENYING MOTION FOR SHOW CAUSE PER 11.88.120
7. RCW.74.34.110: Protection of Vulnerable Adults—Petition for Protection
8. RCW.74.34.120: Protection of Vulnerable Adults ---Hearing
9. RCW 74.34.130: Protection of Vulnerable Adults ---Judicial Relief
10. RCW 74.34.135: Protection of Vulnerable Adults ---Filings by Others
11. RCW 7.21.010: Definitions
12. RCW 7.21.030: Remedial Sanctions—Payment for Losses
13. RCW 7.21.050: Sanctions—Summary Imposition—Procedure
14. RCW 11.88.120: Modification or Termination of Guardianship---Procedure
15. MOTION/DECLARATION FOR ORDER TO SHOW CAUSE AND ORDER APPOINTING GAURDIAN AD LITEM RCW 11.88.120

FILED

NOV 17 2010

2:40pm  
Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

~~In Re: the Guardianship~~ *Motion of*

Plaintiff/Petitioner,

*of Carolyn Plotke*

No. 08-2-04996-9

ORDER DENYING LEO

*Plotke's motion to terminate  
Vulnerable Adult Protection*

Defendant/Respondent

THIS MATTER, having come before the court on the motion of ~~the~~ *LEO PLOTKE*  
Petitioner/Respondent on this 17<sup>th</sup> day of Nov, 2010, the Court  
having heard counsel, having read the pleadings and records filed herein, and  
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that:

*1. Leo Plotke's  
Motion to terminate VAPD is denied.  
2. Leo Plotke's motion for evidentiary  
hearing re: VAPD is denied.*

Dated this 17<sup>th</sup> day of November, 2010.

*[Signature]*  
Judge/Commissioner of the Superior Court

*[Signature]*  
Attorney for *Leo Plotke*  
WSBA # 26381  
ORDERED \_\_\_\_\_

*[Signature]*  
Attorney for *Guendy Camp Plunk*  
WSBA # 22243

*in*

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2010 SEP 30 AM 10:01

Sherry W. Parker, Clerk  
Clark County

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

In Re the Guardianship:	)	
	)	<b>NO. 08-4-00624-8</b>
	)	
CAROLYN K. PLOTKE,	)	<b>ORDER TO SHOW CAUSE</b>
	)	
An Incapacitated Person.	)	<b>Clerk's Action Required</b>
	)	
	)	

LEO PLOTKE IS HEREBY ORDERED to appear in Clark County Superior Court, before Honorable Judge Diane Woolard, at 3:00 p.m. on the 6<sup>th</sup> day of October, 2010, and ordered to show cause why this Court should not issue an Order compelling LEO PLOTKE to comply with the terms and provisions of the Memorandum of Agreement entered in the above noted matter for the reason set forth in the Motion filed herewith.

//  
//  
//  
//

ORDER TO SHOW CAUSE - 1  
9/29/10 2-1398-000jc/guardianship

**GREENEN & GREENEN, PLLC**  
ATTORNEYS AND COUNSELORS AT LAW  
1104 MAIN STREET, SUITE 400  
VANCOUVER, WASHINGTON, 98660  
(360) 694-1571

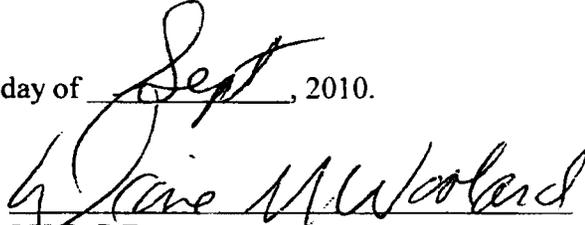
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Upon the failure of LEO PLOTKE to appear and show cause at the date and time specified above, the Court will enter an order and may grant such other relief as requested in the Guardian's Motion.

DONE IN OPEN COURT this 30 day of Sept, 2010.

  
JUDGE

Presented by:  
GREENEN & GREENEN, PLLC

  
\_\_\_\_\_  
THERÈSE A. GREENEN, WSB #22243  
Attorney for Guardian

FILED

2010 OCT -6 PM 4:04

Sherry W. Parker, Clerk  
Clark County

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

IN Re: Guardianship  
Plaintiff/Petitioner,  
CAROLYN PLOTKE  
v.

