Supreme Court No. 91929-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 45465-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

DANIEL F. QUICK, Former Attorney for Keiko Decker,

Peitioner,

v.

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

Respondents.

PETITION FOR REVIEW
Corrected

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APPENDICES

A. IDENTITY OF PETITIONER

Petitioner Daniel F. Quick asks the Court to grant review of the published Court of Appeals decision filed June 16, 2015, attached as Appendix A ("Decision" or "Slip Op.").

B. COURT OF APPEALS DECISION & CASE SUMMARY

Division II of the Court of Appeals affirmed the trial court's ex parte department commissioner's order limiting to $30,000 the attorney's fees which Mrs. Keiko Decker ("Mrs. Decker"), the former ***alleged*** incompetent person, was permitted to pay her personal attorney, Mr. Quick, for the nearly 23 months of following her express instructions to resist the proposed guardianship, from June 2011 until the agreed order of limited guardianship was entered May 7, 2013. This means Mr. Quick is to pay to the guardianship over $88,000 which Mrs. Decker had paid to him on an ongoing basis during the two-year contest over the guardianship.

The nub of the case is whether the trial court has legal authority to control the scope and amount of work for an ***alleged*** incompetent's personal attorney who is required by statute, the constitutions, and legal ethics to follow his client's instructions to retain her freedom. In short, is the trial court allowed to interfere with or control the work the personal attorney does for his client, particularly here where it is a private pay situation? The Court of Appeals affirmed such interference with the attorney-client

relationship and also gave the trial courts blank checks in determining the amount of fees to allow, requiring neither any form of analysis or findings. The fee ruling as affirmed is inconsistent with established decisions of this Court and the Court of Appeals, as there were no findings and conclusions, nor any meaningful analysis of how the fee amount was determined, as has been required for appellate review of such awards for at least four decades.[1]

C. ISSUES PRESENTED FOR REVIEW

1. The personal attorney for an ***alleged*** incompetent person is required by statute, longstanding constitutional law, and her ethical obligations to her client, to represent the wishes of her client who wants to resist a proposed guardianship, not the "best interests" of the ***alleged*** incompetent, which are to be represented and promoted by the GAL and Adult Protective Services. In these circumstances, and where no vulnerable adult proceeding has been initiated, does a trial court in a guardianship proceeding have the legal authority to control the scope and amount of legal work done by the privately paid personal attorney for an ***alleged*** incompetent person, whether directly by court order, or indirectly by seeking to control the fees the attorney is paid from private funds?

2. The trial court fee award, and the rationale used by Division II to affirm, both relied on the earlier orders purporting to restrict the personal attorney's scope and

[1] *See Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998), *overruled on other grounds, Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012); *In re Guardianship of Hallauer*, 44 Wn. App. 795, 799-801, 723 P.2d 1161 (1986).

amount of work in representing his client. If the trial court does not have the legal authority to control the scope or amount of work done by an ***alleged*** incompetent's privately-paid personal attorney in resisting a guardianship, any orders purporting to limit the personal attorney's scope or amount of work or the fees are void. Should review be granted because void orders cannot support any subsequent order, including a fee award, so that the fee "award" (here, a limitation) and its affirmance, conflict with settled Washington and federal constitutional law, including *State v. Coe*, 101 Wn.2d 364, 69, 372 P.2d 353 (1984), *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 74, 483 P.2d 608, *certiorari denied*, 404 U.S. 939 (1971), and *Bradley v. Fisher*, 80 U.S. 335, 343-44, 20 L. Ed. 646 (1871)?

3. Assuming (without agreeing) that a trial court in a guardianship has the legal authority to review the fees incurred and privately paid to an ***alleged*** incompetent's personal attorney engaged to resist the guardianship, is that review limited to determining the reasonableness of the fees incurred while accepting the scope and amount of work done at the client's behest; and must such determination be based on a reasoned analysis with appropriate findings and conclusions to permit meaningful appellate review under established case law, *e.g., Bowers v. Transamerica, Mahler v. Szucs, In re Guardianship of Hallauer*, and *In re Guardianship of Lamb*?

D. STATEMENT OF THE CASE

Mrs. Decker was an independent-minded, proud 76-year old woman born and raised in Japan who was married to Air Force Col. Wilson Decker for over 45 years when he died in October, 2009. *See* Opening Brief ("OB") pp. 5-6. They had no children, she had

no relatives in the Tacoma where she lived, and her primary language still was Japanese, but she had a comfortable house, savings, and her husband's military pension. *Id.* Although because of her personal withdrawal following Col. Decker's death, a male physician who did not speak Japanese understandably thought she was showing signs of dementia[2] and alerted Adult Protective Services to investigate, fearing among other things she might be taken advantage of financially, and APS initiated guardianship proceedings in February 2011. OB 6-7. A GAL was appointed who reported that Mrs. Decker was extremely resistant to a guardianship and he could get "no cooperation" from her. *Id.* & fn. 1, 2. Because of the language barrier, the GAL sought an attorney experienced in guardianships and elder law who spoke Japanese. Surprisingly, there were none in Pierce County, so Mr. Quick was recruited from King County, despite the travel time required. OB 7. It worked.

Mrs. Decker finally had someone with whom she could speak fully. Although Mr. Quick was initially appointed by the trial court pursuant to RCW 11.88.045 and given a "budget" of hours he was supposedly limited to working, in October 2011 Mrs. Decker

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[2] In fact, APS later acknowledged when it sought to dismiss the guardianship proceedings in 2012 and that Mrs. Decker stated her health care providers "confused profound grief for dementia" as she was, not surprisingly, deep in grief if not depression from this dramatic change in her life. CP 46; *see* OB 12. Unfortunately, she did not get treatment, but a paternalistic reaction, even if well-meaning. This she fought, as was her right.

formally hired him directly to fight the guardianship and paid him directly for his legal work. OB 8. Two months later in December, 2011, she named Mr. Quick as her attorney in fact. OB 8-9. As the GAL wrote in his May, 2012 report, after Mr. Quick had been representing Mrs. Decker for a year and while also reporting that Mr. Quick had been named as her attorney in fact: "I recommend that Keiko Decker continue to retain Daniel Quick as her attorney [sic] 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. *See also* OB 9-14 detailing Mrs. Decker's continued rejection of a guardianship and refusals to "cooperate". It also shows the knowledge of the GAL, APS, and the trial court in Mr. Quick's roles as attorney and attorney-in-fact.

In June, 2012, APS concluded that "Mrs. Decker has regained sufficient capacity [that she] no longer needs a guardian" and moved to dismiss the guardianship and replace it with a less restrictive alternative – but one which required removal of Mr. Quick as her attorney-in-fact. *See* OB 11-13. Mrs. Decker resisted because she did not want to lose the one person with whom she could speak and who the GAL acknowledged was her trusted advisor. The APS motion to dismiss the guardianship, which was premised on the replacement of Mr. Quick, was denied, as was Mrs. Decker's motion

to dismiss the guardianship outright for APS' failure to prosecute. *See* OB 11-13.

