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 CONSOLIDATED REPLY BRIEF

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Other State Cases

Page(s)

Federal Cases

Statutes and Court Rules

Law Review

I. GENERAL REPLY AND SUMMARY.

This appeal would not have occurred if the trial court had not attempted to retroactively re-determine what fees Mrs. Decker was allowed to pay her attorney for the time ***before*** she acquiesced in the limited guardianship and subjected herself to court control from that point forward. But until Mrs. Decker took that step on May 7, 2013, she was as fully entitled as any other person to make ***all*** her own decisions, including whether to resist the guardianship and how to spend her money. One way she chose to spend her money was to pay Mr. Quick to resist the guardianship. That was her constitutional and statutory right and she chose to exercise it. The trial court had no authority to determine, after the fact, that she should not have directed Mr. Quick to resist as strongly as he did. Under the statute, he was her attorney and he was ***required*** to follow her directions, not those of the court if they conflicted with her directions. Nor was he required, as is a guardian ad litem, to act "in her best interests."

In its effort to be protective of Mrs. Decker, the trial court apparently conflated the role of an appointed attorney such as a guardian ad litem with that of the personal attorney for an *alleged* incompetent person, whether that personal attorney was initially appointed by the court or initially retained separately by the *alleged* incompetent person. But how Mr. Quick came to be Mrs. Decker's personal attorney is immaterial. The point is he had that role as her

personal, separately retained attorney. In that role he necessarily could not be controlled or have his work limited by the court.[1]

If this court were to affirm and hold that trial courts have the authority to control the amount and/or type of work done by an *alleged* incompetent person's personal attorney, future *alleged* incompetent persons who want to fight a proposed guardianship as is their right would not be able to find representation because any attorney would know payment for their work would be subject to a court's arbitrary reduction at the end of their representation – and that, in fact, they would be at the beck and call of the court and the GAL, not of their client.

While Mr. Quick may have sought the court's approval for the work he did for Mrs. Decker prior to her acquiescence in the limited guardianship as part of getting paid from the guardianship for his small portion of unpaid work, that superfluous application could not retroactively waive Mrs. Decker's right to make her own decisions on whether and how to fight the guardianship and pay him for doing so, a right she had already exercised before his fee application. All he really could ask the trial court to do was to grant

[1] Nor could the trial court have controlled him as her personal attorney even had he remained retained only through the court pursuant to RCW 11.88.045(b) because such control would be inconsistent with the plain terms of the statute and the Mrs. Decker's underlying constitutional right of self-determination.

payment for any of his unpaid services on Mrs. Decker's behalf once the limited guardianship was put into effect – no more; no less.

No doubt the guardianship was initiated with good intentions. And no doubt the trial court thought it was doing the proper thing, as the transcript reflects it had not had the experience of a fully-resistant elderly person fighting the guardianship tooth and nail, as also occurred in *Beecher*. But this dispute over Mrs. Decker's autonomy and ultimate assistance must be put in full context. As set out in the Opening Brief, the guardianship was initiated when she was depressed following the death of her husband of 45 years, Col. Wilson Decker, a career military officer. After such a long marriage and living in the United States after being born and raised in Japan, with limited English skills, it is hardly surprising that Mrs. Decker had a period of depression after Col. Decker's death. But if nothing else, the record makes crystal clear that she did ***not*** want a guardianship of any sort. The record is replete with her resistance to the guardianship, the examinations required for it, even the Limited Guardian's efforts to examine into Mr. Quick's bills after she had acquiesced in the limited guardianship. Indeed, her resistance to the guardianship and outside control is the most consistent theme in the record of Mrs. Decker. And it should come as no surprise that a woman married for 45 years to a proud military officer would prize the freedom he gave his career to secure for her and the rest of us in America, and be loath to relinquish it. It is erroneous and contrary to

law, even if well-meaning, for the trial court to retroactively take any of her freedom or decision-making away. But that is, in fact, the consequence of the trial court's order and why it must be vacated.