No. 08 - 4 - 00624 - 8  
ORDER ON SHOW CAUSE

Defendant/Respondent

THIS MATTER, having come before the court on the motion of the  
Petitioner/Respondent on this 6 day of October, 2010, the Court  
having heard counsel, having read the pleadings and records filed herein, and  
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: Leo Plotke  
shall appear before the honorable

Judge Diane Wooland at 9:00 AM FRIDAY  
October 15, 2010 to show cause why he has

Failed to comply with the Memorandum of appointment  
filed 7/15/09 at the order approximately 1/29/10

Failure to comply may result in incarceration by court

Dated this 6 day of Oct, 2010

Diane M Wooland  
Judge/Commissioner of the Superior Court

[Signature]  
Attorney for Guardian  
WSBA # 22243  
ORDERED \_\_\_\_\_

See Clerk's Office  
Attorney for Leo Plotke  
WSBA # 26381

Copied  
received

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FILED

2010 OCT 15 PM 4:29

Sherry W. Parker, Clerk  
Clark County

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

In Re the Guardianship of )

Carolyn K. Plotke )

NO. 08-4-00624-8

ORDER TO SHOW CAUSE  
RE CONTEMPT

TO:

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled Court for review, and the Court having considered the records and files herein, and being fully advised, now, therefore,

IT IS HEREBY ORDERED as follows:

1. Mr. Plotke shall appear in person before this Court on Friday, Nov. 5, 2010, at 9:00 a.m., at the Clark County Courthouse, Department 8, courtroom Judge Woolard, 1200 Franklin, Vancouver, Washington, and show cause why she should not be held in contempt of the Court's order

to produce all bank records since July 2009 + pay all monies owed to Ms. Plotke (\$67,651.49), filed \_\_\_\_\_, in the above-referenced

proceeding, for failure to perform the following acts required by the order, or as

MS  
W

a result of his/her appointment as guardian of

\_\_\_\_\_, or as the result of his/her position

as the attorney of record for the guardian:

a. Failure to pay + produce records,  
as required by paragraph 1 of the Court's order.

b.

2. TO Leo Platke **IF YOU FAIL TO APPEAR IN PERSON, AND DEFEND THESE PROCEEDINGS, ON THE DATE AND TIME SET FORTH ABOVE, THE COURT MAY GRANT SOME OR ALL OF THE RELIEF DESCRIBED BELOW, AND/OR MAY ISSUE A BENCH WARRANT FOR YOUR ARREST WITHOUT FURTHER NOTICE TO YOU.**

3. If the Court finds Leo Platke to be in contempt, the Court may order any or all of the following:

a. The Court may establish a deadline by which the deficiencies described above are cured, or Leo Platke subjected to further sanctions;

b. The Court may appoint a guardian ad litem or interim successor guardian, and authorize either to bring an action against \_\_\_\_\_, or for appointment of a successor guardian, or to take other action on behalf of \_\_\_\_\_;

c. The Court may order that the cost of these proceedings, and any unexplained deficiencies in the estate of \_\_\_\_\_, may be assessed to \_\_\_\_\_, and a personal money judgment entered against him/her;

- d. The Court may impose penalties upon Les Plotke for his/her contempt of court, including fines and imprisonment; and
- e. The Court may order ~~\_\_\_\_\_~~ immediately removed as guardian of \_\_\_\_\_; may order \_\_\_\_\_ to post bond in amounts sufficient to assume the performance of his/her obligations; and may order \_\_\_\_\_ to fully account for his/her actions in this proceeding.

4. If imprisonment is considered by the Court as a sanction, and Les Plotke cannot afford an attorney, he/she may request the Court to appoint an attorney to represent her at the time of the hearing.

DATED this 15 day of Oct, 2000

W. J. M. Waters  
Judge

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**FILED**

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Sherry W. Parker, Clerk, Clark Co. *9:46 am*

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**Superior Court of Washington  
County of Clark**

In re the Guardianship of:  
  
CAROLYN K. PLOTKE,  
  
Incapacitated.

