

No. 53334-7-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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In Re The Guardianship of Loren Stamm

Appellant,

v.

Guardianship Services of Seattle, et al,

Respondents.

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MOTION TO APPOINT ATTORNEY AND  
TO OBTAIN FUNDING FOR APPEAL

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Margaret K. Dore  
Attorney for Appellant  
Loren Stamm

Margaret K. Dore  
WSBA # 16266  
Law Offices of Margaret K. Dore, P.S.  
800 Fifth Avenue, Suite 4000  
Seattle, WA 98104  
(206) 223-1922  
(206) 907-9066 (vm)

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**I. IDENTITY OF MOVING PARTY**

Loren Stamm, Appellant, asks for the relief designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT**

Mr. Stamm seeks appointment of his attorney per RCW 11.88.045(2) which states:

During the pendency of any guardianship, any attorney purporting to represent a person alleged or adjudicated to be incapacitated shall petition to be appointed . . .

Mr. Stamm is bringing this motion in the appellate court because the trial court, Commissioner Kimberly Prochnau, discharged his attorney. Commissioner Prochnau's order states:

[Ms. Dore] is discharged from acting as [Mr. Stamm's] attorney in this court (or on any subsequent appeals of this court's interim rulings) except to respond to the guardian's report on whether the guardianship should be eliminated or limited.<sup>1</sup>

Commissioner Prochnau also authorized the respondent, Guardianship Services of Seattle (GSS)

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<sup>1</sup> Document No. 1, Order of 9/25/03, p. 3, line 24 to p. 4, line 1. All "documents" refer to the excerpts of record submitted herewith.



to challenge the authority of Ms. Dore to represent Mr. Stamm herein. The order states:

[GSS] should instruct its attorney to file a motion in the appellate proceeding challenging the authority of Margaret Dore to represent Loren Stamm in that proceeding, given the Court's order that Ms. Dore was not to represent Mr. Stamm in any appeal from the orders entered on September 26, 2003.<sup>2</sup>

Ms. Dore is also subject to sanction if she seeks funding for this appeal in the trial court. Commissioner Prochnau's order states:

[Ms. Dore] is directed . . . not to file any further requests for attorneys fees with this court; any further motions to the undersigned subject may result in sanctions.<sup>3</sup>

Mr. Stamm's position is that the above orders are invalid and that he is entitled to the appointment of Ms. Dore.<sup>4</sup>

Mr. Stamm also requests that a \$20,000.00 retainer be paid to Ms. Dore from his funds. He

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<sup>2</sup> Document No. 2, "Order on Limited Guardian's Petition for Instructions Regarding Appeal No. 3," p.2, lines 2-5.

<sup>3</sup> Document No. 55, Order of 12-17-03, p. 6, lines 5-6.

<sup>4</sup> See: infra at § III.16 (Probable issues on appeal) and infra at § IV (Argument).

requests authorization to apply for public funding per RAP 15.2.

### III. FACTS RELEVANT TO MOTION

#### A. Introduction

Mr. Stamm is 73 years old.<sup>5</sup> He lives in his own home with his wife, Wanda Inderbitzin Stamm. Mr. Stamm has been described as "clever, humorous and charming."<sup>6</sup> Prior to guardianship, he had stable assets and good credit.<sup>7</sup> His physician states that he is "fully competent."<sup>8</sup>

Respondent Guardianship Services of Seattle (GSS) is a guardianship company. Its directors are Tom O'Brien and Ed Gardner. Neither Mr. O'Brien nor Mr. Gardner knows Mr. Stamm personally.<sup>9</sup>

In the broadest sense, this appeal concerns

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<sup>5</sup> Document No. 3, p. 10.

<sup>6</sup> Id., p. 14.

<sup>7</sup> Id., p. 27.

<sup>8</sup> Document No. 4, Second Declaration of Mark Gulka, MD, p. 4, ¶19.

<sup>9</sup> Documents Nos. 5 and 6, declarations of Loren Stamm.

Mr. Stamm's inability to access the court. The stakes include his health and financial security, and his intimate relationship with his wife. He seeks the following relief:

1. Reversal and termination of the guardianship;
2. Reversal and removal of GSS;
3. Reversal and disallowance of fees paid to GSS;
4. Reversal and remand to obtain damages from GSS;
5. Reversal and reinstatement of his rights to counsel, notice and appeal; and
6. Attorneys fees.

Mr. Stamm has another appeal which was argued on November 4, 2003, No. 50836-9-I.<sup>10</sup> In the event he prevails, the termination and removal issues presented herein will likely be moot. The other issues against GSS will remain.

Mr. Stamm also appealed under cause No.

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<sup>10</sup> The opening brief is submitted herein as Document No. 3. Mr. Stamm's reply brief is submitted as Document No. 7.

52530-1-I.<sup>11</sup> It was dismissed as not ripe for review.<sup>12</sup>

**B. Factual Context**

**1. GSS is appointed**

The guardianship was initiated on October 18, 2001 by Mr. Stamm's estranged children. (Document No. 3, p. 12). They raised concerns about Mr. Stamm's wife who was then his live-in significant other. (Id, pp. 10-12). They claimed that she was abusing him. (Id, p. 12).

A jury trial was held April 30, 2002 through May 2, 2002, before Superior Court Judge Helen Halpert. (Id, p. 17). No abuse was proved. (Id, p. 25; Document No. 7, p. 13).

Per the verdict, Mr. Stamm was found to be "incapacitated" so that a guardianship would be imposed but he retained certain rights. (Document No. 3, p. 25). His retained rights included the

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<sup>11</sup> See: Document 35, Loren Stamm's Reply to GSS Regarding Removal/Termination, at A-2 to A-5 (attaching Commissioner's ruling).

<sup>12</sup> Id at A-5.

right to see his wife who was then his significant other. (Id). He also retained the right to marry her and to provide for her in his will. (Id).

On May 3, 2003, Mr. Stamm's case was transferred to the Commissioners' Department of the King County Superior Court. (Id). GSS was appointed guardian on June 25, 2002. (Id). It thereby took over control of Mr. Stamm's personal and financial affairs.

