No. 45465-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In the Guardianship of KEIKO DECKER, an alleged Incapacitated Person:

DANIEL F. QUICK, Former Attorney for Keiko Decker,

Appellant,

v.

STEPHEN J. DeVOGHT, Guardian ad Litem, and DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

DANIEL QUICK'S OPENING BRIEF
Amended

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I. INTRODUCTION.

This case focuses on the right of an "alleged incompetent person" ("AIP") to resist a proposed guardianship via a personally engaged, statutory "independent attorney," who is charged by statute with following her express instructions, here to aggressively resist the guardianship proceedings; and, further, to pay for that representation from her existing, ample assets, not public funds.

At issue is whether the superior court has the authority to limit the amount or type of work done by an independent attorney either directly or indirectly by reducing the fees paid for following the AIP's instructions, particularly where the AIP has the resources to pay for the legal services. Reversal is required because this issue was settled a decade ago by *In re Guardianship of Beecher,* 130 Wn. App. 66, 121 P.3d 743 (2005), which held the trial court does not have authority to restrict the work of, or payment to, the independent attorney for the AIP.

A second issue arises only ***if*** the trial court has any authority to control the fees paid to the independent attorney: Must the trial court follow the *Mahler* requirements for lodestar analysis and specific findings of fact and conclusions of law when determining the amount of fees to be paid? Reversal is required because the trial court failed to engage in any analysis of the reasonableness of the fees incurred or to make any findings, instead picking a figure out of thin air and requiring disgorgement of most of the fees.

Finally, the appeal raises the issue of whether Respondents, rather than Mrs. Decker's estate, should bear the cost they choose to incur on appeal by not stipulating to vacate the fee order once confronted with the settled law on these two issues, which require reversal.

The fee issue will be set out first to reinforce from the outset that the fee orders must be vacated and the matter remanded, even if the trial court has some authority to address any of Mr. Quick's fees.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL.

A. Assignments of Error.

1. The trial court erred in entering the August 7, 2013, and September 6, 2013, orders reducing Mr. Quick's fees and costs to $30,000 for two years' work as directed by Mrs. Decker, the ***alleged*** incapacitated person.

2. The trial court erred in requiring Mrs. Decker's independent attorney to disgorge funds he been paid for work done at her direction and which had been paid by her.

3. Assuming it had the legal authority to determine any of an independent attorney's fees paid by an ***alleged*** incompetent person, the trial court erred in its determination of a reasonable amount of the legal fees by failing to use a lodestar or any comparable analysis, and by also failing to make findings and conclusions that would permit meaningful appellate review.

B. Issues on Appeal.

1. Under the guardianship statutes, the trial court lacks authority to control the financial decisions of an ***alleged*** incompetent person who resists the guardianship during the pendency of a guardianship proceeding unless and until there is an adjudication that the person is incompetent. In accord with due process, the statutory scheme specifically provides that the ***alleged*** incompetent person is entitled to an independent attorney and that the attorney is to take direction from that person, as opposed to imposing the attorney's own view, or the view of a Guardian ad Litem, of what they deem to be in the best interests of the AIP. In this case, the alleged incompetent person had substantial assets and instructed her personally-retained attorney to fight the guardianship aggressively. Under these circumstances, must the appellate court vacate the trial court's order purporting to determine and drastically reduce the fees paid by the ***alleged*** incompetent person to her chosen attorney for following his client's instructions; and which order also required disgorgement of the majority of the fees already paid by the ***alleged*** incompetent person for the attorney to resist the guardianship?

2. Is vacation required of the trial court's order which purported to determine and dramatically reduce the amount of fees paid by the ***allegedly*** incompetent person to an independent attorney appointed under RCW 11.88.045 under the plain terms of the statute, basic principles of guardianships and due process, and *In re*

Guardianship of Beecher, 130 Wn. App. 66, 121 P.3d 743 (2005), and/or because the independent attorney was also separately retained by the ***allegedly*** incompetent person?

3. Assuming the trial court had the authority to review and determine the reasonable fees that could be paid to the independent attorney by an ***alleged*** incompetent person before a guardianship was in effect when the attorney followed that person's directions when incurring the fees, must the order related to the fees be vacated because the trial court did not engage in a lodestar or any analysis to determine the reasonable amount of fees allowed for the work performed, as demonstrated in older guardianship decisions such as *In re Guardianship of Hallauer,* 44 Wn. App. 795, 799-801,723 P.2d 1161 (1986), and/or because the trial court failed to make specific findings and conclusions supporting its fees determination, as is required by *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998) and its progeny, and which are required to permit meaningful appellate review?

4. Should the appellate court rule that any fees for work spent defending against this appeal incurred by DSHS's department of Adult Protective Services and/or the Limited Guardian must be paid by Adult Protective Services and/or the Limited Guardian and not by the guardianship estate of Mrs. Decker, where the appeal had to continue despite the fact Respondents were confronted with the settled law on the trial court's lack of authority to control the work

and fees incurred by a statutory independent, privately engaged, attorney of an AIP, and the settled law that fee awards must have sufficiently specific findings and conclusions to permit meaningful appellate review, and that they should pay Mr. Quick's fees on appeal?

III. STATEMENT OF THE CASE.

A. Overview Facts.

Keiko Decker married Wilson Decker in 1964, who later retired from the Air Force as a Colonel, and who died on October 22, 2009, after 45 years of marriage. CP 145; CP 189 ¶7. They did not have any children or close relatives. *Id*; CP 97 (interim report of Limited Guardian). On his death Mrs. Decker came into possession of a substantial estate of over $700,000 in addition to receipt of Col. Decker's pension and social security benefits as his widow. CP 14. Mrs. Decker is of Japanese descent, which was one reason Mr. Quick was chosen for her independent attorney, since he spoke some Japanese in addition to being substantively qualified in terms of his legal practice and experience. *See* CP 27 (verified petition to appoint attorney); 29-31 (Mr. Quick's statement of qualifications). He also was approached because Mrs. Decker made known immediately she did not want a guardianship controlling her and refused to meet with the GAL. CP 27-28.