No. 08-4-00624-8  
*10-9-007364-6*  
Order on Show Cause re  
Contempt/Judgment

Next Hearing Date: \_\_\_\_\_

Clerk's Action Required, ¶ 3.8

**I. Judgment Summary**

Applies as follows:

- |    |  |                                   |
|----|--|-----------------------------------|
| A. | Judgment creditor  | GUARDIANSHIP OF<br>CAROLYN PLOTKE |
| B. | Judgment debtor  | LEO PLOTKE                        |
| C. | Principal judgment amount  | \$ 63,009.58                      |
| D. | Attorney fees  | \$ 4692.50                        |
| E. | Costs  | \$                                |
| F. | Other recovery amount  | \$ <i>67708.08</i>                |
| G. | Principal judgment shall bear interest at 12% per annum                              |                                   |
| H. | Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum |                                   |
| I. | Attorney for judgment creditor   | THERÉSE A. GREENEN                |
| J. | Attorney for judgment debtor   | DEE ELLEN GRUBBS                  |

**GREENEN & GREENEN, PLLC**  
ATTORNEYS AND COUNSELORS AT LAW  
1104 MAIN STREET, SUITE 400  
VANCOUVER, WASHINGTON, 98660  
(360) 694-1571

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## II. Findings and Conclusions

### *This Court Finds:*

#### **2.1 Compliance With Memorandum of Agreement (July 2009) and Court Order**

LEO PLOTKE did intentionally fail to comply with the terms of the Memorandum of Agreement signed by all parties and filed with the court on July 15, 2009 and the court order entered January 21, 2010.

#### **2.2 Nature of the Memorandum of Agreement**

The terms of the Memorandum of Agreement and the Court Order require Leo Plotke to pay funds to the Guardianship of Carolyn Plotke for her ongoing expenses and care.

#### **2.3 How the Memorandum and Court Order were Violated**

This order was violated in the following manner:

Leo Plotke failed to comply with the agreed upon terms of the memorandum of agreement which required him to remit \$4,641.91 per month beginning January 1, 2010 to the guardian of Carolyn Plotke and to remit \$11,948.57 lump sum payment to the guardian representing past debt.

#### **2.4 Past Ability to Comply With the Memorandum and Court Order**

Both LEO PLOTKE and his attorney Dee Grubbs signed the Memorandum of Agreement following consultation between the parties.

#### **2.5 Present Ability and Willingness to Comply With the Memorandum and Court Order**

LEO PLOTKE has the present ability to partially comply with the order as evidence provided by Mr. Plotke indicates he has approximately \$50,000.00 equity remaining in the residence.

LEO PLOTKE does not have the present willingness to comply with the order as evidenced by his recent actions after receiving notice that funds had not been paid

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VANCOUVER, WASHINGTON, 98660  
(360) 694-1571

1 pursuant to the agreement. Specifically, Leo Plotke continued to make  
2 inappropriate disbursements from the reverse mortgage funds then in his possession.

3 **2.6 Attorney Fees and Costs**

4  
5 The attorney fees and costs awarded in paragraph 3.4 below have been incurred and  
6 are reasonable.  
7

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10 **III. Order and Judgment**

11  
12 *It is Ordered:*

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14 **3.1 Contempt Ruling**

15  
16 LEO PLOTKE is in contempt of court.  
17

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19 **3.2 Imprisonment**

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21 LEO PLOTKE is to be confined in the Clark County Jail.  
22

23  
24 Confinement shall commence immediately and shall continue until  
25 (date) \_\_\_\_\_ or until the contempt is purged as set forth in  
26 herein, in which case the contemnor shall be released immediately.  
27

28  
29 Confinement is suspended as follows:  
30

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32  
33  
34 **3.3 Judgment**

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36  
37 GUARDIANSHIP OF CAROLYN PLOTKE shall have judgment against  
38 LEO PLOTKE in the amount of \$ 63,009.58.  
39

40  
41 **3.4 Attorney Fees and Costs**

42  
43 THERÉSE A. GREENEN, attorney for Guardian of the Person and Estate of  
44 Carolyn Plotke shall have judgment against LEO PLOTKE in the amount of  
45 \$4,692.50 for attorney fees  
46

47  
48 **GREENEN & GREENEN, PLLC**  
49 ATTORNEYS AND COUNSELORS AT LAW  
50 1104 MAIN STREET, SUITE 400  
VANCOUVER, WASHINGTON, 98660  
(360) 694-1571

FILED

NOV 17 2010

2:40 PM  
Sherry W. Parker, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

Under Guardianship  
Plaintiff/Petitioner,  
of Carolyn Plotke  
v.

