First Appellate District Civ. No. A145291

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MATTER OF THE ADVANCE HEALTH CARE DIRECTIVE OF DICK R. MAGNEY

HUMBOLDT COUNTY ADULT PROTECTIVE SERVICES,
Petitioner and Respondent

vs.

JUDITH C. MAGNEY
Respondent and Appellant

Appeal from Superior Court of Humboldt County
Honorable Dale A. Reinholtsen, Judge, Presiding
Humboldt County Superior Court No. CV150159

APPELLANT'S OPENING BRIEF

(Service on Attorney General Required by Rule 8.29)

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Court of Appeal of the State of California
First Appellate District
Division One

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number:	A145981
Superior Court Case Number:	CV150159
Appellant/Petitioner:	JUDITH C. MAGNEY
Respondent/Real Party in Interest:	HUMBOLDT COUNTY ADULT PROTECTIVE SERVICES

This Certificate is submitted on behalf of the following party:

Appellant JUDITH C. MAGNEY

☐ INITIAL CERTIFICATE	☒ SUPPLEMENTAL CERTIFICATE

☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208

Date: December 8, 2015

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Appellant, Judith Magney ("Appellant"), wife of Dick R. Magney ("Mr. Magney"), and surrogate under Mr. Magney's Advance Health Care Directive ("AHCD"), hereby submits her Opening Brief, in support of her appeal of the Trial court's final order denying her request for attorney fees and costs incurred defending her husband/principal's wishes pursuant to his AHCD.

I. INTRODUCTION.

Appellant, seventy (70) years old with a dying husband, was forced to defend her husband's wishes, as stated in his Advanced Health Care Directive ("AHCD"), against the "Verified Petition" of Respondent Humboldt County Adult Protective Services' ("Respondent" or "Adult Protective Services") by which it purported to seek to "enforce" her duties under her husband's AHCD, and Respondent's associated "*Ex Parte* Petition for Temporary Order Prescribing Health Care " (the "*Ex Parte* Application"), both of which Respondent brought under the California Health Care Decisions Law ("HCDL").[1/]

On its *Ex Parte* Application, together with the Verified Petition and the accompanying declaration of Heather Ringwald (the "Ringwald

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[1/] This Act (Probate Code § 4600, *et seq*.) states that it may be cited as "Health Care Decisions Law" ("HCDL"). Probate Code §4600. The HCDL was formerly known as the Natural Death Act of 1976.

Declaration"), Respondent obtained a temporary order (the "Temporary Order") by which Respondent assumed total control over Mr. Magney's medical treatment, then forced Mr. Magney to be medicated against the express terms of his Advance Health Care Directive; against the directions of Appellant; and against the reasoned decision of his team of primary/treating physicians and cardiologist at St. Joseph Hospital.

When Appellant opposed Respondent's Verified Petition and the Temporary Order on the grounds that Respondent had no standing to bring the Petition, that the alleged "evidence" upon which it had filed was woefully deficient, and upon Respondent's failure to apprise the lower court of facts that flatly contradicted Respondent's position, Respondent moved to dismiss its Verified Petition. This motion to dismiss was granted and, over the objections of Respondent, the Temporary Order was vacated. However, the lower court retained jurisdiction to consider an award of attorney fees and costs to Appellant.

At the hearing on the award of fees and costs pursuant to Probate Code section 4771, Appellant reiterated its position that Respondent had no standing in the first instance to bring the Petition or to seek the Temporary Order, that Respondent's "evidence" was primarily inadmissable compound hearsay, and that Respondent had failed to apprise the court of actual facts

that flatly contradicted the allegations contained in the Verified Petition and the Ringwald Declaration upon which Respondent had proceeded.

Rather than defend its meritless position, Respondent instead told the court that (without previously so informing the court) it had only submitted the Ringwald Declaration for Nurse Ringwald's "state of mind" and not for the truth of the matters asserted in the Verified Petition. In so doing, Respondent essentially admitted to the lower court that it had misled the court, and that, even apart from its lack of standing, the Verified Petition had been brought without reasonable cause. Nonetheless, over Appellant's repeated objections and despite her repeated admission that her testimony, like her Declaration, was "not for the truth of the matter asserted", the lower court allowed Nurse Ringwald to testify, then used this testimony as the "factual basis" upon which to determine that the Petition had been filed with reasonable cause.

The lower court erred. First, where, as here, under the express terms of the applicable statutes Respondent had no standing to bring its Petition or *Ex Parte* Application, there could be no "reasonable basis" for bringing the Petition. Second, where Respondent repeatedly took the position that nothing stated in Nurse Ringwald's Declaration (upon which Respondent based its Petition), and nothing in Nurse Ringwald's testimony was offered

in any way "for the truth of the matter asserted" but, instead, only for her "state of mind", Respondent conceded that, even apart from its lack of standing, it had no evidentiary basis for filing the Petition or seeking the Temporary Order. As a result, the lower court's failure to award Appellant's attorney fees was error and its denial of attorney fees must be reversed.

II. STATEMENT OF CASE AND FACTS.

1. Appellant, the wife of Mr. Magney, is designated as his agent for health care decisions, as set forth in his AHCD, executed in Eureka, California on August 23, 2011. 1 AA 13-18. In this AHCD, Appellant is also nominated to become Mr. Magney's conservator if at any time it became necessary to appoint a conservator for him. 1 AA 13. Under section 7, Mr. Magney stated that "he wanted to be allowed to die without prolonging his death with medical treatment . . . that will not benefit me" and that he wanted "to die a natural death without having my life prolonged by machines or nonbeneficial treatment." He directed that "I want my religious beliefs to be honored" and that "I want to die free from unnecessary pain and suffering even if pain medications will shorten my life." He clearly stated that "I don't want my life prolonged, by any means when this life has no more meaning for me" and that "I do not want

artificial nutrition and hydration under any circumstances except for the treatment of a temporary condition in which I am unable to eat or drink and then only for a short time." His AHCD stated that, "if within a short period (as determined by my agent after consultation with my physician) there is no benefit to me, then I instruct that artificial nutrition and hydration be withdrawn." Finally he instructed that, "Regarding the decision to withhold or withdraw life sustaining treatment, I desire that my agent act after allowing a reasonable period of time for observation and diagnosis."

2. Under Mr. Magney's AHCD, if Appellant, his wife, is unwilling or unable to act as Mr. Magney's agent, his sister, Anita Reed, is named as his alternate agent. 1 AA 13.

