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Attorney for Tina L. Morin

BEFORE THE COMMISSION ON PRACTICE OF THE
SUPREME COURT OF THE STATE OF MONTANA

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| <p>IN THE MATTER OF</p> <p>TINA L. MORIN,</p> <p>An Attorney at Law,</p> <p>Respondent.</p> | <p>Supreme Court No. PR 17-0448</p> <p>ODC File No. 16-154</p> <p>RESPONDENT'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE</p> |
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I. INTRODUCTION

The standard of review for the Commission's findings of fact, conclusions of law, and recommendations, and weigh the evidence upon which the Commission's findings res is *denovo*. *In re Olson*, 2009 MT 455, ¶ 24, 354 Mont. 358, 365, 222 P.3d 632, 637. With that in mind, Tina L. Morin, the Respondent, (herein "Tina" or

“Respondent”) respectfully objects to many of the Commission’s FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE entered on January 2, 2019. Tina also objects to pre-hearing rulings and a rejection of an offer of proof made by the Chairman. She has set forth below:

1. the issues raised by the complaint filed against Tina;
2. a summary of the facts relevant to those issues;
3. a summary of the relevant procedural background; and
4. Tina’s objections to pre-hearing legal rulings;
5. Tina’s objections to findings of fact;
6. Tina’s objections to conclusions of law;
7. and an explanation of why, even if we assume Tina is culpable for the charges made against her, the Chairman’s recommendation far outweighs the consequences of Tina’s actions.

It is your author’s understanding that the transcript of the hearing in this matter can be reviewed in an active file designated as 17-0448 at supremecourtdocket.mt.gov.

And that copies of all exhibits admitted at the hearing are on file with the Clerk of the Montana Supreme Court.

II. ISSUES RAISED BY COMPLAINT.

1. On June 8, 2011, when the Honorable Kurt Krueger, District Court Judge, who presided over a guardianship proceeding, signed an outdated form order prepared by Steven Shapiro, attorney for individuals who

had been temporarily appointed as guardians for J.A.L., did that order appoint Debbie Churchill, Attorney at Law, to serve in the conflicting roles of both J.A.L.'s Guardian ad Litem (GAL) (duty bound to act in J.A.L.'s best interest) and as J.A.L.'s lawyer (duty found to advocate for for J.A.L.'s wishes) as alleged in ¶5 of the COMPLAINT?

2. Assuming that on June 8, 2011 Judge Krueger: (1) had the authority to appoint Debbie Churchill as both J.A.L.'s to serve as both J.A.L.'s GAL and Attorney and (2) Judge Krueger intended to do so, did Tina know or, under the circumstances, should Tina have known that Debbie Churchill served both as an attorney appointed as J.A.L.'s GAL and as an attorney appointed to serve as J.A.L.'s Attorney (herein "attorney/advocate") in November of 2016 as alleged in ¶30 of the COMPLAINT, in spite of the language of Judge Krueger's order and the fact that Tina was aware that:
 - (1) at no time had Ms. Churchill ever advocated for any of J.A.L.'s wishes including, without limitation:
 - a. J.A.L.'s wish to attend the hearing at which her guardians who had arranged to have J.A.L. held in a secure assisted living facility and drastically restrict her visits with her husband were appointed;
 - b. J.A.L.'s wish to be allowed to be released from the secure assisted facility and return home to live with her husband of five decades; and
 - (2) Ms. Churchill's only actions in the case amounted to repeated recommendations to the Court that were in contrary to J.A.L.'s stated wishes but which Ms. Churchill deemed to be in J.A.L.'s best interest.
3. While Tina did not personally visit with J.A.L., did Tina violate Mont.R.Prof.C. 4.2 (Herein "Rule ___") which provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" when Tina, as mandated by Rule 1.2, abided by her client's

decisions concerning the objectives of representation by, as requested by her client, Ron Lowney (herein “Ron”) by: (1) asking the Disability of Rights of Montana (herein DRM) to arrange for an attorney to visit with J.A.L. to determine whether J.A.L. wished to have an attorney and (2) finding an attorney who would carry out Ron’s wish to have an attorney visit with J.A.L. to determine whether J.A.L. wished an attorney because the employees of DRM and the attorney, Genet McCann were acting as Tina’s agents when they did the foregoing as alleged in ¶30 of the COMPLAINT?

III. SUMMARY OF RELEVANT FACTS.

1. On May 19, 2011 Steven Shapiro, Attorney at law, petitioned the Honorable Kurt Krueger, District Court Judge for the Second Judicial District, Silver Bow County, to appoint the son, Ronald Lowney and daughter, Tammy Teeter, of J.A.L., as her guardians. *See* Transcript of December 3, 2018 hearing at page 108, line 12, *et seq.* (herein “TR, p.____, ln. ____”).
2. J.A.L. was an elderly woman who had resided in her home in Butte, Montana with her husband of nearly fifty years, Ron. TR, p. 232, ln. 25, *et seq.*
3. J.A.L. suffered from the onset of dementia and chronic multiple sclerosis. TR, p. 149, ln. 25 *et seq.*
4. Ron was experiencing mental health issues and in a separate matter Judge Krueger had sent Ron to Warm Springs State Hospital for an evaluation. Ron was discharged after that evaluation, but he raised no objection to his children being appointed as guardians for J.A.L. and did not ask to be appointed as J.A.L.’s guardian at that time. TR, p. 120, ln. 24 *et seq.*; TR p. 121, ln. 8 *et seq.*; TR, p. 233, ln. 13 *et seq.*
5. J.A.L. was currently residing in an assisted living facility in Helena, the Renaissance. TR, p. 117, ln. 16, *et seq.*

6. On June 9, 2011, Judge Kruger signed an ORDER which had been prepared by Mr. Shapiro, the text of which read:

ORDER APPOINTING ATTORNEY TO REPRESENT
AN ALLEGED INCAPACITATED PERSON

The Petition of RONALD L. LOWNEY for the appointment of co-guardians and conservators of JUDITH ANNE LOWNEY, alleged to be an incapacitated person, having come before the Court and an Order Appointing Temporary Co-guardians having been issued,

IT IS ORDERED that Debbie M. Churchill, Attorney at Law, 2728 Colonial Drive, Suite 202, Helena, MT 59601, is hereby appointed to represent [J.A.L.], in the proceedings before the Court, **and shall have the powers and duties of a guardian ad litem.**

(Emphasis added). Ex. 2, TR, p. 145, ln. 7 *et seq.*

7. Mr. Shapiro had taken the form out of a book of forms published by the State Bar and copyrighted in 1980. TR, p. 112, ln. 10 *et seq.*
8. Mr. Shapiro was unaware of any change in the law that might affect the language found in that form. TR, p. 144, ln. 21 *et seq.*
9. When asked to explain the form order he had prepared, Mr. Shapiro expounded “. . . And this attorney is not being placed in a permanent role of guardian by any means, but it’s **a temporary order** of the Court that this person shall be the attorney with the powers of a guardian ad litem.” (Emphasis added). TR, p. 149, ln. 12.
10. Eli Parker, Attorney at Law, a witness called by Tina, testified that he had been associated with the Office of the State Public Defender (herein “OPD”) as a contract lawyer since its inception in 2006 and had become an employee months later. TR, p. 23, ln. 20 *et seq.*

11. Mr. Parker testified that for the last seven years he had worked in the OPD Missoula office and represented individuals in adult guardianship proceedings when appointed by a court per statute. TR, p. 24, ln. 19.
12. Mr. Parker advised that it was not “standard operating procedure” in guardianship proceedings to have a private lawyer appointed to represent the allegedly incapacitated person. TR, 24, ln. 22.
13. Mr. Parker advised the panel that he had never been appointed to represent a protected person in a guardianship proceeding as both counsel of record and GAL. TR, p. 216, ln. 8.
14. In response to a question by a panel member, Mr. Parker advised that:
 - a. it is absolutely a requirement in a guardianship proceeding that the alleged incapacitated person have an attorney appointed to represent the person, adding that it “would be due process violation if they didn’t have an attorney.” TR, p. 221, ln. 14.
 - b. it is necessary that the attorney be either from the public defender program or an attorney of the respondent’s choosing. TR, p. 221, ln. 18
15. After the Chairman repeatedly sustained the ODC’s objections to further questions, Respondent’s Counsel made the following offer of proof at TR, p. 223-225:

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MR. SHERWOOD: So, Mr. Chairman, you've already
8 ruled pretrial that he cannot be called as an expert, and
9 for purposes of this offer I would iterate that we
10 respectfully disagree, and that if allowed to testify as an
11 expert, he would have testified consistent with the opinion
12 rendered in his -- in the expert disclosure that I
13 provided. But in addition to that today, Mr. Parker, if
14 allowed to testify, would testify not to as any opinions,
15 but to the standard practice in a statewide system of the
16 public defenders office, and he would testify that since

17 approximately 2006 when the public defender system went
18 into effect, there are new laws governing the
19 representation of adults in guardianship proceedings, and
20 not only new laws, but there was a critical amendment to
21 72-5-315 which struck the language that's found in
22 Mr. Shapiro's proposed order for Judge Krueger, the
23 language that talked about how there's an appointment of an
24 attorney and there -- and that the attorney is serving as a
25 guardian ad litem. That was Senate Bill 164 from 2006, and

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1 it was labeled as an act to clarify the law.
2 He would also testify that under current law
3 the -- as to -- he was limited -- said in a limited fashion
4 today that all appointments are handled by public
5 defenders.
6 He has not -- does not -- isn't aware, as he
7 said, that anybody besides the public defenders office has
8 been appointed to represent a protected person in a
9 guardianship proceeding -- this is on an adult level. And
10 since -- since the inception of the public defender system,
11 I -- and that, pursuant to state law, that person is
12 provided those services free of charge because of a
13 legislative decision that they should not have to incur
14 costs or attorneys fees when an attorney has been
15 representing them.
16 He would also testify that he would not accept an
17 appointment, nor is he aware of anybody in his office or
18 statewide, that has ever accepted an appointment that -- in
19 which the Court purported to have them represent -- have
20 the appointed attorney represent the protected person both
21 as an -- as the attorney of record, in the role of
22 advocating on behalf of that attorney, and as a guardian ad
23 litem, in the role of looking after that person's -- the
24 protected person's best interests.
25 He would further testify that in his experience

1 of nine years, that no -- or seven -- the last seven years,
2 I apologize -- that the -- no guardian ad litem had been
3 appointed in any proceeding in which he was involved
4 because it would be redundant. He wouldn't say that here,
5 Judge. I wouldn't have asked him because I wasn't going to
6 ask him any whys -- any question of why. But he would say
7 that in -- universally, in those proceedings that he's been
8 involved, a visitor has been involved pursuant to the
9 current statutory provisions in Title 72.
10 I offer this for purposes -- not of establishing
11 anybody did anything wrong here. I offer it because
12 Ms. Morin was aware of these statutes, as she'll testify,
13 and -- and that the -- given the current state of the law
14 and what she saw in the pleadings in the guardianship
15 proceedings, it gave her no indication that
16 Ms. Churchill -- no reason to believe that Ms. Churchill
17 was playing or serving the role of anything other than
18 guardian ad litem.

16. The hearing record is replete with references to the fact that from the time Ron had returned to their home in Butte until the present time, J.A.L. had expressed her wish to return home to live with Ron. *See*, e.g., TR, p. 52, ln. 25; p. 49, ln. 21; p. 150, ln. 4; p. 204, ln. 10; p. 264, ln. 2.
17. After Ms. Churchill's appointment, she advocated for J.A.L. only in the capacity of GAL, always recommending to the Court that the Court should do what the Petitioners were requesting because Ms. Churchill felt it was in the best interest of J.A.L. In Ms. Churchill's opinion it was in J.A.L.'s best interest that the guardians be appointed and that J.A.L. continue to reside in the Renaissance. TR, p. 194, ln. 16 *et seq.*
18. Based upon the recommendations of Ms. Churchill and the recommendation of the Visitor appointed by Judge Krueger, the Court granted the petition for guardianship, but in May 2013 the Court later entered an order appointing Robert and Debbie Bugni (J.A.L.'s brother

and sister-in-law) as replacement co-guardians. Ex. 3 and 17; TR, p. 116, ln. 2 *et seq.*

19. Ms. Churchill admitted that when serving her role, she didn't necessarily do exactly what J.A.L. asked her to do. TR, p. 195, ln. 1 *et seq.*
20. Specifically, Ms. Churchill admitted that she never attempted to find people that could assist Judy living in her home; didn't seek out a marriage counselor that might assist Ron and Judy in working out any problems that might be having; and didn't file a motion asking for Judy to have more visitation with Ron. TR, p. 197, ln. 4, *et seq.*
21. Ms. Churchill allowed that she could not recall the last time she had reached out to J.A.L. to see if she had any needs for which Ms. Churchill might advocate, but opined that it was not recently. Ms. Churchill stated that she didn't think J.A.L. even knew how to call her. TR, p. 198, ln. 13.
22. Ms. Churchill acknowledged that it was fair to say that not only did she perceive her role as being someone who would lobby for Judy's best interests, but that she expressed that belief in multiple pleadings in the guardianship proceeding. TR, p. 202, ln. 22 *et seq.*
23. With respect to J.A.L.'s request to vote, Ms. Churchill went on to testify that: "I didn't agree with that request, just like I didn't agree with the request to go home when she wanted to go home. I didn't think it was in her best interests, and I didn't think Judy had the mental capacity to vote." TR, p. 204, ln. 9.
24. Sometime after the initial appointment of guardians, Ron became dissatisfied with the arrangement that Judy be placed in a secure assisted living facility and had allegedly become disruptive at the locked facility in which J.A.L.'s was being housed. TR, p. 116, ln. 22 *et seq.*
25. At that point Ron hired the first of what would be three attorneys to contest the arrangement, John Michael Myer of Kalispell, Robert

Whelan of Butte and William Driscoll of Butte. TR, p. 13, ln. p.5.