After further proceedings during the next year, and on the eve of a competency trial set for spring, 2013, Mrs. Decker acquiesced in a limited guardianship because the proposed limited guardian was her tax preparer for several years, a person she knew and trusted. *See* OB 14. The order was entered May 7, 2013, over two years after the guardianship was initiated and 23 months after Mr. Quick was sought out to be Mrs. Decker's personal attorney. *Id.*

A hearing was held in August, 2013, to finalize Mr. Quick's work in the matter and, from his perspective, go through the formality of approving the fees that had been paid and provide for any fees owing to him after the guardianship order had been entered, since Mrs. Decker had paid him on an ongoing basis. OB 14-18. He submitted his time records and a declaration detailing the work done since June of 2011, over two years by the hearing. OB 15 & CP 145-265. While the GAL and APS both filed responses to Mr. Quick's papers, neither specifically challenged the reasonableness of his fees, deferring to the trial court. The GAL filed detailed papers, and a copy of RPC 1.5 as "additional relevant authority" (CP 324-325), indicating those factors should guide the court's determination of what is a reasonable fee. The nub of the GAL's complaint was that while Mr. Quick was qualified and willing to act, he "worked diligently to promote Mrs. Decker's stated preferences, but failed to

follow the court orders which mandate that he get prior approval of the court for additional authority (hours) to represent her." CP 518:19-21.

After the hearing Commissioner Dicke agreed with the arguments that she had the right to control Mr. Quick's work as Mrs. Decker's personal attorney and gave a flat number of $30,000, for which no basis was proffered. *See* I RP p. 30: "I'm inclined to order $30,000," a figure no person had suggested and for which no basis was provided in reaching, whether via RPC's, or any kind of loadstar analysis. Judge Nevin denied revision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review Should Granted Pursuant to RAP 13.4(b) on the Issue of the Trial Court's Authority To Monitor And Control the Personal Attorney Representing An Alleged Incompetent Person Because The Decision Conflicts With the State and Federal Constitutions, With the Intent of the Statutes Intended to Implement the Constitutional Protections for Persons Confronted with a Guardianship Petition, And With Decisions of This Court.

The guardianship statutes provide for a personal attorney for an alleged incompetent person and draws a clear line between the lawyer's duties and that of the GAL:

> Counsel for an alleged incapacitated individual 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. 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.

RCW 11.88.045(b) (emphasis added). As noted in the briefing, particularly Mr. Quick's reply brief, this statutory provision is actually codifying underlying state and federal constitutional rights of an ***alleged*** incompetent such as Mrs. Decker to resist the guardianship and direct legal counsel to do so. *See In re Guardianship of Beecher,* 130 Wn. App. 66, 121 P.3d 743 (2005), discussed in OB pp. 25-28 and other authorities therein; RB, pp. 11-21 and cases cited, including *In re Matter of Quesnell,* 83 Wn.2d 224, 238–39, 517 P.2d 568 (1973), *In re Houts,* 7 Wn. App. 476, 481, 499 P.2d 1276 (1972); and *Graham v. Graham,* 40 Wn.2d 64, 240 P.2d 564 (1952). Interestingly, many of the same cases were just cited by Division I in its recent decision affirming the constitutional rights of a person for whom a GAL purports to act and the limits on a trial court's authority in accepting waivers, there in a marriage context. *See In re Marriage of Lane,* ___ Wn. App. ___, ___ P.3d ___, 2015 WL 3970634 (June 29, 2015).

The problem in this case, and why review should be granted, is that the trial court did not fully appreciate the role of the personal attorney. First, it entered orders purporting to limit the scope and amount of legal work to be done for Mrs. Decker. Then it limited the fees that it would "approve" for following his client's directives

to resist the guardianship. The transcript of the hearing makes it apparent that the commissioner believed that Mr. Quick should not have followed his client's directives but, in fact, acted more like a GAL and realized "the context" of the case and not spend so much time on it. This essentially eliminates the core requirement of the personal attorney of representing the ***alleged*** incompetent person as required by the statute and constitutional law. To the extent there is any arguable conflict between the statute and the constitution, the alleged incompetent's right to representation necessarily trumps the statute and voids any orders purportedly made pursuant to the overbroad statute.

2. Review Should Be Granted Per RAP 13.4(b)(2), (3), & (4) Because The Published Decision Conflicts With Decisions of This Court Regarding Determining Reasonable Attorneys' Fees, Including *In Re Guardianship of Lamb and Mahler v. Szucs,* and Other Decisions Of The Court Of Appeals Including *In re Guardianship of* Hallauer; And Because The Decision Dramatically Changes The Law Regarding Fee Awards In Guardianship Proceedings By Giving Trial Courts Unreviewable Discretion When There Is No Principled Basis For Determining The Fee Amount.

The decision sets up the false contention that Mr. Quick argued the Lodestar analysis was the required analysis for calculating attorney's fees, using that as the proverbial "straw-man" argument it then tears down in a tortured analysis to hold the Lodestar need not apply in the guardianship context because the

lodestar only applies to calculate fees to a "prevailing party" and that no findings are required to support a fee award. Slip Op., pp. 14 – 19. The result of this published decision is a fundamental change in the law. Now, no principled analysis is required for fee awards in a guardianship. *See id.* Nor are any written findings needed. This is contrary to settled law. *See, e.g., Mahler v. Szucs,* 135 Wn.2d 398, 433-435, 957 P.2d 632, 966 P.2d 305 (1998), *overruled on other grounds, Matsyuk v. State Farm Fire & Cas. Co.,* 173 Wn.2d 643, 272 P.3d 802 (2012), incorporating the lodestar analysis of *Bowers v. Transamerica*, 100 Wn.2d 581, 595-601, 675 P.2d 193 (1983) as the "suggested" method for making fee awards, in part due to its reliance on principles from the rules of professional conduct. *See also* cases collected in OB at pages 21-22 and footnotes 8-10, fee awards under the statute in both guardianship and probate contexts.

Moreover, Mr. Quick never argued that the Lodestar analysis was the only analysis that could be applied, just that it was the preferred analysis. *See* Opening Brief, pp. 21-24; Reply Brief, pp. 9-10. For example, Heading IV. B. of the OB reads in part that "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. OB, p. 21 (emphasis added). Finally, Mr. Quick argued *In re Guardianship of Hallauer*, 44 Wn. App. 795, 799-801, 723 P.2d 1161 (1986), a pre-*Bowers* and pre-*Mahler* case which reversed the trial court's fee award because it did not detail the basis

for its award. *See* OB., pp. 22-23; Reply Brief, p. 10. *Hallauer,* ignored by the Panel, is quite clear what is required as to fee awards under the same statute at issue in this case:

> An award of fees is not simply payment for "work actually performed". A substantive analysis must also be made; first, by the attorney to determine what fees to charge; and second, by the court to determine what to award. Included in that analysis is the necessity of the given work that is charged. *See [In re estate of] Larson*, 103 Wn.2d [517] at 523-24, 530-32[, 694 P.2d 1051 1985].
>
> What needs to be evaluated by the court then is (1) which claims benefited the estate; (2) what work was necessary to pursue those claims; (3) the reasonableness of the hours billed to perform the needed work; and (4) the propriety of the hourly rate. . . . On remand, the trial court should disallow fees for duplicative service, possibly including the attendance of second counsel at trial, for work not related to the specific issues which actually benefited the estate, and for fees in excess of the amount necessary to present the issues upon which Rainier prevailed.

Guardianship of Hallauer, 44 Wn.App. at 800-801. Here Mr. Quick undeniably provided services as required by Mrs. Decker and maintained her freedom for two years. If the trial court is allowed to review her payment of Mr. Quick's fees for the time before May 7, 2013, the kind of analysis required by *Hallauer* is also required here.