3. For more than 23 years, Mr. Magney suffered serious health problems. These problems had escalated over the last six years. He lived in chronic long term pain with: severe intestinal disorders; back pain; severe arthritis; severe scoliosis (which has resulted in him being unable to stand upright); double knee problems (so painful that he cannot walk); and severe heart problems for which he refused heart surgery. 1 AA 78-82. Over the years Mr. Magney had been prescribed a long list of medications in the attempt to control his chronic pain and chronic health conditions. At the time of his hospitalization, he was prescribed: Morphine; Lorazepam;

Digoxin; Bruproplon; Terazosin; and Carvedilol. His use of Vicoden to manage chronic pain spanned over twenty years. His wife was unsure how long he had been prescribed morphine, but stated that this prescription was through the VA and that he had been taking the prescribed morphine for chronic pain for quite some time. 1 AA 78-82.

4. Over the same period of years, Mr. Magney also suffered from serious intestinal disorders which were acute in nature and which had, over time, grown persistently worse. Mr. Magney refused treatments for this disorder along with refusing treatment and surgery for his heart and other problems. Mr. Magney was adamant that he make his own medical choices. When his intestinal problems flared up, he withdrew to his bathroom for hours and sometimes days because of his persistent pain and diarrhea. 1 AA 78-82.

5. Mr. Magney visited the Veterans Administration ("V.A.") clinic in Eureka, California, approximately two times per year for blood tests, as recommended for the chronic pain management and opiate medications. 1 AA 79:17-20.

6. On February 21, 2015, after initially being taken, by ambulance to Redwood Memorial Hospital, Mr. Magney was transferred to a larger sister hospital, St. Joseph Hospital, in Eureka, California. 1 AA

80:7-10.

7. The decision to place Mr. Magney on comfort/palliative care was made by Mr. Magney and his team of primary/treating physicians at St. Joseph Hospital including Dr. Stephanie Phan ("Dr. Phan") and his cardiologist. Dr. Phan was the primary treating physician at the time palliative care had been ordered for Mr. Magney. RT 2-18, 71:14-22. Mr. Magney's team of primary/treating physicians included Dr. Stephanie Phan, Dr. Frank A. Zazueta, and Dr. Pundit Sarna (Mr. Magney's cardiologist). 1 AA 80:19-24, 94-97, 79:26-28, 80:1-5, 80:17-20. *See also*: RT 2-18, 88:15-28; 80:1-28; 90:1-29; 91:1-28; 92:1-28; 93:1-28; 94:1-28; 95:1-6.

8. This recommendation for end-of-life palliative care was based upon: 1) the prognosis of his team of primary/treating physicians that Mr. Magney was terminally ill and had no prospect of any meaningful recovery; 2) Mr. Magney's repeated requests that life prolonging medications be withheld because of his deeply held religious views; and 3) the express terms of his AHCD. 1 AA 94:1-3; RT 61:6-14. Under this plan, the team of primary/treating physicians would only prescribe antibiotics for Mr. Magney's diarrhea, to keep him as comfortable as possible. RT 2-18, 89:21-28; 90:1-3. See also 1 AA 94:26-28, 95:1-28, 96:1-9.

9. Sometime between March 10 and March13, 2015, Nurse

Ringwald (a public health nurse with the Department of Health and Human Services, Adult Protective Services) and Dr. Phan (Mr. Magney's primary treating physician) communicated by telephone. During this conversation, Nurse Ringwald told Dr. Phan that Nurse Ringwald had seen Mr. Magney on two occasions and that, according to Nurse Ringwald, Mr. Magney was inconsistent in wanting to discontinue life-prolonging medications. Dr. Phan informed Nurse Ringwald that discontinuing all but Mr. Magney's diarrhea medication was, given Mr. Magney's prognosis, a medical decision made in consultation with Mr. Magney and his team of primary/treating physicians at St. Joseph Hospital. Dr. Phan also informed Nurse Ringwald that this medical decision was consistent with Mr. Magney's repeated wishes made at a time when Mr. Magney was medically competent to make that decision. 1 AA 95:6-20; RT 2-18, 79:1-22. Dr. Phan also told Nurse Ringwald that this decision was consistent with Mr. Magney's surrogate's wishes, his wife (Appellant), who understood what her husband's wishes were. 1 AA 95:21-28, 96:1-5. See also RT 2-18, 82:11-28, 83:1-28. Nurse Ringwald countered that Respondent APS had a "handful of incidents" where it had been successful in reversing end-of-life medical care decisions made by other patients. RT 2-18, 83:5-14.

10. On March 13, 2015, Respondent filed both its *Ex Parte*

Application (for the Temporary Order) and its Verified Petition with its accompanying Declaration of Ringwald. 1 AA 1-3, 4-27.[2/] The Verified Petition included a "To Whom it May Concern Letter" purportedly by Dr. Ramil Francisco, who Nurse Ringwald admitted at the hearing had, to her knowledge, only seen Mr. Magney one time at the V.A. the previous December 18, 2014. The Verified Petition also included a purported "Conservatorship" Capacity Declaration supposedly authored by Tanya Tom, Ph.D., who was not a medical doctor, not licensed to practice psychology in California outside of the V.A. system, and who was unknown to both Mr. Magney and Appellant before she appeared uninvited in Mr. Magney's hospital room at St. Joseph Hospital. 1 AA 20; RT 2-18, 51:11-12, 51:21; 1 AA 83:13-22, 80:25-28, 81:1-4, 82:9-11.

11. The Verified Petition was silent as to the issue of standing. Further, it omitted the medical records of St. Joseph Hospital, the hospital actually treating Mr. Magney, and omitted all information concerning diagnosis, prognosis, and treatment decisions of the team of treating/primary physicians and specialists (who had been treating Mr. Magney for many weeks) along with their treatment decision. 1 AA 4-27.

[2/] RT 2-18, 41:23-27, 51:14-18, 51:26-28, 52:1-4, 57:23-27, 59:25-28, 60:1-28, 61:1-28, 62:1-3, 64:4-8. *See also*: RT 77:3-28, 78:1-11, 80:9-18, 81:4-11.

12. On March 13, 2015, Respondent's *Ex Parte* Application and Temporary Order, based entirely upon the Verified Petition and Declaration of Ringwald, was signed by Judge Timothy Cissna. Respondent then immediately used this Order to force intravenous medications and other medical treatment on Mr. Magney against his wishes, against his AHCD, against Appellant's instructions, and against the treatment recommendations of his team of primary/treating physicians at St. Joseph Hospital. 1 AA 1-3, 78-82, 94-97; RT 2-18, 70-105, 108-158.

