

NO. 995371

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOROTHY HELM O'DELL,

Petitioner,

v.

KRISTYAN CALHOUN,

Respondent.

ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION III  
Court of Appeals No. 36820-3-III  
(Consolidated with No. 36826-2-III)  
Yakima County Superior Court No. 18-4-00054-4

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**MEMORANDUM OF *AMICI CURIAE*  
SPECTRUM INSTITUTE AND MENTAL  
HEALTH ADVOCACY SERVICES IN  
SUPPORT OF PETITION FOR REVIEW**

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## Summary

Kristyan Calhoun has been a certified professional guardian in Washington since 2010. She was a complete stranger to Dorothy Helm O'Dell, hereinafter Ms. Helm, until Ms. Helm was directed by a mental health facility where she resided to name Ms. Calhoun as an agent under a financial power of attorney giving Ms. Calhoun virtually unlimited authority over Ms. Helm's assets. These included two properties worth nearly \$300,000 at the time. Ms. Helm was told that she would not be released from the facility unless she signed the power of attorney. So she did.

Soon thereafter, Ms. Calhoun sold both pieces of real estate without a formal appraisal. One was sold privately to a real estate friend of hers. The other was sold to someone else, with the sale handled by the real estate firm for which her friend worked. Ms. Helm objected to these sales. Both properties were sold substantially below market value.

Hoping to gain control over the proceeds before they would disappear, Ms. Helm wanted to revoke the power of attorney and execute a new one with her brother named as agent. To prevent that, Ms. Calhoun escalated matters by initiating a guardianship proceeding and gaining an order, ex parte, therefore preventing Ms. Helm from executing the new power of attorney.

The details of the rest of the case, which raise red flags about financial exploitation and violations of due process, are set forth below.

This case raises significant legal questions. What are the rights of a vulnerable adult to challenge the actions of a fiduciary who misuses her funds? Is she not entitled to challenge such actions in a guardianship proceeding? Considering that her capacity is legally presumed, so much so that a fiduciary had her sign contractual documents, is she not entitled to file a lawsuit against the fiduciary and her real estate friend for violations of law? Is it not a violation of due process when, without any finding of incapacity, she was deprived of any fact-finding process to prove her case against the fiduciary?

### **Statement of Facts**

Dorothy Helm O'Dell, hereinafter Ms. Helm, was 59 years old in 2005. (CP 147, ¶ 1) Having worked for many years, she purchased two properties that year for \$294,000. (CP 183 fn 3) She hoped the rental income from them would help fund her retirement years. (CP 230, ¶ 5, ¶ 9; CP 147, ¶ 3).

Ms. Helm developed psychological issues after her two sons were murdered. (CP 1150, lines 11-12). In 2015, she was receiving treatment at a residential mental health facility. (CP 147, ¶ 2; CP 1192; CP 875). She was told that if she wanted to leave the treatment center, she had to sign a

document which was presented to her without explanation or legal advice. *Id.* Desiring to leave, she signed it. (CP 147, ¶ 2).

The document (the “POA”) turned out to be a comprehensive power of attorney in favor of Kristyan Calhoun (CP 13-18), who operated a for-profit guardianship company in Yakima, Washington (CP 113, ¶ 2). The POA authorized Ms. Calhoun to do anything that Ms. Helm could do (CP 13-18). Ms. Helm did not know Ms. Calhoun before signing the POA (CP 147, ¶ 2).

By January 6, 2017, Ms. Calhoun initiated the sale of the two houses. (CP 231, ¶¶ 12, 14). Ms. Helm spoke to Ms. Calhoun on the telephone and told the latter that she objected to the sales of the properties (CP 147, ¶ 3).

Ms. Calhoun obtained no appraisal of one property and did not expose it to the market (CP 372, ¶ 4; CP 231, ¶ 12). Instead, she sold it under the POA to a friend of hers, Thomas Parker, a real estate broker in Yakima, for \$28,000. *Id.* The Zillow range in value was \$106,761 to \$139,550 (CP 477). Ms. Calhoun netted \$103,730 from the sale of the other property (CP 1202), without an appraisal and with limited exposure to the market. The Zillow range in value was \$115,346 to \$333,188 (CP 479). Ms. Helm’s income was reduced to the \$590 she received from social security (CP 147, ¶ 3).