## **2. GSS's initial work**

On August 16, 2002, GSS submitted its initial "Verified Inventory." (Document No. 3, p. 26). This document substantiated Mr. Stamm's pre-guardianship financial stability. (Id). It listed assets of \$349,304.06 with pre-guardianship debt of less than \$5,000.00. (Id).

GSS also submitted its initial budget projecting a shortfall of \$4,227.65 per month. (Id, p. 27). Pursuant thereto, Mr. Stamm's assets would be liquidated to pay for the guardianship. (Id).

At this same time, GSS took the position that Mr. Stamm's wife who was then his significant other should be required to pay rent. (Document No. 8). This was contrary to his agreement with her.<sup>13</sup> GSS also took the position that it would not pay his cell phone bill because his significant other used the phone. (Document No. 10). GSS did not pay Mr. Stamm's other bills, including his oil bill which was past due.<sup>14</sup>

All of this was upsetting to Mr. Stamm. He testified: "I cannot begin to tell the court my anger and resentment with what is occurring."<sup>15</sup>

He also testified:

[GSS] is trying to put a wedge between me and Wanda. It is already subjecting me to financial ruin. Now, it injects itself into my most private affairs. Perhaps I should set up a camera in the bedroom? The harassment and disrespect

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<sup>13</sup> Document No. 9, Fourth Declaration of Loren Stamm, p. 1, ¶ 2.

<sup>14</sup> Document No. 9, Fourth Declaration of Loren Stamm, August 27, 2002, p. 3, ¶12 (attaching past due oil bill and past due cell phone bill).

<sup>15</sup> Id., p. 3, lines 9-11.

of Wanda has got to stop.<sup>16</sup>

3. **Mr. Stamm moves for termination; he is not allowed to be heard**

On August 28, 2002, Mr. Stamm moved for termination of the guardianship. (Document No. 3, Opening Brief, p. 27). Commissioner Prochnau heard the motion on September 4, 2002. (Id, p. 28). She did not, however, allow Mr. Stamm to present his argument. (Id).

Her position was that as a commissioner, she did not have power to grant the relief requested. (Id). Mr. Stamm suggested that the matter could be presented to Judge Halpert who as the trial judge, would have the power. (Id). This suggestion was declined. (Id). Mr. Stamm's motion was thus denied without having been heard on the merits. (Id, pp. 28-29).

Commissioner Prochnau also ruled that Mr. Stamm would not be allowed to move for reconsideration. (Id, p. 30). This prompted his

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<sup>16</sup> Id, p. 2, lines 11-15.

attorney to state:

[F]or the record, I would just raise the due-process issue that I haven't even made the motion for reconsideration, and I don't even know what I'm going to write yet, and I'm being restricted when we're concerned with a fundamental liberty interest.

Id., p. 30.

**4. GSS does not pay Mr. Stamm's bills; Mr. Stamm is at risk**

During this same time in Fall 2002, Mr. Stamm's cell phone was turned off because GSS did not pay the bill.<sup>17</sup> Mr. Stamm was also without transportation for four or five days because GSS did not timely renew his car tabs.<sup>18</sup> GSS cancelled his credit cards.<sup>19</sup>

On November 11, 2002, Mr. Stamm attended a medical appointment arranged by GSS.<sup>20</sup> During the

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<sup>17</sup> Document No. 11, Declaration of Margaret K. Dore Supporting Loren Stamm's Motions Regarding Fees and His Petition for Instructions, and attachments thereto, including letter dated 10/6/02.

<sup>18</sup> Id. and Document 15 at A-14 and A-15.

<sup>19</sup> Document 11 and attachments thereto.

<sup>20</sup> Document 12, Declaration of Mark Gulka, MD, 11/27/03, attached chart note, p. 1, ¶ 1.



examination, his treating physician identified the guardianship as his most significant health risk.<sup>21</sup> Dr. Gulka's chart note stated:

[Mr. Stamm's] current arrangement with [GSS] and the cost that he is incurring are causing him extreme psychological disturbances. . . .

It is obviously affecting his blood pressure adversely as seen at the visit here today, and certainly this ongoing psychological stress would be a risk factor in his otherwise stable coronary artery disease. (Spacing changed).<sup>22</sup>

On November 18, 2002, GSS brought a motion recommending that Mr. Stamm's car not be repaired and that he be required to use an alternative form of transportation such as taxi script. (Document No. 13, pp. 3-4). GSS's reasoning included that his car was driven by his significant other. Id.

Mr. Stamm opposed GSS's motion and requested a lessening of the restrictions on him generally. (Document No. 14). Mr. Stamm's supporting

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<sup>21</sup> Id., attached chart note, p. 2 ("The most significant impact on his health at this time is his adverse social situation [his current arrangement with the court appointed guardian]").

<sup>22</sup> Id., attached chart note, p. 2.

evidence included a declaration from Dr. Gulka:

If [Mr. Stamm] has another heart attack, the guardianship would likely be one of the big reasons.

Declaration of Mark Gulka, MD, November 27, 2002.<sup>23</sup>

With Mr. Stamm's health at risk, Mr. Stamm's attorney made several requests for a meeting with GSS's attorney, John Hertog, and its director, Tom O'Brien.<sup>24</sup> GSS did not respond.<sup>25</sup>

On December 12, 2002, Mr. Stamm defeated the motion to not repair his car.

By this time, Mr. Stamm's cell phone bill and a bill from Bank of America had been turned over to collection due to nonpayment by GSS.<sup>26</sup> Mr. Stamm was also getting collection calls at home. (Document No. 16, p. 5, ¶ 20). On January 2003,

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<sup>23</sup> Document No. 12, p. 2, lines 9-12.

<sup>24</sup> Document No. 15, Declaration of Margaret K. Dore Attaching Excerpts From the Record at A-41 to A-43 (letters and e-mail to GSS's attorney).

<sup>25</sup> Id., at A-44 and A-45.

<sup>26</sup> Document No. 15, A-24; and Document No. 11 (various attachments).

his heating oil ran out due to nonpayment leaving him without heat for two days.<sup>27</sup>

On January 14, 2003, Mr. Stamm's attorney again requested a meeting with GSS. Her letter stated:

I again request a meeting . . . I note that my previous requests have been ignored.<sup>28</sup>

GSS did not respond.