13. Respondent omitted from the Verified Petition that Nurse Ringwald was specifically told by Dr. Phan, that the medications Respondent sought to be court-ordered had been withdrawn on the medical advice of Mr. Magney's team of primary/treating physicians (Dr. Phan, Dr. Zazueta, and his cardiologist, Dr. Sarna) both for medical reasons and "standard of care" reasons (there being no chance at meaningful recovery), and because of Mr. Magney's strong religious convictions against life-prolonging treatments. 1 AA 1-27, 94:21-28, 95:1-28, 96:1-5; 5 AA 680:20-26; RT 71:14-22, 81:6-14; 82:25-28, 83:1-14.

14. At the hearing on whether there was reasonable cause to have filed the Verified Petition on April 10 and 13, 2015, Dr. Phan testified that on March 14, 2015, she recorded her medical team response and Mr.

Magney's response to the forced medication of Mr. Magney:

DNR

Comfort care (with plan to transfer to SNF for hospice) was revoked given court order placed by APS to resume treatment with antibiotics for endocarditis, decubitus ulcers, and any sepsis condition, against the wishes of pt himself, pt's current surrogate decisionmaker (his wife), and the medical team. pt remains DNR. Again, Pt w/ native mitral valve & likely aortic valve endocarditis in the setting of multiple debilitating comorbidities including decubitus ulcers, profound weakness, & malnutrition. Per 2 different discussions w/ Pt himself last weekend, he no longer desired continued treatment for his medical conditions and wished that all non comfort-related therapy be discontinued. Of note, Pt was evaluated by Cardiology on 2/24/15 during this admission w/ recommendations for palliative care involvement.

Subjective

Date/Time of Documentation

Service date/time

Mar 14, 2015 13:11

Subjective

No overnight events. RN in room during interview today. Pt reports pain at

bilateral hips & generalized pain that is poorly localized. Has pain primarily on movement including being turned in bed. Wife in room during interview as well. "I've been in pain so long, it's hard for me to remember a time when I'm not in pain. And I've been taking pain meds for so long that I only remember being on Morphine & Ativan before coming in here. I don't always remember what I say and I think it's because of the pain meds and also because of the pain." "I've been told I have an infection in my heart and I was getting Abx for that. I'm a born again Christian, just like my wife is, and I don't know why people are constantly coming in to question what she's doing. That makes me wonder about what they want with me and my wife. We've been together for at least 20 years and she knows me by now." 3 AA 278; RT 87-98, 156-157.

15. At the hearing, Dr. Phan also testified that on March 15, 2015, she recorded both her medical team response and Mr. Magney's response to the forced medication of Mr. Magney:

#DNR

Comfort care (with plan to transfer to SNF for hospice) was revoked given court order placed by APS to resume treatment with antibiotics for endocarditis, decubitus ulcers, and any sepsis condition, against the wishes of Pt himself, Pt's current surrogate decisionmaker (his wife), and the

medical team. Pt remains DNR Again, Pt w/ native mitral valve endocarditis in the setting of multiple debilitating comorbidities including decubitus ulcers, profound weakness, & malnutrition. Pt's expressed wishes have been that he not undergo treatment to prolong life. He only wishes to have his pain treated. Regardless of a h/o memory deficit, there is a question of whether meaningful recovery would occur with treatment of his conditions, in their totality. Of note, he was evaluated by Cardiology on 2/24/15 during this admission w/ recommendations for palliative care involvement. Pt was also evaluated by Dr. Zazueta, who documented that hospice would be appropriate for this Pt.

Subjective

No overnight events. RN Stephen in room during interview today. Reports pain at hips and legs as well as generalized pain. "I don't want to be treated if I am sick. I don't want anything will prolong my life. I just want this pain to be taken care of and I'll be happy. My wife and I are born-again Christians and we've talked about this before, and we both agree on this." Reports pain on being shifted in bed. 3 AA 273-74; RT 87-98, 156-57.

16. At the hearing, Dr. Phan also testified that on March 16, 2015, she recorded her medical team response and Mr. Magney's response to the forced medication of Mr. Magney:

#DNR

Comfort care (with plan to transfer to SNF for hospice) was revoked given court order placed by APS to resume treatment with antibiotics for endocarditis, decubitus ulcers, and any sepsis condition, against the wishes of pt himself, pt's current surrogate decisionmaker (his wife), and the medical team. pt remains DNR Again, Pt w/ native mitral valve endocarditis in the setting of multiple debilitating comorbidities including decubitus ulcers, profound weakness, & malnutrition. Pt's expressed wishes have been that he not undergo treatment to prolong life. He only wishes to have his pain treated. Regardless of a h/o memory deficit, there is a question of whether meaningful recovery would occur with treatment of his conditions, in their totality. Of note, he was evaluated by Cardiology on 2/24/15 during this admission w/ recommendations for palliative care involvement. Pt was also evaluated by Dr. Zazueta, who documented that hospice would be appropriate for this Pt. 3 AA 268: RT 87-98, 156-157.

17. At the hearing, Dr. Phan testified that she found: 1) Mr. Magney had, at the time he made the decision for palliative care, the capacity to make his own health decisions (RT 79:6-22, 80:22-28-81:1-2.); and 2) Appellant was acting consistently with both her husband's wishes and the team of primary/treating physicians' (including his cardiologist)

recommended treatment plan. Dr. Phan testified that she specifically informed Nurse Ringwald of Mr. Magney's capacity to make medical decisions, that the treatment plan was agreed to by all of Mr. Magney's treating/primary doctors and specialists, and that it was consistent with Mr. Magney's AHCD. 5 AA 680:20-26; RT 83:26-28, 84:1-2.

18. Nurse Ringwald testified that Respondent withheld the information it had obtained from Dr. Phan not only because it disagreed with the doctors at St. Joseph Hospital and Mr. Magney's AHCD, but because Nurse Ringwald and Respondent believed his AHCD was an impediment to some unnamed "investigation" she claimed was underway, and, instead alleged that a V.A. doctor, Dr. Francisco, was Mr. Magney's current treating physician, even though Respondent and Ringwald knew he was not. Respondent also knew that Dr. Francisco had not seen Mr. Magney since December 18, 2014. RT 51:11-12, 51:21, 71:14-28, 72:1-16, 73:20-28, 74:1-13, 76:27-28, 77:1-16, 91:10-23, 92:27-28, 93:1-2, 93:17-20.

19. At the hearing on whether there was reasonable cause to have filed the Verified Petition on April 10 and 13, 2015, Nurse Ringwald admitted that 1) she intentionally omitted the information regarding Dr. Phan and Mr. Magney's team of physicians who were currently treating him

because Respondent disagreed with Mr. Magney's decisions and those of the doctors who had been treating him for many weeks; and 2) that she and Respondent wanted the judge to issue the Temporary Order because she and Respondent believed that Nurse Ringwald's idea of what was in Mr. Magney's "best interests" prevailed over his AHCD and the treatment plan of his treating physicians. 1 AA 1-27; RT 76-81.