Ms. Helm was shocked that Ms. Calhoun had sold both Ms. Helm’s

houses under the authority of the POA at what Ms. Helm considered to be “far less than fair market value, over my objections,” and Ms. Helm desired to transfer management of her assets to her brother (CP 19; CP 151, ¶ 13). Ms. Calhoun received a letter from Ms. Helm attempting to request transfer of Ms. Helm’s assets to her brother, Glenn Helm, for investment (CP 12, ¶ 7; CP 19).

Ms. Calhoun responded by initiating a guardianship proceeding (CP-1). The petition falsely asserted that Ms. Helm was diagnosed with “dementia” (CP 2, ¶ II), and that Ms. Helm “is suffering from dementia which causes the AIP to be at risk of serious personal and financial harm” (CP 2, ¶ VIII), and failed to include the statutorily required nature of Ms. Helm’s alleged incapacities as set forth in RCW 11.88.030(1)(b) and RCW 11.88.010 (1).

Along with the defective petition for guardianship, Ms. Calhoun filed an “emergency” motion for an injunction (the “1st preliminary injunction”) barring Ms. Helm from revoking the POA (CP 8). Nevertheless, despite the defects in the guardianship petition, the trial court granted the preliminary injunction on the same day ex parte and without notice to Ms. Helm (CP 9).

Ms. Helm filed a response to the guardianship petition (CP 179-180). She alleged that the guardianship petition was filed in bad faith, setting forth fifteen indicia of that bad faith. After a flurry of motions by Ms. Calhoun

which necessitated responses by Ms. Helm and therefore increased attorney fees for everyone, Ms. Helm prophetically expressed her concern on November 29, 2018 that “Ms. Calhoun is spending [my money] far faster than I would, and *at her current rate she will have exhausted all my funds before this guardianship matter comes to trial*” (CP 155) [italics added].

Meanwhile, running in a parallel track, Ms. Helm filed a lawsuit in Kitsap County, where the two properties were located, against Ms. Calhoun and Thomas Parker, the real estate broker to whom Ms. Calhoun had sold one of Ms. Helm’s properties (CP 118-123). The complaint alleged that (a) Ms. Calhoun breached her fiduciary duties toward Ms. Helm by selling Ms. Helm’s properties at less than fair market value, (b) Mr. Parker participated in the breach, (c) the pair engaged in a civil conspiracy to commit a breach of fiduciary duty. The complaint sought damages and attorney’s fees (CP 123).

On November 26, 2018, Ms. Calhoun filed an ex parte verified motion to be heard in less than ninety minutes that very same day in the Yakima County Superior Court in the guardianship action for a temporary restraining order (the “TRO”) to prevent the Kitsap County lawsuit from going forward (CP 103-110). The court granted the TRO ex parte without reasonable notice to Ms. Helm’s attorney on November 26<sup>th</sup> (CP 126). The court later replaced

the TRO with a preliminary injunction (the “2<sup>nd</sup> preliminary injunction”), which revoked Ms. Helm’s ability to sue, not only in the Kitsap County lawsuit but in any other lawsuit (CP 574, ¶1). All of this was done without affording Ms. Helm an evidentiary hearing on her capacity to litigate.

When Ms. Helm sought to depose Ms. Calhoun to establish that her actions were not done in good faith, Calhoun refused to attend her deposition (CP 896-897, ¶ 3). Ms. Calhoun sought a protective order to prevent Ms. Helm from taking her deposition (CP 826-829). Ms. Helm opposed the motion on the grounds that the good faith of Ms. Calhoun was still relevant in the case, and that issue needed to be determined in order to resolve her entitlement to attorney’s fees under RCW 11.96A.150 (CP 871-72). The trial court stated that it did not think “that there’s any evidence that Ms. Calhoun acted except in good faith” (CP 978-979), and that an evidentiary hearing or deposition of Ms. Calhoun would be a “waste of time” (CP 978, 979).

Ms. Calhoun then unexpectedly filed a motion to dismiss the guardianship petition without prejudice (CP 746-758). Ms. Helm did not object to the dismissal but requested a short evidentiary hearing regarding the issue of Ms. Calhoun’s good faith and asked to take the deposition of Ms. Calhoun (CP 869). On April 19, 2019, the trial court dismissed the guardianship petition

without granting any of the relief requested by Ms. Helm (CP 924-25).

