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70739-6

NO. 70739-6-I

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

NANCY A. BECKER and JENNIFER L. WHITE,

Appellants,

v.

JENNIFER C. RYDBERG,

Respondent.

APPELLANTS' JOINT OPENING BRIEF

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I. INTRODUCTION

In the case below, a Guardian ad Litem appointed to advise the trial court on limited issues in a probate action involving a minor child, with a budget capped by court order, arrogated to herself authority far beyond anything authorized by the court and well outside the best interests of her ward, Barbara Becker. The Guardian ad Litem, Respondent Jennifer Rydberg (“GAL”), allied herself with Barbara’s adversaries, adopting their litigation strategy and losing all independence. The GAL purported to settle the litigation; a settlement clearly beyond her authority and weighted grossly against Barbara. She then sought and obtained an order barring the child’s mother, Appellant Nancy Becker, from being heard with respect to the GAL’s effort to obtain court approval for the settlement—barring the child’s mother from protecting both her minor child’s and her own interests. The GAL also provided the trial court with extensive reports and litigation analysis that viciously attacked Nancy and the PR, ex parte, in violation of court rules and the Code of Judicial Conduct. And the GAL hired attorneys to represent her at Estate expense.

The GAL’s inexplicable and misguided actions set off a firestorm of litigation that went all the way to the Washington Supreme Court, where the GAL’s position—pressed, significantly, not by the GAL, but by Barbara’s adversaries—was unanimously rejected by that Court. In the

end, the GAL accomplished nothing. The “settlement agreement” is, thankfully, a dead letter. Nancy’s standing to participate in the probate proceedings and will contest has been confirmed. The litigation precipitated by the probate was finally settled on far better terms than those negotiated by the GAL. And everyone (including the PR and her attorneys) spent as yet untold hundreds of thousands of dollars.

After all this, the GAL requested that she and her attorneys—the attorney and the attorneys for the attorney—be paid nearly \$400,000, from an Estate bled dry of liquid assets by the actions of the GAL and her allies. The trial court granted this request in full and made none of the required findings of fact or law on the record in support of this unreasonable and incredibly damaging award. The trial court then recused itself from the remainder of the probate case, but purported to retain jurisdiction over any motion practice related to its generous award of fees to the GAL.

The trial court’s award of fees to the GAL and her attorneys should be reversed and remanded to a different judge for the following reasons:

First, the trial court improperly allowed the GAL to exponentially expand her own authority and incur substantial fees prior to requesting court approval for such actions. These actions were ultra vires and void.

Second, the trial court failed to make the required findings of fact and conclusions of law in support of the \$382,369.67 fee award. The trial

court made no inquiry into the reasonableness, necessity, or quality of the work completed, or whether the work ultimately benefited the minor child. And the trial court improperly denied Appellants' request for discovery or an evidentiary hearing to determine these issues.

Third, the trial court erred in allowing the GAL to hire outside counsel for herself—attorneys for the attorney—at Estate expense.

Finally, the trial court improperly failed to recuse itself prior to ruling on the GAL's fee petition, despite substantial ex parte communication with the GAL involving information central to the fee request. The appearance of fairness requires remand to a different judge.

II. ASSIGNMENTS OF ERROR

Appellants Nancy A. Becker ("Nancy")¹ and Jennifer L. White ("PR") assign error to the trial court's July 12, 2013, Judgment and Order Granting Guardian Ad Litem's Motion for Fees and for Clarification of Powers Nunc Pro Tunc ("Order on GAL Fees") as follows:

1. The trial court erred in determining that the GAL could act and incur substantial fees without obtaining prior court approval and in authorizing her actions nunc pro tunc;

2. The trial court erred in granting the GAL's entire fee request—\$171,094.57 for the GAL and \$211,275.10 for her counsel—

¹ Due to the number of individuals with the last name Becker in this case, we refer to Nancy, Tory, and Barbara Becker by their first names to avoid confusion.

without the required inquiry into the reasonableness, necessity, or quality of the work completed, or whether the work benefited the minor child;

3. The trial court erred in denying Appellants' request for discovery or an evidentiary hearing to determine the reasonableness, necessity, or quality of the work completed by the GAL; and

4. The trial court erred in determining that the GAL could hire outside counsel for herself (not for the minor child beneficiary of the GAL appointment) at Estate expense.

Appellant Nancy A. Becker separately assigns error to the trial court's July 24, 2013, Order Granting Motion for Reassignment and Recusal of Undersigned Judge ("Order on Recusal") as follows:

5. The trial court improperly failed to recuse itself prior to ruling on the GAL's Motion for Fees and Clarification of Authority Nunc Pro Tunc, despite the GAL's previous ex parte contact with the court, which violated the Code of Judicial Conduct and raises a reasonable question regarding the appearance of fairness of the ruling.

III. STATEMENT OF THE CASE

This case has a long and complex history, including two separate trial court actions, and a previous appeal to the state Supreme Court. Appellants include the following history of the case to provide essential context for the fee dispute and recusal question presently before the Court.

A. Death of Tory Becker and Commencement of Probate

The decedent, Virgil V. Becker, Jr. (“Tory”), died in a private plane crash on July 27, 2008. He was 58. He left behind his spouse, Dr. Nancy A. Becker, whom he had married in 1995, and their minor daughter, Barbara Becker, born in 1997. Barbara was 10 when her father died. Tory had been married once before, to Linda Bulger. That marriage ended in an apparently contentious divorce in 1993. His three daughters from that marriage, Catherine Jane Becker, Carol-Lynne Janice Becker, and Elizabeth Diane Margaret Becker, were adults when Tory died.

In February 1999, Tory signed his Last Will and Testament. CP 1-11. In his Will, Tory left his estate to Barbara. CP 4-5. He nominated Nancy as his personal representative. CP 2. She qualified and was appointed to serve in the probate action a few weeks after Tory’s death.

B. Assets of the Estate

Most of Tory’s assets were in the form of his membership interest in Doctors Becker, LLC (the “LLC”), which he and Nancy formed in 2007. The assets of the LLC included a 40 acre farm and house on the Enumclaw plateau, where Tory, Nancy, and Barbara lived together (and where Nancy and Barbara now live); real property on San Juan Island; and a partially constructed medical office building in Enumclaw. When Tory died, the LLC owed about \$1.5 million to Sterling Bank on a loan for the

construction of the office building, secured by a deed of trust on the Enumclaw residence and the medical building. Tory also owned an interest in a small house (since sold) in Auburn; several modest bank and brokerage accounts (since exhausted); and an interest in two family partnerships Tory held with his two brothers called the Trident entities.

C. Appointment of Guardian ad Litem

Tory's will leaves his entire estate to Barbara and provides for the creation of a trust for Barbara, only *if* Nancy predeceases Tory. CP 5-8. Nonetheless, on August 13, 2008, the probate attorney then representing Nancy (as PR) presented and the court entered an Order Appointing Guardian ad Litem, in which the court appointed Gail Crawford as GAL. CP 12-14. The order directed the GAL to report to the court on three limited issues. *See* CP 13-14. The order limits the guardian ad litem fees "to a maximum of \$3,000 without further, prior court approval." CP 13. In January 2009, Jennifer Rydberg succeeded Gail Crawford as GAL. The order appointing Ms. Rydberg—and signed by her—expressly preserved the provisions of the earlier order. CP 15-18.

D. Will Contest and Creditor Claim Actions

Tory's three adult children (collectively, the "Adult Daughters") contested the validity of Tory's will (the "Will Contest"). The Adult Daughters and their mother (collectively, the "Bulger Parties") together

also filed fourteen creditors' claims against the Estate. Nancy retained the firm of Van Siclen Stocks & Firkins to represent her as PR in litigation. She rejected the creditors' claims and opposed the Will Contest. On January 29, 2009, the Bulger Parties filed a separate action on their creditors' claims under King County Cause No. 09-4-00469-0 KNT (the "Creditor Claim Action"). *See generally* CP 2807-3479. The GAL was not appointed in the Creditor Claim Action and was not a party to that Action. *See* CP 15-18 (appointment in Cause No. 08-4-04979-2 KNT).

E. The GAL Executes the CR2A Agreement

The parties participated in mediation on December 4, 2009, in an attempt to resolve the Will Contest and Creditor Claim Action. Nancy attended the mediation with her attorney. When the mediation failed to generate any agreement by the end of the day, the mediator dismissed Nancy and her attorney. Unbeknownst to Nancy, the GAL stayed and entered into a so-called "CR2A Settlement Agreement" with the Bulger Parties. CP 644-50. The GAL purportedly signed the CR2A Agreement on Barbara's behalf. CP 644. The GAL and the Bulger Parties agreed in the CR2A Agreement that the Estate (which was *not* a party to the agreement) would pay the Bulger Parties \$200,000 in attorney fees and \$400,000 to settle the creditors' claims, CP 645, ¶ 1(a)-(b), and would distribute the remaining net estate assets half to the Adult Daughters and

half to Barbara, CP 645-46, ¶¶ 1(c)-(f), 2. In other words, the GAL purported to surrender substantially *more than half* of Tory's estate to the Bulger Parties, who took nothing under the Will. The CR2A Agreement required approval by the trial court or the PR and provided that the GAL and Bulger Parties might seek the appointment of a special PR if Nancy withheld her approval. CP 646, ¶ 6.

The GAL gave the Adult Daughters far more under the CR2A Agreement than they would have received if they successfully invalidated Tory's Will. If the Estate passed by intestacy, Nancy, as surviving spouse, would be entitled to all of Tory's interest in the community property and half of his separate property. RCW 11.04.015(1)(a)-(b). Barbara and the Adult Daughters would each receive one-eighth of Tory's separate property. RCW 11.04.015(2)(a). If, on the other hand, a prior will were admitted to probate, Nancy would be presumptively entitled to the same intestate share under RCW 11.12.095, as an omitted spouse. The remaining half of the separate property would be distributed under the terms of the will. The CR2A Agreement was thus very generous to the Adult Daughters and highly prejudicial to both Barbara, as the beneficiary of the Will, and Nancy as an intestate heir.

The GAL's concessions in the CR2A Agreement were particularly insidious because of the nature of the assets in Tory's Estate. The Estate

had no liquidity. Most of the value of the Estate, particularly after it was depleted in the contentious litigation instituted by the Bulger Parties, was in the LLC. The assets of the LLC are the house where Barbara (the sole beneficiary) lives with her mother, the weekend property where Barbara and her mother retreat and spend time with friends, and the medical building where Nancy earns an income to support Barbara, service the large LLC debt, and maintain the other two real properties. The GAL agreed to give more than half of Tory's interest in these assets to Tory's former wife and his adult daughters. Moreover, the CR2A Agreement contemplated that the GAL and the Adult Daughters would get together and divide Tory's interest in the tangible, personal community property by mutual agreement. CP 646 ¶ 5. This property consists of the equipment in Nancy's barn, the furniture in the house Nancy shares with Barbara, the cars Nancy drives, and the dishes in Nancy's and Barbara's kitchen.

F. Litigation Caused by Execution of CR2A Agreement

Nancy felt strongly that the CR2A Agreement was contrary to her daughter's interests and refused to sign it. On December 23, 2009, Nancy filed a Petition to Remove Guardian ad Litem, Void Purported "Settlement Agreement," and Compel Disgorgement of Fees ("Petition").² *See*

² The Superior Court docket states the Petition was filed January 4, 2010. But the supporting declaration was filed December 23, 2009, and the Opposition was filed December 30, therefore it appears that the Superior Court mistakenly changed the date.