B. Initial Guardianship Proceedings and Appointment of Mr. Quick as Mrs. Decker's Independent Attorney Because of Mrs. Decker's Continued Resistance to the GAL's Suggestions She Needed Someone to Manage Her and Her Affairs.

A petition for guardianship was filed by Adult Protective Services ("APS") on February 23, 2011, alleging that Mrs. Decker had been diagnosed with dementia, "had been exhibiting paranoid behavior," and "appears to have been financially exploited, " CP 13, 15 ¶ 1 (Petition), allegedly for paying "more than $60,000 for landscaping and concrete work that appeared to be defective work." CP 18 (Partington Declaration). The Petition stated that "APS is concerned that Mrs. Decker is also at risk of being financially exploited in the future due to her vulnerability." CP 15. The Petition requested guardianship of both Mrs. Decker's person and her estate, CP 15 ¶ 3, alleging that her dementia meant she needed help making "personal, medical, and financial decisions," and further alleging that "her cognitive impairments are moderate to severe." CP 16 ¶ 1.[1] The Petition requested a Guardian Ad Litem ("GAL") from the court registry, with the GAL's fees paid from her estate "as authorized by the court." CP 16 ¶¶ 3, 2.

The supporting declaration noted that Mrs. Decker was 78 and was said by her physician to have dementia and paranoia that

[1] *See* CP 18-20, supporting declaration of Robin Partington describing Mrs. Decker's resistance to having help manage her affairs and to giving someone her power of attorney, and also as to her desire to have an attorney "to protect her life." CP 19, ¶ 4.

required her to have assistance from a guardian; however, while Mrs. Decker "admits she is having difficulty with her memory and managing her affairs and finances," nevertheless, "she refuses or is resistant to assistance." CP 18-19, ¶ 3. Mr. Stephen DeVoght was appointed as the GAL on February 23 from the court registry to be paid at private expense. *See* CP 21 – 26 (order appointing GAL); CP 22, ¶ 3 (appointment "shall be . . . at private expense").

The GAL encountered continued resistance from Mrs. Decker so that, by June 22, 2011, he filed a petition to appoint an attorney for her, nominating Mr. Quick because of his knowledge and experience in guardianship and estate matters, and because he spoke some Japanese and was familiar with Japanese culture.[2] CP 27-28 (petition) & CP 29-31 (Mr. Quick's statement of qualifications). The same day the petition was filed, the court entered an order appointing Mr. Quick as "independent legal counsel for Keiko Decker to be paid at private expense" pursuant to RCW 11.88.045.[3]

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[2] The GAL's petition stated at CP 27 (bold in original):

> The Alleged Incapacitated Person has not cooperated with the GAL in the investigation and has, to date, refused to meet with him. The GAL believes that it is in the best interest of the AIP that the Court appoints [sic] an attorney to represent her in this guardianship action. The GAL further believes that it is in the best interest of the AIP to be represented by an attorney that speaks Japanese and is familiar with Japanese culture, and is not aware of attorney's [sic] on the Pierce County registry with those qualifications. A copy of Daniel F. Quick's qualifications is attached at **Exhibit A**.

[3] RCW 11.88.045(b) states as follows (emphasis added):

> Counsel for an alleged incapacitated individual shall act as an advocate for the client ***and shall not substitute counsel's own judgment for that***

CP 32-33. The order provided that Mr. Quick was given "10 hours of authority to represent Mrs. Decker" and that "Independent counsel shall not spend more than 10 hours representing Ms. Decker without prior court approval," CP 32. These limitations were at odds with the express duty under the statute for independent counsel to follow the client's, not the GAL's or the Court's, directions; were at odds with the fact Mrs. Decker had not been declared incompetent to manage her affairs; and at odds with her determination and right to fight the guardianship.

As detailed *infra,* Mr. Quick followed Mrs. Decker's instructions to resist the guardianship proceedings. *See* CP 76 (summary of efforts to resist the set out in her August, 2012, motion to dismiss the guardianship). CP 148-49; 151-52; 189 ¶ 9. On October 20, 2011, Mrs. Decker formally hired Mr. Quick as her personal, independent attorney to fight the guardianship, separate from his appointment by the Court. CP 158-59 (fee agreement); CP 189 ¶ 6 (Quick declaration). She also confirmed on October 20th with written instructions that she wanted to oppose the guardianship and that she was willing to go to trial to resist it. CP 167 (written direction); CO 189 ¶8. On December 20, 2011, Mrs. Decker

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of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of the guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences.

appointed Mr. Quick as her attorney-in-fact by naming him in her durable power of attorney. CP 76.

C. The GAL's 2011 and 2012 Reports of Mrs. Decker's Continued Resistance to a Guardianship and the GAL's Request For Appointment of a Limited Guardian.

The GAL filed an interim report on September 29, 2011, seeking additional authority for payment as the ten hours initially allotted for his work was nearly used up. *See* CP 34-37 (interim report and attachments). The GAL noted Mrs. Decker's continued resistance to the guardianship:

> Ms. Decker has adamantly opposed guardianship from my first contact with her, via telephone, on March 16, 2011. . . .
>
> Ms. Decker has always been cordial with me, but initial attempts to meet with her in person were rebuffed because of her opposition to the guardianship and her belief that she had "cancelled" the guardianship. On August 4, 2011, her appointed counsel arranged a meeting during which she was cooperative and allowed me to review financial information as requested; in a follow-up visit September 14, 2011, she agreed to visit her doctor for the purpose of an updated medical report.

GAL's Interim Report (9/29/11), CP 34.

Mrs. Decker continued to resist the guardianship in any form, now with the help of her attorney Mr. Quick. She served discovery requests on APS in April, 2012, which were not answered, and tried to schedule the deposition of its social worker Ms. Partington, which APS refused to schedule. *See* CP 76-77.