Review should be granted because the Decision is in conflict with this line of cases in guardianship and for fee awards generally which require a reasoned analysis for a fee determination. Review should be granted if for no other reason than if such a major change

is to be made to well-established law of calculating fees in Washington, it should be made by the Supreme Court.

Finally, the Decision confuses the standing of a person to assert the constitutional rights of another (here Mr. Quick to assert Mrs. Decker's rights) with Mr. Quick's absolute right to challenge the legal authority of the trial court to make orders affecting him. After raising standing *sua sponte* to rule that Mr. Quick lacked standing to challenge the trial court's right to take away Mrs. Decker's decision-making before she acquiesced in the limited guardianship (*see Slip Op.*, at pp. 13-14), the Decision states that "it would not make sense to construe the statute to require a trial court to use a lodestar analysis where, as here, the attorney has violated the previous court orders limiting him to a certain number of hours of representation." Slip Op., p. 16, ¶ 2.

But as noted in the argument *supra*, the trial court simply had no legal authority to make those orders limiting Mr. Quick to a certain number of hours as Mrs. Decker's personal attorney, especially where she had the ability to pay him for his work. The trial court, plain and simple, had no legal authority to limit her representation. As such, they are void. *See, e.g., State v. Coe*, 101 Wn.2d 364, 69-372 (collateral bar issue), 374-381 (prior restraint as void under state and federal constitutions), 679 P.2d 353 (1984) ("Under Washington law, if the order in this case was patently invalid or 'void' as outside the court's power, the contempt

judgment must be reversed...For the foregoing reasons the order is annulled, as being beyond the power of the court to make") (also holding that a contemnor may collaterally attack an unconstitutional prior restraint); *State ex rel. Superior Court v. Sperry*, *supra,* 79 Wn.2d 69, 74 (per McGovern, J.) ("We have held in a number of cases that a void order or decree, as distinguished from one that is merely erroneous, may be attacked in a collateral proceeding...The violation of an order patently in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt...")

It would be no different than suggesting the trial court could limit the number of hours a criminal defendant's private-pay attorney could spend on the case, be it a minor felony or murder 1. Where the client has the money to pay the attorney, a court cannot interfere, whether at the time or after the fact, much less both. And where the court has no legal authority to enter the given order, the order is void. The Decision's rationale for avoiding the lodestar falls of its own weight.

3. Review Should Be Granted Per RAP 13.4(b)(4) To Restore The Understanding Of The Necessary Balance In Guardianships Between The GAL's and Adult Protective Services' Necessarily Paternalistic-Maternalistic Approaches And Efforts, The Trial Court's Supervisory Role To Protect The *Alleged* Incompetent, And The Fundamentally Different Role Played By The *Alleged* Incompetent's Personal Attorney Who, In Cases Like This And *Beecher,* Will Necessarily Challenge And Frustrate The Efforts Of The GAL

and APS Rather Than Help Them "Steer" Their Client Into A Guardianship They Insist They Do Not Want. Restoring That Understanding And Balance Includes Reminding Trial Courts They Do Not Have The Authority To Limit The Time Or Effort Of Those Personal Attorneys, Just As They Have No Right To Limit The Efforts Of A Privately Paid Criminal Defense Attorney Who Is Also Seeking To Maintain Her Client's Freedom.

This case illustrates how both the trial court and the panel fundamentally misunderstood the distinctly different role of the attorney for an alleged incompetent person, particularly one like Mrs. Decker who from the first account by the guardian ad litem (and including still, in the latest annual report filed with the superior court on June 26) has resisted the guardianship and continues to not cooperate with even the chosen limited guardian. Mrs. Decker is an example of a person caught in the web of the well-meaning but overly controlling paternalistic/maternalistic philosophy that too often defines the efforts of those few people who regularly serve as the advocates, lawyers, and judicial officers. That outlook, no matter how well-meaning, simply does not have room for the kind of resistance that a person like Mrs. Decker, or Mr. Beecher, or those few others mount to avoid the guardianship. The reason is simple: the attorneys for the Mrs. Deckers and Mr. Beechers make the work of the "regulars" in the system difficult, time consuming, and sometimes frustrating.

The difficulty is that the Mrs. Deckers and Mr. Beechers of the world are entitled to their personal attorneys under the state and federal constitutions, recognized in RCW 11.88.045(b). To the extent orders were entered restricting Mr. Quick's work, either by hours or dollars, and his client demanded he spend more effort than the hours or allowance provided for and she had the money to pay for it, not only was he ethically and legally bound to represent her as directed, the orders allegedly restricting his work were beyond the trial court's legal authority and, therefore, void.

The world view of all the regular participants is that they know better: if the person is in the guardianship proceeding in the first place, they must need the protection. Certainly the kinds of principles enunciated in *Guardianship of Lamb* and prior cases are correct: trial courts have to watch carefully to insure that incompetent persons are properly protected. But too many times that highly protective, paternalistic/maternalistic outlook becomes the only view. A judge caught up in this mind-set simply cannot understand how any lawyer would spend the time and effort demanded of Mrs. Decker. Both the judge and the GAL, and certainly Adult Protective Services, will all agree that the attorney for the alleged incompetent who wants to fight the guardianship should, rather, go along and steer the person into the guardianship that all the regular participants "know" is the best thing for him or her.

The bottom line is that the trial court believed (and the panel affirmed in a published decision) that: 1) the commissioner was entitled under the statute to control the amount of work Mr. Quick did as Mrs. Decker's personal attorney; and 2) the commissioner could control the amount the personal attorney would receive from Mrs. Decker; and 3) Mrs. Decker's personal attorney should be working with the GAL and the court to get Mrs. Decker into a guardianship and really could not follow her instructions. This is illustrated in the comments made at the end of the hearing by the counsel for the limited guardian and by Commissioner Dickie's comments on her rationale for why she thought the fees she authorized in August, 2013, should be less than reflected the work that was done by Mr. Quick at Mrs. Decker's direction.

> . . . $100,000 plus is not reasonable in this kind of matter. No matter how hard or difficult Ms. Decker is, no matter how much of a defense she wants, **you still have to be mindful of, you know, what kind of context this is**.

1 RP, p. 29 (emphasis added).

This is the fundamental misunderstanding that the trial court commissioner, the superior court who refused to revise, and the Division II panel all have. None of them believe that an ***alleged*** incompetent person's ***personal*** attorney is allowed to mount a full

defense if that is what the ***alleged*** wants and instructs her attorney to do, as Mrs. Decker did here, and as Mr. Beecher did a decade ago.[3]

The Limited Guardian will be expected to argue that Mr. Quick acted improperly and that he took advantage of the vulnerable Mrs. Decker. But the record does not reflect that. The record reflects that Mr. Quick was the one person in this entire, tragic episode for Mrs. Decker who could actually communicate with her fully. And he was the one who actually did what she wanted; not what some other person thought was in her best interest.

Established principles of constitutional law say that she had the right to resist the guardianship. Mr. Quick did that and kept her from the guardianship for two years, and in that sense succeeded in maintaining her freedom before she finally acquiesced in relinquishing most of it.