26. J.A.L. advised Ms. Churchill that she wished to have Ron as her guardian, to return home to Butte to live with Ron. TR, p. 204, ln. 9.
27. Although J.A.L. had a constitutional and statutory right to attend the hearing on the motion to appoint the Bugnis as her permanent guardians, J.A.L. did not attend. TR, p. 168, ln. 18.
28. Ms. Churchill did not file a motion asking the Court to allow J.A.L. to return home or to allow J.A.L. more extended visitation with Ron, but, nevertheless, professed to be J.A.L.'s attorney. TR, p. 197, ln. 15.
29. In summary Ron's attempts to terminate the guardianship or have himself appointed guardian and to have Judy removed from the secured facility so that J.A.L. live in their family residence in Butte were unsuccessful. The Court appointed the Bunjis as permanent guardians. TR, p. 121, ln. 24 *et seq.*
30. In addition, Judge Krueger ordered Ron to pay more than \$9,000 in attorney's fees to Mr. Shapiro for serving in his capacity as attorney for the guardians and to pay Ms. Churchill approximately \$22,000 in fees for her representation of J.A.L. TR, p. 156, ln. 24.
31. The Bugni's then made it clear that Ron would not be allowed to come to the Renaissance to visit Judy. TR, p. 118, ln. 3.
32. Shortly thereafter, Ron approached Tina, seeking pro bono representation. TR, p. 230, ln. 13.
33. Ron advised Tina that:
 - a he had been married to J.A.L. for approximately fifty years;
 - b he had suffered some sort of mental breakdown and had been sent to Warm Springs State Hospital for an evaluation;
 - c he had not been determined to be incapacitated and was

eventually released.

- d. when he was sent to the hospital for evaluation, his son and daughter had placed J.A.L. in the Renaissance and petitioned to serve as J.A.L.'s co-guardians;
- e. at the time, he did not oppose the petition for guardianship;
- f. later, when Ron was doing much better mentally, he hired an attorney and asked the Court to dissolve the guardianship'
- g. at or about that time the Bugnis petitioned to be J.A.L.'s co-guardians;
- h. the Court had denied Ron's request and, instead, appointed the Bugnis as permanent guardians and ordered that Ron pay the attorney fees generated by Mr. Shapiro and Ms. Churchill; and
- i. J.A.L. was being held in the Renaissance, a facility with a locked front door and the guardians had taken her phone away.

TR, pp. 232-233.

- 34. Ron was exceedingly distressed and very fervent in trying to get Tina to understand how much he loved his wife and how much they wanted to be back together. TR, p. 238, lns. 12-14.
- 35. Mr. Shapiro confirmed that Ron's representation that the facility was locked and J.A.L. had no phone was true. TR, p. 167, ln. 5, *et seq.*
- 36. Mr. Shapiro advised that the lock was designed mainly for keeping out persons who were not authorized to be there. TR, p. 129, ln. 5.
- 37. Ron further advised Tina that:
 - a. he was allowed to visit J.A.L. only on a limited basis, sometimes as seldom as once a month. TR, p. 128, ln. 18;

and,

- b. he wished to appeal the Court's rulings that Bugnis be appointed permanent guardians and that he be ordered to pay the fees of Mr. Shapiro and Ms. Churchill. TR, p. 242, lns. 2-9.
38. After visiting with Ron, Tina contacted multiple parties to confirm Ron's representations. TR, p. 238, ln. 21 through p. 240, ln. 6.
39. Those parties included two of Ron's three prior attorneys and a friend of J.A.L.'s who was allowed to visit her in the Renaissance. TR, p. 238, ln. 21 through p. 239, ln. 20.
40. Tina also obtained a release from Ron so that she could review his records from Warm Springs and did so. TR, p. 237, ln. 10.
41. Tina reviewed a mental health records of Ron, which one of Ron's prior attorneys had obtained. TR, p. 240, ln. 20-25.
42. Based upon the foregoing actions Tina concluded that Ron was in his right mind and that his representations about J.A.L.'s wish to have the guardians removed and to return home to live with Ron were credible. TR, p. 236, ln. 6 through p. 237, ln. 1.
43. Tina then reviewed the appealable issues with William Driscoll, Ron's latest retained attorney. TR, p. 242, lns. 4-9.
44. Tina agreed to represent Ron *pro bono* to appeal the appointment of the Bugnis as guardians and the order directing that Ron pay Mr. Shapiro and Ms. Churchill. TR, p. 113, ln. 13 and TR, p. 241, ln. 19 through p. 242, line 9.
45. In the briefs filed on appeal, including Morin's opening and reply briefs, Churchill is identified as Judy's attorney in the "Appearances of Counsel" section as well as in the certificates of service. Ex. 84 and 85.
46. When Tina filed Ron's opening appeal brief, she served a copy on Ms.

Churchill, Tina filed a NOTICE OF APPEAL certifying that she served copies of that notice upon the Clerk of Court, the Visitor, a Representative of Adult Protective Services, the Court Reporter, the Bugnis, Mr. Shapiro and Ms. Churchill. Within the brief, Tina did not identify the capacity in which Ms. Churchill was serving. TR, p. 250, ln. 19 and TR, p. 251, ln. 7.

47. So, when Tina filed Ron's opening brief and reply brief, she identified Ms. Churchill as "Attorney for J.A.L." TR, p. 250, lns. 7-10.
48. However, at about the same time, Tina sent a letter to Mr. Shapiro and Ms. Churchill in which Tina wrote:

Mrs. Churchill, as her GAL, we are requesting that you step in, look into these issues and make the changes necessary to protect Mrs. Lowney from further decline and from further violation of her Constitutional rights. Please make the arrangements for Mr. Lowney to see Mrs. Lowney as previously agreed.

Ex. 10.

49. While the appeal was pending, Tina filed two petitions for mandate at the District Court level. TR, p. 256, lns. 16-19.
50. Tina did not cause to have either of those pleadings served on Ms. Churchill because she believed Ms. Churchill's role as GAL had lapsed when the permanent guardians had been appointed. TR, p. 256, ln.16 through p. 257, ln. 8.
51. Ms. Churchill did not appear for purposes of responding to either of those pleadings or for purposes of joining in those pleadings on J.A.L.'s behalf. TR, p. 260, ln.1 through 261, ln. 1.
52. When Tina filed an appeal Ms. Churchill's role in the case was not at issue. TR, p. 255, lns. 1-22.
53. Based upon her discussions with two of Ron's former lawyers

prior to agreeing to represent Ron and with a third former lawyer, John Michael Meyers, her impression was that Ms. Churchill had been appointed as J.A.L.'s GAL. TR, p. 250, ln. 12 through p. 251, ln. 4.

54. Based upon the fact that the record disclosed that Ms. Churchill had done nothing to advocate for J.A.L.'s wishes to attend the hearing which would determine her fate, to have Ron appointed guardian, to be released from the Renaissance and to be allowed to go home and live Ron, Tina determined Ms. Churchill's sole role in the case was that of J.A.L.'s GAL. In short, all of Ms. Churchill's actions were consistent with serving as a GAL and inconsistent with serving in the capacity as J.A.L.'s attorney-advocate. TR, p. 252, ln. 21 through p. 254, ln. 25.
55. Tina's conclusion that Ms. Churchill, although an attorney representing J.A.L, was serving only in the capacity of a GAL was also based upon Tina's knowledge of and review of the law applicable to the appointment of attorneys in guardianship proceedings involving adult individuals. TR, p. 252, ln. 21 through p. 254, ln. 25.
56. Tina knew that the statutes and legal cases, discussed below with respect to the conclusions of law, required that when a District Court deemed it necessary to appoint an attorney to represent an allegedly incapacitated adult, the Court was authorized only to appoint a public defender or some other public official to serve in that capacity at the expense of the state, regardless of the financial resources of the allegedly incapacitated person. TR, p. 252, ln. 21 through p. 254, ln. 25.
57. Tina also knew that it was ethically impermissible for an attorney to serve as both a GAL and an attorney for an allegedly incapacitated person when, as was the case with J.A.L., the wishes of the allegedly incapacitated person differed from what might be deemed to be in that person's best interest. TR, p. 252, ln. 21 through p. 254, ln. 25.
58. The Supreme Court upheld Judge Krueger's rulings as they related to the appointment of the guardians and the requirement that Ron pay the fees of Mr. Shapiro and Ms. Churchill. TR, p. 255, lns. 6-7.

59. When the remittitur from the Supreme Court was sent down to District Court, the District Court's Activity Report indicated that the case was closed on August 14, 2014. Ex. 1, TR, p. 110, ln. 11.
60. Ms. Churchill admitted that she recalled nothing that she had done on J.A.L.'s behalf since August of 2014, when the case was closed. TR, p. 110, ln. 11.
61. Tina knew that Ms. Churchill had taken no steps whatsoever to advocate on J.A.L.'s behalf since that date (or any attempt to advocate as J.A.L.'s attorney before that date). TR, p. 253, lns.1-6.
62. Ms. Churchill testified that later Mr. Shapiro had advised her that J.A.L. had requested to receive communion and to vote, but stated at that point "I wasn't involved." TR, p. 203, ln. 21.
63. During the following eighteen months Tina engaged in a series of e-mail exchanges with Mr. Shapiro, repeatedly urging him to ask his clients, the Bugnis, to grant Ron more visitation with J.A.L. The Bugnis ignored Tina's requests. TR, p. 262, lns. 3-8 through p. 263, lns.16-19.
64. Ms. Churchill confirmed that Tina had opined "all along" that Tina didn't believe Ms. Churchill was J.A.L.'s attorney and that Tina had never served her with any District Court pleadings. TR p. 211, ln. 11.
65. Tina explained that she had concluded that Ms. Churchill no longer continued to be the GAL after the appeal had been resolved, the remittitur had been returned and the case had been closed in August of 2014. Tina explained the basis for her conclusion that Ms. Churchill was no longer GAL at that point as follows:

Yeah, when that -- when the -- if you look at the statute, the word "in these proceedings," when those proceedings are over and permanent guardians have been appointed, the in re AAM case states that those appointments are over, terminated. TR, p. 313, l. 12.

66. Sometime around the beginning of 2016, Ron asked Tina if she could arrange for J.A.L. to meet with an attorney and, possibly, obtain separate counsel for herself. He advised that by that time:

1. J.A.L. was being confined in a locked assisted care facility;
2. J.A.L. was being prevented from getting a lawyer;
3. J.A.L. was being prevented from practicing her Catholic religion;
4. J.A.L.'s phone had been confiscated;
5. J.A.L. was not allowed to receive mail.
6. While J.A.L. wrote to Ron everyday, the Bugnis allowed only some of them to be sent on to Ron;

TR, p. 236, ln. 5 *et seq.*

67. Tina subsequently confirmed all of Ron's representations. TR, 236, ln. 24 *et seq.*

68. Based upon representations by Ron, Tina feared that the guardians would not allow her to meet with J.A.L. to determine whether J.A.L. truly did wish representation and that if she attempted to meet with J.A.L. without clearing it with the guardians the staff at the Renaissance would forbid her to visit with J.A.L. TR, p. 265, lns. 8-25.

69. In early 2016, Tina's researched disclosed that DRM, a federally funded, non-profit organization was tasked with representing disabled persons held in facilities or institutions whose civil rights are being violated. TR, p. 264, lns. 8-16.

70. Tina called DRM and spoke with an intake person. TR, p. 266, lns. 13-24.

71. Tina learned that DRM had federal authority to enter and facility to investigate whether the rights of a disable person were being violated. TR, p. 266, lns. 7-12.
72. Months later Tina eventually met with Bernie Franks-Ongoy (herein “Bernie”), a DRM administrator, and Roberta Zenker (herein “Roberta”), a DRM staff attorney. TR, p. 271, ln. 25 through p. 272, line 4.
73. Tina asked DRM to enter the Renaissance and speak with J.A.L. to see if she was, in fact, conversant and whether J.A.L.’s rights were being violated. TR, p. 267, lns. 12-14.
74. Roberta testified that she and another DRM employee went to the Renaissance and after convincing the staff that they had a right to enter and speak with J.A.L. , were allowed access and spoke with J.A.L. TR, p. 21, ln. 16 through p. 22, ln. 13.
75. Roberta testified that she did not find that the Renaissance appeared to be violating J.A.L.’s rights in any way, but that J.A.L. did advise them that she wanted to go home. TR, p. 22, lns. 6-13.
76. After that first visit, Tina asked whether DRM would facilitate an attorney visiting with J.A.L. to determine whether Ron’s representation was true – that J.A.L. wanted an attorney. TR, p. 28, lns. 17-19.
77. DRM made an independent decision that to do so was within their mission of protecting J.A.L.’s rights– including her constitutional and statutory right to be represented by a lawyer if she wished to challenge her guardianship pursuant to § 72-5-325, MCA. TR, p. 30, ln. 19 through p. 31, ln. 4.
78. DRM staff agreed they would do as Tina asked, but advised her that they did not have the resources to engage an attorney to question J.A.L. as to her wishes or to provide J.A.L. with an attorney to represent if she advised she wanted one. TR, p. 272, ln. 1-8.