**5. Mr. Stamm petitions for instructions**

On January 16, 2003, Mr. Stamm's attorney petitioned for instructions to terminate the guardianship and/or remove GSS.<sup>29</sup> She also continued her efforts to meet with GSS. Hertog & Coster's billing entry for January 28, 2003, states:

Telephone call from Margaret Dore regarding whether [GSS] will respond to her letters . . .

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<sup>27</sup> Document 15, at A-16 to A-18, and A-27, last ¶.

<sup>28</sup> Letter from Margaret Dore to GSS attorney, Richard Furman, dated 1/14/03, attached to Document No. 15, at A-44.

<sup>29</sup> Document No. 17, p.6.

Document No. 15, at A-45.

On January 29, 2003, Mr. Stamm's attorney received GSS's response, a report recommending that she be discharged.<sup>30</sup> The report also recommended that GSS be given authority to remove Mr. Stamm's significant other from his home.<sup>31</sup>

GSS's report was signed by GSS director, Tom O'Brien.<sup>32</sup> As set forth above, Mr. O'Brien does not know Mr. Stamm.<sup>33</sup> Throughout the report, he referred to Mr. Stamm as "Lawrence Stamm."<sup>34</sup> Mr. Stamm's name is "Loren."

GSS's reasoning for the recommendation to discharge Mr. Stamm's attorney was that she "makes no attempts at informal problem solving."<sup>35</sup> With

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<sup>30</sup> Document No. 18, Report and Recommendations Regarding Status of Guardianship, January 29, 2003, p. 3, last sentence.

<sup>31</sup> Id., p. 3, recommendation section.

<sup>32</sup> Id., p. 4.

<sup>33</sup> Document No. 5, Declaration of Loren Stamm, ¶ 4 ("I do not know Tom O'Brien").

<sup>34</sup> Document No. 18, Report and Recommendations Regarding Status of Guardianship, 1/29/03, pp. 1-3.

<sup>35</sup> Id., p. 2, ¶ 4.

her letters and repeated attempts to meet with GSS, this statement was false.<sup>36</sup> GSS cited no authority that would allow an attorney to be discharged for this reason.<sup>37</sup>

GSS's reasoning to remove Mr. Stamm's significant other was the stated belief that she "encourages and causes Mr. Stamm to be dissatisfied with the activities of [GSS]."<sup>38</sup>

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<sup>36</sup> See:

1. Letter from Margaret Dore to John Hertog, November 26, 2002 ("I think it could also be advisable for us to have a meeting, i.e., you, me, Mr. Stamm and Tom O'Brien") (Document No. 15 at A-41);
2. E-mail from Margaret Dore to John Hertog, November 27, 2002 ("What about an in-person meeting, you, me, Tom and Mr. Stamm") (Document No. 15 at A-42);
3. Letter from Margaret Dore to Richard Furman, December 3, 2002 ("Also, I again request an in person meeting . . . Mr. Stamm is extremely despondent") (Document No. 15 at A-43);
4. Letter from Margaret Dore to Richard Furman, January 14, 2003 ("I again request a meeting . . . I note that my previous requests have been ignored") (Document No. 15 at A-44); and
5. Hertog & Coster billing, entry for January 28, 2003 ("Telephone call from Margaret Dore regarding whether the guardian will respond to her letters") (Document No. 15 at A-45).

<sup>37</sup> Document No. 18, pp. 1-4.

<sup>38</sup> Id., p. 2, ¶ 1.

Given GSS's "activities," it is difficult to see why encouragement would be necessary. No rational person would have been satisfied with GSS's performance.

**6. Mr. Stamm is at risk; more financial irregularities**

With GSS's recommendation to remove Mr. Stamm's significant other, Mr. Stamm submitted an updated declaration from Dr. Gulka:

Removing Ms. Inderbitzin would put Mr. Stamm at substantial risk of additional mental and physical consequences including severe depression and heart attack.

Second Declaration of Mark Gulka, MD, p. 3.<sup>39</sup>

At this same time, Mr. Stamm's attorney discovered more irregularities with GSS's bill paying. These irregularities included that GSS had used Mr. Stamm's funds to pay the bills of other persons. Mr. Stamm submitted the declaration of Reed Bettinger, CPA, as follows:

The documents provided demonstrate a systemic problem with [GSS's] accounting

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<sup>39</sup> Document No. 4, lines 13-16.

system in which there are frequent and material errors. The more disturbing issues include: charging Mr. Stamm for what appear to be the bills of other clients; other improper bill paying; and the entry of "extra" weekly allowance checks, suggesting the existence of intentional skimming.<sup>40</sup>

**7. The trial court's ruling: a "well founded basis" on termination, and audit of GSS**

On February 28, 2003, Commissioner Prochnau heard argument on Mr. Stamm's petition for instructions to terminate the guardianship and/or remove GSS. The evidence included declarations from Dr. Gulka and Mr. Bettinger.

Commissioner Prochnau ruled that Mr. Stamm had provided a "well founded basis" to go forward with a hearing to terminate the guardianship. (Document No. 23, p. 25, lines 5-7). She did not, however, order a hearing. She stated that there would first be mediation. (Id, p. 27, lines 15-16). She stated that if mediation failed, she would order a hearing on termination. (Id, p. 30,

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<sup>40</sup> Document No. 19, Declaration of Reed Bettinger, CPA, February 24, 2003, p. 2, ¶ B.I.

lines 10-11). She also ruled that GSS would be audited. (Id, p. 34).

On March 19, 2003, Mr. Stamm married his significant other.

On March 27, 2003, Commissioner Prochnau entered her formal order. (Document 24). It provided that in lieu of mediation, Mr. Stamm and his son could engage in informal discussions. (Id, p. 3, lines 23-28). Commissioner Prochnau also stayed further proceedings pending the outcome of mediation and the audit. (Id, p. 1 and Document No. 1, p.5, lines 20-21).<sup>41</sup>

During the hearing, Commissioner Prochnau also emphasized the reason for the audit, i.e., concern for GSS's reputation. She stated:

[Mr. Stamm's CPA] raises a number of other concerns . . . but there is clearly enough here to raise -- at least to besmirch GSS's reputation . . . If we were not concerned about GSS's reputation, we wouldn't need to be concerned that we get an independent audit and get to the bottom of this

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<sup>41</sup> Commissioner Prochnau entered a separate order on the audit. (Document No. 25).