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[3] As a side note of comparison with *Beecher*, Mr. Beecher's personal attorney incurred time of over $100,000 in billings in four months over a decade ago at lower rates, while Mr. Quick's time shows the fees were incurred over the entirety of his **twenty-three** months of work. The difference, of course, is that Judge Agid and a unanimous panel for Division I reversed the King County commissioner's dramatic reduction in fees to Mr. Beecher's attorney because he was entitled to spend his money on his defense if he wanted, citing cases which recognized the underlying constitutional principles in play. Here the Pierce County commissioner's similar ruling that she could control Mrs. Decker's personal attorney was affirmed by the panel, essentially eliminating *Beecher* as a "troublesome" case for the guardianship bench and bar. Now the bench and bar no longer have to worry about either not having control over a personal attorney or having to provide a principled basis for an award or reduction of fees.

If Mr. Quick truly was taking unfair economic advantage of Mrs. Decker as was claimed at the end of the proceedings, it was incumbent on APS and the GAL to initiate a vulnerable adult protection action under that statute. Indeed, they had an obligation to initiate it if they thought so. That was never done, even though they were aware that Mr. Quick had Mrs. Decker's appointment as her attorney in fact shortly after she gave it to him. A VAPO is the legislatively-approved, flexible and immediate mechanism to cure such a problem if APS and the GAL genuinely believed Mr. Quick was a problem. Their failure to seek such relief is telling. Moreover, the existence of that statute is a rejoinder to the underlying premise of the panel decision, that anyone who is an ***alleged*** incompetent must be protected and really does not have the right to a personal attorney who will follow the instructions of the ***alleged*** incompetent.[4]

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[4] Review of the oral argument audio will show that the first question raised by Judge Worswick was how can a vulnerable, allegedly incompetent person be protected from unscrupulous attorneys or others who might "scour" court files looking for easy targets to get their assets signed over? One implication at argument was that Mr. Quick was just such an unscrupulous attorney "on the hunt" for an easy mark. This despite the fact that it was the initial GAL from Pierce County who had to reach out to King County to find Mr. Quick who was both a qualified attorney in this area and also spoke Japanese, and so would have some chance of being able to work with Mrs. Decker. This hardly made him "on the hunt for an easy mark." But what made him persona non grata in Pierce County was the extreme inconvenience flowing from his actually following Mrs. Decker's directions to fight the guardianship. Commissioner Dicke made clear they did not expect such behavior from a personal attorney.

F. CONCLUSION

The panel decision unfortunately read the material term "alleged" out of the guardianship statutes, effectively agreeing that any such person and their decision-making was subject to trial court supervision and control, without any kind of due process hearing on the person's competence as could be done under those statutes or pursuant to the vulnerable adult statutes. This includes giving the trial court the right to control the ***alleged*** incompetent's personal attorney, despite the statutory, constitutional, and ethical requirements the attorney carry out her client's directions to resist the guardianship. As a consequence, the panel decision also strips from guardianship proceedings the constitutional underpinnings which have long protected individuals' constitutional rights and personal autonomy and also placed limits on trial court authority.

Finally, the undersigned has received numerous comments from attorneys practicing in this area attesting that, if this decision stands, few if any attorneys will agree to be the personal attorney for an ***alleged*** incompetent person. To them, this decision means the personal attorney can be controlled by the court, not her client, with orders restricting the amount and scope of work they may do. Further control is asserted because the attorney must kowtow to the judge to be paid and, as here, has no recourse to a paltry award of fees even when, as here, the work is documented, was required by the client, and successfully kept the client out of a guardianship for

two years. But where, as here, the judge who did not like the fact the guardianship was opposed strenuously and "took too long," this Decision tells the bench and bar that the judge ultimately can chooses a paltry number out of thin air with no analysis and make it stick. In short, even though this was a private pay situation, a genuinely responsive personal attorney for an ***alleged*** incompetent no longer exists.

The Court should grant review to have a full discussion of the issues to restore the balance between the maternalistic/paternalistic forces of the GAL and APS, the rights of the ***alleged*** incompetent and the associated autonomy and obligations of the personal attorney to her client, and the associated proper role and limits on the authority of the trial court in such proceedings where they are contested. The Decision demonstrates the need for this Court to render a decision with a full discussion which reminds the guardianship Bench and Bar that ***alleged*** incompetent persons ***are*** entitled to a personal attorney if they want to resist the guardianship; that the personal attorney is not just another member of the "team" that works to get the person into the guardianship and may be financially penalized if she does not "go along" with the usual program of establishing the guardianship; that the trial court cannot control the scope or amount of legal work done by the personal attorney in resisting a guardianship, either directly by order or indirectly by denial of fees; and finally, that where the personal

attorney is privately paid the trial court has a limited if any role in determining the reasonableness of the fees incurred and paid by the ***alleged*** incompetent when they are, under the law, unrestrained in their personal autonomy and decision-making.

Petitioner asks the Court to grant review of the Decision and address all the issues raised in the appeal and in this Petition, and schedule argument at the earliest opportunity.

Dated this 27 day of August, 2015.

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By _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Guardianship of:	No. 45465-3-II
KEIKO DECKER,	
An Alleged Incapacitated Person.	
	PUBLISHED OPINION

WORSWICK, J. — Daniel Quick, former attorney for Keiko Decker, the incapacitated person in this adult guardianship case, appeals the trial court's order limiting Quick's attorney fees and disgorging fees already paid to him. He argues that the trial court erred by (1) entering orders reducing Quick's fees without authority to do so, or alternatively by (2) reducing Quick's fees without engaging in the proper analysis. Decker's guardian, Maurice Laufer, requests attorney fees on appeal under RAP 18.1 and RCW 11.96A.150. We affirm the trial court's orders and grant Laufer his requested attorney fees.

FACTS

This appeal concerns only the issue of attorney fees in a guardianship case. In February, 2011, the Department of Social and Health Services petitioned for a guardianship over Decker, an elderly Japanese born woman, alleging she was incapacitated. The petition stated that Decker had been diagnosed with dementia, had been exhibiting paranoid behavior, and appeared to have been financially exploited. The Department estimated that Decker's assets were worth $708,700. Accordingly, the trial court's commissioner appointed a guardian ad litem (GAL) to represent Decker's best interests in the guardianship proceedings.

The GAL told the commissioner that Decker had refused to meet with or cooperate with him. He petitioned the commissioner to appoint Daniel Quick as Decker's attorney. Quick spoke some Japanese and was familiar with Japanese culture. On June 22, the commissioner signed an order appointing Quick as Decker's attorney. The order stated that Quick should be paid at Decker's expense, "with fees for representation subject to the Court's approval pursuant to RCW 11.92.180 and SPR 98.12."[1] Clerk's Papers (CP) at 32. It approved an hourly rate of $250.00 per hour and authorized 10 hours of representation. The order further stated that Quick "shall not spend more than 10 hours representing Ms. Decker without prior court approval," and that "[f]ees for time are limited to 10(TEN) [sic] hours at the rate of $250.00 per hour without further court order entered before incurring the additional time." CP at 32, 33.

Later, pursuant to the parties' stipulation, the commissioner entered an agreed order authorizing 40 additional hours for Quick. This order provided that Quick "shall not spend more than forty (40) hours representing Ms. Decker without prior court approval." Suppl. CP at 424. The total amount of court approved time was 50 hours.

On August 16, Quick petitioned for approval of several documents relating to his representation of Decker. He requested that the commissioner approve a fee agreement with Decker that contained no limitation on his time. He also requested prior approval of "reasonable time spent and costs incurred for taking this matter to trial according to the wishes of the alleged incapacitated person." Suppl. CP at 429. He did not specify a number of additional hours in this

[1] SPR 98.12 states that attorneys seeking compensation for work in estates cases must definitely and clearly set forth the amount of compensation claimed. SPR 98.12 does not affect the issues in this appeal.

request. Quick attached a copy of this unsigned, purported fee agreement with Decker. This fee agreement provided for hourly rates of $250 for Quick, $200 for associate attorneys, and $125 for paralegals. The commissioner reserved ruling on these requests without giving any reasons. The commissioner never approved the requests.