On May 9, 2012, the GAL filed a report which recommended the appointment of Joyce Richards as a limited guardian of Mrs. Decker's person and estate, and that Mrs. Decker retain the right to vote. CP 38-40. The report noted that

> There may be a reasonable alternative to guardianship, but I believe it would need to have substantial court oversight and would need to ensure there is proper legal authority that would be recognized by the Social Security Administration and the Department of Veteran's Affairs for financial purposes. My understanding is that Powers of Attorney are often not recognized by these organizations and can lead to substantial delay and costs if there are financial needs to be addressed.
>
> Ms. Decker executed a durable power of attorney on December 21, 2011 which named her appointed counsel, Daniel Quick, as attorney-in-fact[.] I have made recommendations in this report regarding assistance I feel that Ms. Decker should have with her finances and health that have not been addressed at this time. . . .
>
> It is my recommendation that any alternative to guardianship that may be fashioned, address the items above, and specify actions that will be taken in the event Ms. Decker cannot participate in decisions affecting her estate and/or health[.]

GAL Report (5/09/12), pp. 12-13, CP 39-40.

The May, 2012 GAL report recommended setting a bond and blocking access to assets. CP 42. It also made the following recommendation as to Mr. Quick:

> I recommend that Keiko Decker continue to retain Daniel Quick as her attorney she wants to; there is an established

relationship, and the medical report indicates that she requires trusted legal counsel to adequately understand legal matters.

CP 42, ¶ 17. This shows the GAL recognized both that Mrs. Decker had trust in Mr. Quick and that his role was necessary for practical reasons. Finally, the GAL's report recommended that he, the GAL, not be involved in future proceedings unless requested by Mrs. Decker, her attorney or the court. CP 43.

D. The APS's Motion to Dismiss the Guardianship Because Mrs. Decker Had Improved and a Guardianship was No Longer Needed And, Instead, to Appoint a New Attorney-in-Fact For Mrs. Decker, Followed by Mrs. Decker's Motion to Dismiss For APS' Failure to Prosecute, Both of Which Were Denied.

One month later on June 8, 2012, APS filed a motion to dismiss the guardianship and for the appointment of a new attorney-in-fact for Mrs. Decker, Glenda Voller. CP 44 – 51. The motion stated the basic reason for dismissing the guardianship was Mrs. Decker had improved so that a guardianship was not needed:

> Although at the time the petition was filed, the Department had good cause to believe that Ms. Decker lacked capacity and was in the need of a guardian, the Department believes that **Ms. Decker has regained sufficient capacity, no longer needs a guardian**, and may receive adequate protection and assistance through a less restrictive alternative.

APS Motion to Dismiss Guardianship, CP 44-45 (emphasis added). The motion recounts the results from a neuropsychological examination report of February 10, 2012. After noting signs of

cognitive impairment and questionable judgment on management of some health problems, the summary of it concludes:

> The report also indicates that Ms. Decker agrees there was a period of time after her husband's death that she was not functioning well, including not eating, and was quite depressed. *Id.* at 1. However, Ms. Decker denies any current cognitive impairment and **contends that her healthcare providers confused profound grief for dementia**.

APS Motion to Dismiss Guardianship, CP 46 (emphasis added).

Mrs. Decker, through her private counsel, opposed the APS's motion because she believed that, despite its title, rather than actually dismissing the proceedings the proposed motion would force her, "over her objection" and under the guise of a "less restrictive alternative" to accept a change to her chosen attorney-in-fact named in her durable power of attorney, a document which, it noted, "is a wholly revocable document by Ms. Decker." CP 52.

The apparent point of APS's effort was to replace Mr. Quick as Mrs. Decker's attorney-in-fact, which would remove Mrs. Decker from personally giving directions to Mr. Quick. It would, thus, excise from the proceedings the independent counsel who was acting at Mrs. Decker's personal express behest to which she was entitled under RCW 11.88.045 and the constitutions, as opposed to some third party's notion of what is in her best interest. *See* Mrs. Decker's opposition, CP 52 – 59.

On June 18, 2012, after receipt of the APS's reply (CP 60-66), the court denied the motion and all requested relief. CP 67-68.

Mrs. Decker then proceeded with her own motion to dismiss, alleging "want of prosecution, inexcusable neglect, and delay." CP 75. She complained that she had "fully participated and paid for two sets of extensive medical examinations and without any resolution in sight." CP 76. She noted that APS had "refused to provide answers to interrogatories" and failed to provide responses to other discovery requests. CP 76-77. Her motion also was denied. CP 82-83. *See* CP 190 ¶ 12 (Quick declaration).

E. Mr. Quick's Continued Representation of Mrs. Decker as She Directed Him to Resist the Proposed Guardianship and the Resulting Agreed Order for a Limited Guardianship on May 7, 2013.

As the GAL's reports reflect, Mrs. Decker was adamantly opposed to the guardianship from the first indication one was sought. Once she had obtained her own attorney in Mr. Quick who would represent her and do what **she** wanted, as the statute and the constitutions require, she had him take all measures to stop the guardianship and get it dismissed. As a result, Mr. Quick demanded a jury for the hearing on her competence and engaged in discovery and motion practice to follow her instructions. CP 148-150; 189-191. As the trial court docket, petition for fees, and Mr. Quick's billings (CP 194 – 242) reflect, this took substantial time and effort because of the position taken by Adult Protective Services that she required a guardian, which it modified only when it decided to seek a different attorney-in-fact to make decisions for Mrs. Decker rather

than go through with the guardianship and provide the requested discovery, as well as the fact that Mrs. Decker primarily spoke Japanese. Nevertheless, and as required by both the statute and his fee agreement with Mrs. Decker, Mr. Quick followed Mrs. Decker's express instructions and continued to try to prepare for trial, including obtaining the delayed discovery and other trial preparation and motions, all with the goal of defeating the guardianship. *See* CP 147-50.