This same well-meant misunderstanding of the fundamental rights of an *alleged* incompetent person (as well as misunderstanding of settled applicable law), appears to also underlie the efforts of the Limited Guardian and DSHS in resisting the appeal. The most generous explanation is that out of their paternalism for one they believe is vulnerable, they do not genuinely believe that *alleged* incompetent person retains her statutory and constitutional right to make her own decisions fully and completely, including resisting a proposed guardianship, right up to such time of an adjudication of incompetence or, in lieu of such an adjudication, an acquiescence in a limited guardianship. It seems that, as part of that, they do not believe an attorney engaged to act as an *alleged* incompetent person's *personal* attorney can responsibly resist a guardianship strenuously, conflating that role with that of the GAL and court which is premised on a third party's view of the *alleged* incompetent's best interests.

It thus appears both respondents take the position that once someone has acquiesced in a limited guardianship, the court or the limited guardian is entitled to "look back" at actions taken by the *alleged* incompetent person and undo any actions ***they*** – the limited guardian or the court -- deem was improvident. But that would, in

fact, take away those decisions from the *alleged* incompetent person, albeit retroactively. It would mean that, in fact, the *alleged* incompetent person had no such right to make the decisions in the first place; that "*alleged*" was not, in fact, an operative term.

Mr. Quick argues this cannot be the case because it inconsistent with the entire concept of individual autonomy in one's own decision-making on which our country and its legal system are built. It is inconsistent with the safeguards and due process that are required by the state and federal constitutions - safeguards embodied in our statutes - before a person's decision-making is taken away. *See* Opening Brief, pp. 25-31; *infra,* Section III.C. Fundamentally, that loss of decision-making is and must always be ***prospective***, except in those rare cases of emergency, which this was not.

Mr. Quick took the position in his opening brief that to be consistent with the statute and to act in Mrs. Decker's best interest, no party should be reimbursed for this appeal from her estate. No matter how well-meaning, it simply is not right for the Limited Guardian or DSHS to resist the appeal in the face of controlling law on the two substantive elements of the appeal: 1) the lack of trial court authority to control the amount of fees an *alleged* incompetent person pays his or her personal attorney to fight the guardianship, as settled a decade ago in the *Beecher* case (not to mention settled by the basic framework of the guardianship statues and their constitutional underpinnings that are reflected in the case law); and

2) the basic requirement to employ a clear, detailed method for determining a proper "reasonable attorney fee" for work done under *Mahler* and a host of cases, which there is no pretense the trial court complied with. By misunderstanding or ignoring the full autonomy of an *alleged* incompetent person, and the requirements of a proper determination of fees by a trial court, the Limited Guardian has imposed unnecessary costs in both the appeal and trial court proceedings particularly in terms of attorney's fees, as detailed *infra* in Sections II.A. and III.D.

This did not have to be. Mr. Quick sought to prevent it with his letter of February 7, 2013 which described the settled law on the fee issues that would require vacation of the August 7 trial court order under *Guardianship of Beecher,* 130 Wn. App. 66, 121 P.3d 743 (2005), and *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998) and its progeny.[2] Section III.D., *infra*, argues the Limited Guardian should be denied payment of any attorney's fees from Mrs. Decker's Estate under *Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011), from the date of the February notice letter because his course of action has not benefitted Mrs. Decker or the guardianship estate. He also should pay Mr. Quick's appeal and trial court fees incurred after that date per *Lamb* and RCW 11.96A.150.

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[2] The February 7 letter was made part of the appellate record per motion by the Limited Guardian. It is attached hereto for the convenience of the Court.

II. STATEMENT OF FACTS RE APPEAL FEES.

A. Facts Bearing on Mr. Quick's Argument That Respondents Should Not Have Their Appeal Fees Paid By the Guardianship Estate But Bear Those Fees Themselves.