CP 3777-99. The Petition put the GAL plainly on notice that the scope of her authority was hotly contested. The Petition also showed the Adult Daughters' evidence in support of the Will Contest was weak, with no expert opinion that the Will was invalid. *See* CP 3779-80, 3788-89, 3540-64. The Petition further explained that the GAL refused to put her reasons for entering into the grossly unfavorable CR2A Agreement into writing. CP 3796-97; *see also* CP 3565-69 (GAL states: "I will not put [why I agreed to the CR2A Agreement] in a writing I give to you. I will discuss it with you and your client verbally, without any recording of it. No notes taken while I'm in the room."). Nancy (as PR) also moved for summary judgment on the creditors' claims. CP 3175-97, 3201-25.

The same month, the GAL started a separate guardianship action, King County Cause No. 09-4-06072-7 KNT, seeking appointment of a guardian of the Estate for Barbara. This action was unrelated to the probate of Tory's Will and was likely based on the GAL's unfounded suspicions that Barbara was at risk of financial exploitation by Nancy. The guardian ad litem appointed in that action recommended against appointment of a guardian. There is *no evidence* that Nancy financially exploited her daughter's personal accounts.

The GAL then brought a motion to remove Nancy as personal representative. *See* CP 2366-2571. The trial court granted the motion to

remove Nancy as PR and removed from the court calendar the motions to remove the GAL and for summary judgment. *See* CP 462-66.

On April 8, 2010, Nancy appeared personally (not as PR) in the probate action through undersigned counsel. CP 467-68. On April 9, upon agreement of all parties, the court appointed Jennifer White as successor PR. CP 469-72. Ms. White was hand selected by the GAL.

G. The Motion to Deny Nancy Standing

On May 10, 2010, the GAL brought a motion to remove Nancy from the Will Contest, contending she lacked standing after her removal as PR. CP 473-83. Why the GAL felt that denying the surviving spouse and mother of the sole beneficiary her right to be heard would benefit the minor child remains a mystery. Nancy opposed the motion on several grounds, including that the GAL did not have authority to litigate such a motion. *See* CP 491-501. The Bulger Parties supported the motion, CP 527-31, as they had been instrumental in its filing. *See* CP 1779-81 (multiple entries show GAL working with counsel for Bulger Parties on standing motion). To the GAL's displeasure, her handpicked PR opposed the motion and the CR2A Agreement. *See* CP 489-90.

On May 20, the court removed Nancy from the Will Contest ("Order Denying Standing"). CP 555-57. The order denied Nancy the opportunity to protect her minor daughter's interests, a right long

recognized in Washington. *See In re Guardianship of Ivarrison*, 60 Wn.2d 733, 735-36, 375 P.2d 509 (1962); *Estate of Toland v. Toland*, 170 Wn. App. 828, 836-37, 286 P.3d 60 (2012) (recognizing parental standing under TEDRA), *review accepted on other issues*, 176 Wn.2d 1017 (2013). It also prevented Nancy from protecting her own intestate share of the Estate in the event the Will Contest succeeded; a right the Washington Supreme Court held confers standing. *In re Estate of Becker*, 177 Wn.2d 242, 247-49, 298 P.3d 720 (2013). Nancy sought discretionary review.

H. Subsequent Litigation in the Summer of 2010

With Nancy out of the way, on June 2, 2010, the GAL filed a Motion to Approve CR2A Agreement, CP 581-84, and a Motion to Seal Confidential Interim Report of Guardian ad Litem and GAL's CR 2A Litigation Analysis. *See* CP 572-77. The GAL sought to seal: (1) an Interim Report "that details the history of the case from the GAL's perspective that is intertwined with facts, law and her analysis thereof"; and (2) a Litigation Analysis summarizing why the GAL believed the CR2A Agreement benefited Barbara. CP 573. The GAL submitted these reports directly to the court, intending that they never become part of the public record and that no other party or counsel see them. CP 572-73.

No court order or rule directed or authorized the GAL to file such reports. For a GAL initiating intensely adversarial litigation, the

preparation and filing of these reports and their ex parte delivery to the court was highly irregular and likely unethical.

On June 11, 2010, the trial court held a hearing, originally set to discuss the CR2A Agreement. The PR was initially represented at the hearing by Van Siclen, Stocks & Firkins, but the court concluded that the successor PR could not be represented by the firm that had previously represented Nancy as PR. RP (6/11/10) at 18:7-15, 19:3-5. After a brief recess, the Van Siclen firm withdrew. RP (6/11/10) at 23:3-11. The court then executed an “agreed” order (agreed between the GAL, the Bulger Parties, and the now-unrepresented PR) sealing the reports filed by the GAL (“Order on Ex Parte Contact”). CP 1190-93. Although no party made a motion regarding the GAL’s authority, the court concluded that the GAL was “retained by the Court to represent the interests of the minor beneficiary,” and that the “minor beneficiary is the third-party beneficiary of this appointment.” CP 1191, ¶¶ 2-3. The court also sealed redacted versions of the GAL’s reports from the public. CP 1192-93, ¶¶ 1(1)-(2), 2. The Order on Ex Parte Contact provided that the original, unredacted reports “be returned uncopied to the GAL forthwith.” CP 1193, ¶ 4. The original reports were never served on Nancy or the PR. During the hearing, however, the court acknowledged that if there were no authority

for the submission of the unredacted reports to the court on an ex parte basis, recusal would be required. RP (6/11/10) at 10:20-11:1; 36:18-24.

The court declined to rule on the Motion for Approval of CR2A Agreement, instead sending the matter to the minor settlement ex parte department. CP 1187, ¶ 2. The Ex Parte and Probate Department declined to hear the matter and referred it back to the trial court. CP 1186. The GAL made no further effort to have the agreement approved.

Also during the June 11 hearing, the GAL told the court that she wanted to hire a lawyer, at Estate expense. RP (6/11/10) at 20:7-10, 20:13-14. The court agreed. *Id.* at 20:11-12, 20: 15-16, 21:1-2. The GAL's request was at odds with her repeated contentions that she was substituted for Gail Crawford in January 2009 due to her expertise in probate litigation and that she is a TEDRA GAL, in effect acting as counsel for Barbara. *See* CP 1684, ¶¶ 14-15. On July 8, 2010, the GAL sought court approval to hire two different law firms to represent her in the probate litigation. CP 1203-08. Nancy opposed the motion, arguing that there was no further need for a GAL, the appointment of attorneys for the GAL would drain Estate assets, and there was no authority for appointment of a lawyer for a GAL who was herself a lawyer. *See* CP 1291-97. The GAL argued Nancy had no standing to object and characterized the opposition as a "thinly veiled attempt[] to reargue the

Court's decision [at the June 11 hearing] that the GAL is entitled to legal counsel," and that in seeking the appointment of counsel, she was merely complying with the trial court's June 11 "order." CP 1299-1300. On June 23, 2010, the court signed the GAL's proposed order, authorizing her to hire counsel and requiring the Estate to pay all attorney fees, including a \$25,000 advance fee deposit. CP 1304-06.

On July 15, 2010, Nancy filed a Motion to Nullify Actions of GAL and Terminate Appointment, arguing: (1) the GAL acted outside the scope of her authority in signing the CR2A Agreement; (2) she violated the Guardian ad Litem Rules; (3) her reversible actions should be declared null and void; and (4) the GAL's appointment was unnecessary and should be terminated. *See* CP 1236-47. That motion was never decided because the Court of Appeals accepted review of the Order Denying Standing. Given the trial court's order denying Nancy standing, it is unknown whether the court would even have agreed to hear the motion.

On August 23, 2010, the GAL filed a motion for fees and for clarification of her powers nunc pro tunc. CP 1314-25, 1328-34, 1335-70. Both the PR and Nancy opposed the GAL's motion. CP 1401-24, 1425-33, 1434-47, 1448-69. The PR explained that payment would require liquidating Estate assets. *See* CP 1401, 1425. Nancy argued that the trial court lacked jurisdiction to hear the motion because this Court had

accepted review of the trial court's Order Denying Standing on August 31, 2010.³ See CP 1450. The court granted the GAL's motion, awarding the GAL all of the requested fees for the GAL and her lawyers. CP 1546-47. Nancy filed an emergency motion to enforce the stay under Rule of Appellate Procedure ("RAP") 7.2. The Court of Appeals granted the motion and vacated the order awarding fees to the GAL and her lawyers.

I. The Standing Appeal

This Court affirmed the Order Denying Standing in an unpublished decision on March 12, 2012. The Washington Supreme Court accepted review and reversed, ruling unanimously that Nancy had standing in the Will Contest. *In re Estate of Becker*, 177 Wn.2d at 247-49. The Supreme Court also vacated all trial court orders entered after Nancy was denied standing. *Id.* at 249.

The GAL minimally participated in the appeal. Garvey Schubert Barer ("GSB"), counsel for the Adult Daughters, took responsibility for defending the trial court's order denying standing. The GAL did not oppose discretionary review. CP 2073, ¶ 6. The GAL sought extra time to file a brief in the Court of Appeals, but then filed only a short brief avoiding the merits, joining GSB's brief, and addressing a fee issue instead. CP 2073-74, ¶ 8. The GAL filed no substantive briefs in the

³ Nancy also moved on shortened time for an order enforcing the RAP 7.2 stay after this Court accepted review. See CP 1378-92. The trial court denied the motion. CP 1543-44.

Court of Appeals or the Supreme Court, but instead joined the briefs GSB filed. CP 2073-74, ¶¶ 8, 11. The GAL and her attorney attended both the oral arguments as spectators. CP 2074, ¶ 9.

Despite the minimal role played by the GAL in the unsuccessful opposition to the appeal, she and her lawyers billed substantial fees totaling more than \$85,000. It is impossible to tell with any accuracy from the GAL's time records how much time she billed to these efforts, but it was substantial (at least \$13,000). Her attorneys billed approximately \$75,000 for the appeal. A great deal of their time was spent talking to each other. *See, e.g.*, CP 1671 (RSC entries on 7/28/10 totaling \$670.50); CP 1793 (GAL entry on 7/28/10 for \$150); CP 1672 (RSC entries on 8/13/10 totaling \$2,310); CP 1795 (GAL entry on 8/13/10 for \$420); CP 1676 (RSC entry on 6/24/11 for \$1,064).

J. Litigation After Remand to Trial Court

The Supreme Court issued its mandate on May 13, 2013, and the trial court filed it on May 15. CP 1897-98. The same day, the GAL filed another Motion for Fees and Clarification of Powers Nunc Pro Tunc. CP 1601-16. The GAL requested \$382,369.67 from the Estate—\$171,094.57 for the GAL and \$211,275.10 for her lawyers. *See* CP 1602. The accomplishments in the litigation for which the GAL took credit and requested fees included negotiating and entering into the CR2A

Agreement that gave away more than half her ward's inheritance, joining the Adult Daughters (i.e. the opposing party) in seeking to remove Nancy as PR, drafting and filing the reports she improperly filed ex parte without court authorization, and seeking to remove Nancy from the litigation entirely, causing nearly three years of unnecessary and expensive appellate litigation. *See* CP 1604-05.

Nancy and the PR objected to the GAL's exorbitant fee request. *See* CP 2040-67, 2069-70, 2072-75, 2077-88, 2089-2108, 2109-42. Both argued again that the GAL's actions were ultra vires because she failed to seek advance authorization for her actions, *see* CP 2054-57, 2083-85, and that she acted contrary to Barbara's best interests, *see* CP 2062-64, 2085-88. The PR expressed grave concerns that after December 4, 2009, the GAL was acting pursuant to duties imposed by the CR2A Agreement, rather than those authorized by the trial court and/or benefiting Barbara. *See* CP 2111-24, ¶¶ 6-18(f); *see, e.g.*, CP 2119, ¶ 18(a).

On May 22, 2013, Nancy filed a motion requesting reassignment to a different judge. CP 1909-21, 1922-2010. Nancy requested recusal of the trial court because the court had received unauthorized ex parte communications from the GAL, CP 1916-18, and because an appearance of bias and partiality would exist on remand due to the trial court's

previously expressed opinions about legal and factual issues that would come before the court again, CP 1918-20.