No. 08-4-00624-8

ORDER Denying Motion  
for Show Cause per  
11.88.20

Defendant/Respondent

THIS MATTER, having come before the court on the motion of ~~the~~ LEO PLOTKE  
~~Petitioner/Respondent~~ on this 17<sup>th</sup> day of November, 2010, the Court  
having heard counsel, having read the pleadings and records filed herein, and  
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: Leo Plotke's  
motion for order to show cause  
per Rub 11.88.20 is denied.

Dated this 17<sup>th</sup> day of Nov, 2010

[Signature]  
Judge/Commissioner of the Superior Court

[Signature]  
Attorney for Leo Plotke  
WSBA # 26381  
ORDERED

[Signature]  
Attorney for Guardy Care A-the  
WSBA # 22243

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[Signature]

RCW 74.34.110

Protection of vulnerable adults — Petition for protective order.

An action known as a petition for an order for protection of a vulnerable adult in cases of abandonment, abuse, financial exploitation, or neglect is created.

(1) A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order for protection in superior court.

(2) A petition shall allege that the petitioner, or person on whose behalf the petition is brought, is a vulnerable adult and that the petitioner, or person on whose behalf the petition is brought, has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial exploitation, or neglect by respondent.

(3) A petition shall be accompanied by affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought. If the petition is filed by an interested person, the affidavit or declaration must also include a statement of why the petitioner qualifies as an interested person.

(4) A petition for an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action pending that relates to the issues presented in the petition for an order for protection.

(5) Within ninety days of receipt of the master copy from the administrative office of the courts, all court clerk's offices shall make available the standardized forms and instructions required by RCW 74.34.115.

(6) Any assistance or information provided by any person, including, but not limited to, court clerks, employees of the department, and other court facilitators, to another to complete the forms provided by the court in subsection (5) of this section does not constitute the practice of law.

(7) A petitioner is not required to post bond to obtain relief in any proceeding under this section.

(8) An action under this section shall be filed in the county where the vulnerable adult resides; except that if the vulnerable adult has left or been removed from the residence as a result of abandonment, abuse, financial exploitation, or neglect, or in order to avoid abandonment, abuse, financial exploitation, or neglect, the petitioner may bring an action in the county of either the vulnerable adult's previous or new residence.

(9) No filing fee may be charged to the petitioner for proceedings under this section. Standard forms and written instructions shall be provided free of charge.

[2007 c 312 § 3; 1999 c 176 § 12; 1986 c 187 § 5.]

Notes:

**Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176:** See notes following RCW 74.34.005.

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**3.5 Review Date**

The court shall review this matter on upon payment of \$10,000

**3.6 Other**

Mr. Plotke may purge by payment of \$2,000 to the Greenman IOTA

account. Mr. Plotke is ordered to immediately custody at CCSO

Dated: 11/4/10 Donna M. Wood  
Judge

Presented by:

[Signature]  
**THERESE A. GREENEN, WSB#22243**  
of Attorneys for Guardian

~~Approved for entry:~~ Copied received

[Signature]  
**DEE ELLEN GRUBBS, WSB# 26381**  
Attorney for Mr. Leo Plotke

**GREENEN & GREENEN, PLLC**  
ATTORNEYS AND COUNSELORS AT LAW  
1104 MAIN STREET, SUITE 400  
VANCOUVER, WASHINGTON, 98660  
(360) 694-1571

## RCW 74.34.120

## Protection of vulnerable adults — Hearing.

(1) The court shall order a hearing on a petition under RCW 74.34.110 not later than fourteen days from the date of filing the petition.

(2) Personal service shall be made upon the respondent not less than six court days before the hearing. When good faith attempts to personally serve the respondent have been unsuccessful, the court shall permit service by mail or by publication.

(3) When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable adult not less than six court days before the hearing. In addition to copies of all pleadings filed by the petitioner, the petitioner shall provide a written notice to the vulnerable adult using the standard notice form developed under RCW 74.34.115. When good faith attempts to personally serve the vulnerable adult have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained.