79. Tina spoke with Genet McCann, attorney-at-law, about whether she might be interested in speaking with J.A.L. about whether J.A.L. wanted a lawyer and possibly representing J.A.L. if that was the case. TR, p. 272, ln. 22 through p. 273, ln. 15.
80. Tina advised Ms. McCann that Ron had some limited funds to hire her with the understanding, an understanding later explained at length to Ron, that Ms. McCann's obligation would be to serve the wishes of J.A.L. and that if those wishes differed from the wishes of Ron, Ms. McCann would represent only the wishes of J.A.L. TR, p. 275, lns. 3-10.
81. Shortly before Thanksgiving, 2016, Roberta and Ms. McCann returned to the Renaissance. Roberta confirmed that Ms. McCann asked J.A.L. whether she want an attorney and that J.A.L. had said she did. Roberta testified that Ms. McCann drew up something to that effect which confirmed that J.A.L. was engaging the services of Ms. McCann. Roberta recalled that the agreement was in long hand and written on a napkin. Roberta recalled that J.A.L. signed the document. TR, p. 29, lns. 5-11.
82. When professionals from Disability Rights of Montana (DRM) visited with J.A.L. in late 2016 or early 2017, they apparently felt that J.A.L. had sufficient mental faculties and the ability to communicate to warrant DRM entering into an agreement to retain an attorney to represent J.A.L. TR, p. 30, lns. 8-14.
83. Ron retained Ms. McCann. Ex. 37.
84. Tina explained that she saw no harm in Ron doing so:
- It happens a lot in insurance defense cases, right? Insurance company is paying the bill, but your client is the insured. Same thing, you know, if the parents are paying the bill and the kid is the insured. So there was a discussion regarding that with my client, that he needed to understand that he might pay the bill because Judy had no access to money, but that Genet's client was Judy.

TR, p. 275, l. 3.

85. When a representative of DRM and Ms. McCann obtained access to J.A.L., Ms. McCann video-recorded a conversation with J.A.L. during which J.A.L. voluntarily expressed her desire to go home and be with her husband. Ex. 49, TR, p.46, ln. 17.
86. Ms. McCann advised Tina that she had reached an agreement to represent J.A.L. Ms. McCann also advised Tina that it was, indeed, true that Ron and J.A.L.'s wishes were the same. J.A.L. wanted to have the Bugnis removed as her guardians and wanted to go home and live with Ron. TR, p. 275, lns. 3-10.
87. Based upon this understanding, Tina worked closely with Ms. McCann to advocate for their respective clients wishes. TR, p. 276, lns. 15-17.
88. At or about that time DRM and Ms. McCann entered into what Roberta characterized as an association agreement whereby Ms. McCann was to act on behalf of DRM to attempt to fulfill J.A.L.'s wishes that the guardianship be terminated and she be allowed to go home. TR, p. 31, lns. 11-18.
89. While Tina saw a copy of that agreement when it was attached to an e-mail, she played no part in drafting it and was not a party to the understanding between Ms. McCann and DRM. TR, p. 275, lns. 15-24.
90. At no time was Tina ever in any way associated with DRM. TR, p. 57, ln. 24 through p. 58, ln. 9.
91. Roberta testified that DRM does not serve as an agent for any person who reaches out and asks for their help. It is the disabled person and not the person making the request for help who is DRM's client. TR, p. 50, lns. 3-14 and p. 58, l. 3 and Tina testified that she never considered DRM to be her "agent." TR, p. 267, l. 1. Tina explained:

I can't force them to do anything under their federal mandate. It was their call. I certainly made the request, as many people do who take part in their services, but it was

their call.

TR, p. 271, ln. 2. In, fact Tina denied manipulating anybody. TR, p. 267, ln. 12.

92. Tina advised that at no time prior to the fall of 2016 had she ever been associated with Ms. McCann and, in fact, barely knew her. She had reached out to Ms. McCann because Ms. McCann had once called her about potentially representing someone in a trust matter. TR, p. 274, lns. 6-10.
93. Tina testified that at no time did DRM or Ms. McCann act at her direction – that they were not her agents. They simply agreed, based upon their own independent and professional judgments to work together to carry out the wishes of J.A.L. TR, p. 270, ln. 25 through p. 271, ln. 16 and TR, p. 57, ln. 24 through p. 58, ln. 4.
94. As Tina testified, “Genet McCann was never my agent.” TR, p. 312, ln. 10.
95. When Tina asked DRM and Ms. McCann to visit with J.A.L. to determine whether or not J.A.L. wished to be represented by counsel it did not occur to her that her request might be seen as inappropriate or unethical because Ms. Churchill had at no time played the role of J.A.L.’s attorney. Ms. Churchill, although an attorney, had only served in the role of GAL and would have been ethically bound to not also purport to serve as J.A.L.’s attorney. TR, p. 252, lns. 5-8 through p. 253, lns. 1-24.

IV. RELEVANT PROCEDURAL BACKGROUND.

1. Prior to the hearing, Tina moved to dismiss the complaint. In part, she based her motion on the fact that Judge Krueger’s ORDER appointing Ms. Churchill cannot and should not be interpreted as appointing Ms. Churchill to serve in the role

of both of J.A.L.'s GAL and attorney. Tina explained that if the Chairman were to rule that it was Judge Krueger's intent to appoint Ms. Churchill to serve in those conflicting roles, then Judge Krueger exceeded his statutory authority to make such an appointment. The Chairman dismissed the argument, labeling it an impermissible collateral attack on Judge Krueger's order. *See* Appendix A, (COP Doc. 25 - Respondent's Motion to Dismiss Complaint).

2. Prior to the hearing, the Office of Disciplinary Counsel (herein "ODC") moved to preclude Tina from calling J.A.L. as a witness. Tina objected. The Chairman granted the ODC's motion. *See* Appendix B, (COP Doc. 61 - Order on Pending Motions, p. 5.)

3. Prior to the hearing, Tina disclosed Eli Parker, Assistant State Public Defender, as an expert witness and filed an Expert Witness Disclosure. *See* Appendix C (COP Doc. 42 - Respondent's Expert Witness Disclosure). The ODC objected to Tina calling Mr. Parker as an expert. The Chairman sustained the ODC's objection. *See* Appendix B (COP Doc. 61, p. 6 *et seq.*)

4. Prior to the hearing, the ODC moved *in limine* to preclude Tina from offering evidence that Ms. Churchill had at no time advocated on behalf of any of J.A.L.'s stated wishes. The ODC also moves to preclude Tina from suggesting at the hearing that to the extent Judge Krueger's order appointing Ms. Churchill could be

interpreted as appointing her to serve in two conflicting roles – GAL and Attorney – the order was void. The Chairman entered an order warning that the guardianship proceedings would not be re-litigated and preventing Tina from attacking the validity of Judge Krueger’s order, but did indicate that Tina could introduce evidence relevant to whether, under the circumstances, Tina knew that Ms. Churchill was not J.A.L.’s lawyer. Appendix B (COP Doc. 61, p. 9 *et seq.*)

V. RESPONDENT’S OBJECTIONS TO PRE-HEARING LEGAL RULINGS.

OBJECTION 1. Tina respectfully objects to the Chairman’s denial of her motion to dismiss the ODC’s claim based on the fact that Judge Krueger lacked the statutory authority and, therefore, the jurisdiction to appoint Ms. Churchill to serve as J.A.L.’s attorney. Accordingly, J.A.L. was not an individual represented by an attorney.

ARGUMENT.

A. When employees of DRM and Ms. McCann met with J.A.L. Ms. Churchill was not then and had never been J.A.L.’s counsel of record because Montana’s legal scheme related to guardians ad litem for adult persons authorizes a court to appoint only a public defender or other public official to serve as attorney of record. Thus, the Court’s appointment of Ms. Churchill did not have the effect of law.

In 1974 the Montana Legislature adopted a modified version of the UNIFORM PROBATE CODE (1969) (Last Amended or Revised in 2010) (“UPC”), drafted by the NATIONAL CONFERENCE OF COMMISSIONERS ON

UNIFORM STATE LAWS (“COC”) and by it approved and recommended for enactment in all fifty states. At the time the Legislature adopted the UPC it had no provision specifically related to the appointment of a GAL. However, since that time the COC has modified the UPC by drafting proposed legislation which recognizes the need to appoint a GAL. UPC §16. Of importance here is the COC’s comment to that section which reads:

UNIFORM PROBATE CODE, SECTION 16.

Appointments under this section will be infrequent. ad litem. **If the respondent is currently represented, the attorney representing the respondent should not be appointed as the guardian ad litem because of the conflict of interest, since there is a distinct difference between the role of the attorney as an advocate and as a guardian** It is important that the court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages the giving of such advice by requiring that the court record the duties of the guardian ad litem and its reasons for the appointment. The source of this section is UGPPA (1982) Section 1-403. (UPC Section 1-403(4)(1982)).

(Emphasis added).

Had, the Legislature adopted UPC §16, Montana law would make it clear that a Court may not appoint an attorney to serve both as GAL and as attorney for an incapacitated person due to the inherent conflict of interest. However, the Legislature has not enacted UPC §16. With that in mind there is a need to explore the current MONTANA CODE ANNOTATED, the MONTANA RULES OF CIVIL PROCEDURE , the MONTANA RULES OF PROFESSIONAL RESPONSIBILITY

and Montana Supreme Court decisions related to the appointment of a GAL to determine whether they support the COC's summary conclusion that there would be an inherent conflict of interest if a Court were to appoint an attorney to serve as both a GAL and an attorney for an incapacitated person.

A review of the role of the GAL in Montana begins with Mont.R.Civ.P. 17 which mandates that a " court must appoint a guardian ad litem - or issue another appropriate order - to protect a minor or incompetent person who is unrepresented in an action."

We then move to MCA § 25-5-301 Appointment of Guardian, which provides in pertinent part:

When a guardian ad litem is appointed by the court, the guardian ad litem must be appointed as follows:

* * *

(3) when an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of the insane or incompetent person or of any other party to the action or proceeding.

(Emphasis added).

From there, we find that the Montana Legislature has enacted comprehensive pieces of legislation related to the appointment of a guardian at litem for a minor.

See: MCA § 40-4-205, *et seq* and MCA § 75-5-201, *et seq*. However, when the allegedly incompetent person is an adult, the applicable legislation is less

comprehensive, but nevertheless, specific on the whether Judge Krueger had the statutory authority to appoint Ms. Churchill as J.A.L.’s attorney.

MCA § 47-1-104 (Statewide system - structure and scope of services - assignment of counsel at public expense) addresses the appointment of an attorney at public expense for an incapacitated person in a guardianship proceeding. Subsection (4) provides in pertinent part that a **“court may order assignment of a public defender under this chapter . . . (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5.”** (Emphasis Added).

Recognizing the potential for a conflict of interest if a Public Defender were to also be appointed as a “special advocate or guardian ad litem” in Youth Court or dependent and neglect proceedings (which require the appointment of both an attorney and a GAL), subsection (5) prohibits the assignment of a Public Defender to serve as the GAL in those types of proceedings. Presumably, subsection (5) does not recognize an inherent conflict in adult protective proceedings because, as explained below, current law does not mandate the appointment of both a guardian ad litem and attorney in such cases.

As the foregoing statute indicates we must then look to “the provisions of the

Uniform Probate Code in Title 72, chapter 5 for guidance regarding Montana’s law on the procedure for appointment of an individual to represent an incapacitated person. *See*: MCA § 72-5-301, entitled “Guardians of Incapacitated Persons.” With respect to the appointment of counsel for an incapacitated person, MCA § 72-5-315 (Procedure for court appointment of guardian - hearing - examination - interview - procedural rights) provides, in pertinent part, that:

- (1) The incapacitated person or any person interested in the incapacitated person's welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.
- (2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. **The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender, provided for in [section 1], to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the person in the proceeding.**
- (3) The person alleged to be incapacitated must be examined by a physician appointed by the court who shall submit a report in writing to the court and must be interviewed by a visitor sent by the court. **Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of the incapacity. The visitor shall also interview the person who appears to have caused the petition to be filed and the person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made and submit the visitor's report**

in writing to the court. Whenever possible without undue delay or expense beyond the ability to pay of the alleged incapacitated person, the court, in formulating the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in the person's affairs.

- (4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. **The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court- appointed physician and the visitor, and to *trial by jury*. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it.**

[emphasis added].

In short, the foregoing statute contemplates that an incapacitated person can be represented by counsel of her or his choice or the statute allows a Court, in the interest of justice, to appoint either a Public Defender or some other public official to serve as the incapacitated person's attorney. The statute does not bestow on the Court the discretion to appoint a private attorney to represent an incapacitated person as the incapacitated person's attorney. Thus, Judge Krueger's order, if it were to be construed to appoint Ms. Churchill as attorney for an incapacitated person would be null and void as contrary to law.

Furthermore, such an order would render the proceedings void.

