

ORIGINAL

COA NO. 32979-8-III

COURT OF APPEALS, DIVISION III, OF THE STATE OF  
WASHINGTON

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In re the Guardianship of

PAULA A. FOWLER,

Respondent,

and

JOSEPH F. VALENTE,

Respondent,

v.

LIN O'DELL,

Appellant.

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**FILED**

OCT 14 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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BRIEF OF RESPONDENT

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**I.**  
**INTRODUCTION**

The Revised Code of Washington prescribes the procedure for modification or termination of a guardianship. RCW 11.88.120. Under that procedure, the court may, on its own motion, modify or terminate the guardianship upon an order to show cause. (*Id.*) The rule does not require further hearings after an order to show cause. Appellant Lin O'Dell was required by Superior Court to respond to an order to show cause containing thirteen areas of concern for alleged breaches of fiduciary duties, statute, and standards or practice. Ms. O'Dell responded to the order to show cause, and responded to the investigator appointed by the court, Joseph Valente. Steven's County Superior Court entered findings of fact and conclusions of law against Ms. O'Dell.

Ms. O'Dell appeals this order, arguing that the court violated her due process rights by failing to hold an evidentiary hearing. However, Ms. O'Dell was provided notice of the order to show cause, and responded, twice, to the allegations against her. As she was provided with notice and an opportunity to be heard—the requirements of due process—her argument is without merit.

Ms. O'Dell also argues that the court erred in ordering her to pay \$3,000.00 for the investigatory services of Mr. Valente, and to disgorge to the estate the sum of \$2,951.50 resulting from overcharging for her services, as well as the services of unapproved third-parties. Because Ms.

O'Dell's actions constitute the basis for Mr. Valente's hire, and a guardian cannot keep funds it has wrongfully obtained, the Superior Court's order was correct as a matter of law and should be affirmed.

**II.  
STATEMENT OF THE ISSUES**

- A. Did the Superior Court correctly resolve the issues raised in the order to show cause, giving Ms. O'Dell proper notice and a proper time to respond?
- B. Did the Superior Court correctly conclude in the findings of fact that the conduct of Ms. O'Dell fell below the applicable standard of conduct?
- C. Did the Superior Court correctly conclude in the conclusions of law that Ms. O'Dell is responsible for the payment of Mr. Valente's services, disgorgement of fees, and that the guardianship should be dismissed?

**III.  
COUNTERSTATEMENT OF THE CASE**

On March 6, 2007, a limited guardianship of the person and estate was created for Paula Lynn Fowler, an incapacitated person. (CP 13.) Ms. Fowler was determined to have serious mental health issues that significantly and negatively impacted her ability to make rational decisions, including her inability to care for health, safety, and finances. (CP 3.) Lin O'Dell was appointed guardian. (CP 13.) The court concluded the scope of the guardianship is limited as follows:

All income except income earned by the ward through employment shall be under the management and control of the Guardian, including but not limited to paying monthly expenses. The Guardian shall consult monthly on the ward to determine a monthly

amount for Paula Lynn Fowler, sufficient to allow autonomy related to entertainment, hobbies and other reasonable day to day comforts or enjoyment. This monthly amount shall be under the ward's sole control. The Guardian shall have the express authority to seek and control maintenance of a protection order on behalf of Paula Lynn Fowler should the Guardian believe protection is necessary to ensure Ms. Fowler's safety and protection, including emergency relief in any proceeding, with the exception that Ms. Fowler may seek a voluntary dismissal of her petition in Case No. 06-3-00177-1.

(CP 16.)

On November 21, 2013, the court entered an order to show cause that listed thirteen areas of concern regarding breaches of the standards of practice, statutes, and fiduciary duties. The order further required Ms. O'Dell respond and provide the court with additional documentation by December 10, 2013. (CP 199-206.) Ms. O'Dell timely responded, and provided the court with additional information which the court characterized as "voluminous material." (CP 213; CP 277.) As a result, the court appointed Joseph Valente as investigator and special master to review the court filings in the case. (Id.)