20. Respondent did not at any time proffer any evidence of any type of ongoing criminal investigation.

21. From March 13, 2015, until the lower court vacated the Temporary Order on April 2, 2015, Mr. Magney was forced to undergo long term intravenous drug treatment which was prolonging his pain and suffering and which was not only medically futile but also against his wishes. He would survive longer, but in great pain, and still was imminently terminal. 1 AA 3, 157-158; RT 84:3-38, 85:1-28, 86:1-5, 155:10-24, 157:13-28; 158:1-9.

22. On April 3, 2015, the Public Guardian at the request of Ringwald and APS filed a Petition for Conservatorship in PR150089, by which it obtained temporary conservatorship and at the request of Ringwald and Respondent, the Public Guardian again obtained complete medical decision-making authority over Mr. Magney in disreqard of Mr. Magney's

AHCD and Appellant. 4 AA350-360.

23. In its *Verified Petition* and *Ex Parte* Application, Respondent failed to allege any legal basis by which Respondent had standing to bring its Verified Petition and/or to seek temporary orders regarding Mr. Magney's medical treatment. 1 AA 1-27; RT 2-18, 170-196.

24. At the *hearing* on the award of attorneys fees for defending against the Verified Petition and *Ex Parte* Application,[3/] Respondent failed to present any testimony or evidence regarding how it had standing (on direct, cross-examination, redirect and re-cross-examination), nor did it present any testimony or evidence regarding which precise directives of Mr. Magney's ACHD Respondent contended were not being followed by Appellant, as specifically required by Probate Code section 4767. 1 AA 1-27; RT 2-18, 170-196.

25. Prior to ruling on the request for fees in CV150159, the court dismissed the conservatorship petition on May 22, 2015 finding Mr. Magney was competent.[4/] 5AA680-685.

[3/] RT 41:23-27, 51:14-18, 51:26-28, 52:1-4, 57:23-27, 59:25-28, 60-61, 62:1-3, 64:4-8. *See also*: RT 77:3-28, 78:1-11, 80:9-18, 81:4-11.

[4/] On May 22, 2015, the lower court ruled from the bench in the conservatorship matter: "[W]ith the exception of what I believe was the intentional failure to provide relevant information to the magistrate when seeking a temporary order in case ending in CV150159 by a representative of Adult Protective Services, which I'll deal with in a different case, I think

III. STATEMENT OF APPEALABILITY .

Generally, any post-judgment order, awarding or denying costs and/or attorney fees, is appealable under Code of Civil Procedure section 904.1(a)(2). *Whiteside v. Tenet Healthcare Corp.*, 101 Cal. App. 4th 693, 706 (2002). No appeal may taken except from an appealable order or judgment as defined in statutes and developed case law. *Lavine v. Jessup,* 48 Cal. 2d 611, 613 (1957). "The order of dismissal entered on the minutes of the court constitutes a final judgment from which an appeal can be taken." (Citations omitted). *Legg v. Brody,* 187 Cal. App. 2d 79, 83 (1960). "A post judgement order which awards or denies costs or attorney's fees is separately appealable." (Citations omitted). *Krug Real Estate Investments, Inc. v. Praszker,* 220 Cal. App. 3d 35, 46 (1990).

Concurrently with the dismissal of the Verified Petition, the lower court retained jurisdiction to hear the issue of the award of attorney fees and costs pursuant to Probate Code section 4771, and on April 10 and 13, 2015, held an evidentiary hearing under this retained jurisdiction. 1 AA 157-158; RT 21-201. The court issued its ruling on July 22, 2015, denying Appellant's request for attorney fees. 3 AA 328-335. Appellant appeals from the lower court's final denial of an award of attorney fees and costs to

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everybody in this case is well-meaning. 5 AA 680:20-26.

Appellant.

IV. STANDARD OF REVIEW.

Review of a court's conclusion regarding the legal basis, or lack thereof, for an award of attorney's fees is *de novo* when issues to be considered are questions of law. *Butler-Rupp v. Lourdeaux,* 154 Cal. App. 4th 918, 923 (2007); *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal. App. 4th 671, 677;" *Torres v. City of San Diego,* 154 Cal. App. 4th 214, (2007). *De novo* review is warranted where the determination of whether the criteria for an award of attorney fees and costs have been satisfied amounts to statutory construction and a question of law. *Connerly v State Personnel Board,* 37 Cal. App. 4th 1169, at 1175, [quoting *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal. App.4th 132, 142].

Review of the court's factual determinations regarding an award of attorney's fees are reviewed under the abuse of discretion standard.[5/] An abuse of discretion occurs where the lower court exceeds the bounds of

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[5/] The lower court's ruling of July 22, 2015, by what appears to be a typographical error, referred to Probate Code section 4771(a) as "Probate Code section 477(a)." Under Probate Code section 4771, "[i]n a proceeding under this part commenced by the filing of a petition by a person other than the agent or surrogate, the court may in its discretion award reasonable attorney's fees to . . . [t]he agent or surrogate, if the court determines that the proceeding was commenced without any reasonable cause." Prob. Code § 4771.

reason in making or denying of an award of attorney fees. *Maughan v. Google Tech., Inc.,* 143 Cal. App. 4th 1242, 1249-50 (2006). Thus, if an appellant demonstrates that the lower court's decision regarding factual determinations was arbitrary or irrational, the lower court's ruling should be reversed. *Id.*

V. DISCUSSION.

Probate Code section 4771 provides as follows:

> In a proceeding under this part commenced by the filing of a petition by a person other than the agent or surrogate, the court may in its discretion award reasonable attorney's fees to . . . [t]he agent or surrogate, if the court determines that the proceeding was commenced without any reasonable cause.

Prob. Code § 4771.

The lower court abused its discretion in failing to award attorney fees to Appellant. Prob. Code § 4771. First, because Respondent had no standing to file its Petition or to seek the Temporary Order, the lower court could not, as a matter of law, find that Respondent had filed its Petition or its *Ex Parte* Application with reasonable cause. Second, because Appellant admitted to the lower court that Nurse Ringwald's Declaration, upon which it had based its Verified Petition and upon which it had obtained the Temporary Order, had not (without notice to the court) "been submitted for the truth of the matter asserted" but instead only for the "state of mind" of

Nurse Ringwald, thereby establishing that Respondent knew, at the time it filed its action, that it had no factual basis for proceeding, the lower court could not, as a matter of law, find that Respondent had a "reasonable basis" for filing its Petition or its *Ex Parte* Application. Finally, because Respondent, through Nurse Ringwald, flatly admitted that it had deliberately withheld from the court facts that it knew directly contradicted the position it took in its Verified Petition and *Ex Parte* Application, it is incomprehensible that the lower court could find that Respondent had any "reasonable basis" for filing its action.