. . .<sup>42</sup>

Commissioner Prochnau would subsequently allow GSS to privately retain and pay its own auditor, Charles Pratt.<sup>43</sup>

By July 2003, Mr. Stamm and his son had fulfilled the mediation requirement.

**8. GSS submits a report on the audit and its annual report, and requests \$76,604.74 in fees**

On August 15, 2003, GSS submitted a report titled "Report on Results of Audits." (Document No. 28). Therein, GSS took the position that it had complied with all applicable standards and that Mr. Bettinger had failed to conduct a proper investigation. (Id.).

GSS's report contained five exhibits: a letter and two reports from its auditor, Mr. Pratt; an additional report from another privately

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<sup>42</sup> Doc. No. 26, Transcript 3/27/02, p. 21, lines 17-23.

<sup>43</sup> Document No. 27, Order Designating CPA to Perform Tasks Per the Court's March 27, 2003 Order, 6/4/03. See: attached letter from Charles Pratt to Ed Gardner, 5/2/03, (confirming their agreement).

retained CPA, Mr. DeJarnett; and a declaration from a GSS employee.<sup>44</sup> None of these materials included their underlying data or source documents as had been provided by Mr. Bettinger's declarations.<sup>45</sup>

Mr. Stamm responded to these materials with an updated declaration from Mr. Bettinger. (Document No. 22). Mr. Bettinger's opinion included that Mr. Pratt had employed a wrong standard. (Id, p. 2, line 12 to p. 4). Mr. Pratt had not held GSS to the standard of a fiduciary as required by the standards of practice for a professional guardian. (Id). Mr. Bettinger also testified:

[T]he documents and facts I do have, support my conclusions to date. The most basic being that we are presented with a simple situation, i.e., bill paying for an older gentleman with a fixed income, a house and a few investments. There are multiple

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<sup>44</sup> Document No. 28, p. 1.

<sup>45</sup> Cf. Document No. 28, Report on Results of Audits (and attached exhibits) and Document Nos. 19-22, Declarations of Reed Bettinger, CPA.

errors.<sup>46</sup>

In August 2003, GSS also submitted its first annual report.<sup>47</sup> This document characterized GSS as under attack by Ms. Dore, Mr. Bettinger and Mrs. Stamm (Wanda Inderbitzin).<sup>48</sup> It argued that Mr. Stamm was therefore at risk such that Ms. Dore should be removed as his attorney.<sup>49</sup> GSS also requested that Ms. Dore not be paid and that she be sanctioned \$50,000.00. (Document No. 30, p. 7; Documents Nos. 31 and 32).

GSS and its attorneys also requested fees

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<sup>46</sup> Document No. 22, p. 5, ¶ 16.

<sup>47</sup> Document No. 29.

<sup>48</sup> The annual report stated:

The total fees billed reflect the atmosphere of aggressive distrust and sabotage perpetrated by Margaret Dore, Reed Bettinger, and Wanda Inderbitzin [Mrs. Stamm] in their combined effort to attack [GSS]. (Document No. 29, p. 10).

<sup>49</sup> The annual report stated:

Mr. Stamm's financial ruin, started by Wanda Inderbitzin in the bars of Kenmore and continued by way of the repeated attacks on [GSS] by herself, Margaret Dore and Reed Bettinger, will come surely and swiftly unless the Court removes Ms. Dore from the case and appoints a more reasonable attorney to represent Mr. Stamm in his appeal. (Document No. 29, p. 11, last ¶).

from Mr. Stamm in the amount of \$76,604.74.  
(Document No. 36). The charges included fees for GSS to talk to collection agencies about the bills that GSS had caused to go into collection.  
(Document 37, pp. 6-9). GSS also charged Mr. Stamm for its time to work on the audit.  
(Document 36, p. 8; Document 37, p. 6). There were numerous other charges in which GSS had created the problem and then charged Mr. Stamm to fix it. (Document 37, pp. 6-9).<sup>50</sup>

Mr. Stamm objected to the annual report and to GSS's fees. (Document No. 36). He also submitted an updated declaration from Dr. Gulka:

It is now ten months since I first issued my opinion that the guardianship is causing Mr. Stamm harm. . . .

I am writing this declaration to again support relieving the pressure on Mr. Stamm. It seems that no one is listening.

Fifth Declaration of Mark Gulka, MD, p.2, ¶¶4-5.<sup>51</sup>

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<sup>50</sup> See also Document No. 35, Loren Stamm's Reply to GSS Regarding Termination/Removal or Continuance, pp. 4-8.

<sup>51</sup> Document No. 38.

**9. GSS's actions are approved;  
Mr. Stamm's attorney is  
discharged**

On September 17, 2003, Commissioner Prochnau conducted a hearing on the audit and the annual report. (Document 62). It lasted approximately an hour. (Id). Pursuant thereto, she entered an order approving GSS's handling of Mr. Stamm's funds.<sup>52</sup> She also awarded GSS and its attorneys \$65,280.00 in fees.<sup>53</sup> This amount reflected a reduction of approximately \$10,000.00 due to Mr. Stamm's objection.<sup>54</sup>

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<sup>52</sup> Document No. 39, Order Approving Report on Audit and Annual Report of Limited Guardian, p. 2, line 19 to p. 3, line 22, including p. 3, lines 20-22 ("There were no material gaps, problems or breaches of financial responsibility in GSS's handling of Mr. Stamm's account . . .").

<sup>53</sup> GSS had requested \$39,969.81 in fees and \$626.66 in costs, for a total of \$40,596.47. (Document No. 39, p. 4, ¶ D). Commissioner Prochnau disallowed \$4,596.47 due to GSS's having charged Mr. Stamm for its work on the audit and to speak with collection agencies. (Id, p. 4, line 22). The net allowed amount was \$36,000.00. GSS's attorneys had requested a total of \$29,902.27, which Commissioner Prochnau reduced to \$25,000.00 because GSS's attorneys had charged Mr. Stamm for the audit and to interact with collection agencies. (Id, p. 8, ¶ X). She also allowed GSS's attorneys \$4280.00 from a prior fee request. (Id). The total allowed was therefore: \$36,000.00 + \$25,000.00 + \$4,280.00 = \$65,280.00.

