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STATE OF WASHINGTON

BY

DEPUTY

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

GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Plaintiffs/Appellants,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons under the civil justice system, including an interest in the rights of incapacitated persons.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves whether three minor children should be deemed to have forfeited their right to sue for the tort of loss of parental consortium because no one acted on their behalf to join them as parties in their father's prior tort action. For purposes of this amicus curiae brief, the underlying facts are drawn from the "Amended Complaint for Damages," the briefing of the parties, and the "Order Granting Defendant's Motion to Dismiss." See CP 19-25 (amended complaint); Kelley Br. at 1-7, 13; Centennial Br. at 1-5; Kelly Reply Br. at 1-4; Kelley Supp. Br. at 3; Centennial Supp. Br. at 2-3; CP 87-88 (order of dismissal).¹

¹ WSTLA Foundation has also reviewed the superior court verbatim reports of proceedings for February 16 and 21, 2007, involving the legal argument before the superior court and its oral ruling. See VRP 2/16/07, at 1-36 (argument); VRP 2/21/07, at 1-8 (oral ruling). Additionally, WSTLA Foundation has listened to a recording of the oral argument before this court on May 12, 2008.

The following facts are relevant: In April, 2003, Phillip Blackshear (Blackshear or father) sustained personal injuries during the course of employment. In March 2004, Blackshear et ux. sued Centennial Contractors Enterprises, Inc. (Centennial) in tort for damages. At that time, Blackshear's three minor children (Blackshear children) – then aged approximately three, ten and twelve years old - were not joined as parties to their father's tort action, nor represented by a guardian appointed by the court. See CP 20; Centennial Br. at 3-4; Kelley Supp. Br. at 7. Blackshear's claim ultimately proceeded to trial in September 2005, with a favorable verdict and judgment. See CP 22.

Thereafter, George Kelley (Kelley) was appointed as guardian for the Blackshear children and commenced this tort action on their behalf against Centennial, with each child seeking damages for loss of parental consortium. Centennial sought dismissal of these claims, based upon Ueland v. Pengo Hydra-Pull Corp., 103 Wn.2d 131, 691 P.2d 190 (1984), because they had not been joined in the father's prior tort action. Kelley contended that under Ueland such joinder was not feasible, and the failure of the Blackshear children to join their father's tort action did not preclude this action for loss of consortium damages. The superior court granted judgment of dismissal based on Ueland, concluding that Kelley had failed to prove joinder of the children's consortium claims with the father's tort claim was infeasible. This determination addressed feasibility as a factual question. See VRP 2/21/07 at 1-4. This appeal followed.

On appeal, Kelley argues on behalf of the Blackshear children that joinder was not feasible legally because they were unrepresented by a guardian during the course of the father's underlying tort action, and lacked the capacity to file suit until one was appointed to represent their interests. See Kelley Supp. Br. at 3. Kelley further argues that the particular factual circumstances surrounding the father's injuries and the exigencies of the underlying tort litigation rendered joinder of the Blackshear children's consortium claims infeasible.

The decision that the Blackshear family was faced with was whether to join the Appellants' [Blackshear children] claim at or around the time that Mr. Blackshear underwent the microdiscectomy on September 8, 2005. Without question, this decision would have delayed the trial even further.

Kelley Br. at 13.

On the other hand, Centennial argues on appeal that the Blackshear children were sufficiently represented by their parents and the same attorney that represented their father on his underlying tort claim, and that as a consequence the children waived their right to pursue consortium damages because their claims were not joined with the father's tort action.

See Centennial Supp. Br. at 1-2; Centennial Br. at 11. Ultimately, Centennial argues:

This Court must not be swayed that somehow the minor Plaintiffs' rights in this case have been ignored. In reality, this is a case where the minor children had representation through the same attorney they have now and had adult parents looking out for their best interests; there is no evidence to the contrary. The decision was made by the minors' parents and their attorney not to obtain a guardian ad litem and join their claims with their parents. The minor

Plaintiffs' remedy now is against their attorney and not the Defendant in this case.