The trial court's decisions on these pending motions compounded the appearance of impropriety and unfairness identified by Nancy in her Motion for Reassignment. First, on June 27, 2013, the trial court informed counsel by letter that the court would only consider the recusal motion *after* ruling on the GAL's request for fees. CP 2271. Second, the trial court signed the GAL's proposed order granting all her fees and authorizing, *nunc pro tunc*, every action she had taken over the last four years without analysis of the myriad objections raised by Nancy or the PR. CP 2276-79. Finally, on July 24, 2013, the court granted Nancy's Motion for Reassignment, but purported to maintain exclusive jurisdiction over any future motion to clarify or reconsider the award of fees to the GAL and her lawyers. CP 2281-82. This order of events heightens the appearance that the trial court was protective of the GAL and felt bound by its earlier promise, made in the absence of any motion or response, that the GAL "needs to be paid," RP (6/11/10) at 33:8-17, a promise the GAL interpreted as a directive to the Estate to pay her fees, *see* CP 1318.

K. Settlement with Adult Daughters

In August 2013, the Estate, Nancy, and the Bulger Parties settled both the Will Contest and the Creditor Claim Action. CP 2298-2325. The

Estate paid the Bulger Parties \$225,000 in exchange for dismissal of both actions and a complete release of all claims against the Estate, the PR, Nancy, and Barbara. CP 2301-03, ¶¶ 1-3, 5. That amount is a small fraction of the amount the GAL agreed to pay the Bulger Parties under the CR2A Agreement of \$600,000 plus half of Tory's remaining estate.

IV. ARGUMENT

A. **The Trial Court Erred in Allowing the GAL to Litigate and Incur Substantial Fees Without Prior Approval and in Authorizing her Actions Nunc Pro Tunc**

The Court should reverse the trial court's award of fees to the GAL because the GAL never obtained prior court authorization for her actions. The GAL was appointed under a limited order and had no authority to expand the litigation or incur substantial fees without prior court authorization. The Estate should not be required to pay for the costly and ultra vires actions taken by the GAL that were detrimental to her ward.

A guardian ad litem "is an agent of the court" whose "appointment exists at the will of the court." *In re Guardianship of Matthews*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010). A guardian ad litem is vested only with those powers expressly conferred by the court to protect the interests of the ward. *See id.*; *see also In re Marriage of Swainson*, 88 Wn. App. 128, 137 n.31, 944 P.2d 6 (1997) (rejecting argument that "a guardian can make and implement decisions for the child without supervision").

A guardian ad litem appointed under RCW 11.88.090 like Ms. Rydberg, *see* CP 16, has a limited role and is subject to the Superior Court's Guardian ad Litem Rules ("GALRs"). Under these rules, a guardian ad litem is "an officer of the court" and "has only such authority conferred by the order of appointment." GALR 4. A guardian ad litem "shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment." GALR 2(j); *see also* KCLGALR 3. In addition, the local rules require that each order appointing a GAL "specify a limit on the hourly rate and total compensation," which "may be increased or modified only upon application to the court in advance of the GAL providing further services." KCLGALR 4.

The court orders appointing Ms. Rydberg as GAL specified that the trial court appointed the GAL under RCW 11.88.090 and instructed her to prepare a simple report addressing three issues. *See* CP 12-14, 15-21 (stating original order "remain[s] in full force and effect, except for the change of who shall act as Guardian ad Litem"). Ms. Rydberg signed the order appointing her as GAL and accepted its terms. CP 18. A later order approved the GAL's increased hourly rate of \$300 and authorized a \$15,000 advance deposit for payment of fees, but did not modify the

source, nor expand the scope of the GAL's authority. CP 22-26; *see also* CP 36-41 (authorizing further fee deposit).

Instead of confining her role to preparing the single report authorized by court order, the GAL embarked on a multi-year litigation campaign that was detrimental to her ward and, along with her outside counsel, racked up \$382,369.67 in fees. Despite being put on notice—*two weeks* after the failed mediation on December 4, 2009—that her actions were ultra vires, CP 3777-99, the GAL steadfastly refused to seek court authorization for her actions, attempted to keep the CR2A Agreement out of the hands of the court, and continued billing substantial amounts for actions she knew were far beyond the bounds of the orders appointing her.

The GAL has never explained why she failed to seek the court's guidance, approval, or authorization before incurring these significant fees, which greatly reduced the Estate's assets and the sole (minor) beneficiary's inheritance. As the PR's expert explained to the trial court, "[i]f there is any question about the guardian ad litem's role or the need to have additional authority, it is the guardian ad litem's responsibility to seek instructions or authorization from the court before acting." CP 1436-37, ¶ 5; *see also* KCLGALR 3 & 4. Prior court approval of a GAL's actions essentially corresponds to a client's capacity to limit the expense and costs incurred by his or her agent or attorney. CP 1437-38, ¶ 7.

Because a minor cannot direct or limit expenses incurred on her behalf, the GAL must obtain court approval. *Id.*

The GAL took the position below that her role was that of TEDRA GAL, appointed under RCW 11.96A.160 and exempt from the GALRs. *See* GALR 1(a). The GAL's assertion conflicts with the plain language of the orders appointing her, CP 12-14, 15-21, and is inconsistent with her own prior positions in this case. Entering mediation in December 2009, she identified herself as a probate GAL. CP 3533. In June 2010, she asserted that she was both a probate GAL appointed under RCW 11.76.080 (to whom the GALRs apply) *and* a TEDRA GAL (exempted from the GALRs). CP 2614. She also claimed the right to settle the probate action on Barbara's behalf under SPR 98.16W, despite conceding that she was not, in fact, a Settlement GAL. CP 2594-99; CP 2614. The Court should not countenance the GAL's attempts to cloak herself in whichever authority she finds convenient; the orders appointing the GAL are dispositive as to the source of her authority. *See Ivarsson*, 60 Wn.2d at 737 ("A guardian ad litem is an arm of the court whose function is to protect the ward, and a court must not permit its arm to strangle him.").

Even if the GAL was a TEDRA GAL and exempt from the GALRs (she was not), she was still subject to the limitations imposed by court order. The powers of a TEDRA GAL are not well defined by Washington

law, but it is clear “a GAL appointment exists at the will of the court,” and can be limited by court order. *Matthews*, 156 Wn. App. at 210 (comparing guardianship under RCW 11.88.010 and RCW 11.96A.160). Thus, even under TEDRA, the GAL was required to comply with the court’s orders limiting the scope of her duties. Again, if the order was unclear or she was uncertain regarding her duties, it was incumbent on the GAL to clarify her role *before* incurring substantial fees. She failed to do so, even after it became clear in December 2009 that her authority was hotly contested. *See* CP 3777-99 (12/23/2009 Petition to Remove GAL).

Many of the GAL’s actions, moreover, clearly fell outside the only TEDRA proceeding in which she was appointed, the Will Contest. TEDRA GAL’s are appointed in a particular TEDRA proceeding. *See* RCW 11.96A.160. The GAL, however, purported to settle the Creditor Claim Action and started a separate non-TEDRA guardianship proceeding.

The trial court erred in permitting the GAL to decide for herself the source and scope of her authority, the work she chose to do, and the enormous volume of fees she incurred before seeking payment from the Estate. *See* GALR 2(j); KCLGALR 4. The GAL put her own interests above those of her ward, incurred significant expenses without prior authorization, and thereby damaged her ward’s interests in direct

contravention of her role as GAL. The trial court allowed this to happen, protecting the GAL from her egregious mistakes by awarding her every dollar she requested, at the expense of the Estate and the Estate's sole beneficiary, her ward. The trial court did not even read the CR2A Agreement before declaring in open court that the GAL should be paid her fees. *See* RP (6/11/10) at 33:8-17.

The GAL—not the minor beneficiary—should bear the risk when the GAL herself failed to seek advance approval for her ultra vires actions, used extremely poor legal judgment in commencing and perpetuating aggressive litigation tactics, and generated excessive fees in the process. While no Washington court has squarely addressed the issue, courts in other states have held that a guardian ad litem is not entitled to recover fees incurred for activities outside the scope of her appointment. *See, e.g., Ford Motor Co. v. Chacon*, 370 S.W.3d 359, 363 (Tex. 2012) (trial court abused its discretion in awarding fees to guardian ad litem because, “[w]ithout a written court order, Mena had no authority to continue acting as Valerie’s guardian ad litem” and subsequent activities “exceeded the scope of his appointment and were not compensable”); *In re Guardianship of Jansen*, 405 So. 2d 1074, 1077 (Fla. Dist. Ct. App. 1981) (rejecting fee petition in part because guardian ad litem was “entitled to a fee only for her activities in connection with the federal suit . . . since those were the

only activities within the scope of her appointment as guardian ad litem”); *In re Interest of David M.*, 808 N.W.2d 357, 365 (Neb. Ct. App. 2011) (reversing trial court’s award of fees to guardian ad litem for ultra vires actions). This Court should reach the same conclusion.

B. The Trial Court Abused Its Discretion in Awarding Unreasonable Fees to the GAL

1. The Trial Court Failed to Make Required Findings of Reasonableness, Necessity, or Quality of the GAL’s Work in Awarding Fees

The trial court manifestly abused its discretion in awarding the GAL and her lawyers \$382,369.67 for unreasonable, unnecessary work providing no benefit to the minor ward. The trial court merely signed the proposed order prepared by counsel for the GAL without undertaking the necessary inquiry into the reasonableness, necessity, or quality of the GAL’s work. The reasonableness of a fee award is reviewed under an abuse of discretion standard. *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011) (citing *Ethridge v. Hwang*, 105 Wn. App. 447, 459-60, 20 P.3d 958 (2001)).

Reasonableness is generally determined through use of the lodestar method, whereby the fee is determined by “multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit.” *Id.* at 483 n.2. A court may supplement this methodology by analyzing the

nine factors in RPC 1.5(a) to determine whether the fee reward is reasonable. *Id.* at 483 (citing *Mahler v. Szucs*, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998)). “Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees.” *Mahler*, 135 Wn.2d at 433-34 (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 151, 786 P.2d 265 (1990)). Courts may not simply defer to bills submitted by a party seeking fees, but must make an independent decision as to the reasonableness of the fees. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). “Courts must take an *active* role in assessing the reasonableness of fee awards” *Mahler*, 135 Wn.2d at 434 (citing *Nordstrom*, 107 Wn.2d at 744). “Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.” *Id.* at 435 (collecting cases). “[F]indings of fact and conclusions of law are *required* to establish such a record.” *Id.* (emphasis added). The Order on GAL Fees fails to meet these requirements and should be reversed.

First, the trial court’s Order on GAL Fees makes none of the required findings of fact or conclusions of law. *See* CP 2276-79. Indeed, the Order entirely omits any mention of the lodestar method or any relevant factors to be considered under RPC 1.5(a); it simply recites that

the legal services performed were “reasonably necessary, competently performed, and of value to the Court, the Estate and the minor beneficiary.” CP 2278. The trial court provided no explanation for what circumstances made such an extraordinarily high fee request reasonable and made no findings to support the work’s usefulness to the court or the ward. These “findings” and “conclusions” are of no use to this Court on appeal and this alone requires reversal. *See Mahler*, 135 Wn.2d at 434-35.

Second, the GAL’s billing records lack the basic detail necessary to determine the validity and reasonableness of the charges. *See, e.g.*, CP 1794 (8/2/10 entry charges \$450 for: “Telephone conference with Lance Losey. See notes for details.”); CP 1805 (11/10/10 entry charging \$90 with no supporting description); CP 1828 (3/7/10 and 3/8/10 entries charging \$1,080 for preparation and meeting with attorney with no supporting description). The trial court abused its discretion in awarding the GAL these fees when she failed to carry her burden to demonstrate their reasonableness or necessity. *See Mahler*, 135 Wn.2d at 433-34.

