

IN THE SUPREME COURT OF THE STATE OF ALASKA

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| In the Matter of the Protective |) | |
| Proceedings of: |) | |
| |) | |
| H.T. |) | Supreme Court No.: S-18821 |
| |) | |
| |) | |

Trial Court Case No. **3AN-23-00671 PR**

**THE STATE OF ALASKA’S RESPONSE TO THE
OFFICE OF PUBLIC ADVOCACY’S PETITION FOR REVIEW**

The Office of Public Advocacy (“OPA” or “the agency”) is Alaska’s public guardian—the “guardian of last resort” for vulnerable Alaskans.¹ Yet the agency seeks to openly ignore a court order appointing it as a guardian on the ground that the superior court lacks personal jurisdiction over the agency. The consequence of this argument is that OPA may ignore any guardianship order for any reason (or for no reason), and the ward is left with little recourse and no guardian. This cannot be squared with the guardianship statutes, which say that a “court may order the public guardian to act as” a guardian.² This language automatically confers personal jurisdiction over the agency. And the statute is constitutional because agencies like OPA have no due process rights.³

The Court should grant the petition and clarify (1) the guardianship statutes confer personal jurisdiction over OPA and (2) this framework does not violate due process as

¹ AS 13.26.710(a); *In re M.K.*, 278 P.3d 876, 882 (Alaska 2012) (“The State does not appear to contest—nor could it reasonably—that the public guardian exists as guardian of last resort.”).

² AS 13.26.710(b).

³ *See Alaska State Comm’n for Hum. Rts. v. United Physical Therapy*, 484 P.3d 599, 608 (Alaska 2021).

applied to OPA.

I. Background

The Department of Law was not a party to the proceedings below. This pleading is being filed pursuant to the Court’s invitation to respond to OPA’s petition for review, which challenged the constitutionality of a state statute.⁴ As such, the Department has limited access to the case file. For the purpose of this petition, the Department relies on the facts and procedural history from OPA’s petition.

Essentially, the superior court appointed OPA guardian and ordered it to accept the appointment, but OPA declined. This began when a magistrate held a routine guardianship hearing. OPA participated in the hearing “to inform the court that it was unable to accept” the proposed guardianship. [Pet. 2] The magistrate nonetheless recommended that the court appoint OPA. [Pet. 2] The magistrate “provided a date by which to file objections”; OPA declined to do so, and it also did not accept the guardianship.⁵ [Pet. 2] Soon thereafter, the petitioner moved to compel OPA to accept the guardianship. [Pet. 2] OPA responded by filing a motion to dismiss for lack of personal jurisdiction. [Pet. 2] The court denied OPA’s motion on the ground that the agency “does not have statutory authority to refuse this appointment when the court found the Respondent needed a full guardian and there were no alternatives to the public guardian.” [Pet. Exh. (7/25/23 Order)] The court also held that OPA waived its jurisdictional

⁴ See Alaska R. App. P. 514(e); Court Order, S-18821 (Aug. 31, 2023).

⁵ See AS 13.26.261.

argument by not objecting to the proposed guardianship. [Pet. Exh.] The court ordered OPA to accept the guardianship, and the agency petitioned for review instead.

II. Argument

The Department of Law agrees that this petition warrants immediate review.⁶ Nothing stops OPA from using this tactic in any future matter. And OPA’s position leaves some of the most vulnerable Alaskan’s without help to access essential—often life-sustaining—services. It also leaves both other state agencies (like Adult Protective Services) and private parties (like the petitioner Providence) scrambling to fulfill statutory obligations imposed on OPA by the legislature. This is untenable.

OPA makes a statutory argument and a constitutional argument—both have flaws. First, OPA argues that courts lack personal jurisdiction over the agency until it affirmatively accepts a guardianship. [Pet. 6-9] But the agency fails to address or acknowledge the statute expressly authorizing courts to “order the public guardian to act as [a guardian].”⁷ This statute means nothing if OPA can simply ignore any guardianship order for lack of personal jurisdiction. Second, OPA argues that the guardianship statutes violate the agency’s due process rights. But the agency does not have due process rights under either the federal or state constitution.⁸ And OPA lacks standing to litigate the

⁶ See Alaska R. App. P. 402(b). Postponement of review will “result in [further] injustice” to the ward by delaying actual appointment of a guardian. *See id.* The Department also agrees with OPA that the jurisdictional issue will evade review and guidance is “in the public interest.” *See id.* [Pet. 6]

⁷ AS 13.26.710(b).