At the conclusion of his investigation, Mr. Valente made the following findings: (1) Ms. O'Dell had failed to timely designate a standby guardian for two years between November 2011 and December 2013, in violation of SOP 401.6.1; (2) Ms. O'Dell failed to provide the

court with complete, accurate, and comprehensible financial reporting records, in violation of SOP 401.5; (3) and (4) are interrelated for failure to provide the court with notice of a substantial changes in the value of the estate and for failure to obtain a required bond and report the bond to the court, in violation of SOP 409.3, RCW 11.88.100, and 11.92.040(3); (5) Ms. O'Dell failed to provide accurate billing statements to the court and failed to get the court's approval before paying for third-party services for Ms. Fowler; (6) Ms. O'Dell failed to obtain approval from the court for accounting records for 2009 and 2012, and continued to advance herself funds without the court's approval, in violation of SOP 401.5, 410.2, RCW 11.92.100 and 11.92.040; (7) Ms. O'Dell failed to have meaningful, in-person contact with Ms. Fowler, in violation of SOP 401.1 and 401.2; (8) Ms. O'Dell failed to provide the court with notice of Ms. Fowler's residential changes, in violation of RCW 11.92.043(3); (9) Ms. O'Dell failed to notify the court of guardianship proceedings in Idaho, which resulted in an Idaho court appointing an agency, Onsite/Insight, as guardian to Ms. Fowler, in violation of RCW 11.88.100; (10) the court's assertions regarding a failure to notify the court of assets of a separate trust and Ms. O'Dell's appointment as trustee were not well-founded and the trust was separate and distinct from the guardianship; (11) Ms. O'Dell did provide—albeit untimely—information regarding the appointment of Onsite/Insight as the guardian in Idaho; (12) Ms. O'Dell should have

requested the court terminate or modify the guardianship much earlier, given that Ms. Fowler resides in Idaho; and (13) Ms. O'Dell had reason to keep the guardianship open because there was no guardianship of the estate in Idaho to assist Ms. Fowler, and pay her bills. (Supp. CP 350-357.)

In addition to the findings above, Mr. Valente also noted the following issues as a result of his investigation: (1) Ms. O'Dell repeatedly misstated that she was full guardian of the estate, rather than a limited guardian; (2) Ms. O'Dell failed to report substantial trust income to the guardian estate, and commingled trust funds in her guardian reports, making it unduly confusing to follow the money; (3) Ms. O'Dell did not provide sufficient information in her initial reports to determine the reasonableness of fees charged for services performed by her employee, Mr. Smith; (4) Ms. O'Dell failed to perform her due diligence by not providing the court with the qualifications and references of Mr. Smith before placing him in contact with Ms. Fowler; and (5) Ms. O'Dell hired herself as a service provider and billed at high rate for the routine errands she would perform on behalf of Ms. Fowler. (Supp. CP 357-366.)

On February 25, 2014, Ms. O'Dell filed a response to Mr. Valente's report, disputing his findings. (CP 279.) In her response, Ms. O'Dell stated that at all times she did have a standby guardian for Ms. Fowler, that all attorney fees were reviewed and approved by the court,

her guardianship letters have never expired, all of her fees advanced were within a budget, she kept in contact with Ms. Fowler through daily e-mail and contact with her attorneys, and lastly, that her billings for her services and care management were not unreasonable. (*Id.*)

On November 20, 2014, after considering the submissions from Ms. O'Dell, Ms. Fowler, and Mr. Valente, the court entered findings of fact and conclusions of law. (CP 302-14.) In the findings of fact, the court found the following: 1.1 The court adopted the investigative report of Mr. Valente as factual statements for purposes of the findings; 1.2(A) Ms. O'Dell violated RCW 11.88.125(3)(b) and SOP 401.6.1 from October 14, 2013 to December 9, 2013 by failing to designate a certified professional guardian as a standby guardian; 1.2(B) Ms. O'Dell failed to provide the court with complete and accurate reports, thereby necessitating the need for the investigator and special master, Mr. Valente, for which Ms. O'Dell has to pay for; 1.2(C) Ms. O'Dell failed to provide the court with notice of substantial changes in the value of the estate; 1.2(D) Ms. O'Dell failed to secure and maintain bond, as required by RCW 11.88.100 and SOP 409.3; 1.2(E) Ms. O'Dell failed to provide the court with complete and understandable billing records for herself as well as third-parties, and failed obtain an order from the court authorizing approval for such payments; 1.2(F) Ms. O'Dell failed to obtain orders approving her guardian reports and accounting for 2009 and 2012, while continuing to