Third, the trial court failed to exclude “any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Id.* at 434. For example, the GAL was awarded over \$13,000 for her work on the standing appeal, *see* App. D, and her counsel was awarded an additional \$74,956 in fees and \$247.51 in costs, *see* CP 1647, ¶ 3;

CP 1670-80. But the GAL and her lawyers filed *no substantive briefs* on appeal and defending the standing order was *entirely unsuccessful*.

Indeed, the appeal demonstrates the duplicative nature of the requested fees: a single meeting cost more than \$2,000. *See* CP 1651 (RSC entry for 7/8/10); CP 1789 (GAL entry for 7/8/10). The trial court abused its discretion in granting these exorbitant fees.

Finally, the RPC 1.5(a) factors weigh against such a significant fee award and show that the hours expended and hourly rates awarded by the trial court are unreasonable in this case.

Time, Novelty, Difficulty, and Skill. The GAL added to the complexity of this case by inserting herself into the action as a quasi-party/quasi-court-advisor and by aligning herself with the Bulger Parties. The GAL entered into an unauthorized settlement, had Nancy removed as PR in an attempt to push through the settlement, and then tried to have Nancy removed from the case entirely, an effort that failed when the Washington Supreme Court unanimously rejected it as baseless. When her handpicked PR refused to execute the settlement, the GAL sought to cram it down over the PR's objections. She commenced a guardianship action entirely unrelated to the Will Contest. She intervened in the Trident entities lawsuit settlement. None of these actions were within her limited, court-approved authority. All the actions added unnecessary complexity

to the case; complexity for which the GAL requested and was awarded additional compensation, but which produced no benefit to her ward.

Customary Fees. The GAL alleged below that her hourly rate of \$300 is “comparable with rates customarily charged in the Seattle legal market by attorneys with [her] experience and skill in estate and trust matters.” CP 1682, ¶ 6. But she never provided any evidence establishing that this was an appropriate or customary rate for GAL fees. It is not. The PR’s expert established that \$200 an hour is standard in King County for court appointed GALs. 1435-36, ¶ 4. The GAL also failed to explain why she continued to charge \$300 an hour after her lawyers began performing the legal work required. Indeed, the combined billing rate of the GAL and the Ryan Swanson attorneys was \$700 an hour. As an example of the excessive billing that resulted from this arrangement, both the GAL and her counsel needlessly attended the Supreme Court arguments in Olympia as spectators, which cost her ward \$3,890. CP 1677 (RSC entry for 2/12/13); CP 1827 (GAL entry for 2/12/13).

Amount Involved and Results Obtained. The GAL’s actions have harmed the Estate and Barbara, causing extreme expense and delay. For example, the GAL pursued the CR2A Agreement despite substantial disagreement among the necessary parties and instigated the misguided, unsuccessful, and incredibly expensive attack on Nancy’s standing.

Having failed with everything else, the GAL misrepresented her role in the wrongful death action, attempting to inflate her actions and take credit for other parties' work. But Nancy (as PR) was ready and willing to investigate and file the wrongful death action against the airplane engine manufacturer and other corporate defendants. CP 2069-70, ¶ 2. Indeed, Nancy paid for the investigation with personal funds when the Successor PR instituted the action. *Id.* Nancy's reluctance related solely to filing suit against the pilot's estate. (The pilot and her family were close family friends, which made the suit personally difficult for Nancy.) *Id.*

Experience, Reputation, and Ability of Counsel. The GAL conceded before the trial court that she lacks the necessary qualifications to handle such complex probate litigation. CP 1211, ¶ 6 (her "practice does not routinely involve highly conflicted probate litigation"). The GAL's insistence that she requires outside counsel in this action further demonstrates this point.

Applying the lodestar analysis to the GAL's fee request—even without the benefit of an evidentiary hearing to untangle the block-billed time—reveals the unreasonableness of the awarded fees. The trial court should have significantly reduced the fees; instead it entirely failed to show on the record whether it even analyzed the GAL and her counsel's

fees under the lodestar method. *See* CP 2276-79. The trial court abused its discretion by awarding substantial fees without the required findings.

2. The Trial Court Erred in Awarding Fees for Actions Taken With No Benefit to the Ward

In considering fees in the guardianship context, courts must go further than in the ordinary case and must consider whether the actions resulted in substantial benefit to the ward. *See In re Guardianship of Lamb*, 173 Wn.2d 173, 191, 265 P.3d 876 (2011) (“courts allow guardianship fees only when the guardian’s work provides a benefit to the guardianship”); *In re Estate of Black*, 116 Wn. App. 476, 490, 66 P.3d 670 (2003) (under RCW 11.96A.150, the “touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate”). It “has long been the rule that [a] guardian cannot be allowed to make a profit from the handling of his ward’s estate. His compensation must be such a sum as the court deems proper in view of the value of the services performed.” *Lamb*, 173 Wn.2d at 191-92 (internal citation omitted). And trial courts must be “more jealous guarding . . . the interests” of wards, in contrast to ordinary fee requests. *Id.* at 192 (quoting *Disque v. McCann*, 58 Wn.2d 65, 67, 360 P.2d 583 (1961)). “It is the duty of the trial court in such a case to include in its findings the specific amounts it finds to have [been expended on behalf of the ward] so

that they can be challenged on appeal.” *Id.* (quoting *Disque*, 58 Wn.2d at 71). The trial court entirely failed to safeguard Estate assets for Barbara and made no specific findings regarding the value, reasonableness, or necessity of the GAL’s actions. *See* CP 2276-79.

The following actions and extensive motions practice exemplify actions that provided no benefit to Barbara and for which the trial court abused its discretion in awarding fees.

Execution and Motion for Approval of CR2A Agreement. On December 4, 2009, the GAL executed the CR2A Agreement with the Bulger Parties. The agreement purported to settle both the Will Contest and the Creditor Claim Action, despite the fact that neither Barbara nor the GAL was a party to the Creditor Claim Action. The agreement was highly disadvantageous to Barbara: it contemplated paying well over half the Estate to the Bulger Parties and their attorneys, CP 645-46, 648, even though the GAL admitted to having made no assessment of the merits of the creditors’ claims. *See* CP 3535 (“I have not taken the time to thoroughly research the claims.”). Even more problematic, the Agreement likely would have required liquidating the Estate’s assets: Barbara and Nancy’s house, the weekend property in the San Juans, and the medical office where Nancy earns an income to support Barbara. The GAL inexplicably agreed to give a large portion of Tory’s undivided interest in

these community assets to Tory's ex-wife and his adult daughters instead of to his surviving spouse and minor daughter.

The GAL agreed to these terms despite conceding that “[i]t is highly likely that the will offered to probate is valid.” CP 30:3-4. Indeed, the GAL appears to have been irrationally motivated by her animosity toward Nancy and her unsupported belief that Nancy had misstated Estate assets. *See* CP 1688-89, ¶¶ 27-31.

Recognizing the impropriety of the CR2A Agreement, both Nancy (as PR) and the Successor PR refused to approve it. To fulfill her obligations under the CR2A Agreement—and not to benefit her ward—the GAL then expended significant effort and fees pursuing the agreement, which she knew could never be ratified without the PR. The time records show she charged more than \$40,000 for the mediation, execution of the CR2A Agreement, petition for new PR, and petition for approval of the Agreement. *See* App. A. The trial court should have denied these fees.

Interim Report and Litigation Analysis. On June 2, 2010, the GAL provided two voluminous documents to the trial court, a Confidential Interim Report of Guardian ad Litem and GAL's CR 2A Litigation Analysis. *See* CP 572-77 (Motion to Seal). Neither document was served on the parties, but they were later filed in redacted form. CP 1190-93. The redacted Interim Report is highly critical of Nancy,

serving only to poison the trial court against her in favor of the CR2A Agreement. As far as Nancy and the PR are aware, the trial court never requested the reports.⁴ The GAL charged at least \$23,000 in fees for preparing these reports. *See* App. B.

Standing Motion. The GAL's filings proudly report that she sought to have Nancy removed from the Will Contest for lack of standing. *See, e.g.*, CP 2683-84. But she never explains how removing Barbara's mother—who supported the validity of the will—from the Will Contest was in Barbara's best interest. The GAL also stated that her alignment with the Bulger Parties on appeal reduced fees. *See* CP 1695, ¶ 54; CP 2683-84 n.62. Both the GAL and the trial court ignored the fact that the Bulger Parties' interests directly opposed Barbara's; without the Will Contest instituted by the Adult Daughters, Barbara would already have her inheritance.

The GAL's alignment with the Bulger Parties also violated the general principle that “a guardian ad litem should be independent and not appear to favor one side over the other and should not file a motion jointly with another party.” CP 1438, ¶ 8. Ultimately, the GAL's unsuccessful attempt to remove Nancy from the litigation wasted three years and hundreds of thousands of dollars. The GAL then requested and was

⁴ The reports are also problematic because they constituted improper ex parte communications between the GAL and the court. *See infra* Section IV(D).

awarded approximately \$18,000 for her work on the motion and appeal, *see* App. C (motion); App. D (appeal), and her counsel was awarded an additional \$74,956 in fees for the appeal, *see* CP 1647, ¶ 3; CP 1670-80. The trial court abused its discretion in granting these exorbitant fees.

Fees Searching for an Attorney. The GAL's invoices indicate that she and her lawyers were awarded fees of at least \$19,000 for contacting attorneys, copying documents, meeting with counsel, and dealing with potential conflicts of interest. *See* App. E. The actual cost of the GAL's search for counsel may be higher, but cannot be easily calculated due to her block billing. These fees benefited only the GAL.

Fees Incurred Seeking Fees for GAL. The GAL and her counsel also filed two separate motions for fees before the trial court. The GAL's lawyers charged and were awarded almost \$20,000 for preparation and defense of these motions, while the GAL was awarded another \$8,000 for the same motions. *See* App. F. The cost of these motions was unreasonably high and neither motion for fees benefited Barbara.

Fees Incurred for GAL Malpractice Counsel. The GAL's time records show that she charged the Estate and was awarded payment for time addressing concerns about *her own* potential malpractice liability. The GAL billed \$8,000 consulting with malpractice counsel between March 3, 2010, and August 1, 2011. *See* App. G. While the GAL's

concerns may be justified in light of her actions in this case, that time benefits her alone. There is no benefit for Barbara. Likewise her time spent worrying how her fees would be collected in the event of her death did not benefit Barbara. *See* CP 1803-04 (10/14/10 entry).

Fees Incurred Under Conflict of Interest. The trial court failed to recognize that the GAL operated under a conflict of interest after she entered into the CR2A Agreement on December 4, 2009. Under the CR2A Agreement, the GAL contractually bound herself to the Bulger Parties to effectuate and obtain approval of the CR2A Agreement, even if it required removing Nancy from the litigation, and ensuring that the Estate paid all of the Bulger Parties' attorney fees and costs incurred after the date of the Agreement. CP 644-50. Even more problematic, the Bulger Parties promised to support Ms. Rydberg becoming Barbara's guardian until the Estate's distribution was complete, giving the GAL a financial interest in continuing the guardianship. CP 647, ¶ 11(a).

After December 4, the GAL's actions benefited the GAL and the CR2A Agreement parties, not Barbara. Not surprisingly, this is when the GAL's fees began to skyrocket. Between January 17 and December 1, 2009, the GAL was paid approximately \$55,000. *See* CP 2685-87. The trial court then awarded the GAL and her lawyers over \$380,000 for their work from December 2, 2009, to May 15, 2013, despite the appeal staying

most of the case from August 31, 2010, through May 13, 2013. The trial court should have carefully scrutinized the GAL's requested fees after December 4, 2009, to ensure the work benefited Barbara, rather than the GAL or the Bulger Parties. *See Ball v. Smith*, 87 Wn.2d 717, 720, 556 P.2d 936 (1977) (court should intervene where a "conflict of interest . . . discouraged diligent protection of the infant's rights" by the guardian). The record provides no evidence that the trial court fulfilled this duty; this Court should remand to correct this error.