<sup>54</sup> Id; and Document No. 36, pp. 1, 9-11.

On September 26, 2003, Commissioner Prochnau entered an additional order providing that the hearing on termination of the guardianship would be pursuant to a report by GSS on whether the guardianship should be terminated or limited.<sup>55</sup> She also discharged Mr. Stamm's attorney except with regard to Mr. Stamm's initial appeal and to provide a response to GSS's report. Her order stated:

Ms. Dore's authority to act as Mr. Stamm's attorney should henceforth be limited to appeal of the jury verdict [No. 50386-9-I] and to provide a limited response [to GSS's report]. She is discharged from acting as his attorney in this court (or on any subsequent appeals of this court's interim rulings) except to respond to the guardian's report on whether the guardianship should be eliminated or limited. The court discharges her because Mr. Stamm cannot financially or emotionally afford the ongoing costs of an attorney to fight [GSS] at every step of the way with the attendant costs of [GSS] and [GSS's] attorney.<sup>56</sup>

The order noted that Ms. Dore's discharge was

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<sup>55</sup> Document No. 1, "Order of 9/25/03," filed 9/26/03, p. 5, lines 25-26.

<sup>56</sup> Id., p. 3, line 21 to p.4, line 4.

over the objection of Mr. Stamm, that he has a "strongly voiced desire to have access to counsel."<sup>57</sup>

Commissioner Prochnau denied reconsideration on October 6, 2003. (Document Nos. 37 and 40).

**10. Mr. Stamm appeals and moves for reappointment of his attorney**

On November 5, 2003, Mr. Stamm filed a *pro se* notice of appeal. Through his attorney, he also moved for her reappointment. (Document No. 41). His evidence included a letter of instruction, as follows:

I believe without your representation . . . I will be "done for." GSS will continue doing what it does. Pressure me to get rid of [my wife] and/or go live in an old folks home. GSS will continue to spend me down to zero.

I want you to appeal your being fired. I want you to appeal not getting rid of GSS.

I understand that by appealing GSS will spend me down faster. I want you to do whatever you need to do to get rid of GSS. [G]et my credit, my money and my

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<sup>57</sup> Id., p. 5, line 2.

life back.

Loren Stamm's Letter, dated October 29, 2003.<sup>58</sup>

**11. GSS recommends that the guardianship be continued; Mr. Stamm responds with a motion for summary judgment**

On November 12, 2003, GSS issued its report on termination or limitation of the guardianship recommending that the guardianship be continued.<sup>59</sup>

GSS also stated:

[GSS] has been unsuccessful in establishing a relationship with Mr. Stamm that allows [it] to comment on his capacity . . .<sup>60</sup>

On December 16, 2003, Mr. Stamm responded with a motion for summary judgment to terminate the guardianship supported by yet another declaration from Dr. Gulka. (Document 46). Mr. Stamm also submitted his medical records. See: Dr. Gulka's chart note dated February 5, 2003 (Mr.

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<sup>58</sup> Document No. 42, and attached hereto at A-1 to A-4.

<sup>59</sup> Document No. 44, Limited Guardian's Report on Limitation of Guardianship, 11/12/03.

<sup>60</sup> Id., p. 1 (background paragraph).



Stamm is "entirely competent"); Dr. Yakovlevitch's chart note, dated September 3, 2003 (Mr. Stamm is "fully orientated"); and Dr. Maiden's chart note, dated September 15, 2003 (Mr. Stamm "understand[s] the procedure").<sup>61</sup>

Kary Hyre, the Washington State Long Term Care Ombudsman, also testified. With regard to a meeting he had attended on the accounting issues, Mr. Hyre stated:

During the meeting, Mr. Stamm made comments in context to the meeting, i.e., the accounting issues. He also demonstrated a sense of humor. . . .

[Mr. Stamm] did not present as the type of person who should be under guardianship.<sup>62</sup>

**12. The trial court denies payment to Mr. Stamm's attorney and proposes yet more delay; Mr. Stamm appeals again**

On December 17, 2003, Commissioner Prochnau denied all fees that had been requested by Mr.

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<sup>61</sup> Document No. 49 at A-155, A-171 and A-169, respectively.

<sup>62</sup> Declaration of Kary Hyre, Washington State Long-Term Care Ombudsman, dated 12/29/03, p. 2, ¶¶ 4-5, Document 57.

Stamm to pay his attorney.<sup>63</sup> Her reasoning included the following:

Ms. Dore has violated these limitations by assisting Mr. Stamm with filing yet another notice of appeal dated 11/4/03, and by filing a motion to vacate the court's earlier order and/or "reappoint her."<sup>64</sup>

On December 17, 2003, Commissioner Prochnau also issued her own motion to show cause proposing that the guardianship be temporarily limited for four months during which time Mr. Stamm and his wife would pay his bills. (Document 55, p. 5, lines 12-25). Commissioner Prochnau proposed that at the end of this period, GSS would submit yet another report. (Id., p. 5, lines 21-23).

GSS responded that the limitation period

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<sup>63</sup> Mr. Stamm had requested \$73,988.12 with no more than \$45,000.00 to be paid from his funds. This was because Ms. Dore had agreed to cap her fee at \$45,000.00. Mr. Stamm had requested that the balance be paid by GSS. See: Document No. 45, Loren Stamm's Reply to GSS Regarding Fees and Subjoined Declaration, p. 5, lines 10-18; and Document No. 55, Order of 12-17-03, p.6, line 1.

<sup>64</sup> Document No. 55, p. 4, ¶ 13 and p. 6, line 1.

should instead be extended to eight months.<sup>65</sup> It also submitted a proposed order. (Document 58, at A-1). The order set Mr. Stamm up for failure.<sup>66</sup>

On January 12, 2003, Mr. Stamm filed an amended notice of appeal to include the order of December 17, 2003.

**13. Material issues of fact, but no evidentiary hearing; Mr. Stamm is not entitled to notice**

On January 20, 2004, Commissioner Prochnau denied Mr. Stamm's motion for summary judgment to terminate the guardianship because she found that

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<sup>65</sup> Document No. 53, Limited Guardian's Response to Court's Order to Show Cause, dated December 30, 2003, p. 2, lines 17-18.