On December 20, apparently without prior notice to the GAL, Decker filed a durable power of attorney with the Pierce County Auditor, naming Quick as her attorney-in-fact. The durable power of attorney provided that Quick "shall have all powers of an absolute owner over the assets and liabilities of [Decker]." Suppl. CP at 470. The document provided: "It is the principal's intent that the power given to the attorney-in-fact designated herein be interpreted to be so broad as to obviate the need for the appointment of a guardian for the person or estate of the principal." Suppl. CP at 473. It named a certified professional guardian, Glenda Voller, as successor attorney-in-fact to be appointed "only upon the death, disability or incapacity of, or the written resignation by" Quick. Suppl. CP at 469.

Decker continued to be uncooperative with the GAL. On May 9, 2012, the GAL filed a report recommending either appointment of a limited guardian or a less restrictive alternative. On June 8, the Department moved for dismissal of the guardianship proceedings, arguing that an alternate arrangement in lieu of a guardianship would suffice. The Department expressed concerns about Quick: "Mr. Quick is acting in two, conflicting capacities, both as client (as Ms. Decker's attorney-in-fact) *and as his own* legal counsel." CP at 47. Thus, the Department suggested that Voller, the successor attorney-in-fact, be appointed attorney-in-fact. It argued that Decker might receive adequate protection and assistance through a less restrictive alternative such as the durable power of attorney, rather than a full guardianship.

Decker, through Quick, opposed the Department's motion to dismiss the guardianship. She argued that she should be able to defend against being deemed an incapacitated person through an adversarial process, rather than receive a less restrictive alternative. The commissioner denied the Department's motion to dismiss the petition, without giving any reasons.

Decker then moved to dismiss the petition for guardianship completely. The commissioner denied this motion.

At this time, Decker was 80 years old, had been involved in some recent car accidents, and had been diagnosed with dementia. Settlement negotiations ensued between the Department and Decker. Pursuant to these negotiations, Decker approved a proposal that her tax preparer, Maurice Laufer, should act as her guardian.

On May 7, 2013, the commissioner entered an order appointing Laufer as guardian of Decker's person and estate. The commissioner based her order on the GAL's written report, a medical and psychological report, and other documents. The order contained findings of fact and conclusions of law. The commissioner found that Decker's durable power of attorney naming Quick as her attorney-in-fact "is not in effect due to questions of Ms. Decker's capacity at the time she executed this document," that Decker "does not have the current capacity to execute a power of attorney instrument at this time," and that Decker "is capable of managing some personal and/or financial affairs, but is in need of the protection and assistance of a limited Guardian" of her person and estate. CP at 86. It ruled that Decker "is an Incapacitated Person within the meaning of [chapter 11.88 RCW], and a Limited Guardian of the Person [and] Limited Guardian of the Estate should be appointed." CP at 88.

The commissioner canceled the prior durable power of attorney in its entirety. She discharged Quick as Decker's attorney, and she ruled that "Daniel Quick PLLC may petition the court for additional fees and costs up until the 90 day hearing." CP at 95.

Quick moved for approval of his attorney fees. He requested approval of $118,110.65 that he had already been paid and for an additional $17,137.50 for an unspecified number of hours of representation. He submitted lengthy billing summaries. Quick submitted a copy of a *signed* attorney fee agreement between himself and Decker, dated October 20, 2011.

The commissioner approved a total of $30,000 for Quick's fees and costs. This sum appears to reflect 120 hours of work at $250 per hour, but the commissioner did not specify the number of hours she approved. The court commissioner ordered that Quick "shall pay to the Guardian the difference of anything paid over $30,000 within six months from today's date." CP at 331. The commissioner did not enter findings of fact and conclusions of law, but she did discuss this ruling on the record. She dismissed Quick's argument that Decker had agreed to his fees, saying:

> Regardless of the contract, you still are under a court order only to do a certain amount of work without further court authority. So you kind of took your own risk in that regard, because the court is always mindful of maintaining a substantial amount, try to limit litigation costs and keep as much money available for the alleged incapacitated person.

CP at 350-51. The commissioner reminded Quick that she had approved only 50 hours in her previous orders. The commissioner concluded that Quick's fees were not reasonable, stating:

> $100,000 plus is not reasonable in this kind of matter. No matter how hard or difficult Ms. Decker is, no matter how much of a defense she wants, you still have to be mindful of, you know, what kind of context this is. So, you know, I don't know what to say. You're authorized from (inaudible) calculation is like $12,500 is what the court okayed.

> Now, I think that given the difficulty and the fact ultimately some additional funds over and above what was initially authorized makes sense, but nowhere near the 110 that you've already, I guess, received.
>
> And I have to agree, it is somewhat unusual in the context of someone that's being brought before the court for concerns about exploitation to be receiving funds without the court's blessing.

CP at 367.

Quick moved the trial court to revise the commissioner's order. A trial court judge denied this motion to revise. Quick appeals.

ANALYSIS

Quick argues that the trial court erred by failing to revise the commissioner's order reducing his attorney fees and disgorging fees he had already received. He argues that the trial court lacked the authority to reduce fees and that it violated Decker's due process rights by reducing fees accrued before her adjudication of incapacity. He also argues that, even if the trial court had such authority, it erred by reducing the fees without engaging in a proper analysis and making proper findings. We disagree.

I. STANDARD OF REVIEW

In an appeal of a trial court's decision not to revise a court commissioner's decision, we review the trial court's decision, not the commissioner's. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). Where the trial court denied the motion to revise without making findings of its own, we deem that the trial court adopted the findings and conclusions of the commissioner. *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

We apply a two step review to attorney fee calculations. First, we review de novo the legal basis for awarding attorney fees, and then we review a discretionary award of attorney fees

for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). We review an award of attorney fees in a guardianship case for an abuse of discretion. *In re Guardianship of Lamb*, 173 Wn.2d 173, 184, 265 P.3d 876 (2011); *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004).

We review issues of statutory interpretation, such as whether the trial court has authority to act under a statute, de novo. *In re Guardianship of Beecher*, 130 Wn. App. 66, 70, 121 P.3d 743 (2005). First, we look to the plain language of the statute to determine legislative intent. 130 Wn. App. at 70-71. Only if the plain language is ambiguous do we proceed to consider other sources of statutory intent, such as legislative history. 130 Wn. App. at 71. We look "at the statute as a whole, and our interpretation must not create an absurd result." 130 Wn. App. at 71. If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *In re Guardianship of Johnson*, 112 Wn. App. 384, 387, 48 P.3d 1029 (2002). We do not delete language from an unambiguous statute. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

II. Trial Court Had Authority To Limit Attorney Fees

Quick argues that the trial court lacked the authority to limit his attorney fees and to order disgorgement because Decker was never adjudicated incapacitated under RCW 11.88.045(2). Quick also argues that the trial court had no authority to limit his fees incurred prior to the May 7, 2013 trial court order appointing Decker's guardian. We disagree.[2]

[2] Guardian Laufer argues that Quick invited the error he claims, stating that he "invited binding court review when he prepared and presented the Agreed Fee Order." Br. of Resp't Laufer at 40. Laufer argues that cooperating with the Agreed Fee Orders constitutes invited error and that Quick should not be allowed to complain of this error on appeal. But Quick does not assign

A. *Decker Was Adjudicated Incapacitated*

Quick argues that Decker was never adjudicated incapacitated under the guardianship statute because she agreed to a limited guardianship, and thus there was never an adversarial trial proving her incapacity. We disagree.