3. The Trial Court Should Have Granted Appellants' Request for an Evidentiary Hearing or Discovery Regarding the GAL's Fees

To properly award fees only for useful and necessary work, the trial court must know what time was billed to what activities. *See Mahler*, 135 Wn.2d at 434 (requiring exclusion of wasteful or duplicative hours and hours pertaining to unsuccessful theories). Nancy and the PR accordingly asked the trial court to hold an evidentiary hearing or appoint a special master to conduct a line-item review of the extensive bills from the GAL and her lawyers. CP 2060; 2087-88. This was necessary because the billing records for the GAL and her attorneys provided little detail on the work completed and were block billed, listing multiple activities on a single day without breaking down how much time was spent on each activity.

Nancy also requested discovery into the relationship and allocation of responsibilities between the GAL and counsel for the Bulger Parties. *See* CP 2066-67. The Bulger Parties' interests directly opposed Barbara's, yet the GAL's time sheets describe extensive discussions with GSB beginning as early as December 2009 and continuing through the appeal. *See, e.g.*, CP 1759 (12/15/09 entry for \$1,800 for "[w]ork with GSB attorneys to edit and complete Petitions to appoint Limited co-PR for purpose of binding estate to the CR 2A Agreement"); CP 1761 (12/21/09 entry for \$1,140 to "[m]eet with Teresa Byers and Ken Schubert at GSB office to discuss Objection to Fees we are both filing today"); CP 1765 (1/27/10 entry for \$300 for meeting with GSB attorneys to "discuss ideas, including PR's conflicts of interests [sic], responses to multiple motions and petitions brought by the estate, and general strategy"); CP 1779-80 (5/10/10 entry for \$1,920 for "[l]egal research and numerous communications with GSB to revise, refine and complete [GAL's] Motion to Determine Standing of Nancy Becker").

The trial court never responded to Nancy and the PR's requests for an evidentiary hearing and discovery. Without these tools the trial court did not have sufficient information to award the GAL's fees. *See Mahler*, 135 Wn.2d at 434. The award was an abuse of discretion and abdication of the court's responsibility to protect the minor beneficiary.

C. The Trial Court Erred in Allowing the GAL to Hire Outside Counsel at Estate Expense

The trial court's decision to permit the GAL to hire outside counsel resulted in substantial fees with no benefit to Barbara. The GAL simultaneously argued below that she was a TEDRA GAL, authorized to represent Barbara in litigation and settlement, but also that as a sole practitioner she could not handle the volume and intensity of the litigation she instigated in the Will Contest. *See* CP 1211. If the GAL lacked the qualifications necessary to handle this probate litigation, she should have stepped aside in favor of someone with the necessary skills and experience. Instead, the trial court encouraged her to hire outside counsel at enormous expense to the Estate and, ultimately, to Barbara. The GAL has proffered no authority for her to obtain counsel at Estate expense.

Under the GAL's view, she acts as an attorney for Barbara, which means Ryan Swanson acts as Barbara's attorney's attorney. This excess of attorneys led to double billing for every piece of work handled by the GAL and created an unnecessary drain on the Estate's funds, contrary to Barbara's best interests. *See supra* Section IV(B)(2); App. F. And a single meeting can cost the Estate over \$2,000. *See* CP 1651 (RSC entry for 7/8/10); CP 1789 (GAL entry for 7/8/10).

The order appointing attorneys for the GAL wrongly allowed the GAL to obtain counsel without limits on what that counsel should do, or specifying who should benefit from the representation—the GAL or her ward. CP 2278; *see also* CP 1304-06. The GAL’s outside counsel took over all work in the trial and appellate courts. The GAL’s bills show that she continued to perform GAL tasks, but Ryan Swanson also performed these same tasks. This vastly increased expense, without a clear showing or consideration of the areas in which the GAL needed additional help and those in which she could act without an attorney. For example, the GAL prepared the motion to revoke Nancy’s standing on her own, but the trial court awarded Ryan Swanson almost \$75,000 for the appeal, with no explanation why the GAL could not handle these tasks on her own, particularly given she filed no substantive briefs on appeal.

Even more problematic, Ryan Swanson’s ethical obligations were to the GAL, not to Barbara. *See Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994) (holding attorney for personal representative owes duty to PR, not to estate or heirs of estate). This conflict is exemplified by the fact that both the GAL and Ryan Swanson billed the Estate—and the trial court awarded fees—for work with the GAL’s *second set of attorneys* from Lee Smart, which appear to be her malpractice attorneys. *See, e.g.*, CP 1650-56 (RSC entries for 6/30, 7/9, 8/4, 10/13/10); CP 1803 (GAL

entry for 10/13/10 involving meeting with Ryan Swanson and Lee Smart); CP 1800 (GAL entry for 9/21/10 involving correspondence with insurer CNA); CP 1822 (GAL entry for 3/19/10, same). In other words, the trial court ordered the Estate—which belongs to the GAL’s minor ward Barbara—to pay the GAL and her lawyers for time spent protecting the GAL from a future malpractice suit *by Barbara*. The GAL’s interests were preserved at the cost of Barbara’s interests. This was wrong.

D. The Trial Court Should have Recused Itself Prior to Ruling on the GAL’s Fee Request

The trial court abused its discretion by increasing, rather than diminishing, the appearance of unfairness and partiality after the GAL’s improper ex parte communication with the court. “Due process, appearance of fairness and Canon 3(D)(1)⁵ of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned.” *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). “Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair,

⁵ The Code of Judicial Conduct was substantially amended effective January 1, 2011. See *State v. Davis*, 175 Wn.2d 287, 305 n.4, 290 P.3d 43 (2012). The former canons apply to the trial court’s actions in 2010. A copy of the 2010 Code of Judicial Conduct is attached as Appendix H to this brief. Although the current Code of Judicial Conduct was not in effect in 2010, its more detailed explanation of the Judicial Canons should be considered in analyzing the disqualification at issue here.

impartial, and neutral hearing.” *State v. Perala*, 132 Wn. App. 98, 112-13, 130 P.3d 852 (2006) (quoting *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). Actual prejudice is not required. *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1996). The test for determining whether the judge’s impartiality might reasonably be questioned is an objective one that assumes a reasonable person knows and understands all the relevant facts. *Id.* at 206. Decisions on disqualification are reviewed for an abuse of discretion. *Leon*, 133 Wn. App. at 812.

“Where a judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence can be debilitating.” *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 524, 145 P.3d 1208 (2006); *see also Sherman*, 128 Wn.2d at 205. Therefore, “[t]he canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.” *In re Sanders*, 159 Wn.2d at 524 (citing *State v. Graham*, 91 Wn. App. 663, 670, 960 P.2d 457 (1998)).

The trial court should have recused itself from this action on remand and should not have retained control over the GAL’s fee petition. First, the trial court received and reviewed extensive reports provided ex parte by the GAL prior to the first appeal. Second, the trial court’s actions after remand—granting the GAL’s entire fee petition, without any examination of the GAL’s bills on the record, and without the required

findings of fact or conclusions of law, and ensuring no other judge could later reduce the award by retaining jurisdiction over that part of the case *after* ruling on the fee petition—increased the appearance of impropriety.

On June 2, 2010, the GAL improperly presented two extensive “reports” to the trial court *ex parte*. The unredacted reports were never shared with Nancy or the PR; they were given access to redacted versions after the June 11 hearing. The trial court returned the unredacted reports to the GAL. CP 1193, ¶ 4. The redactions remove large portions of the both reports, *see* CP 2574-87, including the GAL’s analysis of the Creditor Claim Action, CP 2703, 2713, and the Will Contest, CP 2715. As a result, Nancy was and remains unable to challenge the reports’ findings before the trial court. Although the trial court did not personally review the reports in detail, CP 1192, ¶ 11, a member of the court’s staff conducted an extensive review and discussed it with the judge, RP (6/11/10) at 10:14-11:1. The PR objected to the trial court’s review of this material as impermissible *ex parte* communication with the GAL. *Id.* at 29:22-30:1; *see also* CP 1192, ¶ 12. And the trial court twice acknowledged that if there was no authority for the submission of these materials *ex parte*, the GAL’s actions would require the trial court to offer to recuse itself. RP (6/11/10) at 10:20-11:1; *id.* at 36:18-24. The trial court’s instincts in June 2010 were correct; the *ex parte* communications

between the court and the GAL created an appearance of partiality and unfairness that required recusal. Unfortunately, the trial court failed to follow through on those instincts.

Former Canon 3(A)(4) provided that judges should “neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.” CJC Canon 3(A)(4) (2010). The current Canons clarify that “[i]f a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” CJC Canon R. 2.9(B) (2014).

Ex parte communications require disqualification of the judge when a court receives information, even inadvertently, that would lead a reasonable person to question the court’s impartiality. *See State v. Davis*, 175 Wn.2d 287, 306-07, 290 P.3d 43 (2012). For example, the ex parte information obtained in *Sherman* required disqualification of the trial judge on remand. 128 Wn.2d 164. *Sherman* involved the termination of a UW Medical Center doctor who struggled with drug addiction and had received treatment from the Washington Monitored Treatment Program (“WMTP”). *Id.* at 168-70. During the pendency of the case, the judge asked his extern to “contact the WMTP for general information about the

process used to monitor recovering physicians.” *Id.* at 203. The extern spoke to a doctor at the WMTP about their “program, *in particular as it pertains to Scott Sherman.*” *Id.* at 204. This discussion was discovered by the State, which moved for recusal and vacation of all rulings subsequent to the ex parte communication. *Id.* The trial court felt that recusal was unnecessary, but the Washington Supreme Court disagreed. *Id.* at 204, 206. “[T]he judge violated the unambiguous dictates” of former Canon 3(A)(4), by asking his extern to contact WMTP regarding the case. *Id.* at 205. And, “the trial judge *may have inadvertently obtained information critical to a central issue on remand* . . . Given that fact, a reasonable person might question his impartiality.” *Id.* at 206 (emphasis added).

Similarly, in *In re Sanders*, the Supreme Court held that Justice Sanders violated the Code of Judicial Conduct and “created an appearance of partiality as a result of ex parte contact.” 159 Wn.2d at 519-20. Justice Sanders visited the McNeil Island Special Commitment Center (“SCC”), which houses sexually violent predators, while an appeal brought by a group of SCC residents was pending before the Supreme Court. *Id.* at 521-22. During his visit, Justice Sanders met with at least one of the petitioners to the lawsuit and discussed a “pivotal issue” in the case. *Id.* at 522. The Supreme Court held that it was “clearly reasonable” to question Justice Sanders’ impartiality under these circumstances. *Id.* at 525-26.

Here, the trial court received and reviewed—both personally and through a member of court staff⁶—ex parte materials that contained a discussion of factual and legal issues central to the pending probate action. This constituted improper ex parte communication under former Canon 3(A)(4). *See Sherman*, 128 Wn.2d at 205-06. The trial court never tried to cure the error by sharing the full reports with parties. Indeed, Nancy still has not seen the full reports, which related directly to the GAL’s role in the case and the fees she charged for her time. The reports also provided large amounts of irrelevant and prejudicial information to the trial court without allowing the other parties to respond or contest any of the information provided. The unredacted portions of the reports largely provide an attempted justification for the GAL’s repeated attempts to remove Nancy from the litigation, exorbitant fees, and alignment with the Bulger Parties—i.e. the parties seeking to invalidate the Will and reduce Barbara’s inheritance. *See, e.g.*, CP 2600, 2666-68 (attacking Nancy and the PR’s motives); 2612-20 (legal argument regarding scope of GAL’s duties); 2679 (detailing GAL’s cooperation with the Bulger Parties).

