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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

In the Matter of the Guardianship of:

NORA RAUPERS HARRIS,

Protected Person.

CASE NO. 13017G6

MEMORANDUM IN OPPOSITION TO
MOTION FOR PROTECTIVE ORDER

Statutory Fee Authority
ORS 125.075(4) (\$0)

Come now, Eric R. Foster and Foster Denman, LLP, and oppose the Motion for Protective Order dated April 19, 2016, as corrected on April 27, 2016. This Memorandum in Opposition is supported by the facts to be presented and the points and authorities set forth below.

I. FACTS TO BE PRESENTED.

The Protected Person, Nora Harris, age 63, suffers from early onset dementia. She began developing her condition in 2009. On September 3, 2009, while living in California, Mrs. Harris signed a California form Advance Directive (the "Advance Directive"). Under Mrs. Harris's Advance Directive, her husband, William Harris, was named as her health care representative. Under the terms of Mrs. Harris's Advance Directive, she gave Mr. Harris the authority to "make all *health care decisions* for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of *health care* to keep me alive." Advance Directive at 2 (italics added). Mrs. Harris further provided in the Advance Directive that she did not want to be kept alive through life sustaining treatment if "I am terminally ill and the use of life sustaining procedures would only serve to artificially delay the moment of my death ..." and "I have an incurable and irreversible condition that will result in my death within

1 a relatively short time.” Advance Directive at 3. Mrs. Harris did not make any statement in the
2 Advance Directive about normal eating and drinking or any statement about assistance with
3 eating and drinking.

4 In 2013, Mrs. Harris was declared incapacitated by this Court. The Guardianship was
5 established and Mr. Harris was appointed as Mrs. Harris’s guardian. Mr. Harris, as appointed
6 guardian, placed Mrs. Harris at Fern Gardens, a memory care facility in Medford.

7 Since Mrs. Harris became a resident at Fern Gardens, she has sometimes refused to eat.
8 She also has shown a desire to eat from time to time by finishing her meals. If Mrs. Harris
9 refuses to eat, the staff at Fern Gardens will not pressure her to eat. Those refusals are
10 documented in Mrs. Harris’s records.

11 Mrs. Harris has the ability to eat finger foods without assistance. If she attempts to eat,
12 but has difficulty eating, then staff at Fern Gardens will help her by prompting her to eat, by
13 lifting food to her mouth, or by lifting food with a spoon or other utensil to her mouth.

14 On April 19, 2016, Mr. Harris filed a Motion for Protective Order that requested that this
15 Court issue a protective order that Fern Gardens not assist Mrs. Harris in eating.

16 **II. POINTS AND AUTHORITIES.**

17 **A. Standard.**

18 Under ORS 125.650(1), ORS 125.305(1), and ORS 125.400, the standard for granting
19 protective orders is clear and convincing evidence. In this case, Mr. Harris must prove by clear
20 and convincing evidence that the Motion for Protective Order to not allow Fern Gardens to
21 assist Mrs. Harris eating should be granted.

22 **B. Mrs. Harris Shows A Desire To Eat.**

23 The best evidence of whether Mrs. Harris should be provided food assistance is her
24 current desire to eat.

25 Mrs. Harris could consistently refuse to eat, if that was her desire. If she refuses meals in
26 the future, Fern Gardens will not pressure her to eat. Until Mrs. Harris refuses to eat, she should

1 be able to continue to eat everyday meals with and without assistance.

2 **C. Mrs. Harris’s Advance Directive Does Not State That She Does Not Want**
3 **Help In Eating.**

4 If Mrs. Harris did not want to be helped with eating, she could have stated that desire in
5 the Advance Directive. When a person’s life is at stake, the Court should consider the protected
6 person’s instructions made in writing when the protected person signed his or her Advance
7 Directive. Since there are no instructions in writing, the Court does not yet have clear and
8 convincing evidence of the protected person’s intent.

9 In this case, Mrs. Harris had the ability to state in the Advance Directive that she did not
10 want assistance in eating. The Advance Directive was signed when Mrs. Harris had capacity.
11 Since Mrs. Harris did not include a specific instruction that she not be helped with eating, the
12 evidence is not yet clear and convincing that Fern Gardens should not help Mrs. Harris eat.