The guardianship statute does not contain a definition of "adjudge" or related terms. Black's Law Dictionary defines "adjudge" in relevant part as: "adjudicate," and "[t]o deem or pronounce to be." BLACK'S LAW DICTIONARY 47 (9th ed. 2009). "Adjudicate" means "[t]o rule upon judicially." BLACK'S LAW DICTIONARY 47 (9th ed. 2009).

Here, the commissioner held a hearing, considered evidence, and then entered findings of fact and conclusions of law finding that Decker "is capable of managing some personal and/or financial affairs, but is in need of the protection and assistance of a limited Guardian" of her person and estate, and ruling that Decker "is an Incapacitated Person within the meaning of RCW Chapter 11.88." CP at 86, 88. Under the statute's plain language, this constitutes an adjudication of Decker's incapacity. Quick's argument fails.[3]

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error to the agreed fee orders initially limiting his representation of Decker; he instead assigns error to the commissioner's ruling on his motion for approval of attorney fees. Furthermore, because the agreed fee orders are not erroneous, we do not hold that Quick invited any error.

[3] Furthermore, Quick's argument leads to the absurd result that, where an allegedly incapacitated person is *so* incapacitated that no one contests the guardianship, there would never be an "adjudication" of incapacity because there was no adversarial process. It does not make sense to construe the statute to require an adversarial trial, expending all of the judicial and estate resources that a trial requires, before a court may "adjudicate" an incapacitated person's status. Our interpretation of a statute must not lead to absurd results. *Beecher*, 130 Wn. App. at 71.

B. *Trial Court Could Limit Preadjudication Attorney Fees*

Quick next argues that the trial court did not have the authority to limit his fees from before the May 7, 2013 order deeming Decker incapacitated. He argues that the court had no way to determine when Decker lost the capacity to contract, so the trial court had no authority to reduce fees she willingly paid to him before May 7, 2013. Quick relies on the Division One case *In re Guardianship of Beecher* in support of this argument. *Beecher*, 130 Wn. App. at 72-73. We disagree, because the plain language of the guardianship statute requires the trial court to oversee attorney fees that are necessarily incurred before the adjudication of incapacity, and because *Beecher* is distinguishable.

The process to create a guardianship begins when a petition alleging a person's incapacity is filed in the trial court. RCW 11.88.010, .030. An allegedly incapacitated person has the right to be represented by counsel of his or her choosing. RCW 11.88.045(1)(a). If incapacity is established, the court appoints a guardian to help make decisions on that person's behalf. RCW 11.88.010(1). The trial court has the authority to appoint a guardian only for an incapacitated person. RCW 11.88.010(2). But the court may appoint a guardian ad litem to consult with an *alleged* incapacitated person about the guardianship proceedings. RCW 11.88.090(3).

"'Although governed by statute, guardianships are equitable creations of the courts and it is the court that retains ultimate responsibility for protecting the ward's person and estate.'" *Lamb*, 173 Wn.2d at 184 (quoting *In re Guardianship of Hallauer*, 44 Wn. App. 795, 797, 723 P.2d 1161 (1986)). Accordingly, the guardianship statute is intended to provide the courts "full and ample power and authority . . . to administer and settle . . . [a]ll matters concerning the

estates and assets of incapacitated . . . persons." RCW 11.96A.020(1)(a). The statute provides *alleged* incapacitated individuals the right to "counsel of their choosing at any stage in guardianship proceedings." RCW 11.88.045(1)(a). And

> *[d]uring the pendency of any guardianship*, any attorney purporting to represent a person *alleged or adjudicated* to be incapacitated shall petition to be appointed to represent the incapacitated or alleged incapacitated person. Fees for representation described in this section *shall be subject to approval by the court* pursuant to the provisions of RCW 11.92.180.

RCW 11.88.045(2) (emphasis added). Thus, under RCW 11.88.045(2), the court must oversee both the appointment of and fees of an attorney for an alleged incapacitated person.

RCW 11.88.045(2) directs the trial court to use RCW 11.92.180 as the mechanism for approval of attorney fees. By its terms, RCW 11.92.180 addresses fees of guardians or limited guardians. But, as quoted above, RCW 11.88.045(2) plainly incorporates the fee provision of RCW 11.92.180 as the mechanism for approval of attorney fees as well. RCW 11.92.180 provides:

> A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian *as the court shall deem just and reasonable*. . . . In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees *shall* be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed. . . . The amount of guardianship fees and additional compensation for administrative costs shall not exceed the amount allowed by the department of social and health services by rule.

(Emphasis added).

Thus, RCW 11.88.045(2)—the section of the guardianship statute that permits representation of an alleged incapacitated person—explicitly provides that the fees of any

attorney representing an *alleged* incapacitated person *during the pendency of any guardianship* "*shall be subject to approval*" by the court under the procedure in RCW 11.92.180. (Emphasis added). The plain language of RCW 11.88.045(2) provides that the court has oversight over the appointment and compensation of an attorney representing an *alleged* incapacitated person during the pendency of the guardianship—that is, before a guardianship is established and an adjudication of incapacity has been made. To hold that a trial court has no authority over attorney fees incurred prior to adjudication would be to delete the word "alleged" where it appears twice in RCW 11.88.045(2). We must give effect to the entire statute. *Beecher*, 130 Wn. App. at 71. Thus, we hold that the guardianship statute clearly allows for court oversight of attorney fees in the case of people *alleged or* adjudicated to be incapacitated. RCW 11.88.045(2).

Nevertheless, Quick argues that the trial court lacked the authority to reduce fees that Decker paid him in the period prior to the May 7, 2013 court order adjudicating her incapacitated. He relies on the Division One case *In re Guardianship of Beecher*, 130 Wn. App. at 72-73. But the facts of *Beecher* are distinguishable from this case, and *Beecher* does not control our analysis.

In *Beecher*, the alleged incapacitated person hired an attorney to represent her in guardianship proceedings, and the trial court approved the attorney's appointment. 130 Wn. App. at 68-69, 69 n. 1. But, apparently, the trial court never entered an order prospectively limiting fees for the attorney. 130 Wn. App. at 69. Beecher told her attorney that she wanted to resist and defend against the guardianship at all costs. 130 Wn. App. at 69. Beecher was never adjudicated as incapacitated. 130 Wn. App. at 72.

The GAL challenged Beecher's attorney's fees. 130 Wn. App. at 69. The trial court ruled that the fees were excessive and unreasonable, and ordered the attorney to repay over half of the fees. 130 Wn. App. at 70. The attorney appealed, arguing that the trial court did not have the authority to limit his fees in his representation of an *alleged* incapacitated person whom the court never adjudicated to be incapacitated.

Division One agreed, holding that

> the court can review fees and costs under the guardianship statute only after an adjudication of incapacity. Until then, an *alleged* incapacitated person retains the right everyone else has to hire and pay the attorneys of her choice. No court ever found Beecher was incapacitated, so the trial court did not have the authority to review [her attorney's] fees.