(4) If timely service under subsections (2) and (3) of this section cannot be made, the court shall continue the hearing date until the substitute service approved by the court has been satisfied.

(5)(a) A petitioner may move for temporary relief under chapter 7.40 RCW. The court may continue any temporary order for protection granted under chapter 7.40 RCW until the hearing on a petition under RCW 74.34.110 is held.

(b) Written notice of the request for temporary relief must be provided to the respondent, and to the vulnerable adult if someone other than the vulnerable adult filed the petition. A temporary protection order may be granted without written notice to the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard, or that show the respondent and vulnerable adult cannot be served with notice, the efforts made to serve them, and the reasons why prior notice should not be required.

[2007 c 312 § 5; 1986 c 187 § 6.]

RCW 74.34.130  
Protection of vulnerable adults — Judicial relief.

The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following:

- (1) Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult;
- (2) Excluding the respondent from the vulnerable adult's residence for a specified period or until further order of the court;
- (3) Prohibiting contact with the vulnerable adult by respondent for a specified period or until further order of the court;
- (4) Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
- (5) Requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources;
- (6) Restraining the transfer of the respondent's and/or vulnerable adult's property for a specified period not exceeding ninety days; and
- (7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

Any relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed five years. The clerk of the court shall enter any order for protection issued under this section into the judicial information system.

[2007 c 312 § 6. Prior: 2000 c 119 § 27; 2000 c 51 § 2; 1999 c 176 § 13; 1986 c 187 § 7.]

Notes:

**Application -- 2000 c 119:** See note following RCW 26.50.021.

**Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176:** See notes following RCW 74.34.005.

RCW 74.34.135

Protection of vulnerable adults — Filings by others — Dismissal of petition or order — Testimony or evidence — Additional evidentiary hearings — Temporary order.

(1) When a petition for protection under RCW 74.34.110 is filed by someone other than the vulnerable adult or the vulnerable adult's full guardian over either the person or the estate, or both, and the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition, then the court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued under RCW 74.34.120 or 74.34.130, or the court may take additional testimony or evidence, or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is ordered and the court determines that there is reason to believe that there is a genuine issue about whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition or order, the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

(2) An evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order, shall be held within fourteen days of entry of the temporary order for protection under subsection (1) of this section. If the court did not enter a temporary order for protection, the evidentiary hearing shall be held within fourteen days of the prior hearing on the petition. Notice of the time and place of the evidentiary hearing shall be personally served upon the vulnerable adult and the respondent not less than six court days before the hearing. When good faith attempts to personally serve the vulnerable adult and the respondent have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained. If timely service cannot be made, the court may set a new hearing date. A hearing under this subsection is not necessary if the vulnerable adult has been determined to be fully incapacitated over either the person or the estate, or both, under the guardianship laws, chapter 11.88 RCW. If a hearing is scheduled under this subsection, the protection order shall remain in effect pending the court's decision at the subsequent hearing.

(3) At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence.

(4) If the court determines that the vulnerable adult is capable of protecting his or her person or estate in connection with the issues raised in the petition, and the individual continues to object to the protection order, the court shall dismiss the order or may modify the order if agreed to by the vulnerable adult. If the court determines that the vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult. In the entry of any order that is inconsistent with the expressed wishes of the vulnerable adult, the court's order shall be governed by the legislative findings contained in RCW 74.34.005.

[2007 c 312 § 9.]

RCW 7.21.010  
Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

## RCW 7.21.030

## Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

## Notes:

**Findings -- Intent -- 2001 c 260:** See note following RCW 10.14.020.

**Findings -- Intent -- 1998 c 296 §§ 36-39:** "The legislature finds that an essential component of the children in need of services, dependency, and truancy laws is the use of juvenile detention. As chapter 7.21 RCW is currently written, courts may not order detention time without a criminal charge being filed. It is the intent of the legislature to avoid the bringing of criminal charges against youth who need the guidance of the court rather than its punishment. The legislature further finds that ordering a child placed in detention is a remedial action, not a punitive one. Since the legislature finds that the state is required to provide instruction to children in detention, use of the courts' contempt powers is an effective means for furthering the education and protection of these children. Thus, it is the intent of the legislature to authorize a limited sanction of time in juvenile detention independent of chapter 7.21 RCW for failure to comply with court orders in truancy, child in need of services, at-risk youth, and dependency cases for the sole purpose of providing the courts with the tools necessary to enforce orders in these limited types of cases because other statutory contempt remedies are inadequate." [1998 c 296 § 35.]