Nevertheless, on the eve of trial, but without a trial or evidentiary hearing, Mrs. Decker acquiesced in a limited guardianship which was predicated on the limited guardian being her tax preparer for several years, Mr. Maurice E. Laufer. *See* CP 84-96 (Agreed Order); CP 190, ¶13 (Quick Declaration describing settlement of the case and agreement on Mr. Laufer); CP 97-98 (Limited Guardian's July 30, 2013 interim report). The Agreed Order provided that Mr. Quick's legal fees were reserved, and he could petition "for additional fees and costs up until the 90 day hearing." CP 95.

F. The Hearing Before the Commissioner and the Reduction in Mr. Quick's Fees Requiring Disgorgement.

On July 30, 2013, the Limited Guardian filed his interim report. CP 97-128. Among other things, he indicated that Mrs. Decker continued to not want the assistance of the Guardian and "has been totally unwilling to assist the Guardian." CP 98. He

noted Mrs. Decker had Mr. Quick's fee statements, but that she refused to provide them to him for review, and that he would not opine on whether they were reasonable. CP 102. The report states her bank records appeared to show she had paid Mr. Quick $110,457.82. CP 101. *See* CP 128 (email to counsel with figures). The Limited Guardian also submitted his own initial bill of nearly $7,500, CP 101, with his lawyer's fees and costs submitted separately in the amount of $6,316.04. CP 130.

The same day, Mr. Quick filed his petition to approve his attorney's fees as the final "wrap-up" of his work as the independent and personal attorney for Mrs. Decker, with a full accounting of his fees charged. *See* CP 145-187 (petition and exhibits); CP 188-265 (Quick Declaration with time records). The petition sets out the procedural posture of the case (CP 145-46), Mr. Quick's duties as the independent attorney for Mrs. Decker (CP 147), his investigation of the matter and findings (CP 147-48), and her consistent directions to him given what was at stake:

> The allegations of neglect and incapacity against Mrs. Decker were serious in nature. The proceedings commenced had the potential to strip Mrs. Decker of control of her residential decisions, finances and her constitutional rights. With these consequences in mind, **Mrs. Decker repeatedly instructed Mr. Quick to aggressively defend her independence.** With so many aspects of Mrs. Decker's life being scrutinized, this matter required a significant amount of work and time both in and out of the courtroom.

CP 148-49 (emphasis added).[4]

Mr. Quick's petition relied on the statute for independent counsel, RCW 11.88.045, especially subsection (1)(b) which provides that such counsel "shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests;" the fact that "Mrs. Decker has been consistent in her request to aggressively defend against the guardianship proceeding;" and that, in accord with the statutory mandate, Mr. Quick "fully complied with Mrs. Decker's expressed intention and fully and aggressively defended against the guardianship proceeding." CP 151-52. As noted, these directions from Mrs. Decker to Mr. Quick are fully consistent with all the reports filed by the GAL and the Limited Guardian in this case noted *supra,* as Mrs. Decker has always resisted the guardianship.

The petition included the signed agreement of October 20, 2011, by which Mrs. Decker, on her own behalf, retained Mr. Quick to represent her "with respect to [1] defense of guardianship petition filed by the State of Washington, including litigation and trial work, [2] planning for lesser restrictive alternatives, and [3] other legal work as determined by client." CP 158-59. It also included her

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[4] These directions to Mr. Quick are consistent with all the reports by the GAL and the Limited Guardian as to Mrs. Decker's view of the guardianship. *See, e.g.,* CP 27 & 34 (GAL); CP 98 ¶ 3 (Limited Guardian) ("Mrs. Decker continues to be adamant that she does not need or want the assistance of a Guardian. She has been totally unwilling to assist the Guardian.").

October 20, 2011, direction to resist the guardianship petition and her statement that she is "willing to go to trial with my lawyers to oppose the guardianship." CP 167.

Mr. Quick was paid for his work by Mrs. Decker directly before entry of the May 7, 2013, Agreed Order, after which the Limited Guardian had the authority to pay bills, as approved by the trial court. The petition stated that the total fees and costs from June 22, 2011 – July 30, 2013 of $118,110.65 were "reasonable and necessary" under the circumstances, and that "an outstanding additional amount of $17,137.50 should be "approved and paid immediately by the guardian from the assets of the guardianship estate." CP 152-53. The petition noted that "the Guardianship has sufficient funds . . . to pay the outstanding attorney's fees and is not insolvent." CP 150.

DSHS filed a response to the petition which did not specifically oppose Mr. Quick's request, but did take issue with the need for all of the work he had documented. *See* CP 267-72 (response); CP 274-323 (declaration with attachments). However, APS did not review Mr. Quick's fee submission and say what was reasonable or what was not, specifically declining (as had the Limited guardian) "to weigh-in on the reasonableness of Mr. Quick's fees, [as] they are properly subject to review by the Court." CP 272.

At the August 7, 2013, hearing, Commissioner Dickie denied Mr. Quick's request for payment of the outstanding balance of his fees. Instead, the commissioner determined that the total amount of fees and costs that would be permitted for the over two years spent on the case representing Mrs. Decker since his appointment on June 22, 2011, was "$30,000 total." CP 331, App. A. *See* CP 339-370 (hearing transcript). The commissioner further ruled that Mr. Quick "shall pay to the Guardian the difference of anything paid over $30,000 within six months from today's date." *Id.*[5] That difference would be over $80,000, whether based on the Limited Guardian's interim report of July 30, 2013, or on Mr. Quick's motion for revision and underlying documents.[6]

G. The Superior Court's Refusal to Revise and Initiation of the Appeal.

Mr. Quick filed a motion to revise (CP 332 -37) which was heard September 6, 2013. *See* RP (9/6/13). The motion was denied by Judge Nevin without changing the commissioner's ruling or making any additional rulings in the final order. *See* CP 381-382 (App. B.) This appeal was then filed. CP 383-91.