A reasonably prudent and disinterested person would conclude that the parties (and Nancy in particular, due to the GAL’s vicious attacks on

⁶ Members of court staff are the “alter-ego of the judge.” *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997); *see also Sherman*, 128 Wn.2d at 203-04, 206 (judicial extern’s ex parte communications with third party required remand to different judge).

Nancy's motives, ethics, and emotional support for her daughter) could no longer obtain a fair, impartial, and neutral hearing before the trial court after the GAL's ex parte delivery of the reports. *See Perala*, 132 Wn. App. at 112-13; *State v. Romano*, 34 Wn. App. 567, 569-70, 662 P.2d 406 (1983) (holding "the conclusion is inescapable that the ex parte inquiry, to which defendant was unable to respond, clouded the proceeding," and remanding to different judge). The potential prejudice resulting from the GAL's ex parte communications is amplified by the highly discretionary nature of the trial court's award of fees to the GAL and her lawyers. *See Tatham v. Rogers*, 170 Wn. App. 76, 104-05, 283 P.3d 583 (2012).

The GAL argued below that recusal was unnecessary because GALs are permitted to speak ex parte with the trial court, but provided no direct authority in support. Indeed, in *Buckley v. Snapper Power Equip. Co.*, this Court held that communication between a GAL and the trial court concerning a minor settlement was prohibited ex parte communication and the "the trial court should have recused itself pursuant to CJC 3(C)(1)." 61 Wn. App. 932, 937-38, 813 P.2d 125 (1991). Had appellant not waived the issue in *Buckley*, the failure to recuse would have been "reversible error because [the ex parte communication] prevented appellant from having a fair hearing." *Id.* at 938.

Buckley comports with the general rule that “[a] guardian ad litem shall not have ex parte communications concerning the case with the judge(s) and commissioner(s) involved in the matter except as permitted by court rule or by statute.” GALR 2(m). The GAL insisted below that she was authorized to submit the reports under SPR 98.16W as a Settlement GAL. But she was not appointed as a Settlement GAL. Special Proceeding Rule 98.16W(c)(1) provides for appointment of a separate and independent Settlement GAL after the filing of a petition for approval of settlement on behalf of a minor under SPR 98.16W(b). A court may only dispense with the appointment of this separate Settlement GAL with *written findings* that a previously appointed GAL is qualified to act as Settlement GAL. *See* SPR 98.16W(c)(2). The trial court made no such written findings prior to the GAL sharing her ex parte Interim Report and Litigation Analysis with the court. Indeed, the GAL conceded she was not a Settlement GAL in her Interim Report. CP 2614.

After agreeing to recuse itself for the remainder of the probate action, the trial court purported to retain jurisdiction over the GAL’s fee motion and any related motions. CP 2281-82. The trial court awarded the GAL every dollar she requested for herself and her lawyers after receiving prejudicial ex parte communications from the GAL containing information central to her fee petition. The trial court did so after promising the GAL

during the June 11, 2010, hearing—without benefit of briefing or argument—that the GAL “needs to be paid.” RP (6/11/10) at 33:8-17. A reasonably prudent person, knowing all of the relevant facts, would agree that the trial court’s decision on the GAL’s fees appears improper, unfair, and partial under these circumstances. To assure the appearance of fairness, this Court should reverse the trial court Order on GAL Fees and remand the fee petition to a different King County Superior Court judge.

V. CONCLUSION

For the foregoing reasons, Nancy Becker and the PR respectfully request that the Court reverse the trial court’s award of attorney fees to the GAL and her lawyers and remand for the required findings regarding the reasonableness, necessity, and benefit obtained through the fees. In addition, Nancy requests that the Court remand to a different trial judge due to the appearance of bias and unfairness at the trial court.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

Davis Wright Tremaine LLP
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By Candice Jewell
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*Attorneys for Appellant Jennifer L. White,
as Personal Representative of the Estate of
Virgil Victor Becker, Jr., Deceased*

By Candice Jewell
for Tim Hobbs
Patricia H. Char, WSBA #7598
J. Timothy Hobbs, WSBA #42665

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COMPTROLLER GENERAL'S DIVISION
STATE OF WASHINGTON
2014 MAR 21 PM 4:34

CERTIFICATE OF SERVICE

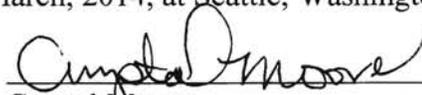
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On March 21st, 2014, I caused to be served via messenger a true and correct copy of the foregoing on the following:

Richard Paul Lentini
Ryan Swanson & Cleveland PLLC
1201 Third Ave., Suite 3400
Seattle, WA 98101-3034
Fax: (206) 652-2956
Email: lentini@ryanlaw.com

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

Executed this 21st day of March, 2014, at Seattle, Washington.



Crystal Moore

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 27 PM 4:35

APPENDIX A

EXECUTION AND MOTION FOR APPROVAL OF CR2A AGREEMENT

GAL Time Records (CP1753-1785)

| DATE | HOURS BILLED | AMOUNT BILLED |
|----------|--------------|---------------|
| 10/27/09 | 3.1 | 930.00 |
| 10/28/09 | 1.2 | 360.00 |
| 10/28/09 | .5 | 150.00 |
| 11/2/09 | .75 | 225.00 |
| 11/2/09 | .8 | 240.00 |
| 11/2/09 | .1 | 30.00 |
| 11/2/09 | .2 | 60.00 |
| 11/10/09 | .2 | 60.00 |
| 12/1/09 | .2 | 60.00 |
| 12/2/09 | 1.7 | 510.00 |
| 12/3/09 | 2.5 | 750.00 |
| 12/4/09 | 15 | 4,500.00 |
| 12/7/09 | .05 | 15.00 |
| 12/9/09 | .1 | 30.00 |
| 12/10/09 | .1 | 30.00 |
| 12/10/09 | .3 | 90.00 |
| 12/14/09 | .2 | 60.00 |
| 12/14/09 | 1.5 | 450.00 |
| 12/15/09 | 6.0 | 1,800.00 |
| 12/16/09 | .7 | 210.00 |
| 12/17/09 | 2.4 | 720.00 |
| 12/17/09 | 2.0 | 600.00 |
| 12/18/09 | .75 | 225.00 |
| 12/21/09 | 3.8 | 1,140.00 |
| 1/27/10 | 1.0 | 300.00 |
| 1/27/10 | 7.6 | 2,280.00 |
| 2/1/10 | 8.5 | 2,550.00 |
| 2/1/10 | 1.0 | 150.00 |
| 2/2/10 | .2 | 60.00 |
| 2/8/10 | 4.4 | 1,320.00 |
| 2/9/10 | 3.8 | 1,140.00 |
| 2/18/10 | .5 | 150.00 |
| 2/25/10 | .1 | 30.00 |
| 2/26/10 | .5 | 150.00 |
| 3/4/10 | .3 | 90.00 |
| 3/4/10 | .3 | 90.00 |
| 3/5/10 | 2.9 | 870.00 |
| 3/6/10 | 7.6 | 2,280.00 |
| 3/7/10 | 5.5 | 1,650.00 |
| 3/8/10 | 1.1 | 330.00 |
| 3/9/10 | 6.9 | 2,070.00 |

| | | |
|---------------|---------------|--------------------|
| 3/10/10 | 6.0 | 1,800.00 |
| 3/11/10 | 1.9 | 570.00 |
| 3/12/10 | 4.1 | 1,230.00 |
| 3/15/10 | .6 | 180.00 |
| 4/6/10 | 5.4 | 1,620.00 |
| 5/26/10 | 4.0 | 1,200.00 |
| 6/2/10 | 7.8 | 2,340.00 |
| 6/9/10 | 6.5 | 1,950.00 |
| 6/9/10 | 4.5 | 1,350.00 |
| 6/10/10 | 3.5 | 1,050.00 |
| 6/10/10 | .8 | 240.00 |
| TOTALS | 141.45 | \$42,285.00 |

APPENDIX B

INTERIM REPORT AND LITIGATION ANALYSIS

GAL Time Records (CP 1764-1785)

| DATE | HOURS BILLED | AMOUNT BILLED |
|---------------|--------------|--------------------|
| 1/11/10 | 3.0 | 900.00 |
| 1/25/10 | 3.5 | 1,050.00 |
| 1/27/10 | 7.6 | 2,280.00 |
| 1/29/10 | 6.0 | 1,800.00 |
| 2/2/10 | 9.0 | 2,700.00 |
| 5/27/10 | 3.2 | 960.00 |
| 5/29/10 | 3.6 | 1,080.00 |
| 5/31/10 | 4.1 | 1,230.00 |
| 6/1/10 | 2.8 | 840.00 |
| 6/1/10 | 9.75 | 2,925.00 |
| 6/2/10 | 7.8 | 2,340.00 |
| 6/8/10 | 8 | 2,400.00 |
| 6/9/10 | 6.5 | 1,950.00 |
| 6/16/10 | 2.3 | 690.00 |
| TOTALS | 77.15 | \$23,145.00 |

APPENDIX C

MOTION TO REVOKE NANCY'S STANDING

GAL Time Records (CP 1778-1782)

| DATE | HOURS BILLED | AMOUNT BILLED |
|---------------|--------------|-------------------|
| 4/27/10 | 2.9 | 870.00 |
| 5/7/10 | .1 | 30.00 |
| 5/10/10 | 6.4 | 1,920.00 |
| 5/14/10 | 2.9 | 870.00 |
| 5/15/10 | 2.1 | 630.00 |
| 5/17/10 | 4.0 | 1,200.00 |
| 5/20/10 | 1.4 | 420.00 |
| 5/20/10 | .3 | 90.00 |
| 5/24/10 | .1 | 30.00 |
| TOTALS | 20.20 | \$6,060.00 |

APPENDIX D

APPEAL ON STANDING

GAL Time Records (CP 1789-1829)

| DATE | HOURS BILLED | AMOUNT BILLED |
|------------|--------------|---------------|
| 7/7/2010 | 0.1 | 30.00 |
| 7/9/2010 | 0.3 | 90.00 |
| 7/19/2010 | 2.1 | 630.00 |
| 7/28/2010 | 0.5 | 150.00 |
| 8/4/2010 | 0.2 | 60.00 |
| 9/2/2010 | 0.75 | 225.00 |
| 9/3/2010 | 0.1 | 30.00 |
| 10/4/2010 | 0.75 | 225.00 |
| 10/4/2010 | 0.6 | 180.00 |
| 10/13/2010 | 1.5 | 450.00 |
| 10/14/2010 | 0.2 | 60.00 |
| 10/20/2010 | 0.83 | 249.00 |
| 10/21/2010 | 0.3 | 90.00 |
| 10/27/2010 | 0.3 | 90.00 |
| 10/29/2010 | 0.3 | 90.00 |
| 11/4/2010 | 3.0 | 90.00 |
| 11/10/2010 | 0.3 | 90.00 |
| 11/16/2010 | 0.1 | 30.00 |
| 12/27/2010 | 0.75 | 225.00 |
| 12/28/2010 | 0.3 | 90.00 |
| 1/5/2011 | 0.1 | 30.00 |
| 2/8/2011 | 0.1 | 30.00 |
| 2/15/2011 | 0.1 | 30.00 |
| 2/23/2011 | 0.1 | 30.00 |
| 5/2/2011 | 0.6 | 180.00 |
| 5/3/2011 | 0.1 | 30.00 |
| 6/6/2011 | 0.1 | 30.00 |
| 6/30/2011 | 0.3 | 90.00 |
| 7/8/2011 | 0.1 | 30.00 |
| 7/13/2011 | 2.0 | 600.00 |
| 7/14/2011 | 0.9 | 270.00 |
| 7/15/2011 | 0.2 | 60.00 |
| 8/1/2011 | 0.1 | 30.00 |
| 8/8/2011 | 0.1 | 30.00 |
| 8/17/2011 | 0.1 | 30.00 |
| 1/24/2012 | 0.2 | 60.00 |
| 1/30/2012 | 0.2 | 60.00 |
| 2/21/2012 | 0.2 | 60.00 |