Centennial Supp. Br. at 2.

III. ISSUE PRESENTED

What is the proper interpretation and application of the joinder mandate and infeasibility exception in Ueland v. Pengo Hydra-Pull Corp., 103 Wn.2d 131, 140, 691 P.2d 190 (1984), when the loss of consortium claim involves minor children?

IV. SUMMARY OF ARGUMENT

When the Supreme Court recognized a minor child's independent right to sue for loss of parental consortium in Ueland v. Pengo Hydra-Pull Corp., it required that the child's claim be joined with the underlying tort claim of the parent unless "the child can show why joinder *was not feasible*." 103 Wn.2d at 140 (emphasis added). In so doing, the Court well understood that a minor child lacks the capacity to pursue a civil claim in his or her own right, and that Washington law requires a court appointed guardian to protect his or her interests. The Ueland "feasibility" concept must be construed with this legal construct in mind. Because the Blackshear children had no properly appointed guardian at the time of the father's tort action, it was not feasible for them to join his action *as a matter of law*. Thus, they are entitled to proceed with this independent action for loss of consortium damages. Under these circumstances, the Court need not inquire further whether feasibility in fact existed.

The parents' (or any other de facto representative's) failure to protect the Blackshear children's right to pursue consortium claims cannot

be imputed to them in these circumstances, nor serve as a basis for waiver of the children's right to independently litigate their claims. Such a result would be inimical to long-standing statutory and common law protections afforded minors. Given the general solicitude in the law for the rights of minors, even if the Blackshear children were represented by a guardian at the time of the father's tort action, a court would intervene to avoid a manifest error prejudicial to them due to the guardian's failure to adequately protect their interests. No less is required here, as the Blackshear children were unrepresented in the eyes of the law at a time when they were under the mandate imposed by Ueland.

V. ARGUMENT

Introduction

In Ueland, the Supreme Court recognized a child's independent claim for loss of parental consortium for the first time, permitting recovery for damages sustained by the child, whether a minor or adult, for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party. See 103 Wn.2d at 139-40. However, the Court required that the "separate consortium claim must be joined with the parent's underlying claim unless the child can show why joinder *was not feasible*." Id. at 140 (emphasis added). The Supreme Court did not define what it meant by "feasible," and this appeal centers upon the meaning of this term, particularly in the context of minor claimants.

A. Overview Of Washington Statutory And Common Law Regarding Protection Of Minors' Rights Under The Civil Justice System.

In Washington, minor children are given special solicitude by both the Legislature and the courts, particularly with respect to their rights under the civil justice system. See generally Charles K. Wiggins, Bryan P. Harnetiaux & Robert H. Whaley, Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits, 22 Gonz. L. Rev. 193, 244-50 (1986/87) (surveying, in course of examining the constitutionality of an amendment to RCW 4.16.350, statutory and common law regarding representation of minors in civil litigation, and collecting cases regarding protection of minors' rights) [hereinafter Wiggins et al.].²

The Washington Legislature has provided mechanisms for either allowing a minor child's civil claim to be held in abeyance until majority, or permitting it to be pursued during minority through a guardian, subject to the direction of the court. Generally, statutes of limitations are tolled during minority, and the limitation period does not begin to run until the age of majority. See RCW 4.16.190.³ Implicit in this tolling statute is the notion that the minor child has no duty to act during minority in order to preserve his or her civil claim. See Wiggins et al. at 245, 247, 249. A

² In Washington a person becomes an adult at eighteen years of age. See RCW 26.28.010 (the current version of which is reproduced in the Appendix to this brief); see also RCW 11.92.010.