A. The Intent and of the Health Care Decisions Law Was to Allow Individuals to Determine for Themselves End-of-Life Decisions.

The entirety of this action must be viewed through the prism of the California's Health Care Decisions Law, the fundamental purpose of which is to allow the individual to control, in advance, decisions regarding his or her health care. The HCDL codifies California State policy to respect the privacy, personal dignity, and individual autonomy of its citizens, including their individual autonomy in medical decision-making. The HCDL specifically recognizes "the fundamental right" of individuals "to control the decisions relating to his or her own health care, including the decision to

have life-sustaining treatment withheld or withdrawn." Prob. Code § 4650(a); *see also* 22 C.C.R. § 70707(b)(6). In codifying the HCDL, the California Legislature recognized that "[m]odern medical technology has made possible the artificial prolongation of human life beyond natural limits" to the point where continued health care does not improve the prognosis for recovery and, as such, "may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person." Prob. Code § 4650(b). Hence, the Legislature directs that, "[i]n the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment." Prob. Code § 4650(c).

The only "controversy" regarding the decision for palliative care was created by Respondent. In so doing, Respondent simply disregarded Mr. Magney's rights, and disregarded the intent of the Legislature in creating the Health Care Decisions Law. Not unlike some of the most egregious cases of abuse of process, some of which have alleged elder abuse simply to achieve the desired end results of the "abuser of the process",[6/] Respondent, through Nurse Ringwald's subsequently admitted "state of mind"

[6/] *See* Treated with Respect: Enforcing Patient Autonomy by Defending Advance Directives, Carol J. Wessels, Marquette Elder's Advisor, Vol. 6, Issue 2, Spring, Article 3, page 240.

declaration and the deliberate omission of key material information (5 AA 680:20-26), sought to and did, while the Temporary Order was in effect, deliberately create an "end run" around Mr. Magney's constitutionally and statutorily protected fundamental right to determine his own end-of-life medical care. As a result of Respondent's malfeasance, Appellant was forced to incur substantial attorney fees and costs to protect her husband's rights, under the most stressful and heartbreaking circumstances she could endure.[7/] 4 AA 471-479, 482-485; 5 AA 547-594. The lower court erred.

B. Because Respondent Lacked Standing to Bring its Petition or Seek the Temporary Order, the Petition and *Ex Parte* Application Were, As a Matter of Law, Commenced Without Reasonable Cause.

The lower court erred in finding that Respondent brought the Petition and its *Ex Parte* Application with "reasonable cause." In the first instance, no action can be obtained under the HCDL where, as here, the patient made his decision with his doctors while he was competent – a state of facts known to Respondent but deliberately not told to the lower court.

[7/] This continued throughout the additional defense of the conservatorship matter, PR150089, wherein the same court found Mr. Magney competent and dismissed the petition to appoint a conservator.

1 AA 13-18, 94-97; RT 70-105, 108-158. Second, as a matter of law, Respondent could not proceed under the Health Care Decisions Law because it had no standing to do so. The HCDL identifies only two specific governmental agencies that are authorized to file actions, and Respondent is indisputably not authorized to do so. Because the specific governs the general, Respondent could not reasonably rely on a general reference in the statute to "interested parties and friends" to claim standing. Finally, Respondent's last minute attempt to claim standing under some vague reading of the Welfare and Institutions Code is similarly without merit. Because Respondent indisputably had no standing under any plausible theory, the lower court could not, as a matter of law, have found that Respondent had "reasonable cause" to bring its action under the HCDL.

1. Because Mr. Magney Made His Decision With His Physicians While He was Competent, No Basis Existed for Respondent to Bring Any Action Under the HCDL.

The HCDL allows patients to create health care directives articulating the types of treatment the patient wishes to receive or forego, should the patient become incompetent. Prob. Code §§ 4600-4743. The HCDL specifically excludes from its provisions those patients, like Mr.

Magney, who are deemed by their treating physicians to be competent at the time a treatment decision is made. Probate Code section 4658 provides, in relevant part, as follows:

> (a) Except as otherwise provided, this division applies to health care decisions for adults *who lack capacity* to make health care decisions for themselves.
>
> (b) This division does not affect any of the following:
>
> (1) The right of an individual to make health care decisions while having the capacity to do so. . .

Probate Code § 4658 (emphasis added).[8/]

Because Mr. Magney made his life decisions while competent, no basis existed for anyone to bring a petition under the HCDL on any basis. 1 AA 13-18, 94-97; RT 70-105, 108-158. On this basis alone, the lower court could not find that Respondent had "reasonable cause" to bring its Petition and *Ex Parte* Application.[9/]

[8/] 1 AA 95:6-20; RT 79:1-22, 150:25-27.

[9/] "A proceeding under this part is commenced by filing a petition stating facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of any advance health care directive in question." Probate Code § 4767. At page 17-19 of its Order of May 6, 2015 in the sister Magney Conservatorship matter, the lower court acknowledged this requirement: "Pursuant to Probate Code section 4767, the petition is required to set forth facts as to why the petition is authorized under the Health Care Decisions Law and the ground for the petition." 4 AA 490-494.

2. Respondent is Indisputably Not One of the Two Government Entities Authorized to Bring an Action Under the HCDL.

To bring a petition under the HCDL, the petitioner must, at the outset, state the basis for its standing. Prob. Code § 4767 ("A proceeding under this part is commenced by filing a petition stating facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of any advance health care directive in question.")[10/] Respondent knew at the outset that it was not so authorized as only two governmental entities are expressly specified as having the authority to file a petition under the HCDL: the "public guardian" and the "court investigator." Prob. Code §§ 4765(f), (g). Respondent is neither. As a result, Respondent indisputably had no standing to bring its Petition or its *Ex Parte* Application. Because Respondent had no standing, no basis existed for the lower court to even begin to find a "reasonable basis" for Respondent's action.