On August 7, 2013, Pierce County Superior Court Commissioner Dickie entered an order providing for Appellant Mr. Quick to "repay" any fees and costs that his client Keiko Decker had paid to him that were "over $30,000" in the year and a half he had been directed by Mrs. Decker to fight the proposed guardianship. CP 331 ("August 7 Order"). Those fees had been paid by Mrs. Decker to Mr. Quick before Mrs. Decker acquiesced in entry of a limited guardianship on May 7, 2013, as described in Mr. Quick's Opening Brief, *e.g.,* pp. 16–18. The August 7 Order, in the nature of an injunction, directed payment to be made within six months, or by February 7, 2014, but does not specify repayment of any specific dollar amount. *See* CP331. Mr. Quick's motion for revision was denied, CP 381, and he timely appealed the August 7 Order in October, 2013. CP 383-391.

The opening brief was served on April 7, 2014, Respondent DSHS served its response brief by mail on June 19, 2014, and Respondent Limited Guardian filed his response brief June 25, 2014, along with his untimely motion to strike portions of the opening brief or, in the alternative, to supplement the record. The Limited Guardian's motion was decided by Commissioner Schmidt on

August 6, but delayed completion of the briefing pending the ruling.

In the meantime, on July 3, 2014, over a week after filing his response brief and untimely motion to strike, and on the eve of a long holiday weekend, the Limited Guardian moved in the trial court for entry of a judgment against Mr. Quick based on the August 7 Order.[3] The Limited Guardian's motion for entry of judgment was made eleven months after the August 7 Order was entered, nine months after the appeal was filed, and six months after the unspecified payment amount was due. *Id.* This delayed completion of the appeal and imposed additional, unnecessary expenses on both the Limited Guardian and Mr. Quick. Mr. Quick's argument that the proposed judgment would unduly delay completion of the pending appeal was essentially affirmed by Commissioner Schmidt's ruling that RAP 7.2(e) was implicated and that the trial court was not permitted to enter the proposed judgment, even though Commissioner Johnson indicated his intent to enter it. *See* CP 543 (Report to the Court) and CP 593 (Commissioner Schmidt's ruling).

On September 11, as part of filing the annual report for the guardianship to be heard six days later on September 19, the Limited

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[3] *See* CP 543-593, esp. 545-546, Mr. Quick's "Report to the [Trial] Court, containing his Motion for Instructions to the Trial Court per RAP 7.2 re Entry of Judgment Over a Year After Entry of the Order on Appeal filed in this Court on August 22, 2014 ("RAP 7.2 Motion") the RAP 7.2 Motion's appendix at App. 2 – App. 4 (proposed judgment) and App. 25 - App.28 (July 3 Petition for Instructions).

Guardian separately sought to be paid the fees expended on the appeal. CP 622-633. Mr. Quick filed an objection and requested the trial court defer any award of fees for work on the appeal because whether fees should be awarded to the Limited Guardian from Mrs. Decker's estate was an issue on this appeal and it would not be appropriate for the trial court to pre-empt the appellate court on that issue, particularly since the appellate court will normally decide in the first instance whether any party is entitled to be paid fees on appeal and if so, how much; and that if such an order was contemplated, it was subject to approval by this Court before it could be entered per RAP 7.2(e). *See* CP 599-601 (Objection). The trial court reserved ruling on a fee award on September 19. CP 634-635.

III. REPLY ARGUMENT.

Neither respondent has shown any reason why the two core issues flowing from the August 7, 2013, order ("August 7 Order") are not resolved by the settled law embodied in *Guardianship of Beecher,* 130 Wn. App. 66, 121 P.3d 743 (2005), and *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998) and its progeny.

A. The Fee Ruling Must Be Vacated Under *Mahler* And Progeny For The Failure To Use Any Method To Calculate A Reasonable Fee Or To Make Findings That Permit Appellate Review.