³ The current version of RCW 4.16.190 is reproduced in the Appendix. As Centennial notes, there is an express exception to minor tolling effected by 2006 amendments to RCW 4.16.350 and RCW 4.16.190, providing that knowledge of a custodial parent or guardian is imputed to the minor child and serves to trigger running of the medical negligence statute of limitations. See 2006 Laws, Ch. 8 §§302, 303; Centennial Br. at 5. Centennial does not contend that RCW 4.16.350 applies in this case.

minor child's claim *may* be pursued before adulthood, but the minor *must* be represented by a court appointed guardian. See RCW 4.08.050; RCW 11.88.010; RCW 11.92.010; .060.⁴ However, appointment of a guardian does not render the tolling statute inapplicable. See Young v. Key Pharmaceuticals, 112 Wn.2d 216, 221-25, 770 P.2d 182 (1989) (recognizing tolling continues because the tort claim belongs to the minor child, not the guardian).

The Washington courts have been sedulous in protecting the rights of minors under the civil justice system, whether construing laws affecting minors' rights, or providing for relief in particular cases when statutory safeguards have broken down for one reason or another. See In re Ivarsson, 60 Wn.2d 733, 375 P.2d 509 (1962) (permitting appeal on behalf of a ward by next friend challenging final report of guardian where guardian's interests conflicted with the ward, and describing the guardian

⁴ The current versions of these statutes are reproduced in the Appendix. All of these statutes or prior versions of them existed at the time Ueland was decided.

Two of these statutes recognize circumstances where a minor may be deemed capable of initiating litigation, but thereafter is replaced by a guardian. See RCW 4.08.050; RCW 11.92.060. Under RCW 4.08.050, a minor fourteen years old or older arguably may begin a civil action and apply to the court for appointment of a guardian. It is questionable whether this capability would include joinder in another action. In any event, this statute does not impose a duty upon the minor to pursue the action or seek appointment of a guardian, and otherwise leaves intact the child's entitlement to tolling under RCW 4.16.190. It does not appear that any of the Blackshear children were fourteen or older at the time the father's action was commenced. See CP 20; text supra at 2. RCW 11.92.060(2), which covers situations requiring a guardian of an estate of an incapacitated person, allows that an incapacitated person may initiate litigation, but contemplates a guardian will thereafter be substituted for the incapacitated person. It is doubtful this statute applies when the guardianship involved is based on minority, and for the sole purpose of pursuing a civil action. See RCW 11.88.010(1) (describing various bases for guardianships). Again, like RCW 4.08.050, this provision, if applicable, does not impose a duty on the minor to initiate litigation, and leaves the right to tolling intact. Ultimately these two statutes principally serve to reinforce the crucial role of a guardian in proceedings involving an incapacitated person.

as an arm of the court; equitable proceeding); Ball v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976) (establishing that court will intervene in a civil action to protect a minor's rights when guardian commits a manifest error prejudicial to the interests of the minor, but denying relief, 5-4, under the particular circumstances); see also Hunter v. North Mason High School, 12 Wn.App. 304, 307, 529 P.2d 898 (1974) (concluding failure of unrepresented minor to file notice of claim not fatal because notice provisions presuppose the existence of a person capable of compliance), *affirmed on other grounds*, 85 Wn.2d 810, 539 P.2d 845 (1975).⁵

In this case, the Blackshear children had no court appointed guardian at the time of their father's underlying tort action. Their loss of consortium claims remained subject to tolling pursuant to RCW 4.16.190. See Young, 112 Wn.2d at 221-25.⁶ No special statute altered this entitlement. Nonetheless, Centennial argues that Ueland modified tolling under RCW 4.16.190 with respect to a minor child's loss of parental consortium claim. See Centennial Supp. Br. at 1,4. This issue is addressed in §B., below.

⁵ Hunter addressed whether a minor's claim for personal injury against a governmental entity should be dismissed for failure to comply with a 120-day nonclaim statute. This court held noncompliance was excused because of minority, concluding that the minor "lacks the means for personally complying with the statute until the time the disability caused by his age is removed." Id., 12 Wn.App. at 308. On review, the Supreme Court held that the 120-day nonclaim statute was unconstitutional. See Hunter v. North Mason School Dist., 85 Wn.2d 810, 811, 539 P.2d 845 (1975).

⁶ Young distinguished a case cited by Centennial, Huntington v. Samaritan Hospital, 101 Wn.2d 466, 468-70, 680 P.2d 58 (1984), on the basis that Huntington involved a statutory wrongful death claim that belonged to the personal representative, not the minor wrongful death beneficiaries. See Centennial Br. at 4.