Representation of counsel is essential to protect an allegedly incapacitated person's

due process rights. Even in involuntary commitment proceedings, Montana Code Annotated § 53-21-115 entitles an individual to all the rights "guaranteed by the constitution of the United States and of [Montana], by the laws of [Montana], or by" the mental illness treatment statutes. *See* § 53-21-115. In a guardianship proceeding, an allegedly incapacitated person is entitled to the same due process rights. Mont. Code Ann. § 72-5-322(2). Furthermore, the failure to provide an attorney violates an allegedly incapacitated person's statutory and constitutional rights of due process. *See Id* and *Matter of Simons*, 698 P.2d 850, 850-51 (Mont. 1985); see also *In re J.S.*, 401 P.3d 197 (Mont. 2017) (The Court stated that, "[w]e affirm [In re Mental Health of *K.G.F.*, 29 P.3d 485 (Mont. 2001)] to the extent it recognized...a right to counsel premised upon the federal Due Process Clause and Montana's right of Due Process contained in Article II, Section 17.")

In short, a court order appointing a guardian is void unless a Court has the statutory authority to issue it. *Fischer v. Fischer*, 2007 MT 101, 23, 337 Mont. 122, 129, 157 P.3d 682, 687. Because Judge Krueger lacked statutory authority to appoint an attorney in private practice to serve as attorney for J.A.L. his order, if construed to do just that, was illegal. *State v. Ariegwe*, 2007 MT 204, 181, 338 Mont. 442, 509, 167 P.3d 815, 863-64. That illegal order would have had no legal force, which would mean that Ms. Churchill cannot not be considered to be or ever

have been considered to be appointed as J.A.L.'s attorney. *State ex rel. McKenzie v. Dist. Court*, 111 Mont. 241, 249, 107 P.2d 885, 889 (1940).

B. Because it is undisputed that J.A.L. expressed wishes which were contrary to what Ms. Churchill deemed to be in J.A.L.'s best interests,, it was ethically impossible for Ms. Churchill to serve both as GAL and to also serve as J.A.L.'s attorney.

The attorney for an allegedly incapacitated or incapacitated person represents the client's wishes and advocates for the client's desired outcome in the guardianship proceeding. Mont. R. Prof. R. 1.2. As far as reasonably possible, an attorney for a client with diminished capacity must "maintain a normal client-lawyer relationship with the client." Mont. R. Prof. 1.14. Accordingly, an attorney who represents an allegedly incapacitated client shall abide by that "client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued," as far as reasonably possible. *See id* at 1.2.

While, as mentioned above, the Montana Legislature has not adopted Rule 16 or the current UPC and the Montana Supreme Court has not expressly addressed this issue in the realm of adult incapacitated persons, the Montana Supreme Court has addressed just this issue in the context of the representation of minors in legal proceedings. The Court has held that when a court appoints a guardian ad litem for a minor, unless the court specifically indicates it intends the guardian to act as an attorney as well, the guardian is not to act as an attorney. *In re K.H.*, 2012 MT 175,

27-28, 366 Mont. 18, 25-26, 285 P.3d 474, 479-80, citing *Jacobsen v. Thomas*, 2004 MT 273, 323 Mont. 183, 100 P.3d 106.

An Ohio Court has done a good job of laying out the ethical principles relevant to this case. In *In re Stacey S.*, 1999-Ohio-989, 136 Ohio App. 3d 503, 513-14, 737 N.E.2d 92, 100, the Court noted that an attorney may act as both guardian ad litem and attorney to the ward, but recognized the inherent danger of conflict in these roles. A lawyer for the ward has an ethical duty to zealously represent his client within the bounds of the law. The attorney is the spokesperson for the ward's wishes. The role of the guardian ad litem is to investigate the ward's situation and then ask the court to do that which the guardian ad litem believes is in the ward's best interests, citing *In re Howard* (1997), 119 Ohio App. 3d 201, 206, 695 N.E.2d . Thus, the Court held that for an attorney to act in both capacities, the court must first make a dual appointment and a finding that no conflict exists. If that does not happen, the appointment is void.

Thus, an attorney for an allegedly incapacitated client represents the client's wishes to the court and advocates for the client's desired outcome. In contrast, a guardian ad litem (GAL) may offer opinion testimony or make a recommendation regarding a person's best interests or well-being. A GAL may recommend an outcome and offer an opinion or report to the court that the client does not desire. A

client's attorney who does the same violates Mont. R. Prof. R. 1.2 on its face.

Furthermore, such action arguably constitutes ineffective assistance of counsel. *See In re J.S.* In short, the GAL recommends an outcome consistent with best interests; i.e., an attorney for an allegedly incapacity person protects rights.

It is for the following reasons that Eli Parker, the expert witness identified by the Respondent, was prepared to explain the members of the adjudicatory panel that in the hundreds of case that he has been appointed as counsel for an incapacitated person, no Court has ever attempted to also appoint him as the GAL. He has further advised that he has never been appointed as a GAL and attorney for an allegedly incapacitated person at the same time. If appointed to do so, he could not proceed.

C. The Chairman erred when he interpreted Judge Krueger's order appointing Ms. Churchill to mean that the Court appointed Ms. Churchill as both J.A.L.'S GAL and J.A.L.'s attorney because such an interpretation rendered the Court's order illegal and was inconsistent with rules applicable to the interpretation of instruments.

First, it is widely accepted that a specific provision in a document controls the general provisions of a document. *Cornwall v. State*, 231 Mont. 58, 63, 752 P.2d 135, 138 (1988). Here it is undisputed that the Court's order limited the appointment of Ms. Churchill, stating that she "shall have the powers and duties of a guardian ad litem. Accordingly, the Court's ORDER appointing Ms. Churchill should be interpreted to read that the Court intended to appoint Ms. Churchill only as GAL.

Second, as with other documents, the legal operation and effect of a court order must be ascertained by construction and interpretation of it. *Gans & Klein Inv. Co. v. Sanford*, 91 Mont. 512, 522, 8 P.2d 808, 811 (1932). An interpretation which gives the order a legal effect, is the interpretation which governs. *Id.* As explained, above, if Judge Krueger's order appointing Ms. Churchill were to be interpreted to read that he intended to appoint her as both J.A.L.'s GAL and attorney, his order would have been illegal. However, if Judge Krueger intended only to appoint Ms. Churchill as GAL, in spite of the fact that the Montana Probate Code anticipates that a visitor rather than a GAL in such an instance, Judge Krueger did have authority to appoint Ms. Churchill as GAL pursuant to §25-5-301, MCA as explained above. Accordingly, Judge Krueger's order would be considered authorized and have legal force. Accordingly, Judge Krueger's order should be interpreted to read that he intended to appoint Ms. Churchill to serve only as J.A.L.'s GAL.

D. The Chairman erred when he ruled that Tina could not collaterally attack Judge Krueger's order appointing Ms. Churchill to the extent that such order might be construed to mean that Judge Krueger had appointed Ms. Churchill to serve as J.A.L.'s legal advocate.

A collateral attack on an order is appropriate when the order is void on its face and the court did not have jurisdiction or committed an act in excess of jurisdiction.

Higgins v. Montana Hotel Corp. (1979), 181 Mont. 149, 154, 592 P.2d 930, 934. Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, ¶ 12, 287 Mont. 161, 165, 951 P.2d 1388, 1390A judgment entered by a court lacking subject matter jurisdiction is subject to attack at any time. *Big Spring v. Blackfeet Tribe of Blackfeet, Etc.* (1978), 175 Mont. 258, 264-65, 573 P.2d 655, 659. Therefore, we consider whether the District Court acted outside or in excess of its jurisdiction when it decreed that Respondents, as purchasers at the sheriff's sales, "be let into possession." Such an attack may be made at any time. *Big Spring v. Blackfeet Tribe of Blackfeet, Etc.* (1978), 175 Mont. 258, 264-65, 573 P.2d 655, 659; *Glickman v. Whitefish Credit Union Ass'n*, 1998 MT 8, ¶ 12, 287 Mont. 161, 165, 951 P.2d 1388, 1390 (holding District Court acted outside of or in excess of its jurisdiction when it decreed respondents to "be let into possession" of purchased property).

Here, as pointed out above, if Judge Krueger's order appointing Ms. Churchill is construed as an order appointing Ms. Churchill (a private attorney who eventually sought \$22,000 in fees for her time) to serve as J.A.L.'s legal advocate rather than as J.A.L.'s GAL, then Judge Krueger acted outside of or in excess of his jurisdiction. No statute authorized him to make such an appointment. Accordingly, the Chairman erred when he ruled that Tina could not now collaterally attack that order.

For the foregoing reasons, the Chairman erred when he denied Tina's motion

to dismiss because Ms. Churchill and J.A.L. never had and couldn't have an attorney/client relationship.

OBJECTION 2: Tina respectfully objects to the Chairman's grant of the ODC's motion precluding Tina from calling Eli Parker as an expert witness and the Chairman's rulings repeatedly sustaining objections to questions put to Mr. Parker by Respondent's Counsel at the hearing.

ARGUMENT.

A. The Chairman erred when he prejudiced Tina by denying her the right to call a fully qualified expert witness testify as to whether a court can appoint a private, fee generating lawyer to represent an adult in a guardianship proceeding.

First, in pertinent part, MRPC 4.2. (COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL) provides:

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer **knows** to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order . . .

(Emphasis added). Comment 8 to Rule 4.2 of the Annotated Model Rule of Professional Conduct (AMRPC) makes it clear that the prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge or lack thereof may be inferred from the circumstances.

Consistent with the foregoing, Rule 1.0(f) provides that a person knows something if he has “actual knowledge” of the fact in question. It goes on to provide that a person’s knowledge or lack thereof may be inferred from the circumstances.

As set forth below, at the hearing Tina testified multiple times that under the circumstances she did had concluded that whatever Ms. Churchill’s role in the guardianship case was, that role was not one of serving as J.A.L.’s legal advocate duty bound to advocate for J.A.L.’s wishes. If Tina was to be believed, then the ODC failed to prove by clear and convincing evidence that Tina knew J.A.L. was represented by Counsel. However, the Adjudicatory Panel ruled in ODC’s favor.

Evidence is relevant if it has any tendency to having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Mont.R.Evid. 401. Here, had Mr. Parker been allowed to testify that Montana’s statutory scheme does not authorize a court to appoint a private, fee generating attorney to represent an adult in a guardianship proceeding, that testimony would have served to make it more probable that Tina was being credible when she testified that she had concluded that Ms. Churchill could not have been appointed as J.A.L.’s legal counsel.

Rule 705, M.R.Evid., allows an expert to testify as to his opinions or inferences, and Rule 704, M.R.Evid., further allows an expert to present opinions and

inferences that embrace the ultimate issues to be decided by the jury. *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶¶ 27-28, 314 Mont. 303, 311, 65 P.3d 570, 575. Of course, it is important to distinguish ultimate issues of fact from ultimate issues of law because legal conclusions offered by an expert witness invade the province of the finder of fact whose duty it is to apply the law as given in the jury instructions to the facts of the case. *Id.* Such expert opinions on the law can be highly prejudicial. *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 72, 748 P.2d 937, 943. So, while an expert witness may properly testify as to an ultimate issue of fact, when an expert states a legal conclusion or applies the law to the facts such testimony is inadmissible. *Mickelson v. Montana Rail Link, Inc.*, 2000 MT 111, P101, 299 Mont. 348, P101, 999 P.2d 985, P101.

Here, the Chairman erroneously opined that Mr. Parker was attempting to: (a) criticize the performance of Ms. Churchill and (b) telling the Commission what the law is and how to rule, writing that: “It is Ms. Churchill's role, not her performance, that is in dispute.” A review of Mr. Parker’s Expert Disclosure (Appendix C) and Tina’s offer of proof at the hearing, discloses that neither Tina nor Mr. Parker were attempting to do either. Instead, Tina and Mr. Parker pointed out that Ms. Churchill had done a commendable job in performing the only role to which Judge Krueger was authorized by law to appoint her to serve – that of GAL. She

decided what was in the best interests of J.A.L. and repeatedly advocated that position to the Court.

More, important Mr. Parker's expert opinion does not purport to tell the Adjudicatory Panel how to rule on the ultimate question in this case. Here, the ultimate question is: "Whether Tina violated Rule 4.2 by having one or more individuals acting as her agents communicate with a party to an action about the subject of that party's representation when Tina knew the party was represented by counsel?" Instead, as is permissible, Mr. Parker's testimony only went to a single issue of fact: "Whether Judge Krueger had appointed or could have appointed Ms. Churchill, a private attorney who expected to be paid for her services, to serve as J.A.L.'s attorney – that, is to say, as J.A.L.'s legal advocate duty bound to advocate for J.A.L.'s positions regardless of whether those positions were in J.A.L.'s best interest?" To paraphrase the Chairman, Mr. Parker's opinions and his proffered testimony at the hearing addressed Ms. Churchill's role, not her performance. Accordingly, the Chairman erred when he precluded Mr. Parker from testifying about what role Ms. Churchill was legally authorized to play in the guardianship case.

OBJECTION 3. Tina respectfully objects to the Chairman's ruling granting the ODC's motion to preclude Tina from calling J.A.L. as a witness.

ARGUMENT.

- A. The Chairman erred when he granted the ODC's motion to preclude Tina from calling J.A.L. as a witness because the mere fact that a Court had declared J.A.L. to be an incapacitated person in 2011, cannot serve as the sole basis for disqualifying J.A.L. as a witness in this matter.**

The question is not whether J.A.L. was declared to be an incapacitated person more than seven years ago, but whether at the time of the hearing she met the competency test set forth in Mont.R.Evid 601 which provides that every person is competent to be a witness except as otherwise provided in these rules. A person is disqualified to be a witness only if a court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him or (2) the witness is incapable of understanding the duty of a witness to tell the truth. See *State v. Rogers*, 213 Mont. 302, 306-07, 692 P.2d 2, 5 (1984).