**Findings -- Intent -- Part headings not law -- Short title -- 1998 c 296:** See notes following RCW 74.13.025.

RCW 7.21.050

Sanctions — Summary imposition — Procedure.

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

[2009 c 37 § 2; 1989 c 373 § 5.]

RCW 11.88.120

Modification or termination of guardianship — Procedure.

(1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.

(2) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. If applicants are represented by counsel, counsel shall move for an order to show cause why the relief requested should not be granted. If applicants are not represented by counsel, they may move for an order to show cause, or they may deliver a written request to the clerk of the court.

(3) By the next judicial day after receipt of an unrepresented person's request to modify or terminate a guardianship order, or to replace a guardian or limited guardian, the clerk shall deliver the request to the court. The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous. Any denial of an application without a hearing shall be in writing with the reasons for the denial explained. A copy of the order shall be mailed by the clerk to the applicant, to the guardian, and to any other person entitled to receive notice of proceedings in the matter. Unless within thirty days after receiving the request from the clerk the court directs otherwise, the clerk shall schedule a hearing on the request and mail notice to the guardian, the incapacitated person, the applicant, all counsel of record, and any other person entitled to receive notice of proceedings in the matter.

(4) In a hearing on an application to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may grant such relief as it deems just and in the best interest of the incapacitated person.

(5) The court may order persons who have been removed as guardians to deliver any property or records belonging to the incapacitated person in accordance with the court's order. Similarly, when guardians have died or been removed and property or records of an incapacitated person are being held by any other person, the court may order that person to deliver it in accordance with the court's order. Disobedience of an order to deliver shall be punishable as contempt of court.

[1991 c 289 § 7; 1990 c 122 § 14; 1977 ex.s. c 309 § 9; 1975 1st ex.s. c 95 § 14; 1965 c 145 § 11.88.120. Prior: 1917 c 156 § 209; RRS § 1579; prior: Code 1881 § 1616; 1860 p 227 § 333; 1855 p 17 § 11.]

Notes:

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

**Severability – 1977 ex.s. c 309:** See note following RCW 11.88.005.

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FILED

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Sherry W. Parker, Clerk  
Clark County

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF CLARK**

In re: the Guardianship of	)	<b>Case No. 08-4-00624-8</b>
	)	<b>MOTION/DECLARATION FOR</b>
<b>CAROLYN PLOTKE</b>	)	<b>ORDER TO SHOW CAUSE AND</b>
	)	<b>ORDER APPOINTING GUARDIAN</b>
	)	<b>AD LITEM RCW 11.88.120</b>
An Incapacitated Person	)	

**I. MOTION**

COMES NOW LEO PLOTKE, by and through his attorney of record, Dee Ellen Grubbs, Attorney & Counselor at Law, and pursuant to RCW 11.88.120 moves the court for an Order to Show Cause why the Guardianship herein should not be modified as follows:

1.1 Replacing the current Guardian of the Person and Estate to wit Yvonne M. Polkow with an alternate Certified Professional Guardian for the purpose of addressing the issues noted hereinafter wherein the Guardian has failed to act in the best interest of the Incapacitated Person and the Incapacitated Person's estate AND by restoring Carolyn Plotke's right to make social decisions and her right to decide who shall provide care and assistance.

1.2 Appointing an independent attorney Guardian Ad Litem to investigate the issues of concern outlined in DECLARATION OF LEO PLOTKE noted hereinafter.

MOTION ORDER TO SHOW CAUSE

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1.3 Ordering a psychological exam to determine if Carolyn Plotke has the capacity to make her own social decisions and to decide who shall provide care and assistance.

1.3 Setting a hearing wherein the declarant herein may present his case as to why the relief requested should be granted.

This Motion is based upon the following Declaration and the records and files herein.