B. Joinder Of The Blackshear Children's Consortium Claims With The Tort Claim Of Their Father Was Not Feasible As A Matter Of Law Because They Did Not Have A Guardian At The Time The Father's Claim Was Litigated.

At the time the Supreme Court decided Ueland, it was of course familiar with Washington statutes and common law protecting the rights of minor litigants, including the guardianship statutes and the general tolling statute, RCW 4.16.190. See §A., supra. The Court's imposition of the joinder requirement in Ueland, and the meaning of "not feasible" as an exception to the requirement, must be interpreted against the backdrop of existing Washington law safeguarding the rights of minors, particularly when the Court does not give any indication that its decision has the effect of altering that law.

Generally, something is "feasible" if it is "[c]apable of being done, executed, or affected." See Black's Law Dictionary, at 739 (Rev. 4th ed. 1968). In terms of joinder, whether a minor is capable of joining a parent's underlying tort action must be assessed from both a legal and factual standpoint. From a legal standpoint, if the Blackshear children were not represented by a guardian at the time of the father's underlying tort action, they should be deemed incapable of effectuating joinder. The Court should hold that under such circumstances joinder was not feasible *as a matter of law*. There is no need to reach the separate question of whether joinder was infeasible in fact, under the particular circumstances of the case.

Centennial's analysis of feasibility is largely fact-driven, and does not meaningfully address whether the Blackshear children were legally capable of effectuating joinder under the circumstances. Instead, notwithstanding conceding that "minors simply are not capable of bringing their own claims," it argues that it was the "responsibility" of the children's parents and the lawyer representing both parents and children to timely pursue joinder on their behalf. See Centennial Br. at 4, 6. This analysis, which imputes the parents' and lawyer's failure to effectuate joinder of the children's claims to the children, is unprecedented under Washington law outside of the medical negligence context, an exception specifically crafted by the Legislature. See supra at n.3.⁷ If the Supreme Court had intended to alter so dramatically the law regarding protection of minors, it likely would have acknowledged this result. It did not. Centennial's assessment of feasibility should be rejected.⁸

⁷ Centennial's argument is also unsound because it would have the Supreme Court altering by fiat a positive law of the Legislature regarding tolling, RCW 4.16.190. This has separation of powers implications. See State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (refusing to establish an exception to application of a statute, concluding "[w]e are bound to interpret the proclamations of the Legislature and not create an exception in the law where there is none." The Court is without the power to create an "exception" to the tolling statute merely in service of a new common law rule. Any exception must result from the Court performing its interpretive function.

⁸ Regarding Centennial's claim that the Blackshear children are bound by the choices made by the attorney purportedly representing their interests at the time of their father's tort action, while also representing the father, this argument fails under a similar analysis. See Centennial Supp. Br. at 3-4. Even if the Blackshear children contracted with an attorney, the contract could be disaffirmed under Washington law. See RCW 26.28.030 (the current version of which is reproduced in the Appendix); Plummer v. Northern Pac. R. Co., 98 Wash. 67, 70, 167 Pac. 73 (1917) (absent court approval, a minor's contract for legal services may be disaffirmed and becomes void ab initio). If an attorney retainer agreement was not approved by the court, the attorney's actions taken on behalf of the Blackshear children should be without legal significance in assessing their right to pursue consortium damages in this independent action.

The Supreme Court's pronouncement in Ueland must be read in the context of existing statutory and common law of general application. This necessarily means that joinder of the Blackshear children's claims must have been feasible both in law and fact. Absent an appointed guardian, the parents could not bind the Blackshear children by inaction and doom their loss of consortium claims. Joinder was infeasible as a matter of law. This independent action should be allowed to proceed.

C. A Court Will Intervene To Protect A Minor Child's Interests When Disserved By A Guardian, And, If Necessary, The Court Should Do The Same For The Blackshear Children Who Stand To Lose A Substantial Property Right Due To Their Parents' Alleged Failure To Act At A Time When The Children Were Not Represented By A Guardian.