| | | |
|---------------|--------------|--------------------|
| 2/23/2012 | 2.0 | 600.00 |
| 3/12/2012 | 1.1 | 330.00 |
| 3/16/2012 | 1.7 | 510.00 |
| 3/21/2012 | 0.2 | 60.00 |
| 4/2/2012 | 0.1 | 30.00 |
| 4/2/2012 | 0.2 | 60.00 |
| 4/5/2012 | 0.1 | 30.00 |
| 4/16/2012 | 0.3 | 90.00 |
| 4/19/2012 | 5.7 | 1,710.00 |
| 5/8/2012 | 0.1 | 30.00 |
| 5/22/2012 | 0.6 | 180.00 |
| 7/23/2012 | 0.1 | 30.00 |
| 7/24/2012 | 1.4 | 420.00 |
| 7/25/2012 | 0.1 | 30.00 |
| 10/10/2012 | 0.1 | 30.00 |
| 10/17/2012 | 2.0 | 600.00 |
| 10/25/2012 | 0.9 | 270.00 |
| 11/7/2012 | 3.0 | 900.00 |
| 11/7/2012 | 0.2 | 60.00 |
| 11/14/2012 | 0.1 | 30.00 |
| 11/16/2012 | 0.1 | 30.00 |
| 11/29/2012 | 0.1 | 30.00 |
| 12/3/2012 | 0.1 | 30.00 |
| 12/10/2012 | 0.2 | 60.00 |
| 2/11/2013 | 0.1 | 30.00 |
| 2/12/2013 | 5.5 | 1,650.00 |
| 4/11/2013 | 0.5 | 150.00 |
| 5/6/2013 | 1.3 | 390.00 |
| TOTALS | 46.78 | \$13,224.00 |

APPENDIX E

FEES SEARCHING FOR AN ATTORNEY

| RSC ENTRIES (CP 1650) | | |
|--------------------------|--------------|-------------------|
| DATE | HOURS BILLED | AMOUNT BILLED |
| 6/22/10 | 1.0 | 340.00 |
| 6/23/10 | 1.0 | 340.00 |
| 6/25/10 | 2.3 | 782.00 |
| 6/28/10 | 3.5 | 1,190.00 |
| 6/29/10 | 4.8 | 1,632.00 |
| 6/30/10 | 4.8 | 1,632.00 |
| TOTALS | 17.40 | \$5,916.00 |

| GAL ENTRIES (CP 1786-1793) | | |
|-------------------------------|--------------|--------------------|
| DATE | HOURS BILLED | AMOUNT BILLED |
| 6/22/10 | 13.5 | 4,050.00 |
| 6/22/10 | .7 | 210.00 |
| 6/23/10 | .8 | 240.00 |
| 6/24/10 | 1.6 | 480.00 |
| 6/28/10 | .9 | 270.00 |
| 6/28/10 | .6 | 180.00 |
| 6/28/10 | 7.0 | 1,050.00 |
| 6/29/10 | 12.4 | 3,720.00 |
| 6/30/10 | .9 | 270.00 |
| 7/1/10 | .3 | 90.00 |
| 7/1/10 | .9 | 270.00 |
| 7/2/10 | 5.0 | 1,500.00 |
| 7/6/10 | .4 | 120.00 |
| 7/7/10 | 1.5 | 450.00 |
| 7/21/10 | .6 | 180.00 |
| 7/21/10 | 1.9 | 570.00 |
| 7/26/10 | .7 | 210.00 |
| TOTALS | 49.70 | \$13,860.00 |

APPENDIX F

FEES INCURRED SEEKING FEES FOR GAL

| RSC TIME ENTRIES (CP 1651-1666) | | |
|------------------------------------|--------------|--------------------|
| DATE | HOURS BILLED | AMOUNT BILLED |
| 7/21/10 | 1.7 | 578.00 |
| 8/10/10 | 3.2 | 704.00 |
| 8/10/10 | 4.4 | 1,496.00 |
| 8/11/10 | 6.5 | 2,210.00 |
| 8/11/10 | 1.3 | 286.00 |
| 8/13/10 | 2.5 | 850.00 |
| 8/20/10 | 1.0 | 375.00 |
| 8/23/10 | 3.2 | 1,088.00 |
| 8/23/10 | 5.9 | 2,212.50 |
| 9/8/10 | 5.9 | 2,006.00 |
| 9/8/10 | 2.6 | 975.00 |
| 9/9/10 | 4.6 | 1,725.00 |
| 9/9/10 | 6.0 | 2,040.00 |
| 3/15/13 | 2.1 | 840.00 |
| 3/19/13 | .5 | 200.00 |
| 3/20/13 | .9 | 360.00 |
| 4/19/13 | .7 | 280.00 |
| 5/1/13 | 1.3 | 520.00 |
| 5/2/13 | 2.9 | 1,160.00 |
| TOTALS | 57.20 | \$19,905.50 |

| GAL TIME ENTRIES (CP 1792-1829) | | |
|------------------------------------|--------------|-------------------|
| DATE | HOURS BILLED | AMOUNT BILLED |
| 7/21/10 | 1.2 | 360.00 |
| 8/9/10 | 4.8 | 1,440.00 |
| 8/11/10 | 3.9 | 1,170.00 |
| 8/13/10 | 1.4 | 420.00 |
| 8/23/10 | 2.8 | 840.00 |
| 8/24/10 | 1.8 | 540.00 |
| 8/24/10 | .3 | 90.00 |
| 8/24/10 | .5 | 150.00 |
| 8/26/10 | .2 | 60.00 |
| 8/26/10 | .1 | 30.00 |
| 9/8/10 | 1.8 | 540.00 |
| 9/8/10 | 1.1 | 330.00 |
| 9/9/10 | 1.9 | 570.00 |
| 5/1/13 | .5 | 150.00 |
| 5/6/13 | 1.3 | 390.00 |
| 5/13/13 | 2.9 | 870.00 |
| 5/14/13 | .3 | 90.00 |
| TOTALS | 26.80 | \$8,040.00 |

APPENDIX G

FEES INCURRED FOR GAL MALPRACTICE COUNSEL

GAL Time Records (CP 1770-1812)

| DATE | HOURS BILLED | AMOUNT BILLED |
|---------------|--------------|-------------------|
| 3/3/10 | 1.0 | 300.00 |
| 6/29/10 | 12.4 | 3,720.00 |
| 7/19/10 | 4.0 | 1,200.00 |
| 7/23/10 | 1.0 | 300.00 |
| 7/26/10 | .1 | 30.00 |
| 8/2/10 | .1 | 30.00 |
| 8/3/10 | 2.1 | 630.00 |
| 8/24/10 | .3 | 90.00 |
| 9/2/10 | .2 | 60.00 |
| 9/21/10 | .1 | 30.00 |
| 9/22/10 | .9 | 270.00 |
| 9/23/10 | .6 | 180.00 |
| 10/5/10 | 1.0 | 300.00 |
| 10/13/10 | 1.5 | 450.00 |
| 10/14/10 | .2 | 60.00 |
| 10/20/10 | .1 | 30.00 |
| 10/20/10 | .1 | 30.00 |
| 11/4/10 | .3 | 90.00 |
| 11/30/10 | .2 | 60.00 |
| 12/8/10 | .5 | 150.00 |
| 8/1/11 | .1 | 30.00 |
| TOTALS | 26.80 | \$8,040.00 |

APPENDIX H

DAVIS WRIGHT TREMAINE



89054671

WASHINGTON COURT RULES

STATE

2010

SEE PREFACE FOR CURRENTNESS INFORMATION

FOR FEDERAL RULES, SEE WASHINGTON
COURT RULES, FEDERAL, 2010

FOR LOCAL RULES, SEE WASHINGTON
COURT RULES, LOCAL, 2010

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CODE OF JUDICIAL CONDUCT (CJC)

Originally Effective January 1, 1974

Including Amendments Received Through
August 15, 2009

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PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section, and Comments. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The use of permissive language in various sections of the Code does not relieve judges from the other requirements of the Code that apply to specific conduct. The Comments provide explanation and guidance with respect to the purpose and meaning of the Canons and Sections. The Comments are not intended as a statement of additional rules nor as a basis for discipline.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the independence of judges which is essential in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether the activity was inadvertent, unintentional or based on a reasonable but mistaken interpretation of obligations under the Code, whether there is a pattern

of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

[Preamble amended effective July 1, 1974; April 11, 1986; March 25, 1988; June 23, 1995.]

TERMINOLOGY

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3(C)(1) and 3(C)(2).

"Candidate" is a person seeking election to judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. See Preamble and Sections 7(A) and 7(B).

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3(A)(7)(c) and 3(A)(9).

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Section 3(E).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution; the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding

pending or impending before the judge could substantially affect the value of the securities. See Sections 3(D)(1)(d) and 3(D)(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3(D)(2) and 5(D).

"Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. See Sections 3(C) and 3(D)(1).

"Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship. See Sections 7(B)(1)(a) and 7(B)(2).

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 5(D) and 5(F).

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Sections 3(D)(1) and 5(C)(5).

"Part-time judges." Part-time judges are judges who serve on a continuing or periodic basis, but are permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than a full-time judge. See Application Section (A)(1).

"Political organization." Political organization denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office or to support or oppose a ballot measure except those concerning the law, the legal system, and the administration of justice. See Sections 7(A)(1) and 7(A)(2).

"Pro tempore judges." Pro tempore judges are persons who are appointed to act temporarily as judges. See Application Section (A)(2).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3(A)(3), 3(A)(5), 3(A)(6), 3(A)(9) and 3(B)(2).

[Adopted effective June 23, 1995; amended effective November 7, 1995.]

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

(A) Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges should comply with this Code except as provided below.

(1) *A Part-Time Judge*

- (a) is not required to comply:
- (i) except while serving as a judge, with Section 3(A)(9); and
 - (ii) at any time with Sections 5(C)(2) and (3), 5(D), 5(E), 5(F), 5(G) and 6(C).
- (b) should not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Comment

When a person who has been a part-time judge is no longer a part-time judge, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to the Rules of Professional Conduct.

(2) *A Pro Tempore Judge*

- (a) is not required to comply:
- (i) except while serving as a judge, with Sections 2(A), 2(B), 3(A)(9), 4(B), 4(C) and 7(A);
 - (ii) at any time with Sections 2(C), 5(B), 5(C)(2), 5(C)(3), 5(C)(4), 5(D), 5(E), 5(F), 5(G) and 6(C).
- (b) A person who has been a pro tempore judge should not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by the Rules of Professional Conduct.

(B) Time for Compliance. Persons to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it.
[Adopted effective June 23, 1995.]

CANON 1**JUDGES SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Comment

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in

the judiciary and thereby does injury to the system of government under law.

[Canon 1 amended effective March 25, 1988; June 23, 1995 and Comment adopted June 23, 1995.]

CANON 2**JUDGES SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THEIR ACTIVITIES**

(A) Judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Judges should not allow family, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

Comment

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

The testimony of judges as character witnesses injects the prestige of their office into the proceeding in which they testify and may be misunderstood to be an official testimonial. This canon, however, does not afford judges a privilege against testifying in response to a subpoena.

(C) Judges should not hold membership in any organization practicing discrimination prohibited by law.

[Canon 2 and Comment amended effective March 25, 1988; June 23, 1995.]

CANON 3**JUDGES SHALL PERFORM THE DUTIES OF THEIR OFFICE IMPARTIALLY AND DILIGENTLY**

The judicial duties of judges should take precedence over all other activities. Their judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

(A) Adjudicative Responsibilities.