As of the hearing date, no Court or mental health professional had made the foregoing determinations about J.A.L. Additionally, as is pointed out, above, when professionals from Disability Rights of Montana (DRM) visited with J.A.L. in late 2016 or early 2017, they apparently felt that J.A.L. had sufficient mental faculties and the ability to communicate to warrant DRM entering into an agreement to retain an attorney to represent J.A.L.

As pointed out in Tina's response to the ODC's motion, she anticipated that J.A.L.'s testimony was vital not just to establish that it was her independent wish to return to her home, but also to testify that she ad wished to attend the hearing at which her fate was determined, that she did not think she was ever represented by a lawyer and that Ms. Churchill had never advised her that she had a right to a jury trial. All of this evidence would have further served to make it more likely that Tina was credible when she testified that she had concluded in good faith that Ms. Churchill had never served as J.A.L.'s legal advocate.

Accordingly, the Chairman erred when he granted the ODC's motion to preclude Tina from calling J.A.L.

OBJECTION 4. Tina respectfully objects the Chairman's repeated actions and rulings restricting her exploring at the hearing the factual basis for her good-faith conclusion that Ms. Churchill at no time served as J.A.L.'s attorney – that is to say, J.A.L.'s legal advocate.

Prior to the hearing, the ODC moved in limine to preclude Tina from offering evidence of Ms. Churchill's failure to advocate on behalf of J.A.L. Of course, the ODC had the burden of showing by clear and convincing evidence that Tina knew for a fact that J.A.L. was represented by an attorney – that is to say, not just an attorney serving as a GAL, but an attorney serving in the role of J.A.L.'s legal advocate for J.A.L.'s wishes. MRLDE Rule 22.B. However, the ODC sought to

hamstringing Tina in presenting any defense that she did not know that J.A.L. was represented in October of 2016 when Ms. McCann visited with J.A.L. While the Chairman opined that the ODC's motion was "overly broad in its reach" and did rule that:

While Ms. Churchill's and Mr. Shapiro's performance in any role is not an issue, their conduct as it relates to J.A.L.'s representation and Ms. Morin's knowledge of that relationship is relevant. To that extent the testimony may be proper. ODC's first motion in limine is therefore denied.

Appendix B (COP Doc. 61, p. 10).

Nevertheless, at the hearing, the Chairman repeatedly interrupted Tina's Counsel or sustained ODC objections when counsel attempted to explore the role Ms. Churchill played in the guardianship proceedings.

VI. RESPONDENT'S OBJECTIONS TO THE COMMISSION'S PROPOSED FINDINGS OF FACT.

Tina hereby objects to the Commission's introductory remarks and Findings of Fact because they are clearly confusing, erroneous or irrelevant to the issues in this case. See: *State v. Bower*, 254 Mont. 1, 7, 833 P.2d 1106, 1110 (1992).

Paragraph 1. Tina respectfully objects to the Commission's introductory remark that "the district Court's orders were affirmed on appeal" as confusing. The only two rulings raised on appeal were the Court's order: (1) appointing permanent

co-guardians; and (2) directing Ron to pay the fees of Mr. Shapiro and Ms. Churchill. To be clear, the Supreme Court did not affirm the District Court's order appointing Ms. Churchill.

Paragraph 2. Tina respectfully objects to the Commission's introductory comment that:

Significantly, when Morin arranged for McCann to associate with the disability rights organization to represent Judy, neither she nor McCann disclosed the fact that McCann had already entered into an attorney-client agreement with Ron in which Morin was to be the sole point of communication between McCann and Ron.

The comment is irrelevant because it has no tendency to make it more likely that Ms. McCann was acting as Tina's agent when Ms. McCann met with J.A.L. to see if J.A.L. wished to retain an attorney.

Paragraph 3. Tina respectfully objects to the Commission's characterization of the complaint as alleging that Tina breached her ethical duties by communicating with a represented party. A review of the complaint discloses that it alleges only that employees of DRM and another attorney, Ms. McCann communicated with a party Tina knew to be represented while acting as Tina's agents. *See* COMPLAINT, ¶30. The Commission appears to have now summarily discounted the validity of the allegation that employees of DRM acted as Tina's agents. The COMPLAINT makes no allegation that Tina ever had any contact with the party in question.

Tina objects to the Commission's specific itemized Findings of Fact because they omit many material facts which have been itemized in Tina's Summary of Relevant Facts (herein "SRF ___"), set forth above. Tina also respectfully objects to the Commission's following findings of fact which are identified by the paragraphs assigned by the Commission because they are erroneous, confusing, or irrelevant and, at times, prejudicial.

Paragraph 4. Tina objects because the language of this finding is confusing. The full language of Judge Krueger's order is set forth in Tina's SUMMARY OF RELEVANT FACTS (herein "SRF") Fact #5, above. The order was, at best, ambiguous. As mentioned in the preceding argument, when read in full the delineation of scope of Ms. Churchill's role as GAL should be read to limit Ms. Churchill's role to just that – GAL. If the order is read, as the Commission has alleged, that Judge Krueger appointed Ms. Churchill to serve both as J.A.L.'s attorney and as J.A.L.'s GAL, then such a construction would run afoul of standard rules of instrument interpretation and run afoul of statutory provisions and ethical considerations regarding conflict of interest.

Tina also objects to the Commission's representation that the guardianship proceedings remains open as erroneous. A review of Ex. 1, p. 1, discloses that after Ms. Churchill's appointment in 2011, the proceedings were then closed on August

14, 2014. They were re-opened on November 19, 2015, then closed again on December 23, 2015 and then reopened the same day.

Paragraph 6. Tina respectfully objects because, while this proposed finding is true, a more complete explanation would be that Attorney Steven Shapiro ("Shapiro") was initially paid \$2,200 to represent the initial guardians (TR, p.109, ln. 2), later submitted a bill for approximately \$9,000 for additional fees to the Court in September of 2013 and has represented the Guardians on a pro bono basis since their appointment in 2013.

Paragraph 12. Tina respectfully objects because this proposed finding is erroneous. Tina was not "retained" by Ron. While she did agree to represent him, their agreement did not provide that he would pay her a retainer. She has represented Ron over these past 5 plus years on a pro bono basis. TR, p. 230, ln. 16.

Tina also objects to the proposed finding that the Bugnis placed J.A.L. in the locked assisted living center near their home to "better" enable them to perform their duties as erroneous. This embellishment is not found in the record.

Paragraph 15. Tina respectfully objects to this proposed finding because it is irrelevant, erroneous and prejudicial. Tina's first identified issue on appeal was not "whether the District Court erred by not following the statutory procedure for guardianship proceedings." Instead, it was whether the "District Court abused its

discretion by appointing guardians without priority and allowing the guardians to restrict marital consortium between Ron and J.A.L.” Ex. 84. While it is true that Tina did not attack the validity of appointing Ms. Churchill as J.A.L.’s attorney, as Tina explained at the hearing, based upon representations by her predecessor counsel, she believed that Ms. Churchill had been appointed as GAL and that she served Ms. Churchill, together with all other parties she could identify in the record with her notice of appeal so as to err on the side of caution.

Tina also objects to the Commission ’s referring to her brief as including “**supposed** due process failures” as prejudicial editorializing. Tina will not refer to any of the Commission’s proposed findings of fact contained herein as “supposed.”

Tina also respectfully objects to the Commission’s proposed finding that: “Neither position is consistent with the arguments she advanced in defense of the ODC's charges” as irrelevant. At the time that Tina filed her appellate brief, she was not aware that Ms. Churchill was asserting that she had not only been appointed as J.A.L.’s GAL (duty bound to act in represent J.A.L.’s best interest), but also appointed to serve in the conflicting role of J.A.L.’s attorney (duty bound to advocate for J.A.L.’s wishes regardless of whether they were in J.A.L.’s best interest). The issue of whether Ms. Churchill had been serving as J.A.L.’s legal advocate as well as GAL only came to the forefront when Mr. Shapiro filed his complaint with the ODC.

Paragraph 16. Tina objects to this proposed finding as clearly erroneous. A review of Tina's briefs discloses that nowhere in those briefs did Tina recognize that Ms. Churchill had served in a role as J.A.L.'s advocate in support of J.A.L.'s stated wishes. While it is true that Tina's briefs did not contain a contention that Churchill was not acting as an attorney (advocate) for J.A.L.'s desired objectives, Tina believed that the claim was for Ms. Churchill's attorney's fees for performing her role as J.A.L.'s GAL. In hindsight, Tina might have raised this issue, but the point of her argument at the time was that the Court had no authority to order Ron to pay the attorney fees incurred as the result of Mr. Shapiro representing the guardians and Ms. Churchill serving as GAL for J.A.L., respectively – not whether the court had the inherent power to order the payment of the fees regardless of whether Ms. Churchill was serving as an attorney-advocate or as an attorney-GAL. As the Commission notes: “. . . her briefs contend only that Ron should not be required to pay the fees "for the guardian ad litem."

Tina objects to the Commission's characterization of her testimony as “self-serving and not credible in view of the record.” The Commission fails to support this conclusory proposed finding with any language in the transcripts of the hearings to which he refers. It also ignores the language found in the District Court's order issued after the September 24, 2013 in which the Court noted that Ms.

Churchill was appearing at the hearing as “Guardian Ad Litem for [J.A.L.]” Ex. 5. For that matter, it ignores the language in the appellate decision in which this Court noted: “A Guardian ad Litem (GAL) was appointed for J.A.L. . . . “ *In re J. A. L.*, 2014 MT 196, ¶4, 376 Mont. 18, 19, 329 P.3d 1273, 1275. Tina also respectfully asks this Court to take judicial notice of Judge Krueger’s September 24, 2013 ORDER filed in the guardianship case in which the Judge referred to Ms. Churchill as “Guardian ad Litem for [J.A.L.]” Ex. 5.

Paragraph 17. Tina objects to this proposed finding as erroneous. If the Commission is permitted to iterate Tina’s arguments, she would respectfully request that it do so correctly. While Tina did raise the arguments enunciated in ¶17, she also testified, as explained above, there were multiple other “circumstances” of which she was aware in November 2016 (when Ms. McCann first met with J.A.L.) that resulted in Tina’s good faith conclusion that J.A.L. was not represented by an attorney at that time. Those included, without limitation:

1. Representations by Tina’s predecessor counsel that Ms. Churchill had served in the role of GAL when representing J.A.L., always advocating for J.A.L.’s best interest and never for J.A.L.’s desired outcomes in the proceeding; and
2. Ms. Churchill’s failure to request that she be included in Tina’s certificates of service for multiple district court pleadings Tina filed after the case was appealed and after the case was initially closed in August of 2014.

Again, whether Ms. Churchill ever served as J.A.L.'s attorney (advocate) was a non-issue at the time. As Tina put it: "She was not on anyone's radar until Mr. Shapiro and his clients filed this claim against me and they needed to support it."

Tina also objects to the Commission's continued use of irrelevant negative assertions of fact when the Commission alleges: "The record reflects Morin's concerns about [J.A.L.'s] "stated interests" during the Commission hearing were not a part of any of her court filings or communications in the Guardianship Proceeding or in this proceeding." This assertion is not relevant. Tina represents Ron. Her ethical obligation is to represent his stated interests. It was not Tina's role to represent the "stated interests" of J.A.L. So, of course, Tina did not ever purport to represent J.A.L.'s "stated interests." Performing that task would have been the duty of an attorney appointed to represent or hired to represent J.A.L. Because Ms. Churchill did not perform that role, for that and other reasons, Tina, in good faith, believed Ms. Churchill was not J.A.L.'s lawyer-advocate.

Paragraph 18. Tina respectfully objects to this proposed finding based on relevance. Tina's failure to raise an argument in a proceeding in which Ms. Churchill's role was not an issue has no tendency to impact her credibility when years later the issue came to the forefront in an ODC complaint.

Paragraph 19. Tina respectfully objects, again, to this sort of argumentative

proposed finding which has no relevance to the issue which was only initially raised when the ODC filed its complaint.

Paragraph 20. Tina respectfully objects to this proposed finding as erroneous. While Tina has no recall of specifically telling Ms. McCann about Ms. Churchill because as Tina explained, Ms Churchill “was not on anyone’s radar until Mr. Shapiro and his clients filed this claim against me.” However, Tina advise at the hearing that Ms. McCann had accessed the file. TR, p. 282, ln. 14. Tina is not sure whether it was Ms. McCann’s review of the file or the Shapiro complaint that triggered an e-mail from Ms. McCann to Tina on December 13, 2016, in which Ms. McCann asked “Has Debbie Churchill ever done an (sic) thing on the case afer the proceeding that appointed the guardians?” Tina responded:

Not that I am aware of. Shapiro always answered all the motions and writs and he filed the brief at the Supreme Court. I challenged that her appointment as GAL had to end as soon as Judy had permanent guardians appointed and Shapiro only initially objected to that position but Churchill never did. She never reasserted or reinserted herself after the guardians were appointed.

Ex. 63.