If the Blackshear children had a guardian at the time the father's tort claim was being pursued, the question of whether the children should forego joinder of their consortium claims in order to expedite consideration of the father's own claim and avoid family financial disaster would have been thoughtfully scrutinized by the guardian on behalf of the children, with their best interests in mind. Cf. In re Ivarsson, 60 Wn.2d at 737; RCW 11.92.060(4). Under such circumstances, the guardian may have asked the court in the guardianship proceeding for guidance, knowing that under Ueland there is the risk that if joinder is not sought, the children's right to claim consortium damages may be lost. This course of events is exactly what the Legislature contemplated in establishing the guardianship scheme. The children would have been represented by an

advocate dedicated solely to protecting their interests, serving as an arm of the court.

Under the same hypothetical, if an appointed guardian chose to forego joinder of the children's claims in their father's action without advance court approval, and that decision was later determined by a court to be a manifest error by the guardian, the court could prevent the harsh result that would otherwise follow from noncompliance with the Ueland mandate. See Ball v. Smith, 87 Wn.2d at 721 (suggesting that in appropriate circumstances a court may intervene to correct a manifest error by a guardian who, due to improper motive, neglects the cause of the minor ward); see also id. at 731 (Dolliver, J., dissenting) (urging that the "court has both the power and the responsibility to act when to do otherwise would result in a gross injustice to a minor child").⁹

In the absence of a guardianship in this case, the Blackshear children should not be worse off under the law because of any decision by the parents to forego joinder. Centennial's argument that Ueland allows parents to exercise the responsibility for determining whether the children's claim should be joined should be rejected. It is out of keeping with statutory and case law designed to ensure protection of the rights of minors. As noted by this court in a related context, a minor's "right of

⁹ Inexplicably, the majority in Ball indicates that no "property" of the minor was involved in the case, see 87 Wn.2d at 721, overlooking the fact that the Court recognized in Hunter, 85 Wn.2d at 814, that "[t]he right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life."

action should not depend on the good fortune of having an astute relative or friend to take the proper steps on his behalf.” Hunter, 12 Wn.App. at 307.¹⁰

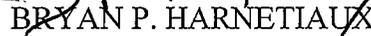
VI. CONCLUSION

The Court should consider the analysis advanced in this brief, and resolve the issues on review accordingly.

DATED this 3rd day of July, 2008.


KELBY D. FLETCHER


BRYAN P. HARNETIAUX


BRYAN P. HARNETIAUX


SARAH C. SCHRECK

On behalf of WSTLA Foundation

¹⁰ The Ueland joinder requirement was born out of the Supreme Court’s expressed concern that in the absence of joinder there may be multiplicity of litigation, resulting in a waste of judicial resources. See 103 Wn.2d at 136-37. Under the analysis proposed in this brief, there is such a risk of multiplicity of litigation when a parent, for whatever reason, does not seek a guardianship for the minor child or children in order to address potential loss of consortium claims. However, CR 19(a)(2)(B), governing mandatory joinder of claims, appears to contemplate that in circumstances such as these a defendant may seek joinder of the minor children as party plaintiffs, in order to avoid a substantial risk of multiple obligations. (The current version of CR 19 is reproduced in the Appendix to this brief.)

APPENDIX

RCW 4.08.050

Guardian ad litem for infant.

Except as provided under RCW 26.50.020 and 28A.225.035, when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:

(1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

(2) When the infant is defendant, upon the application of the infant, if he or she be of the age of fourteen years, and applies within thirty days after the service of the summons; if he or she be under the age of fourteen, or neglects to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

[1996 c 134 § 7; 1992 c 111 § 9; 1891 c 30 § 1; Code 1881 § 12; 1854 p 132 §§ 6, 7; RRS § 187.]