<sup>66</sup> Mr. Stamm's wife testified:

I am concerned with GSS's proposed order under which we would attempt to pay Loren's bills. I say "attempt" because the order sets us up for failure. It states that Loren "shall be responsible for payment of all of his bills out of his monthly income." . . . This time of year, [Loren's] bills exceed his monthly income, e.g., for taxes, higher utilities, etc.

Document No. 58, p. 1, ¶ 2, Declaration of Wanda Stamm Supporting Reply on Summary Judgment and Regarding Show Cause.

there were material issues of fact.<sup>67</sup> She did not, however, set a hearing to resolve these issues.<sup>68</sup> She instead ordered GSS to provide another report in five months. Id., p. 4. She stated that she anticipated that she would then terminate the guardianship, i.e., unless GSS would identify significant problems or if it would be unable to obtain information.<sup>69</sup>

Commissioner Prochnau also provided that GSS would be allowed to obtain future orders on an ex parte basis, i.e., without notice to Mr. Stamm.

Her order states:

[GSS] may seek instructions, ex parte, for any additional orders necessary to

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<sup>67</sup> Document No. 61, Order Limiting Guardianship, p.3, lines 10-11.

<sup>68</sup> Id.

<sup>69</sup> The court's order stated:

Unless the guardian is able to identify significant problems with Mr. Stamm's management of his estate or person (or is prevented by Mr. Stamm from receiving the necessary information to do its report) the court anticipates terminating the guardianship in its entirety.

Document 61, Order Limiting Guardianship, p. 4, lines 22-25.

implement this court's ruling.<sup>70</sup>

**14. Mr. Stamm's current situation**

Mr. Stamm first moved for termination of the guardianship in August 2002.<sup>71</sup> It is now February 2004. He has yet to have an evidentiary hearing.<sup>72</sup> He is not allowed to have a lawyer. He has no right to notice.

Commissioner Prochnau has also made Mr. Stamm's release from guardianship contingent on GSS's recommendation.<sup>73</sup> Termination of the guardianship is contrary to GSS's interests. Under guardianship, Mr. Stamm provides GSS with a source of income. Termination would also restore

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<sup>70</sup> Document 61, Order Limiting Guardianship, p.5, ¶7.

<sup>71</sup> Supra at § III.B.3.

<sup>72</sup> See, e.g., Id and supra at § III.B.13.

<sup>73</sup> Again, see: Document 61, Order Limiting Guardianship, p. 4, lines 22-25 ("Unless [GSS] is able to identify significant problems . . . or is prevented . . . from receiving the necessary information . . . , the court anticipates terminating the guardianship in its entirety").

Mr. Stamm's civil rights including the right to sue GSS.

GSS has also taken the position that termination is improper without a ruling by this court.<sup>74</sup>

With this situation, it appears unlikely that GSS's upcoming recommendation will be to terminate the guardianship. As a practical matter, Mr. Stamm is stuck unless this Court provides him with relief.

#### **15. Mr. Stamm appeals again**

On February 19, 2004, Mr. Stamm filed an amended notice of appeal to include the order of January 20, 2004.<sup>75</sup> His intent is to consolidate this notice of appeal with his prior notices of appeal filed herein.

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<sup>74</sup> See e.g., Document 44, Limited Guardian's Report on Limitation of Guardianship, November 10, 2003, p. 2:

[O]ral arguments have been heard in the appeal of the jury verdict and a ruling is pending. The Court of Appeals decision will be known in the next few weeks. It is not appropriate for [GSS] to prejudge that decision, . . .

<sup>75</sup> The notice of appeal also appeals from the court's order of January 23, 2004. (Document No. 2).

**16. Probable issues on appeal**

Mr. Stamm provides the following issues for review for which he seeks the appointment of counsel herein:

1. Whether a trial court that acts to prevent a party's access to counsel and funding for appeal, is in effect determining the appealability of its own orders which is the role of the appellate court, not the trial court?

2. Whether the trial court's orders which act to "effectively foreclose access" to the appellate court are invalid because court access is a fundamental constitutional right?<sup>76</sup>

3. Whether the trial court's orders which act to deny Mr. Stamm the right to appeal violate the equal protection clause of the 14<sup>th</sup> Amendment of

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<sup>76</sup> Cf. Bounds v. Smith, 430 U.S. 817, 822-28 (1977) and State v. Hurt, 107 Wn. App. 816, 826, 27 P.3d 1376 (2001).

the United States Constitution?<sup>77</sup>

4. Whether Mr. Stamm's right to due process under the 14<sup>th</sup> Amendment is violated by the court's procedure on termination of the guardianship in which there is ongoing delay, no evidentiary hearing and the decision is contingent on the recommendation of a party that has its own interests to keep the guardianship in place?

5. Whether Mr. Stamm's right to due process is violated by the trial court's procedure on termination of the guardianship in which he is not entitled to notice and his representation by counsel is prohibited?

6. Whether a ward who provides a "well founded basis" for termination of his guardianship, is entitled to a prompt hearing on termination, i.e., akin to a criminal defendant's right to speedy

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<sup>77</sup> Cf. State v. Hurt, 107 Wn. App. at 827.



trial?<sup>78</sup>

7. Whether a guardianship that causes financial devastation to the ward and puts his health at risk, must be terminated as contrary to the purpose of the guardianship statute which is to benefit the ward?<sup>79</sup>

8. Whether Washington State should adopt the burden shifting analysis for termination provided in Matter of Guardianship of Hedin, 528 NW 2d 567, 583 (Iowa 1995) that once the ward makes a prima facie showing of some decision making ability, the guardian has the burden to go forward and prove by

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<sup>78</sup> Document No. 46, Loren Stamm's Response to GSS and Motion for Summary Judgment on Termination, p. 7, § B.