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[5] No judgment has been entered as to this order, obviating the need for a stay. Nor has the Guardian sought to enforce it pending the appeal. Counsel for Appellant and for Respondent Limited Guardian have discussed the enforcement and stay issue and a hearing likely will be noted before the trial court to address any enforcement or stay issues that need court approval.

[6] *See* CP 101, the interim report stating Mrs. Decker had paid Mr. Quick $110,492.82 to date, so the difference would be $80,492.82, and CP 335, the motion to revise stating that Mrs. Decker had paid Mr. Quick $118,110.65, so the disgorgement would be $88,110.65.

Although the GAL obtained instructions in January, 2014, from the trial court on whether to defend against the appeal, *see* Supp. CP. 397-399, they were sought without giving notice to Mr. Quick (*see* CP 412-413) and before counsel wrote to the GAL's counsel setting forth the essence of the appeal under *Beecher, Mahler v. Szucs,* and RCW 11.88.045, which have now been elaborated. Mr. Quick' position is that Respondents should stipulate to vacating the fee order because of the controlling law to save Mrs. Decker's Estate and the State from further expense, as the applicable fee statute would permit charging the State and/or the GAL with the cost of defending the appeal. The docket confirms that neither party has yet brought this information to the attention of the trial court in an amended petition for instructions, though that could still occur, even if only in the form of this brief.

IV. ARGUMENT.

A. Standard of Review.

Review is *de novo* of a commissioner's decision on the papers which the superior court did not revise. *In re Parentage of Hilborn,* 114 Wn. App. 275, 278, 58 P.3d 905, 907 (2002), citing *State v. Wicker,* 105 Wn. App. 428, 433, 20 P.3d 1007 (2001) (decision to accept or revise commissioner becomes decision of the superior court) and *In re Marriage of Balcom,* 101 Wn. App. 56, 59, 1 P.3d

1174 (2000) (appellate review is *de novo* if record before commissioner was on the papers).[7]

The question of a trial court's authority to act is a question of law which is reviewed *de novo*. *In re Guardianship of Lamb,* 173 Wn.2d 173, 183-84, 265 P.3d 876 (2011). This applies to both a court's authority to act in a guardianship proceeding, *id.,* and a court's authority to determine the reasonableness of fees or make a fee award. *Id.,* 173 Wn.2d at 189-92 (determining as a matter of law the rules under which fees could be awarded for "advocacy" efforts by a guardian, then reviewing the application of those rules to the facts for an abuse of discretion).

A trial court's award of the **amount** of attorney's fees in cases in which the trial court has the legal authority to award or approve fees is reviewed for an abuse of discretion. *In re Guardianship of Lamb,* 173 Wn.2d at 183-84. An inadequate record of the basis for the trial court's determination of the amount of fees allowed requires vacation of the order and remand for a proper calculation based on the lodestar or comparable factors. *Mahler v. Szucs,* 135 Wn.2d 398, 433-435, 957 P.2d 632, 966 P.2d 305 (1998), incorporating the lodestar analysis in *Bowers v. Transamerica*, 100 Wn.2d 581, 595-601, 675 P.2d 193 (1983). *Accord, In re Marriage*

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[7] *Accord, In re Mowery*, 141 Wn. App. 263, 274-75, 169 P.3d 835 (2007) ("Because the superior court did not revise the commissioner's decision, the commissioner's decision stands as the decision of the superior court that is before us for review," citing RCW 2.24.050 and *In re B.S.S.*, 56 Wn. App. 169, 171, 782 P.2d 1100 (1989)).

of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006); *In re Guardianship of Hallauer,* 44 Wn. App. 795, 800-01, 723 P.2d 1161 (1986) (Pre-*Mahler* decision reversing the trial court for failing to provide the specific reasoning for its fee award to the guardian in a guardianship accounting proceeding).

B. Even if the Trial Court Had the Authority to Adjust the Fees Ms. Decker Incurred, the Order Must Be Vacated Because the Trial Court Failed to Engage in a Proper Lodestar or Similar Analysis and Also Failed to Make Required Findings Under *Mahler v. Szucs*, Each of Which Failure Requires Vacating the Fee Order.

1. The trial court's failure to engage in any meaningful analysis for reaching its award and its failure to use required criteria requires vacation of the fee orders.

Even if the trial court had the authority to determine the amount of fees that would be paid by Mrs. Decker before she acquiesced in a guardianship, which it did not, the trial court erred both by failing to go through the lodestar factors and by failing to make a proper record with findings and conclusions of the reasonableness of the fees awarded. This violated the long-established requirements for determining fees set out in *Bowers v. Transamerica, supra, Mahler v. Szucs, supra,* and *Mahler's* progeny.[8]

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[8] *See, e.g., Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004) ("The trial court must create an adequate record for review of fee award decisions, [footnote omitted] which means in part that the record must show a tenable basis for the award," citing *Mahler*); *Just Dirt, Inc. v. Knight Excavating, Inc.,* 138 Wn. App. 409,

The fact fees may be awarded pursuant or subject to RCW 11.88.045 and 11.92.180 does not take them out of the normal rules for analysis of the reasonableness of the amount of the fees awarded, nor was there traditionally an "exemption" for guardianships. Despite a broadly worded statute and a trial court's broad discretionary authority to determine fee amounts for guardianship and estate proceedings, the trial court nevertheless must provide an adequate record upon which to review its determination of attorney's fees in both probate administration of estates,[9] and in guardianship contexts.[10] Older cases are in accord.[11]

416, 157 P.3d 431 (2007) (emphasis added) ("Just Dirt argues that the trial court's oral decision provides an adequate record for review. We disagree. **The trial court's oral decision does not explain how it calculated the fee award as required for review**.); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006) ("The trial court must provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of a fee award. Mahler . . .Thus, we vacate the judgment for attorney fees and remand for a new hearing on attorney fees based on adequate information and for entry of specific findings of fact and conclusions of law regarding any attorney fee award.").