The trial court approved total fees and costs incurred by Ms. Calhoun and her attorneys in the amount of \$68,885.39 (CP 1118 ¶ 8), with an unpaid balance of \$53,318.73. *Id.*, ¶ 9. A judgment was authorized to be entered in that amount. The trial court granted every dollar requested by Ms. Calhoun and her attorneys but made no provision for any payment of attorney's fees to Ms. Helm's counsel (CP 1118).

On May 24, 2019, Ms. Helm filed a notice of appeal of the order approving attorney's fees and costs and the judgment (CP 1112-1116).

In her appeal, Ms. Helm raised several grounds for reversal, including that: (1) The trial court abused its discretion in disregarding the numerous indicia of the lack of good faith and the lack of a reasonable basis (a) in the actions taken by Ms. Calhoun under a power of attorney Ms. Helm signed and (b) in the subsequent guardianship proceeding Ms. Calhoun initiated, resulting in the trial court's erroneously finding that Ms. Calhoun acted in good faith; (2) The trial court erred in failing to conduct an evidentiary hearing, or at least in not allowing Ms. Helm to take the deposition of Ms. Calhoun, prior to making factual determinations about Ms. Calhoun's good faith *vel non*; (3) The trial court erred in entering Finding of Fact 13 of the 1-10-19 order (CP 573) to the

effect that the Kitsap County lawsuit filed by Ms. Helm against Ms. Calhoun has or will interfere with the guardianship action; and (4) The trial court erred in entering Finding of Fact 14 of the 1-10-19 order (CP 573) that Ms. Helm did not have the financial resources to pay for the Kitsap County action, when that case was taken on a contingent basis.

The Court of Appeals acknowledged that “Whether a petition is filed in good faith is relevant to the court’s decision to award fees.” (Opinion, p. 10) However, it affirmed the judgment below on the ground that “The superior court did not abuse its discretion in denying Ms. Helm O’Dell’s request for discovery and an evidentiary hearing.”

Ms. Helm has petitioned this Court for discretionary review of the judgment of the Court of Appeals, arguing that the Court’s ruling violated the constitutional rights of Ms. Helm and that the issues presented in the petition for review are of significant public interest.

As argued below, based on the evidentiary and procedural facts presented to the Court of Appeals, along with the legal arguments presented to it supporting a reversal, the ruling of the Court of Appeals is manifestly unjust. Granting review will provide this Court with an opportunity to reverse and remand so that Ms. Helm is given an opportunity for a deposition and

evidentiary hearing on the issue of good faith or not of Ms. Calhoun related to the award of fees, as well as establishing procedural guidelines and substantive criteria for trial courts when such issues arise in future guardianship cases.

## **ARGUMENT**

### Constitutional Issues

This case involves significant constitutional issues. Ms. Helm was deprived of property without due process of law. (U.S. Const., Fourteenth Amendment). Prior to the guardianship case, she had assets worth nearly \$300,00. Due to fees she was ordered to pay to petitioner and petitioner's attorneys, and fees to the guardian at litem, she was left more than destitute. She also had a \$50,000 judgment against her. Her every attempt to challenge the actions of petitioner were thwarted by the trial court – all on the basis of ex parte orders and without any evidentiary hearings. That is not due process.

Ms. Helm had a First Amendment right to petition the government for redress of grievances. This right extends to all branches of government. (*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). Her grievance was that the actions of petitioner in bilking her out of her life savings without legal justification were not done in good faith. She was denied access to the courts to develop evidence on this issue through discovery

and to have an adjudication made on this matter after an evidentiary hearing.

This was a fundamental constitutional violation.

Significant Public Interest

Guardianship abuse and access to justice in such proceedings are matters of significant public interest. This Court acknowledged such when it convened the WINGS project which lasted three years. Congress enacted legislation just four years ago which focused on elder abuse and guardianship reform. A documentary film titled *Framing Britney* and a television movie titled *I Care a Lot* are the most recent evidence of public interest.

Relief Requested

If this Court grants review, *amici curiae* will then ask permission to file a brief on the merits. We ask the Court to grant review so that we can assist it in deciding the important constitutional issues presented by this case.

Dated: April 5, 2021

Respectfully submitted:



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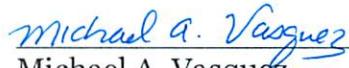
## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this day I have served a true and correct copy of the foregoing Memorandum of *Amici Curiae* on the following counsel representing the parties in this matter by mailing a true and correct copy via U.S. Mail with first class postage affixed to the following addresses:

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