⁸ See *Alaska State, Comm’n for Hum. Rts.*, 484 P.3d at 608 (holding state agency “is not a ‘person’ that can assert due process rights” under state or federal constitution)

hypothetical due process rights of other proposed guardians.⁹

The Court should grant the petition and clarify that (1) the guardianship statutes confer personal jurisdiction over OPA and (2) this does not violate due process. If OPA wishes to get out of a guardianship, it may petition for modification of the guardianship.¹⁰

A. OPA may not ignore valid court orders that are authorized by statute.

Five years ago, the agency told this Court that “OPA does not have the luxury of declining appointments.”¹¹ But the agency now argues that it actually can decline guardianship appointments by simply ignoring court orders on the ground that courts lack personal jurisdiction over the agency. This argument overlooks the judiciary’s express statutory authority to order OPA (as the designated public guardian) to serve as a guardian. Alaska Statute 13.26.710(b) says:

A court may order the public guardian to act as full guardian, partial guardian, conservator or special conservator for a person who is determined under this chapter to be in need of guardianship or conservatorship service if no person or private guardianship association is willing and qualified to perform the function.¹²

(citing as federal authority *South Carolina v. Katzenbach* 383 U.S. 301, 323-24 (1966)); *cf. Kenai Peninsula Borough v. State, Dep’t of Com. & Reg’l Affairs*, 751 P.2d 14, 18-19 (Alaska 1988) (holding borough “is not a ‘person’ and therefore may not assert due process” claims under state or federal constitution).

⁹ See *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 630 n.9 (Alaska 1989) (“Generally, a litigant lacks standing to assert the constitutional rights of another.”).

¹⁰ AS 13.26.286 (modification procedure); see *Kenai Peninsula Borough*, 751 P.2d at 19 (holding borough entitled only to procedural rights “bestowed by statute”).

¹¹ Brief of Appellee at *2 filed in *Kirkland ex rel M.M. v. State, Dep’t of Admin. (OPA)*, 462 P.3d 539 (Alaska 2020). This public filing is available at 2018 WL 4921796.

¹² The Court interprets statutes “according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent

This statute automatically confers personal jurisdiction over the agency once the court makes the predicate findings and issues a valid order.¹³ If it did not, then the statute would have no meaning. OPA could simply ignore every court order issued under this provision. And if the court lacked jurisdiction, OPA would not need to explain itself and neither the petitioner nor the ward could challenge the agency’s refusal. That cannot be what the legislature had in mind when it created a “guardian of last resort.”¹⁴

OPA’s statutory argument rests on an incomplete reading of the guardianship statutes. In its discussion of personal jurisdiction, OPA focuses only on AS 13.26.261, which says that by “accepting appointment, a guardian submits personally to the jurisdiction of the court.” [Pet. 6-9] That is one path to personal jurisdiction in this context, and it is clearly designed to avoid the due process concerns that *individuals* could raise if they were ordered to serve as a guardian without participating in the proceedings. But nothing suggests that AS 13.26.261 is the only path to personal jurisdiction in guardianship matters. The petition merely assumes this is true. However, the statute in the block quote above offers a second path: A court may order the public guardian to act as someone’s guardian.¹⁵ OPA offers no discussion of this statute and its

of the drafters.” *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999).

¹³ There is no question that the legislature may decide when courts have personal jurisdiction over a party. *See, e.g., Polar Supply Co., Inc. v. Steelmaster Indus., Inc.*, 127 P.3d 52, 54-55 (Alaska 2005) (applying long-arm jurisdiction statute). Constitutional due process limits these statutes, but as explained below the agency has no due process rights.

¹⁴ *In re M.K.*, 278 P.3d 876, 882 (Alaska 2012).

¹⁵ AS 13.26.710(b).

jurisdictional implications.

OPA's position places the health and safety of Alaskans at risk. Without the support of a guardian, incapacitated Alaskans, some of our state's most vulnerable people, are unable to make decisions related to medical care, mental health treatment, and housing. They may be deprived of access to personal care, healthcare, and educational and vocational services necessary for their welfare. And they may be unable to apply for health insurance and other benefits they are entitled to. To the extent courts have ordered OPA to serve as guardian in more pressing cases where delay is not an option, those vulnerable Alaskans now sit in limbo.