130 Wn. App. at 68. The court based this holding on the fact that RCW 11.88.045(2) incorporates the fee review provisions of RCW 11.92.180, which governs guardian fees. 130 Wn. App. at 68. Because the statute permits the court to appoint a guardian only after there has been an adjudication of incapacity, the *Beecher* court reasoned that the trial court similarly obtains authority to review and limit attorney fees under the statute only after an adjudication of incapacity. The court held that "[s]ince Beecher never lost her capacity to contract, there was no basis on which or reason to invalidate her contract with [her attorney]." 130 Wn. App. at 73.

Beecher is distinguishable. Beecher was never adjudicated incapacitated, but Decker was. The holding of *Beecher*, by its terms, applies only where there was *never* an adjudication of incapacity. 130 Wn. App. at 68. In such cases, the alleged incapacitated person has never lost the right to contract. But, as described above, the guardianship statute's plain language permits the court to reduce preadjudication attorney fees *once there has been an adjudication.* RCW 11.88.045(2).

Because Decker was adjudicated incapacitated, *Beecher* does not apply to this case. Instead, the plain language of the statute makes clear that the court had the authority to oversee and reduce Quick's fees. We do not look beyond the plain language of the statute if it is clear. *Beecher*, 130 Wn. App. at 70.

C. *Due Process—Quick Lacks Standing*

Quick further argues that the trial court violated Decker's due process rights by reducing Quick's attorney fees incurred prior to Decker's adjudication of incapacity. We do not entertain his challenge, because we hold that Quick lacks standing to vindicate Decker's due process rights.[4] As a fundamental principle, we refrain from deciding constitutional issues when a case can be decided on nonconstitutional grounds. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002).

It is a general rule that "a person lacks standing to vindicate the constitutional rights of a third party." *In re Guardianship of Cobb*, 172 Wn. App. 393, 401, 292 P.3d 772 (2012). But a litigant may have standing where (1) he or she "has suffered an injury-in-fact, giving him or her a sufficiently concrete interest in the outcome of the disputed issue; (2) [he or she] has a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests." *Cobb*, 172 Wn. App. at 401-02. A litigant purporting to vindicate a third party's constitutional rights bears the burden of demonstrating that "the allegedly injured third party lacks the ability to vindicate his or her rights." *Cobb*, 172 Wn. App. at 403.

[4] We may address standing sua sponte. *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006).

In *Cobb*, the siblings of an incapacitated person purported to vindicate his due process rights. 172 Wn. App. at 402. The siblings did not argue that any asserted errors in the guardianship proceeding "led to an erroneous incapacity determination or resulted in an erroneous appointment" of the guardian. 172 Wn. App. at 402. Because none of the asserted errors implicated the incapacitated person's ability to protect his interests through his appointed guardian, we held that the challenging siblings did not have standing to raise the incapacitated person's due process rights. 172 Wn. App. at 402.

Here, Quick has suffered an injury in fact: the trial court disgorged his attorney fees. And he had a close relationship to Decker as her attorney during the pendency of the guardianship. But Quick does not meet the third prong of the test and thus cannot litigate Decker's due process rights: he has not shown that there is some hindrance to Decker's ability to protect her own interests. *Cobb*, 172 Wn. App. at 402-03. Quick does not argue that the incapacity determination was erroneous nor that Laufer cannot adequately protect Decker's interests. *See Cobb*, 172 Wn. App. at 402. Quick has not carried his burden of showing us that Decker lacks the ability to vindicate her own due process rights. We hold that Quick has not shown that he has standing to assert Decker's rights.

III. REDUCTION OF ATTORNEY FEES WAS PROPER

Quick next argues in the alternative that, even if the trial court had the authority to limit his attorney fees, it did so erroneously without engaging in the lodestar analysis[5] and without

[5] The lodestar analysis is an equation whereby a court determines whether the attorney expended a reasonable number of hours in the case, then determines whether the attorney's hourly rate was reasonable, and multiplies these figures to arrive at a reasonable sum of attorney fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998) (*overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012)).

entering proper findings. We disagree because a trial court is not required to conduct a lodestar analysis when determining compensation under the guardianship statute.

A. *Lodestar Analysis Not Required for Attorney Compensation in Guardianship*

In general, trial courts should use the lodestar method when determining the award of attorney fees as costs. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998) (*overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012)). To perform its supervisory function and to permit appellate review under the lodestar analysis, the trial court must make findings of fact and conclusions of law supporting its decision. *Mahler*, 135 Wn.2d at 435.

While the lodestar method is generally accepted as the starting point for attorney fee determinations, it is not required in all contexts. Where the primary considerations for the fee award are equitable, courts are not required to apply the lodestar method to determine an award of fees. *See, e.g.*, *In re Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509 (holding that the lodestar method was not required to determine fee award in marital dissolution cases), *review denied*, 130 Wn.2d 1019, 928 P.2d 416 (1996). As stated above, statutory guardianships are "'equitable creations of the courts and it is the court that retains ultimate responsibility for protecting the ward's person and estate.'" *Lamb*, 173 Wn.2d at 184 (quoting *Hallauer*, 44 Wn. App. at 797).

The court, in overseeing guardianships, must weigh the competing concerns of individual autonomy and protection of incapacitated persons. RCW 11.88.005. This is not a typical situation wherein lodestar analysis is required, such as where a trial court awards attorney fees to the prevailing party. Here, the primary considerations for the fee award are equitable, and trial

courts are not required to apply the lodestar method. *See, e.g.*, *Van Camp*, 82 Wn. App. at 342. But the trial court, in making its equitable decision, may balance lodestar factors when it determines just and reasonable fees.

Although consideration of reasonable hours and reasonable hourly fees may play a role, requiring a lodestar analysis does not make sense in the context of this statute. The lodestar method is intended to calculate costs awarded to a prevailing party. Typically, attorney fees are available only for successful claims. In a lodestar analysis, the court "should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). But under the guardianship statute, an attorney for an alleged incapacitated person need not succeed in contesting the guardianship to merit compensation. RCW 11.88.045(2) provides attorney compensation whether or not the attorney prevails in contesting a guardianship. The calculation of a reasonable attorney fee, therefore, is different in these two different contexts.

Furthermore, it would not make sense to construe the statute to require a trial court to use a lodestar analysis where, as here, the attorney has violated previous court orders limiting him to a certain number of hours of representation. If only a lodestar analysis were required here, attorneys appointed under the statute would have an incentive to bill hours in contravention of a trial court's order, and the trial court would then be required to analyze the reasonableness of such excessive hours under the lodestar method. This would render RCW 11.92.180 and 11.88.045(2) nearly meaningless, because regardless of the trial court's prospective limitation on attorney fees, the attorney could demand that the trial court compensate him for a reasonable number of hours retrospectively. Thus, we hold that a lodestar analysis is not required here,

although a court may consider the lodestar factors of reasonable hours and reasonable fees in arriving at a just and reasonable result.[6]

Instead of requiring a lodestar analysis, the guardianship statute itself contains guidance for the trial court in determining fees. RCW 11.92.180 provides:

> A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian *as the court shall deem just and reasonable*. . . . In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed.