<sup>79</sup> Cf. Guardianship of Atkins, 57 Wn. App. 771, 777, 790 P.2d 210 (1990) (that the purpose of the guardianship statute is to benefit the alleged incompetent). See also Document 56, Loren Stamm's Reply on Summary Judgment and Show Cause, 1/9/04, pp. 1, 3-7.

clear and convincing evidence the ward's incompetency, if any?<sup>80</sup>

9. Whether the guardianship is unnecessary as a matter of law because Mr. Stamm is now married so that his spouse can provide any needed assistance?<sup>81</sup>

10. Whether GSS's actions to further restrict Mr. Stamm including its attempt to forcibly remove his significant other from his home, were *ultra vires*, unfounded and in reckless disregard of his health?<sup>82</sup>

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<sup>80</sup> See also: Document No. 46, Loren Stamm's Response to GSS and Motion for Summary Judgment, 12/16/03, pp. 5-7; and Document No. 56, Loren Stamm's Reply on Summary Judgment and Show Cause, 1/9/04, pp. 8-10.

<sup>81</sup> Cf. RCW 11.88.005 and Document No. 51, Loren Stamm's Response to Court's Motion to Show Case Why Guardianship Should Not Be Temporarily Limited, 1/4/04, p. 2, lines 20-21.

<sup>82</sup> Document No. 35, Loren Stamm's Reply to GSS Regarding Removal/Termination, 8/21/03, pp. 5-7.

11. Whether GSS's ongoing harassment of Mr. Stamm's relationship with his wife violates Mr. Stamm's retained rights of marital privacy and intimate association?<sup>83</sup>

12. Whether the trial court abused its discretion by awarding fees to GSS and its attorneys?<sup>84</sup>

13. Whether the trial court abused its discretion by not removing GSS?<sup>85</sup>

14. Whether a guardian's report signed by a person who does not know the ward is inadmissible

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<sup>83</sup> Id; Washington v. Glucksberg, 117 S.Ct. 2258, 2267 (1997) (listing marital privacy as a fundamental right); and City of Bremerton v. Widell, 146 Wn.2d 561, 575 (2002) (discussing the due process right of intimate association).

<sup>84</sup> Document No. 36, Loren Stamm's Response to Annual Report and Objections to Proposed Order, 9/11/03; and Document No. 37, Loren Stamm's Motion for Reconsideration, 10/6/03, pp. 6-9.

<sup>85</sup> See: Document 35, Loren Stamm's Reply to GSS Regarding Removal/Termination, 8/21/03, pp. 1-13; and Document No. 37, p. 3 (attached hereto at A-10).

hearsay?<sup>86</sup>

Mr. Stamm seeks the appointment of counsel to present these and other issues to this Court.

#### IV. ARGUMENT

##### A. Mr. Stamm is Entitled to Appointment of His Attorney on Appeal

Mr. Stamm is entitled to appointment of his attorney on appeal per RCW 11.88.045 and constitutional mandates. See below.

##### 1. Mr. Stamm is entitled to counsel on appeal per RCW 11.88.045

RCW 11.88.045(1)(a) provides that counsel shall be appointed for a ward:

When in the opinion of the court, the rights and interests of an . . . adjudicated incapacitated person cannot otherwise be adequately protected and represented . . .

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<sup>86</sup> Cf. State v. Nation, 110 Wn. App. 651, 662-666, 41 P.3d 1204 (2002) (reversible error to admit report of crime lab supervisor).

There is no caselaw interpreting this provision. Guardianship of K.M., 62 Wn. App. 811, 815, 816 P.2d 71 (Div I 1991) does, however, address a predecessor statute which had substantially similar language. Therein, this Court held that the trial court erred to not appoint counsel for the ward at trial. Id., at 818. The guardians therein had sought to obtain the ward's sterilization. Id. at 812 and 818. This Court stated:

Given the fundamental right at issue here and the lack of adversarial testing of the relevant considerations to be weighed, we hold that the trial court erred by failing to appoint independent counsel for K.M.

K.M., 62 Wn. App. at 818.

In the case at bar, the issues presented include Mr. Stamm's fundamental right to access the court. Cf. Bounds v. Smith, 430 U.S. 817, 822-28 (1997)(attached infra at A-5). Other issues concern Mr. Stamm's fundamental rights to due process and marital privacy. Cf. Hedin, 528 NW.2d at 572-77 and Washington v. Glucksberg, 117

S.Ct. 2258, 2260 and 2267 (1997). Mr. Stamm also has a fundamental right to be free from abuse and exploitation by a court-appointed guardian. Cf. Braam ex rel, Braam v. State, 81 P.3d 851, 857 (Wash. 2003).

These rights cannot be adequately addressed without "a thorough adversary exploration of the issues." K.M., 62 Wn. App at 818. Mr. Stamm is therefore entitled to counsel to present these issues. Mr. Stamm is entitled to appointment of his attorney per RCW 11.88.045.

**2. Mr. Stamm is also entitled to counsel due to constitutional mandates**

Counsel must also be appointed due to Constitutional mandates. This is because as a ward under guardianship, Mr. Stamm is subject to a severe loss of liberty. Matter of Guardianship of Hedin, 528 NW.2d 567, 573-74 (Iowa 1995), states:

Although the determination of incompetency is in no way a criminal proceeding, the result in terms of the defendant's liberty interests may be very similar. He may be deprived of control over his residence, his

associations, his property, his diet,  
and his ability to go where he wishes.

A similar point is made by commentators.

Paul F. Stravis states: "Individuals . . .  
subject to guardianship typically retain fewer  
rights than are retained by convicted felons."<sup>87</sup>

Mark D. Andrews states: "An adjudicated  
incompetent loses more rights than the typical  
prisoner."<sup>88</sup>

In the case at bar, GSS monitors Mr. Stamm's  
finances and personal life.<sup>89</sup> It controls most of  
his property and receives his income.<sup>90</sup> It has  
the authority to speak to his physicians.<sup>91</sup> With

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<sup>87</sup> Paul F. Stravis, Counsel to the NY Commission on  
Quality Care, *Guardianship: the Problem or a Solution*,  
*Quality of Care Newsletter*, Issue 40, May-June 1989, CP 941  
(No. 50836-9-I). See also: Denise M. Topolnicki, *The Gulag  
of Guardianship*, *Money Magazine*, March 1989, CP 1152-53 (No.  
50836-9-I).

<sup>88</sup> Document No. 43, Mark D. Andrews, *The Elderly in  
Guardianship: A Crisis of Constitutional Proportions*, 5  
Elder L.J. 75, 93 (Spring 1997).