13 **D. Mrs. Harris’s Advance Directive Does Not Apply To Help With Normal**
14 **Food.**

15 Mrs. Harris’s Advance Directive gives her representative the ability to make all health
16 care decisions on her behalf. Section 1.3 of Mrs. Harris’s Advance Directive states that “unless
17 I otherwise specify in Exhibit ‘A’, my agent is authorized to make all *health care decisions* for
18 me, including decisions to provide, withhold, or withdraw *artificial* nutrition and hydration and
19 all other forms of *health care* to keep me alive.” Advance Directive at 2 (emphasis and italics
20 added). California law defines the term health care as “any care, treatment, service, or
21 procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition.”
22 California Probate Code §4615. California law further defines a health care decision as “[A]
23 decision made by a patient or the patient’s agent, conservator, or surrogate, regarding the
24 patient’s health care, including the following: (a) Selection and discharge of health care
25 providers and institutions. (b) Approval or disapproval of diagnostic tests, surgical procedures,
26 and programs of medication. (c) Directions to provide, withhold, or withdraw artificial nutrition

1 and hydration and all other forms of health care, including cardiopulmonary resuscitation.”
2 California Probate Code §4617. California law does not define health care to include everyday
3 eating and drinking and assistance with everyday eating and drinking.

4 While Mrs. Harris signed a California Advance Directive, she now is a resident of
5 Oregon. ORS 127.515(5) provides that “an advance directive executed by an adult who at the
6 time of execution resided in another state, in compliance with the formalities of execution
7 required by the laws of that state, the laws of the state where the principal was located at the
8 time of execution or the laws of this state, is validly executed for the purposes of ORS 127.505
9 to 127.660 and 127.995 and may be given effect in accordance with its provisions, *subject to the*
10 *laws of this state.*” ORS 127.515(5) (italics added). Under ORS 127.515(5), Oregon law
11 applies to the administration of the Advance Directive.

12 Under Oregon law, a health care decision means “consent, refusal of consent or
13 withholding or withdrawing of consent to health care, and includes decisions related to
14 admission to or discharge from a health care facility.” ORS 127.505(9). Health care means,
15 “diagnosis, treatment or care of disease, injury and congenital or degenerative conditions,
16 including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the
17 use, maintenance, withdrawal or withholding of *artificially administered* nutrition and
18 hydration.” ORS 127.505(8) (italics added).

19 The definitions of health care and health care decisions under Oregon law do not include
20 decisions related to everyday food and drink. Providing assistance in eating and drinking
21 everyday food and drink does not involve a health care decision. Mrs. Harris decided in the
22 Advance Directive that Mr. Harris could withhold artificially administered food and hydration
23 on her behalf. She made that health care decision, but did not authorize the prevention of help
24 with everyday food and drink, especially in light of her desire to eat.

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1 **E. Oregon Law Requires Fern Gardens To Provide Mrs. Harris With**
2 **Assistance In Eating.**

3 The Oregon Administrative Rules require that residential care and assisted living
4 facilities provide a minimum level of care to their residents. The minimum level of care rules
5 include, “services to assist the residents in performing all activities of daily living, on a 24-hour
6 basis, including...[a]ssistance with eating (eg, supervision of eating, chewing, or the use of
7 special utensils)...” OAR 411-054-0030(1)(e)(F). Fern Gardens is required by Oregon law to
8 help Mrs. Harris with eating.

9 **F. Mrs. Harris Should Not Be Deprived Of The Social Interaction And**
10 **Comfort That Help With Eating Provides.**

11 Even if Mrs. Harris had specified in advance that in a situation such as her present one
12 she would not want help with eating, she is entitled to change her view. As her world becomes
13 more limited, eating and human contact are basic pleasures she can continue to experience.
14 Taking food by mouth and the human contact as she is assisted to eat, would seem to make her
15 life more comfortable and satisfying. Her continuing to eat, both on her own and with
16 assistance, expresses her current view. The Court should not deprive her of these limited, basic
17 satisfactions.

18 **G. Mrs. Harris Should Be Given The Opportunity To Satisfy Her Hunger With**
19 **Help.**

20 Even if Mrs. Harris expressed previously a desire to not to be helped with eating
21 everyday food, she may feel differently now when she is hungry. She has expressed her desire
22 to satisfy her hunger by eating with and without help from the staff at Fern Gardens. The Court
23 should not deprive her of the ability to satisfy her hunger by preventing Fern Gardens from
24 helping her to eat everyday food.

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III. CONCLUSION.

Based on the foregoing, The Motion for Protective Order should be denied.

FOSTER DENMAN, LLP
Attorneys for Protected Person

Date: July 12, 2016

By: Eric R Foster
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Memorandum in Opposition to Motion for Protective Order** on the attorney(s) listed below, by electronic mail and by depositing a copy of said document in the Post Office at Medford, Oregon, enclosed in a sealed envelope with first class postage prepaid, and addressed as follows:

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Dated this 12 day of July, 2016.

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