As to *Mahler*: even assuming, *arguendo*, the trial court had any authority on any basis to review and authorize any of the fees at issue (which Mr. Quick contests), any determination of the fees to be

awarded for the scope of work here – over 18 months of representation including discovery and motion practice and all undeniably at the express behest of the *alleged* incompetent person Mrs. Decker – must be evaluated based on the lodestar analysis first set out in *Bowers v. Transamerica*, 100 Wn.2d 581, 595-601, 675 P.2d 193 (1983), (or a similar structured analysis of the work performed and values assigned), which was confirmed in *Mahler*. The Supreme Court then made the explicit ruling in *Mahler* that it is reversible error if, as here, the trial court fails to make adequate findings and conclusions to permit appellate review of the method of calculating the reasonable fee for the work done, a requirement that the Opening Brief pointed out at pp. 22-23 & fn. 11 was consistent with prior law as to guardianships, citing *Guardianship of Hallauer*, 44 Wn. App. 795, 799-801, 723 P.2d 1161 (1986). That requirement, painfully missing here, has been emphasized repeatedly by a host of published and unpublished appellate decisions after *Mahler* which have regularly reversed trial courts which fail to make the necessary findings. *See* Opening Brief, pp. 20 – 24 & fn. 7 – 10. There is no need to cite additional cases for this settled proposition that on its own requires vacation of the August 7 Order.

B. *Beecher* Recognized A Decade Ago Trial Courts May Not Interfere With The Fundamental Right Of Decision-Making By *Alleged* Incompetent Persons To Fight A Proposed Guardianship And To Retain And Pay Their Personal Attorney From Their Own Funds. *Beecher* Requires Vacation Of The August 7 Order And Remand For – At Most – Determination Of Any Fees Still To Be Paid To Mr. Quick For His Work After Mrs. Decker's Last Payment To Him Before Entry Of The Limited Guardianship.

First, under *Beecher* and the underlying common law and constitutional principles it embodies, the trial court has no authority over an *alleged* incompetent person's decision-making and financial decisions until ***after*** an adjudication of incompetence; and then, the trial court authority extends ***only*** as to the decisions prospectively, from the date of adjudication forward. No authority exists to let a trial court "look back" and alter the *alleged* incompetent person's financial decisions prior to such adjudication, and particularly, those decisions related to their right of the legal representation of their choice. *See* Opening Brief, pp. 25-31.

Second, neither respondent has shown that the August 7 Order must not be vacated where the fees Mrs. Decker paid to her private attorney were not under the control of the court, as this court has recognized in *Beecher,* in at least one unpublished decision, and by basic logic.[4] Rather, where an *alleged* incompetent person has

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[4] Mr. Quick argued these essential points at the August 7,2013, hearing. *See* CP 351:8-16 ("she has a right to defend herself. . . . Simply because it's a guardianship proceeding doesn't mean she can't use her own money.") & CP 352

(Footnote continued next page)

retained her own attorney, the obligation to pay the attorney is separate from whatever may be imposed pursuant to the statute. The fact that both *Beecher* and at least one unpublished decision since *Beecher* have recognized that the court has no authority to order the *alleged* incompetent person to pay her privately retained attorney meant when that latter case was decided, the point of law was deemed settled and the decision did not merit publication. *See* RAP 12.3(d).[5]

("I don't have a choice to not defend. I mean, the choice here is to throw [Mrs. Decker] under the bus and simply let the guardianship get imposed, and that was against her express wishes. And that's the choice I fased right there. . . That's the choice."). *See also* RP (9/6/13) pp. 5-10 (argument on revision) (p. 9: "the two court orders and RCW 11.92.180 do not apply to subsequent private representation" of a ward in guardianship proceedings).

While Mr. Quick did not cite *Beecher*, he made the proper arguments based on the statutory and constitutional principles that he had a duty to represent what Mrs. Decker wanted, which was to oppose the guardianship, and the trial court could not properly try to restrict him as her personal attorney. But even if he had not, it is well established the "trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009), *aff'd*, 170 Wn.2d 768, 246 P.3d 785 (2011). *Accord, State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008): "The abuse of discretion standard does not allow us to excuse an order based on an erroneous view of the law because the trial court considered and rejected an equally erroneous argument. . . . A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." This obligation to follow the law is especially acute when addressing matters in guardianships. *See Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011), discussed *infra*.