Tina, also objects to Commission ’s conclusory assertion that Tina “created the distinction/division between Churchill’s roles as attorney and GAL solely as a defense to the ethical charges as clearly erroneous and prejudicial. In fact, Tina

believed Ms. Churchill's role to be that of GAL as early as December 13, 2013. Ex. 63; SRF 48.

Paragraph 21. Tina objects to this assertion because it omits a material fact – Tina did not serve Ms. Churchill with a copy of this pleading because Tina at that time believed Ms. Churchill had been serving only as J.A.L.'s GAL.

Paragraph 23. Tina respectfully objects because this proposed finding is clearly unsupported by the record to the extent that it alleges that paragraph 10 of the Complaint alleges the district court “stated Churchill had been appointed attorney for [J.A.L.]” Paragraph 10 of the Complaint does not make this allegation.

Paragraph 24. Tina respectfully objects to the proposed findings contained in this proposed finding as irrelevant and prejudicial. The Complaint does not allege she was “overly dramatic” in her representation of Ron or that she ever inappropriately attempted to advocate on behalf of J.A.L. (an individual who was not her client) to enforce J.A.L.'s due process rights. Had the Complaint done so, Tina would have presented multiple exhibits and also called witnesses to establish what she and Ron were having to tolerate from Mr. Shapiro and his clients.

Nothing in this proposed finding makes it more or less likely that she violated the ethical rules she is accused of violating. Tina respectfully suggests this and other “Findings of Fact” have been inserted only to prejudice the Court when reviewing

her objections.

Paragraph 25. Again, Tina respectfully objects to this conclusory and opinionated proposed finding as irrelevant and prejudicial for the same reasons as set forth in her objections to ¶24. Ms. Morin respectfully asks the Court to remember that she had a duty to diligently abide by the wishes of her client, Ron, and that duty included a responsibility to express Ron's sentiments to the extent that Tina had any basis for believing they were based in fact. Rule 1.2.

Paragraph 26. Tina respectfully objects to this proposed finding as, in part, clearly erroneous. In truth, Tina first contacted DRM sometime in January of 2016. Additionally, while Tina did not expressly mention Ms. Churchill's past role in the proceedings, DRM Staff Attorney, Ms. Zenker, confirmed that Tina had directed her to the 2014 published Montana Supreme Court opinions related to the case – opinions in which Ms. Churchill was identified as "Attorney for J.A.L." Ms. Zenker indicated she'd actually read the opinion, but allowed as how she hadn't really paid attention to who was counsel of record. TR, p. 83, ln. 16. Finally, the Commission incorrectly characterizes Tina's request. Tina did not "seek DRM's assistance." Instead, she asked employees of DRM, an independent, federally funded agency if they would visit J.A.L. in the facility in which she was being held. The decision whether DRM would do so was not Tina's. Ms. Zenker confirmed that

DRM at no time served as her “agent” as alleged in ¶30 of the Complaint. TR, p. 58, ln. 2.

Paragraph 28. Tina objects to this proposed finding as irrelevant. There is nothing “significant” about it. Tina had fulfilled Ron’s request that she attempt to find a lawyer to help bring J.A.L. home. Ms. McCann had agreed to aid in that attempt. Ron retained Ms. McCann, but did not retain her to specifically represent J.A.L. – of course, that would be J.A.L.’s decision. The McCann/Ron retainer agreement provides only that McCann would:

1. research and draft Petition for Removal in DG 11- 15, before Judge Krueger, District Court Judge, Silver Bow County;
2. research and draft initiating documents for federal (possibly state court) prosecution of the Guardian's wrongful and. tortuous conduct against Ron and Judy Lowney.

It further provided that Ms. McCann could withdraw as Ron’s counsel in any circumstances that would render Ms. McCann’s continuing representation unethical. (Ex. 37, ¶5). Once Ms. McCann had an opportunity to meet with J.A.L. and confirm that J.A.L.’s wishes were the same as Ron’s – they both wanted J.A.L. to be released from the secured facility and return to their family home in Butte – Ms. McCann’s representation of J.A.L. posed no ethical problem unless, at some point in the future, their objectives were to differ.

Whether Ms. McCann disclosed the fact that Ron had retained her when Ms.

McCann entered into her association agreement with DRM has no relevance to the issues raised by the Complaint, except to demonstrate that when Ms. McCann contacted J.A.L. she was doing so as Ron's agent, not, as alleged in ¶30 of the Complaint, as Tina's agent. Additionally, nothing in the record reflects that Tina was aware of what Ms. McCann had disclosed to DRM about her arrangement with Ron.

Paragraph 29. Tina again objects to this proposed finding based upon the Commission's editorializing and the erroneous nature of the conclusory statements made therein. First, as is clear in the record, Ron and J.A.L. did not have conflicting interests – they were joined at the hip in their wishes. Second, the Commission's reference to Rule 1.8(f) is misplaced. That rule pertains to situations in which a lawyer purports to undertake represent a client while being paid by another person. As noted, above, the McCann/Ron agreement makes no reference to Ms. McCann representing J.A.L.

Third, the Commission's assertion that Tina did not advise Ms. McCann about Ms. Churchill's prior involvement in the case is belied by ODC's own Exhibit 63 in which McCann specifically asks Tina about whether Ms. Churchill had ever done anything on the case after the proceeding that appointed the guardians.

Finally, while it true that Ms. McCann later agreed with DRM that she would

associate with that agency and represent J.A.L. at no cost to DRM, this understanding with DRM did not conflict with her earlier agreement with Ron to perform the services she had contracted to perform.

Paragraph 30. Tina, again objects to this proposed finding as unsupported by the record, irrelevant and prejudicial. First, the Complaint does not accuse Tina of violating an ethical rule by acting in a fashion inconsistent with the requirement that informed consent must be on the part of the client, not the attorney. Second, the record contains no testimony or evidence indicating that either Ms. McCann or Tina had not informed Ron of the fact that: (1) should J.A.L. later agree to a have Ms. McCann represent her; and (2) should a conflict arise, Ms. McCann would not be able to represent the parties without both signing a waiver of that conflict. In fact, Tina testified that later, when J.A.L. had indicated in writing that she wished to have Ms. McCann represent her, the following occurred:

So there was a discussion regarding that with my client, that he needed to understand that he might pay the bill because Judy had no access to money, but that Genet's client was Judy.

TR, p. 275, ln. 7. Third, the record is devoid of any reference to what Tina knew about the steps Ms. McCann took in reach a mutual agreement with J.A.L. that Ms. McCann would be her lawyer. However, it is important to note, that DRM Staff Attorney Zenker testified:

I think there's a statutory right for the person under guardianship to have representation and to challenge the guardianship appointment. I also think there's a constitutional right that comes into conflict with the capacity to contract issue.

TR, p. 59, ln. 9. Ms. Zenker then went on to opine that an individual's due process right to counsel trumps any statutory restriction on an incapacitated person's ability to enter into a contract. TR, p. 60, p. 5.

Fourth, Tina again objects to the Commission's continued insistence in editorializing by referring to the attorney/client agreement between Ms. McCann and Ron as a "surrogate arrangement.

Paragraph 31. Tina objects to this proposed finding as clearly erroneous. Tina's relationship with Ms. McCann was that of two lawyers who represented one or more clients with mutual interests. Ms. McCann did not work for Tina. She was not a partner or associate in Tina's office. The two lawyers had no prior experience in working together on a case or representing clients with common interests. Tina paid Ms. McCann no money. Ms. McCann's decision to enter into the case and represent J.A.L. would have been based upon her independent professional judgment.

In addition, the record clearly indicates that Ron and J.A.L.'s stated interests were not "averse." To the contrary, they both wished the same thing – for J.A.L. to

be released from the secure facility in which she was being held so that she and Ron, once again, live in the family home in Butte which they had occupied for decades. This “agenda” reflected the mutual wishes of J.A.L. and Ron – it was Tina’s only to the extent that she had an obligation to diligently advocate for Ron’s wishes.

Paragraph 32. Tina respectfully objects to this proposed finding because, in part, the facts represented are misleading, if not erroneous. Tina did advise DRM that Ms. McCann was willing to meet with J.A.L. and to represent J.A.L. if J.A.L. indicated her desire for that to happen. Tina did not tell DRM that “no one represented Judy’s interests in the guardianship proceeding”, but, instead in an e-mail, Tina advised Janice Sanderson, a DRM employee that: “No one has ever helped Judy or represented her directly.” Ex. 65. Given the record of the guardianship proceedings and the record in the ODC hearing, that statement was the gospel truth. J.A.L. wanted to go home and nobody had ever directly represented or advocated for that wish. Finally, in order to avoid confusion, Ms. McCann’s “representation agreement” did not, in fact, pertain to J.A.L. Her agreement was to perform certain tasks for Ron. Ex. 37.

Paragraph 33. Tina respectfully objects to this proposed finding as erroneous and irrelevant. First, Tina could not “fail to disclose” to DRM something that she had concluded, in good faith and in compelling circumstances, wasn’t true – that the

Court had appointed Ms. Churchill to serve in the role as J.A.L.'s lawyer-advocate. Nor could she "fail to disclose" that Ms. Churchill was J.A.L.'s attorney acting as her GAL because that role had terminated upon appointment of permanent guardians. Finally, the fact that Tina's client had retained Ms. McCann to perform certain legal work had no adverse effect upon Ms. McCann's ability to represent J.A.L. unless, of course, the stated interests of J.A.L. and Ron should diverge at some time in the future.

Paragraph 38. Tina respectfully objects to the proposed findings in this paragraph. The Complaint does not allege that Tina performed unprofessionally or unethically toward DRM staff. Parenthetically, it should be noted that Tina later determined that the information she had been provided was false and she apologized to Ms. Zenker. TR, p. 270, ln. 2. In order to avoid any tacit admission, Tina respectfully denies that this incident was "emblematic of Morin attacking anyone she perceives as interfering with her objectives."

Paragraph 41. Tina respectfully objects to the proposed findings in this paragraph because they are irrelevant, misleading, not supported by the record and omit material facts. First, the Commission fails to support any of the proposed findings by reference to the transcript or exhibits. Appears the exhibit in question is Exhibit 45.

Second, the complaint alleges only that Ms. McCann was acting as Tina's agent when she visited J.A.L. on October 20, 2016. The facts alleged in this paragraph do not make it more or less likely that this was the case – they are irrelevant.

Third, it is important to note that the proposed findings fail to point out that by November 16, 2016, Ms. McCann had met with J.A.L. on October 20, 2016 when J.A.L. had signed a written request that Ms. McCann represent her. Ex. 61.

Fourth, as alleged, the association agreement between DRM and Ms. McCann in which DRM placed limitations on the purpose for which it agreed to be associated had not yet been finalized and signed.

Fifth, the proposed finding that Tina knew that DRM has instructed McCann not to pursue visitation issues when she sent copies of prior pleadings she had used to Ms. McCann on November 16, 2016 is clearly erroneous. By that date, all Tina knew was what she read on an e-mail upon which she was copied in which a DRM employee had opined that obtaining a video statement from J.A.L. regarding holiday visitation is outside the scope of the proposed agreement. Ex. 44.

Sixth, Tina disputes the Commission's assertion that she was lying when she testified that the pleading she intended to have her paralegal, Yvonne, send to Ms. McCann was a "template." Tina did not use the word "template" at the hearing.

Instead, she explained that what she intended to have her paralegal send to Ms. McCann was a copy of a pleading Tina had “done for Ron” so that “if she wanted to reference it” because she saw “no use in reinventing the wheel . . .” TR, p. 304, ln. 21. Tina respectfully suggests that she told the truth at the hearing and that her conduct was entirely consistent with that of an attorney attempting to assist another attorney who was by that time representing a client who had the same objectives as her client – expanded visitation for their respective clients.

Paragraph 42. Tina respectfully objects to the proposed findings in this paragraph as being partially clearly erroneous and also irrelevant. While Tina was aware that Ms. McCann and DRM were considering entering into an “association agreement” and was ultimately provided a copy, Tina did not orchestrate that agreement. A search of the transcript text reveals no use of the word “orchestrate” during the entire hearing. No witness testified that Tina had played a role in formulating that agreement.

Paragraph 43. Tina respectfully objects to the Commission’s continued speculative editorial comments as clearly erroneous. It is true that Tina, advocating for Ron, wrote Ms. McCann with a copy to DRM personnel, suggesting that Ron would be willing to travel to Helena to meet with “meet with Judy and help her understand that you guys are on her side” [Ex. 47], but Tina makes no specific

reference to the meeting being “without the guardians consent.” Nowhere in the record does anyone opine that this constituted Tina using McCann’s representation of J.A.L. as “subterfuge to pursue expanded visitation for Ron.” Injecting such an opinion in a proposed finding of fact is inappropriate and, in this case, the accusation is clearly erroneous.

Paragraph 44. Tina objects to this proposed finding because it omits a material fact – Tina was not aware that Ms. McCann intended to take the described action while purporting to be acting in association with or under the aegis of DRM. By then, Tina was aware that DRM did not feel its federal mandate would allow it to participate in the issue of visitation, but, rather, only in pursuing J.A.L.’s right to vote (her guardians had denied her the opportunity for the two preceding years) and in pursuing an action to have the guardianship terminated. To this day, Tina is unsure why Ms. McCann did not include her on the certificate of service Tina became aware of Ms. McCann’s action only after the fact.