(1) Judges should be faithful to the law and maintain professional competence in it, and comply with the continuing judicial education requirements of GR 26. Judges should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) Judges should maintain order and decorum in proceedings before them.

(3) Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and of the staff, court officials, and others subject to their direction and control.

Comment

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(4) Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by amicus curiae only, if they afford the parties reasonable opportunity to respond.

Comment

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude judges from consulting with other judges, or with court personnel whose function is to aid judges in carrying out their adjudicative responsibilities. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

(5) Judges shall perform judicial duties without bias or prejudice.

Comment

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

(6) Judges should dispose promptly of the business of the court.

Comment

Prompt disposition of the courts business requires judges to devote adequate time to their duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with them to that end.

(7) Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from

making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(8) Judges shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Comment

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(B) Administrative Responsibilities.

(1) Judges should diligently discharge their administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) Judges should require their staff and court officials subject to their direction and control to observe the standards of fidelity and diligence that apply to them.

(3) Judges should not make unnecessary appointments. They should exercise their power of appointment only on the basis of merit, avoiding nepotism and favoritism. They should not approve compensation of appointees beyond the fair value of services rendered.

Comment

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

(C) Disciplinary Responsibilities.

(1) Judges having actual knowledge that another judge has committed a violation of this Code should take appropriate action. Judges having actual knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office should take or initiate appropriate corrective action, which may include informing the appropriate authority.

(2) Judges having actual knowledge that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. Judges having actual knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's fitness as a lawyer should take or initiate appropriate corrective action, which may include informing the appropriate authority.

(D) Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(d) the judge or the judge's spouse or member of the judge's family residing in the judge's household, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

Comment

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "their impartiality might reasonably be questioned" under Canon 3(D)(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" may require the judge's disqualification.

(2) Judges should inform themselves about their personal and fiduciary economic interests; and make a reasonable effort to inform themselves about the personal economic interests of their spouse and minor children residing in their household.

(E) Remittal of Disqualification. A judge disqualified by the terms of Canon 3(D)(1)(c) or Canon 3(D)(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

[Canon 3 amended effective September 20, 1976; September 1, 1983; Canon 3 and Comments amended effective March 25, 1988; Canon 3 amended effective December 27, 1991; Canon 3 and Comments amended effective June 23, 1995; Canon 3 amended effective July 1, 2002.]

CANON 4

JUDGES MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM AND THE ADMINISTRATION OF JUSTICE

Judges, subject to the proper performance of their judicial duties, may engage in the following quasi-judicial activities, if in doing so they do not cast doubt on their capacity to decide impartially any issue that may come before them:

(A) They may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(B) They may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and they may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

(C) Judges may serve as members, officers, or directors of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. They may assist such an organization in raising funds and may participate in their management and investment, but should not personally solicit contributions from the public. They may attend fund raising activities. They may make recommendations to public and private fund granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Comment

As judicial officers and persons specially learned in the law, judges are in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that their time permits, they are encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Use of an organization's letterhead for fund raising or membership solicitation is permissible provided the letterhead lists only the judge's name and position in the organization, and if comparable designations are listed for other persons.

Judges must not be speakers or guests of honor at an organization's fund raising event, but attendance at such an event is permissible if otherwise consistent with this Code. Judges may pay to attend an organization's fund raising event.

Extrajudicial activities are governed by Canon 5.

[Canon 4 and Comment amended effective March 25, 1988; June 23, 1995.]

CANON 5

JUDGES SHALL REGULATE THEIR EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THEIR JUDICIAL DUTIES

(A) **Avocational Activities.** Judges may write, lecture, teach, and speak on nonlegal subjects, and engage

in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of their office or interfere with the performance of their judicial duties.

Comment

Complete separation of judges from extrajudicial activities is neither possible nor wise; they should not become isolated from the society in which they live.

(B) Civic and Charitable Activities. Judges may participate in civic and charitable activities that do not reflect adversely upon their impartiality or interfere with the performance of their judicial duties. Judges may serve as officers, directors, trustees, or nonlegal advisors of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) Judges should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before them or will be regularly engaged in adversary proceedings in this state's courts.

Comment

The changing nature of some organizations and of their relationship to the law makes it necessary for judges to reexamine regularly the activities of each organization with which they are affiliated to determine if it is proper for them to continue their relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past.

(2) Judges should not use the prestige of their office to solicit contributions for any educational, religious, charitable, fraternal, or civic organization, but they may be listed as officers, directors, or trustees of such an organization. They should not be speakers or the guest of honor at an organization's fund raising events, but they may attend such events.

Comment

Judges may pay to attend an organization's fund raising event.

Participation in fund raising activities for organizations devoted to the law, the legal system and the administration of justice are governed by Canon 4.

Use of an organization's letterhead for fund raising or membership solicitation is permissible provided the letterhead lists only the judge's name and position in the organization, and if comparable designations are listed for other persons.

(C) Financial Activities.

(1) Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties or exploit their judicial position.

(2) Judges should not involve themselves in frequent business transactions with lawyers or persons likely to come before the court on which they serve.

(3) Subject to the requirements of Canon 5(C)(1) and (2), judges may hold and manage investments,

including real estate, and engage in other remunerative activity, but should not serve as officers, directors, managers, advisors or employees of any business.

Comment

See Application of the Code of Judicial Conduct, Section (B).

(4) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as they can do so without serious financial detriment, they should divest themselves of investments and other financial interests that might require frequent disqualification.

(5) Judges should not accept, and should urge members of their families residing in their households not to accept a gift, bequest, favor or loan from anyone except as follows:

(a) judges may accept a gift incident to a public testimonial to them; books supplied by publishers on a complimentary basis for official use; or an invitation to judges and their spouses to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) judges or members of their families residing in their households may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) judges or members of their families residing in their households may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and the judge reports it in the same manner as compensation is reported in Canon 6(C).

Comment

This canon does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(6) Judges are not required by this Code to disclose their income, debts, or investments, except as provided in this canon and Canons 3 and 6 or as otherwise required by law.

Comment

Canon 3 requires judges to disqualify themselves in any proceeding in which they have a financial interest, however small; Canon 5 requires judges to refrain from engaging in business and from financial activities that might interfere with the impartial performance of their judicial duties; Canon 6 requires judges to report all compensation they receive for activities outside their judicial office. Judges have the rights of ordinary citizens, including the right to privacy of their financial

affairs, except to the extent that limitations thereon are required to safeguard the proper performance of their duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by judges in their judicial capacity should not be used or disclosed by them in financial dealings or for any other purpose not related to their judicial duties.

(8) Subject to the limitations and requirements of Canon 6, judges may accept compensation and reimbursement of expenses for the solemnization of marriages, performed outside of regular court hours, pursuant to RCW 26.04.050.

(D) **Fiduciary Activities.** Judges shall not serve as executors, administrators, trustees, guardians or other fiduciaries, except for the estate, trust or person of members of their families, and then only if such service will not interfere with the proper performance of their judicial duties. As family fiduciaries judges are subject to the following restrictions:

(1) Judges shall not serve if it is likely that as a fiduciary they will be engaged in proceedings that would ordinarily come before them, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which they serve or one under its appellate jurisdiction.

(2) While acting as a fiduciary, judges are subject to the same restrictions on financial activities that apply to them in their personal capacities.

Comment

Judges' obligations under this canon and their obligations as a fiduciary may come into conflict. For example, judges should resign as trustees if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5(C)(4).

(E) **Arbitration.** Judges should not act as arbitrators or mediators or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(F) **Practice of Law.** Judges shall not practice law. Notwithstanding this prohibition, judges may act pro se and may, without compensation, give legal advice to and draft or review documents for members of their families.

(G) **Extrajudicial Appointments.** Judges should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. Judges, however, may represent their country, state or locality on ceremonial occasions or in connection with historical, educational and cultural activities.

Comment

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extrajudicial assignments. The appropriateness of conferring these assign-

ments on judges must be reassessed, however, in light of the demands on the judiciary created by today's crowded dockets and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the efficiency, effectiveness and independence of the judiciary.

[Canon 5 amended effective September 1, 1985; Canon 5 and Comments amended effective March 25, 1988; June 23, 1995.]

CANON 6

JUDGES SHALL REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRAJUDICIAL ACTIVITIES

Judges may receive compensation and reimbursement of expenses for the quasi-judicial and extrajudicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judges in their judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(A) **Compensation.** Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(B) **Expense Reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.

(C) **Public Reports.** A judge shall make such financial disclosures as required by law.

Comment

The Code does not prohibit judges from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. Judges should ensure, however, that no conflicts are created by the arrangement. Judges must not appear to trade on their judicial position for personal advantage. Judges should not spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payments must not raise any question of undue influence or the judges' ability or willingness to be impartial.

[Canon 6 amended effective September 1, 1983; March 25, 1988; Canon 6 amended and Comment adopted effective June 23, 1995.]

CANON 7

JUDGES SHALL REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO THEIR JUDICIAL OFFICE

(A) **Political Conduct in General.**

(1) Judges or candidates for election to judicial office shall not:

(a) act as leaders or hold any office in a political organization;

(b) make speeches for a political organization or nonjudicial candidate or publicly endorse a nonjudicial candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or nonjudicial candidate;

(d) attend political functions sponsored by political organizations or purchase tickets for political party dinners or other functions, except as authorized by Canon 7(A)(2);

(e) identify themselves as members of a political party, except as necessary to vote in an election;

(f) contribute to a political party, a political organization or nonjudicial candidate.

(2) During judicial campaigns, judges or candidates for election to judicial office may attend political gatherings, including functions sponsored by political organizations, and speak to such gatherings on their own behalf or that of another judicial candidate.

(3) Judges may contribute to, but shall not solicit funds for another judicial candidate.

(4) Judges shall resign from office when they become candidates either in a primary or in a general election for a nonjudicial office, except that they may continue to hold office while being a candidate for election to or serving as a delegate in a state constitutional convention, if they are otherwise permitted by law to do so.

Comment

See State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 P. 954 (1912) and State ex rel. Chandler v. Howell, 104 Wash. 99, 175 P. 569 (1918).

(5) Judges should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice.

(B) Campaign Conduct.

(1) Candidates, including an incumbent judge, for a judicial office:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of their families to adhere to the same standards of political conduct that apply to them;

(b) should prohibit public officials or employees subject to their direction or control from doing for them what they are prohibited from doing under this canon; and except to the extent authorized under Canon 7(B)(2) or (B)(3), they should not allow any other person to do for them what they are prohibited from doing under this canon;

(c) should not

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Comment

Section 7(B)(1)(c) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3(A)(6), the general rule on public comment by judges. Section 7(B)(1)(c) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office.

(2) Candidates, including incumbent judges, for a judicial office that is filled by public election between competing candidates shall not personally solicit or accept campaign contributions. They may establish committees of responsible persons to secure and manage campaign funds and to obtain public statements of support. Such committees may solicit campaign contributions and public support from lawyers and others. Candidates' committees may solicit contributions no earlier than 120 days from the date when filing for that office is first permitted and no later than 60 days after the final election in which the candidate participated. Candidates shall not use or permit the use of campaign contributions for the private benefit of themselves or members of their families. Candidates shall comply with all laws requiring public disclosure of campaign finances, which may require knowledge of campaign contributions. When an unsolicited contribution is delivered directly to the candidate, receipt and prompt delivery of the contribution to the appropriate campaign official is not prohibited.

Comment

Although campaign contributions of which a judge has knowledge are not prohibited, these contributions may be relevant to recusal.

(3) An incumbent judge who is a candidate for office without a competing candidate may obtain public support and campaign contributions in the manner provided in Canon 7(B)(2).

[Canon 7 amended effective September 1, 1983; January 18, 1985; March 25, 1988; Canon 7 amended and Comments adopted effective June 23, 1995.]