Moreover, the briefing on the issue of the lack of reasonableness in

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[10/] At page 17-19 of its Order of May 6, 2015 in the sister Magney Conservatorship matter, the lower court acknowledged this requirement: "Pursuant to Probate Code section 4767, the petition is required to set forth facts as to why the petition is authorized under the Health Care Decisions Law and the ground for the petition." 4 AA 490-494.

the filing of the Petition included two reports from the Court Investigator, James Dawson ("Court Investigator Dawson"), who was appointed to investigate the Magney matter in a sister conservatorship proceeding and to report back to the lower court in the conservatorship matter (which had been filed by Respondent concurrently with its dismissal of the Verified Petition in this matter). 4 AA 365-368, 471-479, 482-485. Court Investigator Dawson wrote:

> EVALUATION:
> Mr. Magney has a valid Health Care Directive in place, naming his wife, Judith Magney, as his agent. Mr. Magney has expressed, many times, and to different treating physicians, his desire to discontinue extensive medical treatments. Mr. Magney's rights to have his desires for his end of life medical treatment have been seriously abridged. Mr. Magney went to the trouble to have an Advance Health Care Directive set in place prior to his current medical issues, trusting that his wife would carry out what she knew to be his wishes. Now the remaining days of this life spent are being spent in a legal battle over treatment he does not want to receive. Mr. Magney is dying, and having to go through this legal battle while going through the death process is inhumane, so say the least. Additionally, for Mrs. Magney, watching her husband die, having to defend his wishes in court is appalling.
>
> Recommendation:
> It is respectfully recommended the proposed conservatorship of the person and estate of Dick Magney be set aside and that Judith Magney continue in her sole role as Agent of Mr. Magney's Advance Healthcare Directive . . .

4 AA 478-479.

3. Respondent Was Not An "Interested Person or Friend" of Mr. Magney.

Apparently recognizing, when Appellant challenged the Petition and Temporary Orders, that it lacked standing to bring its Verified Petition, Respondent moved to withdraw its Verified Petition, but in its Reply to Appellant's motion for attorney fees and costs, vaguely referenced Section 4765(i), which allows a petition to be brought by "[a]ny other interested person or friend of the patient" as the basis for its standing. Prob. Code § 4765(i). No such basis exists.

Section 4765 does not define "interested person"; however, under Probate Code section 48(a), an "interested person" is defined as,

> (1) an heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
>
> (2) Any person having priority for appointment as personal representative.
>
> (3) A fiduciary representing an interested person.

Prob. Code § 48(a).

Respondent is none of the above. On this basis alone, Respondent's belated claim of standing fails. But even more to the point, under standard rules of statutory construction, the specific governs the general. Civ. Proc.

Code § 1859; Civ. Code § 3534. Had the Legislature intended to identify Respondent as one of the governmental entities that could bring an action under Probate Code Section 4765 it would have so stated. It did not. Had it intended that any governmental entity could bring an action by declaring itself an "interested person" or a "friend of the patient", its express specification of the public guardian or the court investigator as the governmental entities authorized to bring an action would be superfluous.

4. Respondent's Belated Reliance on Welfare and Institutions Code Section 15600(i) as the Basis for Standing is Misplaced.

In its Closing Argument in Opposition to Respondent's Request for Attorney's Fees (3 AA 318-325), as well as in oral argument to the lower court (RT 202-236), Respondent took a new tack, claiming that it had separate standing to file the Verified Petition based upon it's understanding of some vague "'intent of the Legislature" under the Welfare and Institutions Code. Respondent argued that it has authority to take any action it deemed necessary to protect an elder or dependent adult and correct the situation [so as] to ensure the individual's safety, citing Welfare and Institutions Code section 15600(i).

Respondent was and is again wrong. The California Elder Abuse

and Dependent Adult Civil Protection Act, contained in Welfare and Institutions Code sections 15600, *et seq*. (the "Protection Act") "despite its remedial purposes does not displace or alter fundamental legal and procedural principles generally applicable to civil actions." *Quiroz v. Seventh Ave. Center,* 140 Cal. App. 4th 1256, 1279 (2006). Those "legal and procedural principals" would include the specific standing requirements contained in Probate Code 4765. As set forth above, however, no basis for standing under Probate Code 4765 exists. Hence, Respondent's attempt to somehow bootstrap itself into standing through Section 15600(i) was without merit.

Even more to the point, section 15636(b) specifically provides that where Respondent lacks consent but believes an "elder or dependent adult is so incapacitated that he or she cannot legally give or deny consent to protective services," its only option is to "petition for temporary conservatorship or guardianship . . . in accordance with Section 2250 of the Probate Code." Prob. Code § 15636(b).[11/] What Respondent could not do

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[11/] In fact, Respondent was aware of this provision: In conjunction with the decision to abandon the Verified Petition under the HCDL, Respondent voiced the same selectively limited allegation to the Humboldt County Public Guardian ("Public Guardian") who employed the same selectively limited allegations as were alleged in Respondent's Verified Petition and Temporary Order in Case No. PR150089, as the basis for a Temporary and "Permanent" Conservatorship of the Person and Estate of Dick R. Magney.

when faced with a lack of consent for an alleged private APS investigation was to file its own petition under Probate Code section 4765. Because Respondent lacked standing under any theory, the lower court erred in failing to dismiss the Verified Petition outright and abused its discretion in failing to award Appellant her attorney fees and costs.

C. The Lower Court Erred in Finding Reasonable Cause for Filing the Petition Based Upon a Declaration and Testimony that Respondent Itself Contended Was "Not For the Truth of the Matter Asserted" But Only for Nurse Ringwald's "State of Mind".

In its order, the lower court characterized the Declaration of Ringwald, and her testimony (specifically proffered not for the truth of the matter asserted, but only for her "state of mind") as "facts" known to Respondent, and upon this basis found "reasonable cause" to file the Petition and *Ex Parte* Application. 3 AA 328-335. The lower court erred. "'Fact' means reality of events or things *the actual occurrence or existence* of which is to be determined by *evidence*. . ." *Markman v. Westview*

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4 AA 350-360, 381-384; 456-469. The "Permanent" Conservatorship, after trial, was denied by the lower court. RT 21-201.

Instruments, Inc., 52 F. 3d 967, 1009 (1995) (emphasis added). Here, even apart from its lack of standing, Respondent submitted no evidence whatsoever as to what specific directive was allegedly not being followed in Mr. Magney's AHCD. Instead, it simply claimed that it could bring its Verified Petition and seek the Temporary Orders on nothing more than Nurse Ringwald's "state of mind". The lower court erred.

1. By Respondent's Own Admission, There Were No "Facts" Known to Nurse Ringwald.

Included in the lower court's recitation of "facts known to petitioner," was information Respondent presented under multiple layers of hearsay, as well as references to documents which Appellant had formally objected to, but upon which the lower court never ruled regarding their admissibility or veracity.[12/] On the other hand, Appellant presented admissible evidence, including the testimony of Mr. Magney's primary treating physician, that not only contradicted Nurse Ringwald's so-called state of mind testimony, but which also established that Nurse Ringwald

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[12/] The Capacity Declaration - Conservatorship - of Tanya L. Tom, Ph.D. referenced in the "facts" relied upon by the lower court was objected to as hearsay in that proceeding when Respondent failed to produce Ms. Tom as a witness in that proceeding. In addition, Appellant moved to strike the Capacity Declaration because Ms. Tom did not testify, was not a medical doctor as required, nor was she licensed in the State of California.

knew at the time she filed the Verified Petition, supported by her Declaration, of actual facts that flatly contradicted what she verified in her Declaration as "true" under penalty of perjury.