collect fees for services she performed and payment to third-parties without the court's permission; 1.2(G) Ms. O'Dell failed to have meaningful in-person contact with Ms. Fowler, even though it was often futile, and limited contact through e-mail does not suffice; 1.2(H) Ms. O'Dell failed to provide the court with notice of Ms. Fowler's residential changes; 1.2(I) Ms. O'Dell failed to provide notice of the court proceedings in Idaho, in violation of SOP 411.1 and 411.2; 1.2(J) Ms. O'Dell failed to notify the court of her appointment as trustee of a trust by an Idaho court; 1.2(K) Ms. O'Dell failed to notify the court that a different guardian had been appointed in Idaho; 1.2(L) Ms. O'Dell failed to recommend that the court modify or terminate the guardianship; 1.2(M) Ms. O'Dell failed to assist Ms. Fowler in terminating the guardianship after she was appointed a different guardian in Idaho, and after Ms. O'Dell was appointed trustee—thus incurring a double layer of fees and costs as both a trustee of the estate and a limited guardian; 1.4 (there is no 1.3) Ms. O'Dell's time billed for arranging the installation of an ignition interlock device on Ms. Fowler's vehicle was reasonable and necessary<sup>1</sup>; 1.5 Ms. O'Dell overcharged for time spent traveling to review and sign closing papers on Ms. Fowler's property in Northport, thereby owing a disgorgement of \$437.50; 1.6 Ms. O'Dell failed to provide a resume,

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<sup>1</sup> In her brief, Ms. O'Dell states that the court erred in making this ruling, however, the ruling is in her favor. (Appellant Brief at 1.)

qualifications, job application, and background check for Mr. Smith, and overcharged for his work, thereby owing a disgorgement of \$1,584.00; 1.7 Ms. O'Dell overcharged the guardianship estate when she billed six hours to travel to Ms. Fowler's Northport property to oversee a writ of execution and remove discarded items from the property, thereby owing the estate \$300.00; 1.8 Ms. O'Dell overcharged the estate when she overcharged for personally getting Ms. Fowler's car washed and delivering it to Ms. Fowler's brother in Idaho, thereby owing the estate \$270.00; 1.9 While Ms. O'Dell frequently failed to adhere to the applicable statutes and SOPs, overall she strived to care for and meet the expectations of a very demanding client; 1.10 Given the existence of the trust and full guardianship in Idaho, there is no longer a need for the limited guardianship in Washington; 1.11 Even though Ms. O'Dell was frequently outside the bounds of the duties and obligations prescribe by the statute and SOPs, she did so without malicious intent and is not required to disgorge all of the fees paid; and 1.12 Given the existence of the trust estate in Idaho as well as an appointment of a full guardian, there is no further need for the Washington limited guardianship. (*Id.*)

As to the conclusions of law, the court found: 2.1 Ms. O'Dell is required to pay Mr. Valente \$3,000.00 for his services as investigator and special master; 2.2 Ms. O'Dell must disgorge the guardianship estate of \$2,591.50 and transfer the funds to the guardianship estate, and, upon

proof of the transfer, the resulting guardianship funds shall be transferred to the Idaho trust and the limited guardianship will be dismissed; and 2.3 a final order approving the guardian's report, accounting and budget shall be approved. (CP 315.) Ms. O'Dell now appeals. (CP 322.)

#### IV. ARGUMENT

**A. The court did not err by failing to hold an evidentiary hearing after Ms. O'Dell responded to the order to show cause and Mr. Valente's report was submitted.**

After responding to both the order to show cause and Mr. Valente's investigative report, Ms. O'Dell argues that the court, by failing to provide an evidentiary hearing, violated her due process rights.