Paragraph 45. Tina objects to the proposed finding in this paragraph because it doesn’t appear to make sense and is prejudicial. To the extent that it accuses Tina of being rude, it is irrelevant because the complaint does not accuse her of being rude. The gratuitous insertion of this proposed finding appears to be for the purpose of prejudicing the court against Tina. To the extent that the proposed

finding has any relevance, it makes it clear that DRM did not and could not act as Tina's agent in this case as alleged in ¶30 of the Complaint.

Paragraphs 46 and 47. Tina objects to these proposed findings based upon relevance. The facts alleged in these paragraphs relate to Ms. McCann's actions and not Tina's. They do not tend to make any fact at issue more or less likely.

Paragraph 48. Tina admits that Ms. Zenker sent a letter to Ms. McCann in which Ms. Zenker understandably vented her ire as a result of Ms. McCann filing a pleading outside the scope of their association agreement but, nevertheless, purporting to be with the aegis of DRM. Tina admits that in that letter Ms. Zenker wrote:

Thus, it is not credible to assert that filing a pleading that directly contradicted earlier direction fell outside the meaning of that oversight. This is especially true in light of your admissions that you can "only apologize. Tina was pushing hard for it..." These admissions are further buttressed by your November 11, 2016, email stating that Ms. Morin would be filing the motion for visitation.

Ex. 61, p.4. However, as Tina explained at the hearing, she did not know that Ms. McCann would be taking the action she did purporting to be acting under the authority of DRM. Tina testified that "absolutely" she had initially encouraged Ms. McCann to file such a motion. TR, p. 281, ln. 10. As indicated above, at one time Tina sent Ms. McCann a copy of a similar pleading she had filed on Ron's behalf.

TR, p. 281, ln. 5. But, as Ms. Zenker indicated, in light of the parameters set for Ms. McCann's representation of by the terms of the DRM association agreement, Tina had stopped encouraging Ms. McCann to file such a motion.

Paragraph 49. Tina admits the proposed finding contained in this paragraph, but a review of the language she proposed to Ms. McCann discloses that the word "unethical" was not included. Tina did, however, make reference to the Rules of Professional Responsibility. Tina's proposed language, however, was born of her ignorance. She did not realize at the time that there was no attorney/client relationship between an attorney at DRM and J.A.L.

Paragraph 50. Tina, objects to the word "advised" as a mischaracterization of her e-mail. A review of that e-mail discloses that Tina did suggest potential arguments, but that she neither advised nor instructed Ms. McCann to make those arguments. That decision was Ms. McCann's.

Paragraph 54. Tina objects to this paragraph as being irrelevant. Additionally, the assertion therein is not supported by the record. When Ms. Zenker was asked this question, she advised that she was unable to answer because she had no researched the question. TR, p. 77, ln. 13.

Paragraph 55. Tina objects to this proposed finding as irrelevant and prejudicial. She is not accused of being discourteous and because she was not

accused of it, she did not introduce copies of the correspondence from Mr. Shapiro to which she was responding which spawned her responses. Tina respectfully suggests, that this and many of the prior “Findings of Fact” have been included for the singular purpose of prejudicing the Court against her.

Paragraph 56. Tina objects to this finding because some of the proposed findings are erroneous, some are irrelevant and some are, again, appear to be born of an intent to prejudice this Court in its ruling.

First, as has been repeatedly stated above and was born out at the hearing, Tina’s knowledge that Ms. Churchill at sometime represented J.A.L. was limited to her knowledge that Ms. Churchill had at one time served as J.A.L.’s GAL.

Second, the fact that Ron had retained Ms. McCann had no bearing on the issues raised by the Complaint.

Third, the Commission ’s characterization of Tina’s role in getting Ron and Ms. McCann as “sponsorship” constitutes inappropriate editorializing. The facts born out at the hearing speak for themselves. Tina asked Ms. McCann if she would help represent Ron and she agreed.

Fourth, Tina disagrees that she arranged for new counsel for J.A.L. The record indicates that she arranged for Ms. McCann to meet with Ron and asked DRM to arrange for Ms. McCann to meet with J.A.L. Whatever would occur next was in

the hands DRM, Ms. McCann and J.A.L.– Ms. McCann was not Tina’s agent in fact and explained below was not her agent in law.

Fifth, there was no conflicting nature in Ms. McCann’s dual representation. Both her clients wished for the same objective.

Sixth, as explained Tina’s objections to the Commissions proposed Conclusion of Law, the Commission’s use of the term “surrogate” can only be born of ignorance and has no application here. What the Commission should be alleging (although inaccurately) is that Ms. McCann was Tina’s “agent.”

Seventh Ms. McCann did not act surreptitiously. Within five weeks of J.A.L. giving Ms. McCann her written authorization to serve as J.A.L.’s attorney, Ms. McCann filed a motion with the Court on J.A.L.’s behalf and served Mr. Shapiro.

Paragraph 57. Tina again respectfully objects to this paragraph as irrelevant. The assertion that Ms. Churchill represented J.A.L. as her attorney-advocate in October of 2016, arose only upon Mr. Shapiro filing his complaint shortly thereafter.

Paragraph 58. Tina respectfully objects to this proposed finding as clearly erroneous:

First, as explained above, the plain language of the order of appointment appointed Ms. Churchill only to serve as GAL and any other interpretation would render the order invalid and would have placed Ms. Churchill in an inherent conflict

of interest. As Mr. Parker testified, he would not have accepted such an appointment.

Second, Tina's defense to the Complaint is entirely consistent with her conduct. She never gave a second thought to whether Ms. Churchill might have been representing J.A.L. as J.A.L.'s attorney-advocate. Had that been the case, then Ms. Churchill would not have played the role of GAL and would have a multitude of things to protect J.A.L.'s due process rights and carry out J.A.L.'s wishes.

Third, Tina denies that the record herein paints a picture of a "strained and tortured construction of court orders and statutes. It is only by ignoring very specific statutes applicable to guardianship proceedings; construing a court order in a fashion which violates those statutes and then ignoring the due process rights of J.A.L. that the ODC has succeeded in prosecuting Mr. Shapiro's complaint.

Paragraph 59. Tina respectfully objects to this proposed finding as clearly erroneous and redundant:

First, if it is not clear by now, Tina did not meet with J.A.L on the date in question.

Second, Ms. McCann was not Tina's agent, as is explained more fully in Tina's objections to the Commission's proposed Conclusions of Law.

Third, Tina did not know and, under the circumstances, had no reason to

believe that Ms. Churchill ever served in the role as J.A.L.'s attorney-advocate. By her own admission, Ms. Churchill saw her role as limited to looking after J.A.L.'s "best interests" as opposed to J.A.L.'s stated wishes.

Paragraph 60. Tina, respectfully objects to this proposed finding as partially clearly erroneous. This exhibit, while admitted at the hearing, was never discussed during any testimony. Tina does admit, however, that she did write the e-mail to Ms. McCann. Her suggestion that Ms. McCann might write Ms. Shapiro and represent that Ms. McCann did not represent Ron, however, was born of ignorance. She did not realize at the time she sent the e-mail to Ms. McCann exactly what the October 15, 2016 McCann/Ron retainer agreement said. She thought the agreement provided that Ron was agreeing to pay Ms. McCann to represent J.A.L. if J.A.L. confirmed she wanted a lawyer. Embarrassingly, Tina had never really reviewed the agreement. In retrospect, of course, Tina she was remiss in failing to do so. But, she objects to the Commission's proposed finding that she was encouraging Ms. McCann to lie. She suggested that Ms. McCann make the representation because it wasn't until she made the suggestion that Ms. McCann clarified her relationship with Ron. Prior to that, Tina believed the representation would have been true. She would not have made the suggestion if she thought otherwise.

Had Tina been confronted with the exhibit at the hearing, she would have explained as much. Of course, Ms. McCann never made the suggested representation to Mr. Shapiro because Ms. McCann knew that such a representation would not be true.

VII. RESPONDENT’S OBJECTIONS TO THE COMMISSION’S PROPOSED CONCLUSIONS OF LAW.

Conclusion 1. Tina respectfully objects to this proposed Conclusion of Law because it is not correct as a matter of law and comes to a conclusion (although erroneously) that Ms. McCann was Tina’s surrogate.

First, it should be noted that the Commission has apparently correctly concluded that, contrary to the allegation in ¶30 of the complaint that employees of DRM acted as Tina’s agent, those employees were not, in fact, Tina’s agents.

Second, ¶30 of the Complaint does not allege that Ms. McCann was Tina’s surrogate. Accordingly, the finding is superfluous and apparently designed to cast Tina in a bad light. Even if we assume that such a finding might have some place here, the nomenclature is out of place. Webster’s on-line dictionary defines “surrogate” as:

Noun: 1. a substitute, especially a person deputizing for another in a specific role or office, a substitute, proxy, or replacement;

Adjective: 1. relating to the birth of a child or children by means of

surrogacy.

So, the Commission's misplaced characterization is not only prejudicial, but inaccurate. We can all agree that Ms. McCann did not play the role of substitute or replacement for Tina. Tina remained in her role as Ron's advocate. We can also agree that Tina did not deputize Ms. McCann or give Ms. McCann her proxy. Finally, Ms. McCann's role as J.A.L.'s independent counsel had nothing to do with childbirth.

Third, an agent is one who represents another, called the principal, in dealings with third persons. MCA § 28-10-101. An agent may be authorized to do any acts that the principal might do, except those to which the principal is bound to give personal attention. MCA § 28-10-105. An agency may be created by a precedent authorization. MCA § 28-10-201. Here, it is undisputed that when Ms. McCann visited with J.A.L. on October 20, 2016, she did so with Ron's authorization to carry out two objectives: (1) determine whether J.A.L. wished to be represented by a lawyer; and (2) determine whether J.A.L. wished to have Ms. McCann represent her. When Ms. McCann acted as Ron's agent because they had a contractual relationship which allowed Ron to authorize her to act on his behalf.

On the other hand, Ms. McCann had not been paid by Tina. She was not in Tina's employee. She was not serving as Tina's independent contractor. She had no

prior associations with Tina. She had no oral or written contractual agreements with Tina. Because Ms. McCann and Tina had no recognizable legal relationship, it was legally and factually impossible for Tina to authorize Ms. McCann to act on her behalf. Ms. McCann was no more Tina's agent than were the DRM employees who made an independent decision that they would visit J.A.L. in the course of carrying out the stated mission of DRM – protecting and representing the rights of disabled individuals. Like the DRM employees, Ms. McCann a professional capable of making independent legal judgments, may have visited J.A.L. because Tina asked her to do so, but she did not visit J.A.L. because Tina authorized or directed her to do so. She did not visit J.A.L. for the purpose of asking J.A.L. if she wished to have Tina represent her, but, instead, whether J.A.L. wished to have Ms. McCann a separate and independent lawyer represent her.

Accordingly, Ms. McCann was not acting as Tina's agent when she visited with J.A.L. on October 20, 2016.

Conclusion 2. Tina respectfully objects to this proposed conclusion because it is not correct as a matter of law. Tina has already explained why this conclusion is erroneous in her argument set forth above related to the Chairman's error in not granting her pre-hearing motion to dismiss and hereby incorporates that argument for purposes of this objection. In summary, to the extent that Judge Krueger's order can

be interpreted to appoint Ms. McCann as both J.A.L.'s GAL and also to serve as her attorney advocating for J.A.L.'s stated wishes, that order is void. Tina did not begin representing Ron until more than two years after the order was issued and so, wasn't around to attack it then. More important, Ms. Churchill's conduct – serving purely as J.A.L.'s GAL – gave Tina no reason to attack it. The matter first became an issue when Mr. Shapiro made his complaint to ODC. Because Judge Krueger lacked or exceeded his statutory authority to appoint Ms. Churchill as a private attorney-advocate for J.A.L. who would be billing for that service (as opposed to a public defender serving at public expense), Tina is free to attack the Judge's order at any time. Therefore, this proposed conclusion of law is incorrect as a matter of law.

Conclusion 3. Tina objects to this proposed conclusion of law because: (1) it is not a conclusion of law, but rather, a proposed finding of fact; and (2) as a finding of fact it is clearly erroneous. The language in an instrument is construed in its "ordinary and grammatical sense." *In re Charles M. Bair Family Tr.*, 2008 MT 144, ¶55, 343 Mont. 138, 156, 183 P.3d 61, 74. Contrary to the allegations in this conclusion (finding) that "the case register does not indicate the case was closed in 2014," a review of Ex. 1 reveals that the document could not be more clear about the fact that the guardianship case was closed on August 14, 2014. Page one (1) of the document reflects a Status History as follows:

Open 5/19/2011
On Appeal 11/18/2013
Closed 8/14/2014
Reopened 11 /19/2015
Closed 12/23/2015
Reopened 12/23/2015

Page six (6) reflects that the case was closed on 08/14/2014, the date the remittitur from this Court was returned and filed. The case was only re-opened fifteen months later because, as is reflected at page 6, Tina filed a motion for an annual report and request for visitation. Accordingly, Tina respectfully asks that the Court interpret the word “closed” in its ordinary and grammatical sense and find this proposed conclusion to be factually erroneous and contrary to the rules of interpretation of instruments.