The court erred in relying upon what it perceived as Nurse Ringwald's subjective intent instead of making its own determination of whether or not, based on all of the actual evidence presented at the hearing, any "reasonable cause" could exist for filing the Petition and *Ex Parte* Application. Boiled down, the lower court determined that, despite Nurse Ringwald's knowledge, before Respondent filed the Petition and *Ex Parte* Application, of the decision of Mr. Magney's team of treating physicians at St. Joseph's Hospital to provide him only palliative care; Mr. Magney's own confirmation of his decision to accept only palliative care; and of the terms of Mr. Magney's AHCD so instructing, Nurse Ringwald's factually irrelevant "state of mind" was, with nothing more, sufficient to establish "reasonable cause" for Respondent to file the Verified Petition and the *Ex Parte* Application.

A verified petition, however, does not simply "verify" that a person has a particular "state of mind". Instead,

> In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she

> believes it to be true; and where a pleading is verified, it shall be by the affidavit of a party . . . .

Civ. Proc. Code § 446(a) (emphasis added).

Nowhere in its Petition, its *Ex Parte* Application, or in Nurse Ringwald's Declaration did Respondent tell the court that any of its allegations were made on information and belief, or that they were submitted only for Nurse Ringwald's "state of mind". Even if it had, however, it could in no way have relied upon those "information and belief" or "state of mind" statements to even begin to sustain its pleadings, as allegations in a verified complaint made on information and belief will not sustain a petitioner's burden of proof. *Shearer v . Superior Court*, 70 Cal. App. 3d 424 (1977).

Nonetheless, the entire absence of evidence and the deliberate omission of actual evidence by Respondent was relegated to a mere footnote in the lower court's Order, in which it soft-shoed Respondent's failures, stating that "*[g]iven the basic and fundamental rights involved, the Court would expect the information received from Dr. Phan, a hospital physician caring for Mr. Magney, to be provided to the Court when the temporary order was sought".* (3 AA 334) The lower court did not, however, give either the deliberately omitted information or the complete lack of anything but Nurse Ringwald's "state of mind" testimony much

weight in its analysis of whether there was objective reasonable cause for Respondent to file its Verified Petition in the first instance. In doing so, the lower court erred.

2. The Lower Court Erred in Finding That Reasonable Cause to File a Verified Petition to Enforce a Health Care Directive Could Be Based upon Hearsay.

By the terms of its July 22, 2015, Order, the lower court based its denial of Appellant's motion for attorney fees and costs on the erroneous conclusion "that reasonable cause can be hearsay." The lower court reasoned, "I don't know that the same rules of evidence apply to the content of the petition on the issue of reasonable cause that apply to a hearing on which evidence is being presented in a courtroom." RT 41:23-27.

The lower court erred. The petition filed by Respondent was required to be verified as to the truth of the matters asserted in the Petition. Hearsay going to a declarant's state of mind is not evidence of anything other than "the declarant's then existing state of mind, emotion, or physical sensation". Evid. Code § 1250. Inadmissible hearsay does not create admissible facts, especially, when Respondent repeatedly averred to the lower court that the state of mind testimony was *not offered for the truth of*

the matters asserted in the petition or on the stand.

While Appellant can find no case on point defining "reasonable cause" with respect to Probate Code section 4771, by analogy to other situations: "Reasonable cause" requires that a *Sheldon Appel Co. v. Albert Oliker*, 47 Cal. 3d 863, 875 (1989), analysis be applied: "[T]he existence or absence of probable cause" is a "question of law to be determined by the court . . . ." 47 Cal. 3d 863, 875 (probable cause" in civil action of malicious prosecution).

Citing to the malicious prosecution case of *Sheldon Appel Co. v. Albert Oliker*, 47 Cal. 3d 863, 886 (1989), the court in *Mabie v. Hyatt*, 61 Cal. App. 4th 581, 595-596 (1998), opined that "the controlling test for determining whether a claim is supported by probable cause ... is whether, as an objective matter, 'any reasonable attorney would have thought the claim tenable.' . . . The answer depends upon the state of the law as well as the state of the facts. (*Ibid.* ["in evaluating whether or not there was probable cause for malicious prosecution purposes, a court must properly take into account the evolutionary potential of legal principles. (*See*, *e.g.*, Rest.2d Torts, § 675, com. f.)"].) Thus the question is whether the claim was "objectively tenable" (*Sheldon Appel*, *supra*, 47 Cal. 3d at p. 882) or "objectively reasonable . . . ."

Similarly, the court in *Roberts v. Sentry Life Insurance,* 76 Cal. App. 4th 375, 382 (1999), opined: "A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. ... Probable cause is present unless any reasonable attorney would agree that the action is totally and completely without merit."

"There is never any legitimate basis for pleading a claim unsupported by probable cause." *Mabie v. Hyatt,* 61 Cal. App. 4th 581, 595. By presenting a matter to the court, an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . ." that "[t]he allegations and other factual contentions have evidentiary support . . . ." Civ. Proc. Code § 128.7(b)(3) (Emphasis added).

"Evidence" is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Evid. Code § 140 (emphasis added). As here, "state of mind" testimony is expressly not submitted for "proof of the matter asserted." It therefore cannot "prove the existence or nonexistence of a fact." *See Jauregi v. Superior Court,* 72 Cal. App. 4th 931, 939 (1999). As a result, no "reasonable attorney" could understand that a declaration,

signed under penalty of perjury, but which is expressly stated to be offered only for Ringwald's "state of mind" could be used as "evidentiary support" for any claims asserted by Respondent. No reasonable attorney could file a petition without a whit of admissible evidentiary support for the allegations made therein. Civ. Proc. Code § 128,7(b)(3).

3. The Lower Court Erred in its Application of a Criminal Law Definition of Reasonable Cause.

In assessing the "reasonableness" of Respondent's filing a petition to countermand Mr. Magney's AHCD, the court erred both with the use and the application of what it believed to be the definition of "reasonable cause" in a criminal proceeding. *Ortega v. Superior Court*, 135 Cal. App. 3d 244, 256 (1982). This *Ortega* definition the lower court used was:

> Reasonable and probable cause. . .mean such a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. . . .

The lower court did not make its own determination of the "facts that would lead a person of ordinary caution or prudence," but instead determined that the so-called "state of mind" evidence selectively presented under the guise of Nurse Ringwald's Declaration could be considered as "facts" which justified the filing of the Verified Petition and Ex Parte Application. The court erred in treating the "state-of-mind" evidence as

facts.