Due Process is flexible and calls for such procedural protections as the particular situation demands. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). An essential component of due process is the right to notice and a meaningful opportunity to be heard, which, at a minimum, means "at a meaningful time and in a meaningful manner." *Morrison v. State Dep't of Labor & Indus.*, 168 Wn.App. 269, 272-73, 277 P.3d 675, 677 (2012).

The modification or termination of a guardianship is governed by RCW 11.88.120, which states,

(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 or modify the authority of a guardian or limited guardian. Such action may be taken based on the court's own motion, based on a motion by an attorney for a person or entity, based on a motion of a person or entity representing themselves, or based on a written complaint, as described in this section. The court may grant relief under this section as it deems just and in the best interest of the incapacitated person. For any hearing to modify or terminate a guardianship, the incapacitated person shall be given reasonable notice of the hearing and of the incapacitated person's right to be represented at the hearing by counsel of his or her own choosing.

RCW 11.88.120 (emphasis added). RCW 11.88.120 sets forth the procedure the court must follow for the modification or termination of a guardianship, and allows the court, on its own motion, to modify or terminate the guardianship for good reason. The rule does not require the court, after issuing an order to show cause and consideration of the evidence provided, to hold an evidentiary hearing.

In this case, after entering the order to show cause, the court required Ms. O'Dell to respond to the concerns regarding breaches of standards of practice, statutes, and fiduciary duties. Ms. O'Dell timely responded to the order. In addition to her declaration, Ms. O'Dell filed numerous "amended" guardian reports, which included old reports dating back to the beginning of the guardianship. After Ms. O'Dell submitted this material, the court appointed Mr. Valente as investigator and special

master. After his investigation was complete, Ms. O'Dell was given another opportunity to respond to the allegations, which she did.

Ms. O'Dell had notice of the order to show cause and of Mr. Valente's report, and was provided an opportunity to respond to both, which she did. While Ms. O'Dell would like another chance to make her case to the court, the fact remains that she was afforded two opportunities to do just that. This is what due process requires. If Ms. O'Dell wanted to provide further evidence in support of her case, she should have done so in her response to the order to show cause or in response to Mr. Valente's investigative report. Because she was given notice and an opportunity to be heard, the court did not violate Ms. O'Dell's due process rights.

Ms. O'Dell also argues that the evidence submitted in this case raised a genuine issue of material fact for which the judge should have held an evidentiary hearing under CR 56(c). However, this case is not a summary judgment matter, and CR 56(c) does not apply; rather, the statute regarding the modification and termination of a guardianship applies. RCW 11.88.120 does not provide the same considerations and burden shifting as a summary judgment matter. Rather, the statute gives the court discretion to take any action for the best interest of the incapacitated person. Here, after the court issued the order to show cause and required the investigation and response, the court had the discretion to decide what

was in the best interest of Ms. Fowler at that time, without the need for further proceedings.<sup>2</sup>

**B. Did the Superior Court correctly conclude in the findings of fact that Ms. O’Dell’s conduct fell below the applicable standard of conduct?**

Ms. O’Dell argues that the court erred in the findings of fact, to the extent the court found her performance as guardian fell below the applicable standard of care. During the course of the limited guardianship, Ms. O’Dell has frequently failed to keep the court apprised of numerous aspects of the case. First, the court did not err in concluding that Ms. O’Dell violated RCW 11.88.125(3)(b) and SOP 401.6.1 from October 14, 2013 to December 9, 2013 by failing to designate a certified professional guardian as a standby guardian, because one was never appointed. Second, the court did not err in concluding Ms. O’Dell failed to provide the court with complete, understandable, and accurate reports, thereby necessitating the need for the investigator and special master, Mr. Valente.<sup>3</sup> Third, Ms. O’Dell failed to provide the court with notice of substantial changes in the value of the estate and to secure and maintain the required bond when the

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<sup>2</sup> This procedure is supported in other areas of the statute, such as RCW 11.92.050(4) which states “[i]f a guardian or limited guardian fails to file the account or report or fails to appear at the hearing, the court shall enter an order for one or more of the following actions: (a) entering an order to show cause and requiring the guardian to appear at a show cause hearing. At the hearing, the court may take action to protect the incapacitated person, including, but not limited to, removing the guardian or limited guardian pursuant to RCW 11.88.120 and appointing a successor.