[9] *See In re Estate of Jones*, 152 Wn.2d 1, 20-21, 93 P.3d 147 (2004) (noting that RCW 11.96A.150 allows the court to award fees to any party from any party in probate cases, but still remanding and reminding the court "to substantiate its award with the appropriate findings of fact and conclusions of law").

[10] *See In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 79, 223 P.3d 1276 (2010) (upholding reduction of attorney fees where trial court articulated its reasons for doing so and used lodestar method which court recognized is "the clearly preferred method for calculating attorney fees in Washington"); *Estrada v. McNulty*, 98 Wn. App. 717, 723-24, 988 P.2d 492 (1999) (citing *Mahler* and vacating fee award and remanding for entry of findings where RCW 11.92.180 required separate accounting of the attorney's services as guardian and services as attorney, attorney provided only flat fee for all services, and trial court did not provide basis for its award).

[11] *See e.g., In re Guardianship of Hallauer*, 44 Wn. App. 795, 799-801,723 P.2d 1161 (1986) (reversing for trial court's failure to adequately detail its method of

Specific to the circumstances here, when the trial court allots substantially less than the amount requested, the court must indicate how it arrived at the final numbers and explain why discounts were applied. *Taliesen Corp. v. Raxore Land Co.*, 135 Wn. App. 106, 146, 144 P.3d 1185 (2006) (although court recognized possible grounds for trial court's reduction of award to prevailing party, it vacated and remanded fee award for findings explaining how the award was calculated and the basis for deductions, as review was not possible without them). The appellate court ***must*** reverse an award "if the record fails to mention the method the trial court used to calculate fees or if the court used an improper method." *Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n*, 94 Wn. App. 744, 762, 972 P.2d 1282 (1999) (remanding for recalculation of attorney fee award where trial court abused its discretion by awarding fees in skewed apportionment between the parties based on blanket statement of work performed).

Here the commissioner did not use any recognized method or criteria to reduce the fees by three quarters in arriving at a "reasonable amount" for the work performed, despite the requirement for such under *Mahler* and its progeny, as well as under older decisions such as *Hallauer*.

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determining fees for a guardian and remanding for application of factors consistent with the rules of professional conduct and the guardian's role of preserving the estate and only being paid for efforts that benefitted the estate).

Since there was no analysis by the commissioner of what the reasonable fee should be other than an amount that was, literally, plucked out of thin air as opposed to by a proper lodestar or similar analysis; and since there were no findings entered as required by *Mahler* to permit review of the non-existent reasonableness analysis (*see* App. A, August 7 fee order and App. B, September 6 order denying revision), the orders must be vacated. Vacation thus is required no matter what this Court determines as to trial court authority to review fees incurred by the AIP's personal and independent attorney prior to the date the guardianship was established.

2. Remand should be ordered only for payment to Mr. Quick of any unpaid amounts for his work through the date of the Agreed Order of May 7, 2013, and appropriate post-order work.

Mr. Quick also contends that, since the trial court did not have the legal authority to make the order in the first place for the reasons given in Section C, *infra,* there need be no "recalculation" of the reasonableness of the fees on remand. Rather, there needs to be a remand only to insure that Mr. Quick receives any unpaid amounts for his work, minimally through entry of the Agreed Order on May 7, 2013, and at most, for any post-Agreed Order work that was necessary or part of his agreement with Mrs. Decker.

C. Under the Settled Law of *Guardianship of Beecher,* the Structure of the Guardianship Statutes, and Due Process, Mrs. Decker as the *Alleged* Incompetent Person had the Constitutional and Statutory Right to Fight the Guardianship Proceedings and Make Her Own Decisions. The Trial Court Lacked the Legal Authority To Interfere With Mrs. Decker's Choice to Fight the Guardianship and Incur and Pay From Her Own Funds the Attorney's Fees Generated By Her Directions: The Trial Court Had No Authority to Adjust Mrs. Decker's Independent, Personal Attorney's Fees in Any Way.

It was settled a decade ago by *In re the Guardianship of Beecher,* 130 Wn. App. 66, 121 P.3d 743 (2005), that the trial court lacks the authority to control the scope of legal work performed for, or the amount of fees incurred or paid by Mrs. Decker, the alleged incompetent person, to her independent and personal attorney.

The key point of *Beecher* is that under the structure of the guardianship statutes,[12] a person who is *alleged* to be an incompetent person, but is not adjudicated to be incompetent, has all their rights to make decisions as to their person and estate ***until*** there is an adjudication of their competence.[13] That includes Mrs. Decker's

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[12] There has been no material change to the pertinent guardianship statutes since the decision in *Beecher.*

[13] This principle is dictated by well-recognized due process principles which underlie the statutes and require appointment of independent counsel for an alleged incompetent person even in the absence of a specific statutory obligation. *See In re Guardianship of K.M.,* 62 Wn. App. 811, 814-818, 816 P.2d 751 (1991) (reversing and remanding for trial court's failure to appoint independent counsel to permit the ward to challenge the guardian's recommendation the ward be sterilized). Due process protections are critical because the nature of guardianships is to take all decision-making away from the ward. *Id. See also* Mitchell and Mitchell, 26 WASHINGTON PRACTICE "Elder Law" §§ 4.2 – 4.4

right to fight a proposed guardianship and direct the attorney acting on her behalf to fight it hard, as in *Beecher*, and paying that attorney for his services from her funds, as also occurred in that case.

In *Beecher,* the AIP's independent attorney generated fees of over $110,000 in four months between June and September, 2003, as compared to the similar amount of fees for the ***25 months*** of Mr. Quick's representation. The trial court reduced the fee allowance by over 65%, to a total of $39,000, ordering the attorney to repay his client $47,500 of the $86,500 already paid to the attorney. *Beecher,* 130 Wn. App. at 70. The Court of Appeals then held that the trial court in guardianship proceedings initiated by the stepson of an alleged incapacitated person did not have authority to review the fees of the independent attorney hired by the AIP to represent her to resist the proposed guardianship. The Court of Appeals ruled that the AIP had the same autonomy as any other person absent an adjudication of incompetence, and thus only she or her attorneys-in-fact at the time, had standing to dispute fees.