Conclusion 4. Tina respectfully objects to this conclusion as contrary to law. MCA § 72-5-315(2) specifically provides that the Court may appoint counsel to represent that allegedly incapacitated person “in the proceeding.” The "proceeding" referenced is, of course, the guardianship proceeding. Here, the guardianship proceeding had concluded upon the appointment of the permanent guardians and the resolution of issues on appeal to this Court. The appeal was completed and the remittitur had been filed with the Clerk of District Court in August of 2014. The case was then closed. At that point the guardianship proceeding came to an end. See, also: *In re Guardianship & Conservatorship of A.M.M.*, 2015 MT 250, ¶23,

380 Mont. 451, 458, 356 P.3d 474, 479 (We note, however, that the temporary appointments were superseded by the permanent order of guardianship and conservatorship made on March 14, 2014.) and *Burris v. McDermott (In re M.R.O.)*, 2008 MT 280, ¶17, 345 Mont. 309, 312, 190 P.3d 1109, 1111 (After lapse of temporary guardianship, court may not extend the guardianship, but may re-appoint the guardian if necessary).

This proposed conclusion is also contrary to the testimony of Mr. Shapiro who drafted the order appointing Ms. Churchill. When asked about the intent of his order, he explained:

Okay. And I take it, in some situations, the alleged incapacitated person may be unable to express their wishes and how to proceed, and this particular attorney, who is appointed to represent that alleged incapacitated person, is given the authority by the Court to make decisions on her behalf. And this attorney is not being placed in a permanent role of guardian, by any means, but **it's a temporary order of the Court** that this person shall be the attorney with the powers of a guardian ad litem.

(Emphasis added) TR, p. 149, ln. 7.

Conclusion 5. Tina respectfully objects to this conclusion as being an incomplete statement of the law. Tina hereby incorporates in this objection, her argument and authorities set forth above related to the Chairman's erroneous ruling in refusing to dismiss this matter because the current law rendered any attempt to

appoint Ms. Churchill as J.A.L.'s attorney/advocate invalid. While the assertion made by the Commission is true, it fails to disclose the additional holding in the *Jacobsen* case discussed in Section V, Objection 1, Argument B, above, and to disclose that *Jacobsen* has statutorily abrogated two years later. This Court has since held that when a court appoints a guardian ad litem for a minor, unless the court specifically indicates it intends the guardian to act as an attorney as well, the guardian is not to act as an attorney. *In re K.H.*, 2012 MT 175, 27-28, 366 Mont. 18, 25-26, 285 P.3d 474, 479-80, citing *Jacobsen v. Thomas*, 2004 MT 273, 323 Mont. 183, 100 P.3d 106. Additionally, it is important to note that the legislature has since recognized the inherent conflict posed for an attorney appointed to serve both roles. Accordingly, when in 2006 the legislature enacted MCA § 47-1-104 (addressing the state-wide public defender system), it specially provided that a state public defender should be appointed as attorney to represent a youth and then specifically that a public defender may not be assigned to act as a guardian ad litem. Subsection (5). Thus the foregoing statute statutorily abrogated the *Jacobsen* ruling. It is this statute and which rendered Mr. Shapiro's 1980 form for appointing a lawyer obsolete.

The foregoing is, of course, consistent with Section 115 the UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT, which, while not adopted in Montana, makes it clear that “[t]he guardian ad litem may not be the same

individual as the attorney representing the respondent.”

Conclusion 6. Tina has no objection to this conclusion of law.

Conclusion 7. Tina has no objection to the conclusion reached, renews her argument discussed above that Ms. McCann acted neither as a surrogate or agent for Tina when she met with J.A.L. on October 20, 2016 or anytime thereafter.

Conclusion 8. Tina has no objection to this restatement of the law, but denies that it applies to her conduct.

Conclusion 9. Tina has no objection to this restatement of the law, but denies that it applies to her conduct

Conclusion 10-12. Tina respectfully objects to these conclusions based upon the authorities and her arguments set forth above and based upon the following conclusions of law omitted by the Commission.

1. Pursuant to Rule 1.2. Tina was required to advocate for the wishes of Ron;
2. Comment 4 to Rule 4.2 set forth in *Annotated Model Rules of Professional Conduct*, 7th Ed. (American Bar Association 201) (AMRPC) provides that this no-contact rule "does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. *See*: p. 405.
3. In interpreting this model "no-contact" rule adopted in its entirety in Minnesota, State Bar Authorities have held that: "As comment 4 to Rule 4.2 states, the no-contact rule does not "preclude communication with a represented person who is seeking advice from a

lawyer who is not otherwise representing a client in the matter." *Minn. R. Prof. Conduct* 4.2 cmt. 4 (emphasis added). *In re: Panel File No. 41755*, 2018 Min. LEXIS 261, 2018 Minn. LEXIS 261 * | 2018 WL 2325379.

4. The comment to Rule 4.2 was amended in 2002 to clarify that a lawyer is permitted to talk to someone who already has counsel but who wants a "second opinion from a lawyer who is not representing a party in the matter." AMPRC, at p. 407.
5. When an individual is dissatisfied with her or his current counsel and is seeking representation from a second lawyer, the second lawyer not only should not, but may not, notify current counsel with the prospective client's permission. AMPRC, at p. 407, citing *Phila.Ethics.Op.* 2004-1 (2004).
6. Rule 1.0(f) provides that a person knows something if he has "actual knowledge" of the fact in question. It goes on to provide that a person's knowledge or lack thereof may be inferred from the circumstances.
7. Mont.R.Civ.P. 17 mandates that a court must appoint a guardian ad litem - or issue another appropriate order - to protect an incompetent person who is unrepresented in an action.
8. In 2006, when the Legislature established a new statewide public defender system, it enacted MCA § 47-1-104. Subsection (4) of that statute provides that "a court may order assignment of a public defender under this chapter for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5."
9. Recognizing the potential for a conflict of interest if a Public Defender were to also be appointed as a "special advocate or guardian ad litem" in Youth Court or dependent and neglect proceedings (which require the appointment of both an attorney and a GAL), subsection (5) prohibits the assignment of a Public Defender to serve as the GAL.

10. With respect to the appointment of counsel for an incapacitated person, MCA § 72-5-315(2) provides that upon the filing of a petition, the court shall set a date for hearing on issues of incapacity at which time the incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender to represent the person in the proceeding. Subsection (4) provides that the person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court- appointed physician and the visitor, and to trial by jury.
11. No statute authorizes a District Court to appoint a private attorney to represent an allegedly incapacitated person or to approve any attorney charging for his or her services in such a situation.
12. In *In re Stacey S.*, 1999 Ohio 989, 136 Ohio App. 3d 503, 513-14, 737 N.E.2d 92, 100, the Court noted that a lawyer for the ward has an ethical duty to zealously represent his client within the bounds of the law. The attorney is the spokesperson for the ward's wishes. The role of the guardian ad litem is to investigate the ward's situation and then ask the court to do that which the guardian ad litem believes is in the ward's best interests, citing *In re Howard* (1997), 119 Ohio App. 3d 201, 206, 695 N.E.2d . Thus, the Court held that for an attorney to act in both capacities, the court must first make a dual appointment and a finding that no conflict exists. If that does not happen, the appointment is void.

RECOMMENDATION FOR DISCIPLINE

Tina respectfully objects to the Commission's recommendation because the recommendation is unduly harsh when viewed in the context of the factors to be considered, pursuant to (9)B of the Disciplinary rules, in recommending discipline:

- (1) The gravity and nature of the duty violated, including whether the duty

is owed to a client, to the public, to the legal system, or to the profession;

- (2) The lawyer's mental state;
 - (3) The actual or potential injury caused by the lawyer's misconduct;
 - (4) The existence of aggravating or mitigating factors; and
 - (5) The existence of prior offenses.
1. **The gravity and nature of Tina's duty to Ms. Churchill, as a fellow lawyer, was dependent upon Ms. Churchill actually playing that role – advocating for J.A.L. – and the actual injury caused by Tina's conduct was minimal because the purpose of Rule 4.2 is to preserve the efficacy and sanctity of Ms. McCann's lawyer-client relationship with J.A.L. Here, by her own admission, Ms. McCann never developed a lawyer-client relationship with J.A.L., but, instead, served only in the role of J.A.L.'s GAL.**

Assuming Tina committed the offenses for which she was charged, the gravity and nature of the duty violated is minor. If the allegations are true, Tina aided Ms. McCann when Ms. McCann met with J.A.L. when Tina knew that Ms. McCann's agreement with Ron was not to represent J.A.L, but, instead to do some legal work for Ron and knowing that J.A.L. was actually represented by Ms. Churchill. Taking that as a given, the sanctions recommended by the Commission are excessive.

“The purpose of Rule 4.2 is to prevent lawyers from taking advantage of un-counseled lay persons and to preserve the efficacy and sanctity of the lawyer-client relationship.” *Carter-Herman v. City of Philadelphia*, 897 F. Supp.

899, 901 (E.D. Pa. 1995); See, also, *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, No. 3:10cv00195, 2012 U.S. Dist. LEXIS 39841, at *10-11 (S.D. Ohio Mar. 23, 2012) (Rule 4.2 is meant to prohibit untoward intrusions into the attorney-client relationship). Here, of course, Ms. Churchill had never developed an attorney-client relationship. But her own admission she chose to do only what was in J.A.L.'s best interest and took no steps to advocate for J.A.L.'s state wishes. Accordingly, Ms. McCann's discussion with J.A.L. on October 20, 2016 and her eventual representation of J.A.L. had no adverse impact on an attorney-client relationship that never existed.

Additionally, the MRPC 8.4(d) violation requires conduct which is "prejudicial to the administration of justice." ODC must demonstrate some nexus between Tina's conduct and an adverse effect upon the administration of justice. *In re Olson*, 2009 MT 455, ¶ 32, 354 Mont. 358, 367, 222 P.3d 632, 639. Here, there was no evidence presented that Tina's conduct disrupted the administration of justice. Quite the opposite. In the end, she was attempting to get someone to help a vulnerable, disabled woman who was residing in a secure assisted living facility against her will have a voice and exercise her Constitutional Rights. The woman had never been represented by someone who had advocated for her rights and wishes. Tina respectfully suggests that she was attempting to supporting the administration

of justice.

However, the Commission seeks punishment for conduct that was not alleged in the complaint and only alluded to at the hearing. The Commission, in full cry, insists Tina's actions were "a reflection of an unreasonable method of practicing law that employs intimidation (not alleged), accusation (not alleged) and artifice to accomplish her goals (not alleged). Because it was not alleged, Tina had no opportunity to defend against them. The Commission also wishes to make a big thing out of Tina's failure to disclose to someone that Ms. McCann already represented Ton when Ms. McCann associated herself with DRM. Again an uncharged allegation and one which Tina did not really take the opportunity to defend. As noted, above, however, Tina was guilty of not really reviewing the agreement between Ron and McCann. She wrongfully assumed it was an agreement whereby McCann agreed to represent J.A.L. if she was agreeable. It was only much later, when Tina suggested to Ms. McCann that she tell Mr. Shapiro that Ms. McCann did not represent Ron that Ms. McCann explained that, pursuant to her retainer agreement with Ron, she actually did represent him. Nevertheless, the Commission insists Tina should be punished for these "crimes" for which she did not stand charged and against which she saw no need to defend.

The Commission, perhaps astutely, also insists that Tina should somehow be punished for her guilt by association with Ms. McCann. Ms. McCann has gotten very sideways with the Commission and is now disbarred. In hindsight, given Ms. McCann's actions after entering into her representation of J.A.L. – many of which were neither encouraged or sanctioned by Tina. Tina might have chosen a better person to ask about representing J.A.L. However, Tina is not charged with her lack of judgment about who she asks to help out a desperate individual.

- 2. Because the ODC complaint made no allegations that Tina's mental state is in question, this should not be a factor to be considered in meting out punishment.**
- 3. By way of mitigation Tina respectfully asks the Court to bear in mind that Tina was only trying to help an old man, a husband of fifty years, see his wife. By way of aggravation Tina, in hindsight, Tina acknowledges she was, in fact, rude and did owe and still owes apologies.**

The record cited herein makes it clear that Tina was doing her best (and doing it *pro bono*) to advocate for the wishes of her client, Ron. Ron is an elderly gentlemen who, in the spring of 2011, experienced mental difficulties and could no longer care for his wife, J.A.L. When he resolved those difficulties to return to an empty family home in Butte with his wife being held in a secure facility in Helena. His visitations were eventually limited to monthly. No one disputes that Ron is an irascible individual, including Tina. However, his cause was a good one and Tina

did her best to represent it.

By way of aggravation, in hindsight, Tina does recognize that at times she was overly zealous. When she'd been erroneously told that Roberta Zenker had an inherent conflict of interest in the case, she became accusatory. As the record reflects, upon learning that she'd received bad information, she apologized immediately to Roberta. Tina is also willing to apologize to Mr. Shapiro whether or not he makes the apology reciprocal.

4. The existence of a prior offense.

With respect to this issue, Tina respectfully asks the Court to review the Court record rather than rely on the representations of the Commission. The record speaks for itself.

With the foregoing in mind, if Tina is to be sanctioned, she respectfully requests that the Court impose a one-year probationary period. If the court wishes her to have a mentor during that period, she is amendable. Whether or not the Court requires it, Tina does intend to apologize to Mr. Shapiro.

RESPECTFULLY SUBMITTED this 1st day of February, 2019.

MICHAEL J. SHERWOOD, P.C.

By: /s/ Michael J. Sherwood
Michael J. Sherwood
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Michael J. Sherwood, hereby certify that I have served true and accurate copies of the foregoing Other - Other to the following on 02-01-2019:

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