<sup>89</sup> Cf. Document No. 55, Order of 12-17-03, p. 3, line 17  
(regarding GSS's "necessary monitoring duties").

<sup>90</sup> Cf. Document No. 61, Order Limiting Guardianship, p.  
3, lines 19-20 (providing that GSS will provide Mr. Stamm  
with a check "representing" his income).

<sup>91</sup> Id., p. 4, lines 12-22.

its ability to recommend or not recommend his release from guardianship, it can pressure him to conform to its view of what is appropriate.<sup>92</sup> Mr. Stamm is in effect under a type of house arrest.

GSS has also succeeded in silencing Mr. Stamm with the elimination of his right to notice.<sup>93</sup> The trial court also purports to eliminate his rights to counsel and appeal.<sup>94</sup> Judicial oversight is thereby minimized. Mark Andrews states: "A ward could end up a *de facto* lifetime prisoner of the guardian without any judicial oversight."<sup>95</sup>

Equal protection "requires similar treatment under the law for similarly situated people." Miquel v. Guess, 112 Wn. App. 536, 552, 51 P.3d 89 (2002). Mr. Stamm is thus entitled to the same or similar rights as persons who are actually

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<sup>92</sup> Id., p. 4, lines 23-25, and Declaration of Wanda Stamm, filed February 23, 2004.

<sup>93</sup> Document No. 61, p. 5, ¶ 7.

<sup>94</sup> Document No. 55, Order of 12-17-3, p. 4, lines 24-25.

<sup>95</sup> Document No. 43, Mark D. Andrews, 5 Elder L.J. at 110.



incarcerated. The fact of Mr. Stamm's confinement also triggers due process guarantees.<sup>96</sup>

Incarcerated persons have the right to "adequate, effective and meaningful" access to the court which includes the right to seek post conviction relief.<sup>97</sup> They are also entitled to the right of retained counsel. Tully v. State, 4 Wn. App. 720, 725-26, 483 P.2d 1268 (Div. I 1971) states:

During the reign of Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595

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<sup>96</sup> Quesnell v. State, 83 Wn.2d 224, 230, 517 P.2d 568 (1973), states:

It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration--whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent--which commands observance of the constitutional safeguards of due process.

<sup>97</sup> Bounds v. Smith, 430 U.S. 817, 822 (1977) states:

More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful. . . . [I]n the order to prevent "effectively foreclosed access," indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees (attached hereto at A-7).

(1942), "the Court made it clear that denying a defendant the assistance of His own lawyer in Any case, at Any stage on Any issue, constituted a per se violation of 'fundamental fairness'." (Emphasis in original).

In the case at bar, Mr. Stamm seeks the equivalent of post conviction relief. Pursuant thereto, he is entitled to retained counsel of his choice. For this reason also, Mr. Stamm's attorney must be appointed as requested.

**B. Expense is Not a Reason to Deny Appointment of Mr. Stamm's Attorney**

As set forth above, Commissioner Prochnau's reasons for discharging Mr. Stamm's attorney included the expense.<sup>98</sup> The expense of legal counsel is, unfortunately, a cost borne by accused and incarcerated persons. State v. Blank, 131 Wn.2d 230, 236-37, 930 P.2d 1213 (1997), states:

A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer.

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<sup>98</sup> Document No. 1, p. 4, lines 1-4.

To not allow Mr. Stamm to use his own money to obtain counsel and pursue appeal is constitutionally impermissible. For this reason also, Mr. Stamm's attorney must be appointed now.

**C. Mr. Stamm is Entitled to the Record and Fees**

Mr. Stamm is also entitled to use his own money to obtain the record and for court fees. This is because "adequate and effective appellate review" is not possible without the record and payment of costs. Bounds, 430 U.S. at 822. Mr. Stamm is therefore also entitled to funding for transcripts, clerks papers, the filing fee, etc.

**D. Mr. Stamm's Attorney Should be Paid a Retainer as Authorized by Mr. Stamm**

Per GSS, Mr. Stamm had approximately \$45,000.00 in cash as of January 2004.<sup>99</sup> Assuming this information is correct, Mr. Stamm has authorized immediate payment of \$20,000.00 to his attorney as a retainer. His declaration states:

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<sup>99</sup> Declaration of Loren Stamm Supporting Appointment of His Attorney on Appeal, January 25, 2004.

I want \$20,000.00 of that sum to be paid to Ms. Dore . . .<sup>100</sup>

Mr. Stamm requests that this Court now direct that this payment be made.

**E. Mr. Stamm Should be Authorized to Apply for Public Funding per RAP 15.2**

With the cost of the guardianship and this litigation, Mr. Stamm may become indigent in the future. If this occurs, he may be eligible for public funding of this appeal per RAP 15.2.

RAP 15.2(a) provides that a litigant seeking such funding is to submit a motion in the trial court. This presents a problem for Mr. Stamm because Commissioner Prochnau's order of December 17, 2003 would seem to prohibit such a motion.

Again, that order states:

[Ms. Dore] is directed to not to file any further requests for attorneys fees with this court; any further motions to the undersigned subject may result in sanctions.<sup>101</sup>

Mr. Stamm therefore requests that he be

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<sup>100</sup> Id., p. 1.

<sup>101</sup> Document 55, p. 6, lines 5-6.

authorized to bring the motion in this court. In the alternative, he would request a ruling instructing the trial court to hear the motion without imposing sanctions. He suggests the possibility of a different judicial officer not employed in the Commissioners' Department.<sup>102</sup>

#### V. CONCLUSION

Mr. Stamm is not indigent. He merely seeks to use his own money to defend his own life. Per RCW 11.88.045 and constitutional mandates, he must be allowed to do so. He is thus entitled to the appointment of his attorney, the record and fees.

Mr. Stamm' requested retainer should immediately be paid. He should also be authorized to apply for public funding as requested.

Mr. Stamm is not getting any younger. If he does not obtain relief now, any relief may be too late.

Respectfully submitted this \_\_\_\_\_ day of

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<sup>102</sup> Cf. Document No. 3, pp. 48-49 citing Custody of R, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997); and Document No. 7, pp. 22-23.

February, 2004.

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Margaret K. Dore, WSBA #16266  
Attorney for Loren Stamm