The guardianship statute's plain language allows the court to determine compensation "as [it] shall deem just and reasonable." RCW 11.92.180. Here, the trial court commissioner appointed Quick as an attorney under the statute as part of the guardianship proceedings for Decker. Quick was entitled to such compensation as the commissioner deemed just and reasonable for the limited amount of time the court appointed him as an attorney. The statute appears to contemplate that the trial court will determine just and reasonable compensation based on the competing equitable factors of compensating an attorney for his work, protecting the alleged incapacitated person's right to autonomy, and also protecting the incapacitated person's

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[6] Quick argues that a lodestar analysis is required even in this procedural context, citing *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 79, 223 P.3d 1276 (2010). In *AGM*, the trial court used a lodestar analysis to reduce attorney fees for a settlement guardian ad litem in a minor settlement case. 154 Wn. App. at 79. We held that the trial court did not abuse its discretion by using the lodestar method, and wrote in dicta that the lodestar method is the "clearly preferred method for calculating attorney fees." 154 Wn. App. at 79. But *AGM* addresses whether it was an abuse of discretion for the trial court to use the lodestar method. It does not address whether it is an abuse of discretion *not* to use it.

estate from excessive attorney fees, because guardianships are equitable creations of the trial court.[7] *Lamb*, 173 Wn.2d at 184.

B. *The Trial Court Made a Just and Reasonable Fee Award*

Quick argues that the award of attorney fees was improper under a lodestar analysis. We hold that the trial court did not abuse its discretion because it made a just and reasonable award of attorney fees as compensation under the statute.

The commissioner ordered that Quick was entitled to represent Decker for 50 hours only. Later, in the commissioner's oral ruling limiting Quick's fees to $30,000, the commissioner clearly decided that Quick's fees were excessive because his hours were so far in excess of what the court had ordered. The commissioner stated, "[Y]ou still are under a court order only to do a certain amount of work without further court authority. So you kind of took your own risk in that regard." CP at 350-51. The commissioner continued, "$100,000 plus is not reasonable in this kind of matter. No matter how hard or difficult Ms. Decker is, no matter how much of a defense she wants, you still have to be mindful of, you know, what kind of context this is." CP at 367. But the commissioner weighed this against the large amount of work Quick had in fact performed for Decker, saying, "I think that given the difficulty and the fact ultimately some additional funds over and above what was initially authorized makes sense, but nowhere near the 110 that you've already, I guess, received." CP at 367. On these bases, the commissioner concluded that a reasonable total fee for Quick was $30,000.

[7] Quick also argues that the trial court failed to make a reviewable record of its fee award. But because we hold that a lodestar analysis was not required, neither were corresponding lodestar findings required for our review.

The amount the commissioner awarded was significantly higher than the $12,500.00 total Quick was authorized to bill based on the Agreed Fee Orders ($250.00 per hour for 50 hours), but significantly lower than Quick's actual bill of $135,248.15. In reaching this decision, the commissioner kept to the agreed reasonable rate of $250.00 per hour, and arrived at an award of total fees that took into account Quick's violation of the court orders, but also considered the unexpected difficulty Quick faced in this unusual guardianship case. In doing so, the commissioner appears to have balanced the equitable factors central to the guardianship statute. The trial court balanced Decker's right to contest a guardianship and protect her autonomy by paying an attorney, and the competing need to protect Decker's estate from excessive attorney fees. These considerations are central to the trial court's responsibility to protect the ward's person and estate. *Lamb*, 173 Wn.2d at 184.

We hold that the trial court's award of attorney fees was not an abuse of discretion, because the award reflects a previously agreed hourly rate and a number of hours that weighed the competing equitable concerns, including Quick's actual efforts and the order limiting his hours. This method of calculation and the ultimate award of fees was just and reasonable.

ATTORNEY FEES ON APPEAL

Both Laufer and Quick seek attorney fees in this appeal. We grant Laufer's request for attorney fees and deny Quick's request.

A. *Laufer is Entitled to Fees*

Guardian Laufer requests that we grant reasonable attorney fees to Decker's estate under RAP 18.1 and RCW 11.96A.150 reflecting the guardian's expense in this appeal. RAP 18.1 permits us to award reasonable attorney fees to a party entitled to recover such fees under

applicable law. RCW 11.96A.150 permits us to award attorney fees from any party to any party "in such amount and in such manner as the court determines to be equitable." RCW 11.96A.150(1). Under this section, we may consider any and all factors we deem to be relevant and appropriate, such as whether the litigation benefits the estate. RCW 11.96A.150(1).

We hold that equity requires that Decker's estate receive reasonable attorney fees reflecting Laufer's expenses in defending this appeal. Laufer defends Decker's interests pursuant to his duties under the guardianship statute. At stake in this appeal is over $100,000 of Decker's assets; as guardian, Laufer defends this appeal to protect those assets on behalf of Decker. The guardianship statute is designed to protect vulnerable people who cannot manage their financial affairs on their own. RCW 11.88.005. Thus, it is equitable to award reasonable attorney fees to Decker's estate, reflecting her legal guardian's expenses for protecting Decker's finances. We consider him a prevailing party, and provide him reasonable attorney fees as an equitable matter for his defense of Decker's estate's assets.

B. *Quick is Not Entitled to Fees*

Quick argues that respondents Laufer and the Department, not Decker's estate, should bear the costs of this appeal because they frivolously defended the appeal and did not acquiesce to Quick's insistence that his position was supported by settled law. We disagree. For the reasons stated above, Laufer's and the Department's defense of this appeal was not frivolous, and Quick is not entitled to fees.

In conclusion, we affirm the trial court's orders, holding that the trial court had authority to limit Quick's attorney fees and order disgorgement of fees paid to him. We further hold that a lodestar analysis was not required because Quick was retained as an attorney under the

guardianship statute, which by its plain terms requires court oversight of appointed attorneys' fees in an equitable context. RCW 11.92.180, 11.88.045(2). And we hold that the trial court did not abuse its discretion in finding that $30,000 was just and reasonable. We affirm the trial court's award of attorney fees and we further award Decker's estate reasonable attorney fees.

Worswick, J.

We concur:

Bjorgen, A.C.J.

Bjorgen, A.C.J.

Sutton, J.

Sutton, J.

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

IN COUNTY CLERK'S OFFICE
A.M. AUG 07 2013 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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, 20 13

Judge/Commissioner

Daniel Quick Petitioner/WSBA # 26064

Petitioner Respondent/WSBA #4316 B

Order (OR) - Page 1 of 1

guardian ad litem WSBA 36133

Ellen J. Peterson
ATTNY for Gdn. WSBA# 17405

App. B-1

OFFICE RECEPTIONIST, CLERK

To: Norgaard, Cathy
Cc: epeterson@gth-law.com; nataliek@atg.wa.gov; marcher@gth-law.com; Miller, Greg
Subject: RE: Filing Attachments to Email on Behalf of Appellant Daniel Quick - 91929-1

Rec'd 08/10/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Norgaard, Cathy [mailto:Norgaard@carneylaw.com]
Sent: Monday, August 10, 2015 12:23 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: epeterson@gth-law.com; nataliek@atg.wa.gov; marcher@gth-law.com; Miller, Greg
Subject: Filing Attachments to Email on Behalf of Appellant Daniel Quick - 91929-1

To: Court Clerk

Filing Attachments to Email on behalf of Appellant Daniel Quick:

Documents to be filed:

1. Mr. Miller's letter to SCT
2. Corrected Petition for Review (includes tables of authorities)
3. Appendices A and B
4. Certificate of Service

Case Name: Guardianship of Keiko Decker
Case No.: 91929-1
Filer(s): Gregory M. Miller, WSBA 14459, 206-622-8020, miller@carneylaw.com

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