RCW 4.16.190

Statute tolled by personal disability

(1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

[2006 c 8 § 303; 1993 c 232 § 1; 1977 ex.s. c 80 § 2; 1971 ex.s. c 292 § 74; Code 1881 § 37; 1877 p 9 § 38; 1869 p 10 § 38; 1861 p 61 § 1; 1854 p 364 § 11; RRS § 169.]

RCW 26.28.010
Age of majority.

Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.

[1971 ex.s. c 292 § 1; 1970 ex.s. c 17 § 1; 1923 c 72 § 2; Code 1881 § 2363; 1866 p 92 § 1; 1863 p 434 § 1; 1854 p 407 § 1; RRS § 10548.]

26.28.030
Contracts of minors – Disaffirmance.

A minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money and property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority.

[1866 p 92 § 2; RRS § 5829.]

RCW 11.88.010
Authority to appoint guardians — Definitions — Venue — Nomination by principal.

(1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW 26.28.010.

(e) For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

(f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incapacitated person is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse or domestic partner of the alleged incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor.

[2008 c 6 § 802; 2005 c 236 § 3; (2005 c 236 § 2 expired January 1, 2006); 2004 c 267 § 139; 1991 c 289 § 1; 1990 c 122 § 2; 1984 c 149 § 176; 1977 ex.s. c 309 § 2; 1975 1st ex.s. c 95 § 2; 1965 c 145 § 11.88.010. Prior: 1917 c 156 § 195; RRS § 1565; prior: Code 1881 § 1604; 1873 p 314 § 299; 1855 p 15 § 1.]

RCW 11.92.010

Guardians or limited guardians under court control — Legal age.

Guardians or limited guardians herein provided for shall at all times be under the general direction and control of the court making the appointment. For the purposes of chapters 11.88 and 11.92 RCW, all persons shall be of full and legal age when they shall be eighteen years old.

[1975 1st ex.s. c 95 § 18; 1971 c 28 § 5; 1965 c 145 § 11.92.010. Prior: 1923 c 72 § 1; 1917 c 156 § 202; RRS § 1572. Formerly RCW 11.92.010 and 11.92.020.]

RCW 11.92.060

Guardian to represent incapacitated person — Compromise of claims — Service of process.

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

(2) JOINDER, AMENDMENT AND SUBSTITUTION. When the guardian of the estate is under personal liability for his or her own contracts and acts made and performed on behalf of the estate the guardian may be sued both as guardian and in his or her personal capacity in the same action. Misnomer or the bringing of the action by or against the incapacitated person shall

not be grounds for dismissal of the action and leave to amend or substitute shall be freely granted. If an action was commenced by or against the incapacitated person before the appointment of a guardian of his or her estate, such guardian when appointed may be substituted as a party for the incapacitated person. If the appointment of the guardian of the estate is terminated, his or her successor may be substituted; if the incapacitated person dies, his or her personal representative may be substituted; if the incapacitated person is no longer incapacitated the person may be substituted.

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

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

(5) LIMITED GUARDIAN. Limited guardians may serve and be served with process or actions on behalf of the incapacitated person, but only to the extent provided for in the court order appointing a limited guardian.

[1990 c 122 § 26; 1975 1st ex.s. c 95 § 23; 1965 c 145 § 11.92.060. Prior: 1917 c 156 § 206; RRS § 1576; prior: 1903 c 100 § 1; Code 1881 § 1611; 1860 p 226 § 328.]

CR 19

Joinder Of Persons Needed For Just Adjudication

(a) **Persons To Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of rule 23.

(e) **Husband and Wife Must Join--Exceptions.** (Reserved. See RCW 4.08.030.)

Kelley v. Centennial Contractors Enterprises, Inc.
No. 36089-6-II

DECLARATION OF SERVICE

I declare under penalty of perjury that I have emailed the BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION in this case to the following:

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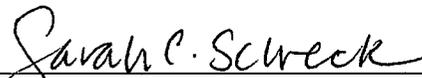
For Centennial:

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For Washington Defense Trial Lawyers, Amicus Curiae:

Stewart A. Estes at sestes@kbmlawyers.com.

Dated this 3rd day of July,



Sarah C. Schreck
WSBA #39417