<sup>3</sup> This is made apparent by the fact that Ms. O’Dell, in response to the order to show cause, filed numerous “amended” guardianship reports and accounting and budget reports, including many from previous years.

value increased, in violation of RCW 11.88.100 and SOP 409.3. Fourth, Ms. O'Dell failed to provide the court with any notice of proceedings and changes in Idaho, including: Ms. Fowler's change of residence, the Idaho trust, of which Ms. O'Dell was appointed trustee, the appointment of a full guardianship by an Idaho court, and a failure to recommend that, as a result of these actions in Idaho, the court modify or terminate the limited guardianship. Fifth, Ms. O'Dell hired a third-party, Jimmy Smith, to help to assist Ms. Fowler without ever seeking approval from the court, providing a resume, qualifications, or background check before placing him in the presence of Ms. Fowler. Sixth, Ms. O'Dell frequently overcharged for her services and the work Mr. Smith performed, and never sought the court's approval to collect these fees. Seventh, Ms. O'Dell provided a double layer of fees by acting as both Ms. Fowler's limited guardian and trustee of the Idaho trust, without the court's knowledge or approval. Lastly, Ms. O'Dell failed to have in-person contact with Ms. Fowler without court approval, in violation of SOP 404.1 and 404.2.

As evidenced, Ms. O'Dell's performance frequently fell below the acceptable standard of care. Accordingly, the court did not err in the findings of fact.

**C. Did the Superior Court correctly conclude in the conclusions of law that Ms. O'Dell is responsible for the payment of Mr. Valente's services, disgorgement of fees, and that the guardianship should be dismissed?**

Ms. O'Dell argues that the court erred in ordering her to pay the \$3,000.00 fee for Mr. Valente's services without holding a proper evidentiary hearing. When Ms. O'Dell responded to the order to show cause, she included additional material that the court characterized as "voluminous". The court stated in 1.2(B) of the findings of fact that because Ms. O'Dell had failed to provide the court with complete and accurate reports, an investigator and special master was necessary.<sup>4</sup> The court did not err in ruling that Ms. O'Dell pay for a service her conduct necessitated.

In her assignments of error, Ms. O'Dell also argues that the court erred in concluding under 2.2 that she must disgorge the guardianship estate of \$2,591.50 and transfer the funds to the guardianship estate, and, upon proof of the transfer, the resulting guardianship funds shall be transferred to the Idaho trust and the limited guardianship will be dismissed; and 2.3 a final order approving the guardian's report, accounting and budget shall be approved. (Appellant Brief at 1.) However, Ms. O'Dell does not argue either of these issues in the body of her brief.

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<sup>4</sup> The court had discretion to appoint Mr. Valente to act as investigator and special master pursuant to RCW 11.88.120(1) and (2)(c)(vi) which states "[t]o order other action, in the court's discretion..."

Even so, the court did not err in ordering Ms. O'Dell to disgorge to the estate the sum of \$2,591.50—a product of frequent overcharging to the estate for routine errands and unapproved payments to third parties. Furthermore, the court did not err in concluding the limited guardianship should be dismissed as a result of the full guardianship and trust estate in Idaho.

**V.  
CONCLUSION**

For each of the foregoing reasons, it is respectfully submitted that For the reasons stated above, Ms. Fowler respectfully requests that this Court find that the Superior Court did not violate Ms. O'Dell's due process rights, and affirm the Superior Court's findings of fact and conclusions of law that Ms. O'Dell must pay \$3,000.00 for the investigatory services of Mr. Valente, and disgorge the sum of \$2,951.50 to the guardianship estate.

DATED THIS 14<sup>th</sup> day of October, 2016.

HAWLEY TROXELL ENNIS &  
HAWLEY LLP

By   
Stephen C. Smith, WSBA No. 15414  
Attorneys for Respondent Paula A.  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14<sup>th</sup> day of October, 2016, I caused to be served a true copy of the foregoing BRIEF OF RESPONDENT by the method indicated below, and addressed to each of the following:

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