> So a court could not possibly review a guardian's fees before the adjudication because **no guardian is or can be appointed until *after* the court has ruled on the petition**. Since RCW 11.88.045 incorporates the guardian fee review provisions, a court's statutory review of an AIP's attorney's fees must also be limited to situations where there has been a determination that the AIP is in fact incapacitated. **Until that time, she has the same autonomy and rights as any other**

(2013) (sections on constitutional rights, least restrictive alternatives to comply with constitutional rights, and checklist for same).

> **person.** As Beecher was never adjudicated to be an incapacitated person, the guardianship statute did not provide a basis on which the trial court could review Blair's fees.
>
> The overall statutory scheme supports this conclusion. The legislative intent of the guardianship statute is "to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person." [footnote omitted.] Beecher had the right to be represented during the guardianship proceedings by counsel of her choosing. She chose Blair, an attorney with whom she was familiar from his previous work on her behalf. He provided a detailed contract stating his hourly rate and warning of the potential for high costs inherent in Beecher's litigious approach to defending her autonomy. Beecher and her attorneys-in-fact approved. Since Beecher never lost her capacity to contract, there was no basis on which or reason to invalidate her contract with Blair.

In re Guardianship of Beecher, 130 Wn. App. at 72-73 (bold and underlining added; italics by the court).

The emphasized language makes the central point: **until** a person is determined to be incompetent, they have "the same autonomy and rights as any other person." Here that includes, as in *Beecher*, the ability of Mrs. Decker to make contracts and incur and pay debts ***up until the date of the Agreed Order***.

If this were not the case, then due process rights and the entire structure of the guardianship statutes which provide for notice, the appointment of a GAL, provision for independent counsel answerable to the AIP, and the potential for a jury trial, would mean nothing. An adjudication of incompetence is the collision point of

the State's assertion of total control over a person via a guardianship (even if it is in their best interest and for their own good) with the prospective ward's most fundamental constitutional rights of autonomy and independence of self-control: decision-making. It is the point where the State may formally take control of the individual and their assets. It is a delicate thing, even when the guardianship sought is well-meaning, as many guardianships are. But given that our country's and our state's governmental and legal foundations are predicated on jealously protecting individual rights,[14] there can be no exercise of control by the apparatus of the State over a person for anything done ***before*** the guardianship order is entered. *Beecher.*

In short, *Beecher* holds what the guardianship statutes must be applied to be consistent with Mrs. Decker's fundamental rights to personal autonomy and due process: unless and until a court with proper jurisdiction adjudicates her as an incompetent, or she agrees to it, Mrs. Decker, the alleged AIP, retains all rights for such decision-making. There is no basis under the law or logic for a court to second-guess, after the fact, the decisions made and bills incurred by Mrs. Decker (or any person) before such date she is determined to be incompetent or otherwise submits to a guardianship.

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[14] *E.g.,* WASHINGTON CONSTITUTION, Art. 1, sec. 32, which states: "FUNDAMENTAL PRINCIPLES. A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

This is illustrated here if for no other reason than there is no tenable basis for determining on what date before her agreement as of May 7, 2013, it can be accurately determined that Mrs. Decker was not capable of making her own decisions, and which ones.

For example, here DSHS through its department of Adult Protective Services began the guardianship proceeding based on a physician's report and some investigation during which Mrs. Decker refused to cooperate.[15] But after initiating the guardianship and seeking all of its restrictions for a woman with substantial assets and guaranteed future income, in the summer of 2012 APS told the trial court it had determined that the guardianship was no longer necessary because Mrs. Decker "has regained sufficient capacity [and] no longer needs a guardian." CP 44-45. Given this assertion which must be given credence as it was made pursuant to Civil Rule 11, and the ultimate resolution which was an agreed order for a limited guardianship held by a trusted financial advisor for Mrs. Decker, it cannot be said on this record that Mrs. Decker could not make decisions before the May 7, 2013 Agreed Order. Indeed, if that were the case, then that Agreed Order is itself suspect and should be vacated.

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[15] There is an appearance that Mrs. Decker's consistent refusal to "cooperate" with APS was the reason for initiating the guardianship. Without full discovery (resisted by APS) and a trial, it is difficult to know now how much of that "refusal to cooperate" was generated by cultural and language differences, as well as Mrs. Decker's strong streak of independence and pride from 45 years as a military wife.

There has never been an "adjudication" that Mrs. Decker is incompetent, as the contested hearing was avoided and she acquiesced in a limited guardianship with her known financial advisor in that role. As noted, it was at most an open question that the APS went back and forth on before deciding it was no longer necessary when it moved to dismiss the proceedings because they were no longer needed. Given the language in *Beecher,* the structure of the guardianship statutes with the constitutional rights of the AIP, and the facts here of APS declaring in 2012 that the guardianship was not necessary, there can be no premature determination that Mrs. Decker could not make her own decisions on hiring her attorney, or to fight the guardianship, or to pay her attorney for doing so. Since she was legally and constitutionally entitled to make those decisions up to May 7, 2012, the trial court had no right to interfere with them. Nor did it have any right to "reduce" the fees incurred following her directions, nor to require return of those fees she had already paid.

Beecher eliminates any possible question that the statutory structure and basic principles of due process require reversal here, because a person retains all rights of decision-making over her and her property unless and **until** she has been adjudicated incompetent or otherwise submitted to a guardianship over the person and estate. Here, the trial court simply had no authority to second-guess, after the fact, Mrs. Decker's decisions to fight the guardianship, hire Mr.

Quick and direct him to fight the guardianship aggressively, and to pay his fees. While the trial court, or the GAL may not have made the same decisions, they were hers to make up until May 7, 2013. Her decisions must be respected, whether they were wise or foolish, because otherwise, they have been improperly taken from her.