## II. DECLARATION

I LEO PLOTKE declare as follows:

1. I am the husband of CAROLYN PLOTKE, the Incapacitated Person. I am eighty (80) years old. I have several chronic illnesses which limits my ability to leave home for long periods of time as I tire quickly. I am also still recovering from cataract surgery and a lens implant. I have blurry vision and must now have all written documents read to me. I am of sound mind; my memory is intact. Please see NEURO/PSYCH portion of physical exam filed herein on October 5, 2010 under confidential seal. I am making this declaration from my own personal knowledge of the facts and circumstances noted herein.

2. I am asking the court to order the Guardian of the Person and the Estate Yvonne M. Polkow to show cause why she should not be replaced because:

a. Ms. Polkow has breached her fiduciary duty to my wife by forcing me to agree to pay guardian fees at the private pay rate even after my wife qualified for Medicaid.

b. Ms. Polkow created an artificial need for a guardian of the estate by failing to inform me or my attorney of a past due notice by the care facility and by having the care facility direct all information to her as guardian of the person.

c. Ms. Polkow has isolated my wife away from family and friends and has not allowed her to use the telephone against my wife's express wishes to the contrary.

d. Ms. Polkow has not properly applied substitute decision making because she has ignored the wishes of my wife's son and daughter, has not kept them informed has never  
MOTION ORDER TO SHOW CAUSE

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communicated with me and has not followed the advanced directive that my wife executed years prior to the entry of the guardianship.

3. I am asking the court to appoint a guardian ad litem that has not previously been aware of the facts of this case and also a guardian ad litem that is an attorney because many of the issues that I am raising herein require a fresh perspective and experience in financial matters and Medicaid regulations and requirements.

4. I am asking the court to order a psychological exam because I believe that my wife's mental status has improved from the time the guardianship was first imposed. I am told by family members that have been allowed to visit her that her long term memory is intact and that her short term memory is only slightly impaired. She recognizes all of her family and she often asks about me. I have not been able to visit her because the guardian has placed a restraining order on me and insists that she will not allow any visitation unless it is supervised. Until about eight (8) months ago my wife regularly initiated telephone calls to me. When the guardian learned of this, and despite my wife's requests and desires, she put a stop to my wife making any outgoing phone calls. I believe there is a basis for a modification of the guardianship and I am asking the court to order an exam by a clinical psychologist so that I can show the court that my wife is capable of making her own social decisions and deciding who should provide her care.

5. I am asking the court to set a hearing for fifteen days after the report from the psychologist and guardian ad litem are filed.

MOTION ORDER TO SHOW CAUSE

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360-694-1472  
E-mail: [decellengrubbs@Comcast.net](mailto:decellengrubbs@Comcast.net)

Dated: 10-11-10

  
LEO PLOTKE  
Husband of Carolyn Plotke

MOTION ORDER TO SHOW CAUSE

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of October 2010, a copy of the foregoing MOTION FOR ORDER TO SHOW CAUSE/MODIFICATION GUARDIANSHIP, was served by the method indicated below, and addressed to the following:

Therese A. Greenen, WSBA #22243  
Greenen & Greenen, PLLC  
Attorneys and Counselors at Law  
1104 Main Street, Suite 400  
Vancouver, WA 98660

FIRST-CLASS MAIL  
 HAND DELIVERED  
 OVERNIGHT MAIL  
 FAX TRANSMISSION 360-694-1572

  
Dee Ellen Grubbs

MOTION ORDER TO SHOW CAUSE

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CERTIFICATE OF MAILING & FILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Therese Greenen  
Attorney at Law  
1104 Main Street, Suite 400  
Vancouver, WA 98660

And that I sent the original and one copy to the Court of Appeals,  
Division II, for filing to:

Clerk of the Court of Appeals  
Division II  
950 Broadway, Suite 300  
Tacoma, Washington 98402

All postage prepaid, on June 17, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS  
OF THE STATE OF WASHINGTON THAT THE FOREGOING IS  
TRUE AND CORRECT.

Signed at Portland, Oregon on June 17, 2011.



CHRISTOPHER R. HARDMAN, WSBA No. 21237  
of Attorneys for the Appellant

  
DEE E. GRUBBS, WSBA No. 26381  
of Attorneys for the Appellant