As noted above, OPA has historically agreed that it may not decline court-ordered guardianship appointments. The context of OPA's prior assertions is important because it likely influenced a key case that reduced the scope of OPA's statutory duties.¹⁶ In *Kirkland ex rel M.M.* the Court was deciding whether certain aspects of the guardianship statutes require strict compliance or merely substantial compliance on OPA's part.¹⁷ The specific issue was whether OPA may contract with service providers to fulfill the agency's duty to visit wards quarterly.¹⁸ OPA implied in its briefing that the agency's inability to decline appointments supported the argument that it should not need to comply strictly with the statute, which likely would have stressed agency resources

¹⁶ *Kirkland ex rel M.M.*, 462 P.3d at 539.

¹⁷ *Id.* at 542. The Court did not discuss it in these precise terms, but the superior court did. And the Court affirmed the "superior court's interpretation." *Id.* at 542, 546.

¹⁸ *Id.* at 542-46; AS 13.26.720(c)(2).

further. Put another way, OPA leveraged the idea that it had to accept all appointments in order to lower the legal “standard by which to judge OPA’s performance of its duties.”¹⁹ Now the agency has reversed itself with no explanation. OPA’s prior position hews more closely to the statutory text and this Court’s precedent.

OPA has statutory rights that it may pursue to try to get out of a guardianship. For example, AS 13.26.286 says that “on petition of . . . the guardian” the court may “amend the guardianship plan or the responsibilities of the guardian” or “remove a guardian and appoint a successor.” That same statute also says that “the court may accept a resignation and make any other order that may be appropriate.”²⁰ To be sure, these require more from OPA than if the agency had sole discretion to reject any guardianship for lack of personal jurisdiction. But it is up to the legislature to decide OPA’s statutory rights. And the legislature has decided that Alaska’s guardian of last resort must file a petition to be released from its statutory duties.

B. The guardianship statutes are constitutional as applied to OPA.

i. OPA is a state agency and thus lacks constitutional due process rights.

As explained above, OPA may not ignore guardianship orders for lack of personal jurisdiction. OPA argues that this violates the agency’s due process rights because the guardianship statutes do not give the agency robust rights to participate²¹ in the

¹⁹ Brief of Appellee at *20 filed in *Kirkland ex rel M.M.*, 462 P.3d 539 (Alaska 2020) (available at 2018 WL 4921796).

²⁰ AS 13.26.286(a).

²¹ OPA says that it cannot be served with the petition and has no right to file

guardianship proceedings before being appointed.²² [Pet. 2] This argument is flawed because it is the agency—not any specific person—that is subject to the guardianship order, and agencies lack due process rights under the state and federal constitution.

The guardianship statutes authorize the superior court to order the agency as a whole to serve as a guardian. Alaska Statute 13.26.710(b) says that a court “may order the public guardian to act” as a guardian. Subsection (a) says that “the office of public advocacy . . . shall serve as the public guardian.” Taken together, these mean that the agency, not any one person, must comply with orders like the one at issue here.

Agencies like OPA lack due process rights under the Alaska Constitution. The Alaska Constitution says that “[n]o *person* shall be deprived of life, liberty, or property, without due process of law.”²³ In a recent case involving the Alaska State Commission for Human Rights, the Court held that the agency is “not a ‘person’ that can assert due process rights.”²⁴ The Court has also held that a borough “is not a ‘person’ and therefore may not assert due process . . . claims against its creator, the state.”²⁵ The same is true of

pleadings, seek discovery, or otherwise act as a party. [Pet. 7; *but see* Pet. 2 (“[OPA] counsel was present [at the guardianship] hearing . . . to inform the court that it was unable to accept the case.”; *but see* Pet. Exh. (court order contemplating objection from public guardian)]

²² OPA implies that it is in fact “provided no notice” of guardianship petitions and proceedings. [Pet 7] But OPA cites no evidence for this proposition, and it is not obviously true given that for the proceeding at issue here OPA’s “counsel was present” to participate. [Pet. 7]

²³ ALASKA CONST. art. 1, § 7 (emphasis added).

²⁴ *See Alaska State Comm’n for Hum. Rts. v. United Physical Therapy*, 484 P.3d 599, 608 (Alaska 2021).