Since the trial court's order purporting to set the total fee amount and requiring a refund of fees by Mr. Quick was beyond the court's lawful authority, it is void and must be vacated.

D. None of the Fees on This Appeal Should be Charged to Mrs. Decker's Estate But Should Be Assessed Against APS and/or the Limited Guardian For Requiring the Appeal to Proceed Despite Notice That the Legal Issues Are Settled and Require Reversal.

It is fundamental that guardianships are to be managed so as to maximize the assets of the ward and minimize unnecessary expenses, which is why fees must be approved by the trial court once a guardianship is established. *In re Guardianship of Lamb, supra,* 173 Wn.2d at 190-91, ¶ 25; *See also Hallauer, supra,* 44 Wn. App. at 797. The Respondents elected to place the question of whether to defend the appeal before the trial court in a request for instructions as to which no notice was given to Mr. Quick, and which did not give any detail on the nature of the appeal, just general statements, as no briefing or other specific information had been filed or given to Respondents. *See* Supp. CP 397-399. The trial court, with very

limited information, therefore instructed the Limited Guardian to defend. Supp. CP 417.

Mr. Quick gave written notice to Respondents that the issues to be raised on appeal are settled by *Beecher* and *Mahler* and its progeny, and the controlling law requires reversal, reiterated by this brief. The docket shows that Respondents have not supplemented their earlier request for instructions with the new information received from Mr. Quick, which could still be done following receipt of the opening brief. This brief is a second written notice of the fact that reversal of the fee orders is required and that Respondents should take steps to not impose unnecessary fees on Mrs. Decker's estate by ignoring settled law and fighting an appeal that only seeks application of well-settled law.

In the absence of such acquiescence in the established law, Mr. Quick requests that this Court's disposition include a ruling that their fees may not be charged against Mrs. Decker's estate or Mr. Quick; and, further, that they are responsible for Mr. Quick's fees under RCW 11.92.180 from the time of his first written notice to them that the appeal was governed by settled law. *See, e.g., McDonald v. Korum Ford,* 80 Wn. App. 877, 891-93, 912 P.2d 1052 (1996) (fees for the opposing party were imposed against a party from the date it had notice of lack of basis for its position).

Mr. Quick therefore requests that none of his fees on appeal be paid to him from Mrs. Decker's estate, and that none of the Respondents' fees be paid from her estate.

V. CONCLUSION.

Appellant Daniel Quick respectfully asks the Court to vacate the trial court orders and remand with instructions to provide for payment of the unpaid portion of the fees Mrs. Decker incurred from Mr. Quick acting on her instructions, prior to her acquiescence in the limited guardianship of her estate; to provide that Mrs. Decker's estate cannot be otherwise charged for fees related to this appeal; and that Mr. Quick's fees be paid by DSHS or the Limited Guardian from the time they had notice from Mr. Quick of the settled law governing the appeal.

DATED this 7th day of April, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By: _____
Gregory M. Miller, WSBA No. 14459
Attorneys for Appellant

NO. 45465-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In the Guardianship of KEIKO DECKER, an alleged Incapacitated Person DANIEL F. QUICK, Former Attorney for Keiko Decker, Appellant, and, STEPHEN J. DeVOGHT, Guardian ad Litem, and DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondents.	CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I caused to be delivered in the manner indicated a copy of *DANIEL QUICK'S OPENING BRIEF* and this *Certificate of Service* on the following parties:

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Natalie K. Cooper Office of the Attorney General 7141 Cleanwater Drive SW PO Box 40124 (zip: 98504-0124) Olympia, WA 98501 Phone: 360-586-6485 Email: nataliec@atg.wa.gov *[counsel for DSHS]*	☒ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☒ email ☐ Other
Court of Appeals, Division II David Ponzoha, Clerk/Administrator Washington Court of Appeals, Div. II 950 Broadway, #300 Tacoma, WA 98402-4454 Phone: (253) 593-2970 Fax: (253) 593-2806 Email: coa2filings@courts.wa.gov	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ email ☒ filing via JIS-Link

DATED this 7th day of April, 2014

Catherine A. Norgaard, Legal Assistant

APPENDIX A

8/8/2013 .22158 .00014

11-4-00294-5 41007803 ORRE 08-08-13

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

In re the Guardianship of

Keiko Decker
an Incapacitated Person

No. 11-4-00294-5

ORDER

[ ] Clerk's action require

This Matter having come before the COURT upon the moving party's Motion, and the COURT having heard the argument of the parties and having considered the records and files herein, it is now therefore,

ORDERED, ADJUDGED AND DECREED The attorney's fees and costs of Daniel Quick on behalf of Keiko Decker are approved in the amount of $30,000 total. He shall pay to the Guardian the difference of anything paid over $30,000 within six months from today's date.

Dated this 7 day of August, 2013

Judge/Commissioner

Daniel Quick Petitioner/WSBA # 26064

Petitioner Respondent/WSBA #43168

guardian ad litem WSBA 36133

Atty for WSBA# 17405

APPENDIX B

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

In re the Guardianship of:	NO. 11-4-00294-5
KEIKO DECKER,	ORDER ON MOTION TO REVISE
An Incapacitated Person.	

THIS MATTER having come before the Court on Daniel Quick's motion to revise the Commissioner's Court order approving fees of $30,000; the Court having reviewed Motion (and the attached transcript) as well as the pleadings before the Commissioner; the Court having heard comments from Daniel Quick, the Guardian ad Litem, the Petitioner, and the Guardian; it is hereby

ORDERED that the motion to revise is denied.

DONE IN OPEN COURT THIS 6th day of September, 2013.

JUDGE JACK NEVIN

Presented by:

GORDON THOMAS HONEYWELL LLP

By _____
Eileen S. Peterson, WSBA No. 17405
epeterson@gth-law.com
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CARNEY BADLEY SPELLMAN

May 20, 2014 - 3:04 PM

Transmittal Letter

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Amended Appellant's Opening Brief and certificate of service

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