In addition, the court's allowance of hearsay to establish Nurse Ringwald's state of mind based upon the assertion that it is permissible to consider hearsay for probable cause to arrest, ignores the problem that the petition was required to be verified and the declaration that was made under penalty of perjury. By analogy, under applicable criminal procedure, "the integrity of the judicial system" requires that the intentional misrepresentations or those made with reckless disregard of the truth be stricken and probable cause retested. *See People v. Truer*, 157 Cal. App. 3d 345 (Cal. App. 5th Dist. 1984). Purposeful omissions are treated like intentional falsehoods and should be added in and probable cause retested.

In the matter currently before the court, Respondent put on no evidence whatsoever regarding facts it verified that supported the filing of the Petition and Ex Parte Application to the lower court. The only admissible evidence proffered on the issue was by Appellant, and was the testimony of Dr. Phan. Dr. Phan's statements were not only known to Respondent at the time of filing the petition, but Dr. Phan directly undermined and contradicted what was in the Verified Petition and Ex Parte Application, which is precisely why Nurse Ringwald testified that she intentionally kept what Dr. Phan told her from the court. RT 159-196.

4. The Lower Court Erred in Apparently Applying a "Malice" Standard to Probate Code section 4771.

Because the issue of "reasonable cause" in civil actions is most often discussed in malicious prosecution cases, the lower court erred in apparently having read a "malice" requirement into Probate Code section 4771. While "reasonable cause" is viewed on an objective basis, "malice" concerns a person's subjective intent in initiating, or continuing to prosecute, an action. *Zamos v. Stroud,* 32 Cal. 4th 958, 971 (2004); *Soukup v. Law Offices of Herbert Hafif,* 39 Cal. 4th 260, 292 (2006); *Sheldon, supra*, 47 Cal. 3d at p. 874. A litigant acts with malice only if he or she acts primarily for an improper purpose, that is, a purpose other than to secure a proper adjudication on the merits. *Downey Venture v. LMI Ins. Co.,* 66 Cal. App. 4th 478, 494 (1998).

Under the law, "reasonable cause" and "malice" are very different findings. *Sheldon, supra*, 47 Cal. 3d at page 878 ("the 'probable cause' element in the malicious prosecution tort plays a role quite distinct from the separate 'malice' element of the tort.") "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is

untenable under the facts known to him." *Sangster v. Paetkau*, 68 Cal. App.4th 151, 164–165 (1998). "In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim." *Mabie v. Hyatt*, 61 Cal. App.4th 581, 597 (1998). "Probable cause, moreover, must exist for every cause of action advanced in the underlying action." *Soukup v. Law Offices of Herbert Hafif,* 39 Cal.4th 260, 292 (2006).

In this case, the "state of mind" declaration by Nurse Ringwald was not supported by any facts and was directly contradicted by Dr. Phan, who testified that she informed Nurse Ringwald prior to the filing of the Verified Petition, Declaration, and *Ex Parte* Application, that Mr. Magney was competent, that he objected on religious grounds to the procedure that Respondent wanted because he did not want his pain and suffering to be prolonged, and that the transfer to pallative care was a medical decision made by Mr. Magney's primary treating physicians. 1 AA 94-97; RT 70-105, 108-158.

Unlike malicious prosecution, Probate Code section 4771 requires objective reasonableness to have filed the Petition to enforce a health care directive and it contains no malice requirement. Prob. Code § 4771.

VI. CONCLUSION.

Mr. Magney and Appellant, his wife, are elderly and on limited incomes. Mr. Magney is still terminal, his suffering has been prolonged against his wishes, his AHCD, and the course of treatment prescribed by his specialists and treating physicians which were usurped by Respondent. His wishes and AHCD were usurped not because any such directive was not being followed but because Mr. Magney's wishes, his AHCD, and doctors course of treatment was not compatible with what Respondent determined to be in the best interests of their alleged claimed "investigation".

Appellant, Mr. Magney's wife, sought below only to make sure that her husband's right to pass away on his own terms was followed. Respondent was not and is not, under the law, allowed to usurp any elder or dependent adult's rights over their own medical treatment, including end-of-life decisions. Mr. Magney, alone, possessed the choice to determine whether he wants his pain and suffering to be prolonged when he has no chance at any "meaningful" recovery. Mr. Magney prepared his AHCD and he informed Appellant (his wife and surrogate), his sister (his alternate surrogate), and his doctors of his wishes.

Respondent had no standing to file the Verified Petition and the *Ex Parte* Application. Respondent had no objectively reasonable cause, after

consideration of admissible evidence, to have brought the Verified Petition on the facts sworn to by Nurse Ringwald in the Petition and associated *Ex Parte* Application, by which it obtained a court order for total medical control over Mr. Magney at the expense of Mr. Magney's wishes, his surrogate's wishes, and the course of treatment prescribed by the doctors (primary/treating and specialists) who were actually treating Mr. Magney.

It was not objectively reasonable for Respondent to have brought a petition when such petition was not based upon any admissible evidence (facts), but only upon the state of mind of an APS worker who disagreed with Mr. Magney's decisions, Mr. Magney's AHCD, Mr. Magney's treating physicians, and Mr. Magney's appointed agents. Accordingly, the court should reverse the lower court's finding that it was reasonable for Respondent to file the petitions based upon the facts, or lack thereof. The lower court's denial of Appellant's attorney fees must be reversed and the matter be remanded to the lower court with instructions to award Appellant her attorney fees and costs.

Dated: December 8, 2015 HARLAND LAW FIRM LLP

By: */s/ Allison G. Jackson*
Allison G. Jackson

Attorneys for Appellant
JUDITH C. MAGNEY

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 9,326 words as counted by the Corel WordPerfect version X6 word-processing program used to generate this brief.

Dated: December 8, 2015 HARLAND LAW FIRM LLP

By: */s/ Allison G. Jackson*
Allison G. Jackson

Attorneys for Appellant
JUDITH C. MAGNEY

PROOF OF SERVICE

I am a citizen of the United States, employed in the County of Humboldt, over the age of 18 years, and not a party to this action. My business address is 622 H Street, Eureka, California, 95501-1026.

On this date, I served the following on the interested parties listed below:

APPELLANT'S OPENING BRIEF

☒ **(By Mail)** I placed a copy of each document in an envelope for each addressee, sealed the envelope and, with postage thereon fully prepaid, placed each envelope for deposit with the U.S. Postal Service at Eureka, California.

I am readily familiar with this firm's practice for processing items for mailing or overnight delivery; each item shall be deposited with the U.S. Postal Service or with an overnight delivery service this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: December 8, 2015

/s/ Paul Heagerty
Paul Heagerty

HUMBOLDT SUPERIOR COURT
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