²⁵ *Kenai Peninsula Borough v. State, Dep’t of Com. & Reg’l Affairs*, 751 P.2d 14, 18

OPA. It is a subdivision of the state and thus cannot “assert due process rights against” the state.²⁶ OPA does not challenge this precedent or otherwise explain why it has more due process rights than other state agencies and political subdivisions.

This Court has held that agencies like OPA also lack due process rights under the United States Constitution. The federal constitution says nearly the same thing as Alaska’s constitution: “Nor shall any State deprive any *person* of life, liberty, or property, without due process of law.”²⁷ Just as state agencies are not “person[s]” under the Alaska Constitution, they are not “person[s]” under the federal constitution.²⁸ Indeed, this Court has said that the “question appears to be well-settled under the federal constitution: a political subdivision may not challenge the validity of a state statute under the due process [clause].”²⁹ The agency thus has no constitutional due process rights.

Without due process rights, “the only procedural rights to which [the agency] is entitled are those bestowed by statute.”³⁰ But OPA makes no argument that the superior court violated its statutory rights. The Court thus should clarify that the guardianship

(Alaska 1988).

²⁶ *United Physical Therapy*, 484 P.3d at 608.

²⁷ U.S. CONST. amend XIV, § 14 (emphasis added).

²⁸ *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (holding state is not “person” for purpose of Fifth Amendment Due process Clause); *United Physical Therapy*, 484 P.3d at 608 (citing *Katzenbach* to reject Alaska state agency’s due process claim); *Kenai Peninsula Borough*, 751 P.2d at 18 (“[A] political subdivision of the state may not challenge the validity of a statute under the due process or equal protection clauses.” (citing Fourteenth Amendment, which OPA relies on)).

²⁹ *Kenai Peninsula Borough*, 751 P.2d at 18.

³⁰ *Id.*

statutes both confer personal jurisdiction over OPA and do not violate due process as applied to the agency.

ii. OPA lacks standing to assert the due process rights of other proposed guardians.

OPA suggests that the due process rights of “proposed guardians of all types” are being violated. [Pet. 11] To the extent OPA wishes to litigate the hypothetical due process rights of other proposed guardians, it lacks standing to do so.³¹ This Court has repeatedly said that parties generally lack standing “to assert the constitutional rights of another.”³² OPA does not explain why this default principle should not apply here.

The third-party exception to general standing doctrine does not apply. Sometimes this Court allows parties to litigate the constitutional rights of third parties, but doing so “usually requires the existence of a ‘special relationship . . . between plaintiff and third party, such as [a] parent asserting [a] minor child’s constitutional rights.’”³³ And here, proposed guardians outside of OPA “are not dependent on [OPA] to protect their rights; they are adults who are presumably able to sue on their own behalf but have not chosen

³¹ See *Anchorage Sch. Dist. v. Murdock*, 873 P.2d 1291, 1292 (Alaska 1994) (“As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.” (quoting *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1245-46 n.11 (Alaska 1992))).

³² *Keller v. French*, 205 P.3d 299, 304 (Alaska 2009) (quoting *State, Dep’t of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624 630 n.9 (Alaska 1989)).

³³ *Ebli v. State, Dep’t of Corr.*, 451 P.3d 382, 392 (Alaska 2019) (alteration original) (quoting *Friends of Willow Lake v. State Dep’t of Transp. & Pub. Facilities*, 280 P.3d 542, 546 n.12).

to do so.”³⁴ OPA thus does not have standing to litigate the hypothetical constitutional rights of other proposed guardians and should not be allowed to do so.

III. Conclusion

The Court should grant the petition and clarify that (1) the guardianship statutes give superior courts personal jurisdiction over OPA and (2) this aspect of the statute does not violate due process as applied to the agency.

DATED September 11, 2023

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³⁴ *See id.* It is worth noting that the statutory framework applicable to guardians other than OPA (and thus its implications for constitutional rights) is vastly different than the one applicable to OPA because there is no provision authorizing the court to order them to act as guardians without consent—as there is for the agency. So litigating those rights would not directly affect the judiciary’s ability to order OPA to serve as guardian.

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CERTIFICATE OF SERVICE

I certify that on September 11, 2023, true and correct copies of **The State of Alaska’s Response to the Office of Public Advocacy’s Petition for Review** and this **Certificate of Service** were served on the following via Electronic Mail without error:

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