[5] *See State v. Arreola*, 176 Wn.2d 284, 296-97 & fn. 1, 290 P.3d 983 (2012), citing unpublished decisions to show that, in practice, the lower courts were following the directives of Supreme Court decisions, in that case, as to pretextual traffic stops. With the Court's permission, Mr. Quick will submit unpublished authorities as to this point of law as well as the enforcement of the *Mahler* requirements in the guardianship context.

In short, where an *alleged* incompetent person has engaged and contracted to pay her personal attorney from her own funds, separate and apart from the court order -- as occurred here -- and then makes those payments without a court requiring her to do so – as also occurred here -- her prior, voluntarily-assumed obligation to pay her attorney is separate from any relief the trial or appellate court may provide, and indeed, is irrelevant to any relief or action of the court. Thus here, where Mrs. Decker as the *alleged* incompetent person has already made the payments to her privately-retained attorney Mr. Quick, the trial court was not in a position to order the attorney who has been paid by the *alleged* incompetent person to disgorge fees the court believes are just "too high."

C. *Beecher* Was Correctly Decided To Protect An *Alleged* Incompetent's Decision-Making Authority Unless and Until An Adjudication of Incompetence Was Entered, As Was Required Under the Federal And Washington Constitutions. Pursuant To Those Long-Standing Fundamental Principles, Mr. Quick Did Not and Could Not Waive The Fundamental Rights Of Mrs. Decker To Hire And Pay For Her Personal Attorney To Defend Against The Guardianship And The Court Has No Authority To Intrude Into Her Decisions After The Fact.

Although the Limited Guardian purports to not address the validity of *Beecher* and leaves that argument to DSHS, the documents added to the record by the Limited Guardian show an interest in attacking the *Beecher* decision, which could well be seen by some practitioners as "inconvenient" to the orderly operation of

the guardianships. But whether it is a misguided effort to "defend" an order deemed advantageous to Mrs. Decker's estate even while denigrating her decision-making prior to the limited guardianship was agreed to, or an effort to remove or narrow an inconvenient appellate decision to practitioners, it is the nature of the legal system that it is the courts who determine what the law is, not practitioners or parties, however helpful they may be while asserting their vested interests.[6] It is, thus, the appellate courts who determine the application of their precedents, not the opinions of a few members of a bar group who publish a practice guide. *Id.*

Indeed, this case shows how important it is for the Court to remind the practitioners and the bench that fundamental, constitutional rights of persons facing a guardianship are whole and complete up until the time they are adjudicated incompetent or otherwise agree to a full or limited guardianship. The supplemental materials proffered by the Limited Guardian, and the positions taken by him in this litigation demonstrate the need to for a clear decision that an *alleged* incompetent person's rights cannot be taken away prematurely and without due process, nor can they be taken away after the fact. That reminders are required where the issue is the

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[6] "[I]t is the unique role of this court to decide what the law is and what tort duties are recognized in this state. *Brown v. State*, 155 Wn.2d 254, 261–62, 119 P.3d 341 (2005) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803))." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 406, 241 P.3d 1256 (2010) (Chambers, J., concurring).

taking away of, or impinging on, a person's fundamental rights is seen by this Court's recent decision *In re Welfare of H.Q.*, ___ Wn.App. ___, 330 P.3d 195 (Div. II, July 22, 2014). In *H.Q.*, this Court vacated the trial court's order that the father was not mentally competent to voluntarily relinquish his parental rights because due process required a hearing to determine the father's competency to voluntarily relinquish his parental rights and such a hearing had not been had. It is the nature of constitutional rights that insuring their full exercise is often inconvenient or messy; but it is our system that preserves individual autonomy and freedom.

Guardianship results in a devastating deprivation of personal rights and civil liberties which reduces the adult to the legal status of a child. As a person *alleged* to be incompetent, but not adjudicated to be incompetent, Mrs. Decker had a statutory right that embodied her fundamental constitutional right to make decisions as to her person and estate unless and until there was an adjudication she was not competent to do so. This includes the right the fight the proposed guardianship. It also includes her right to hire and pay for her own personal attorney for any lawful purpose, including having that attorney fight the proposed guardianship. She also had the right to direct her attorney to fight it hard, and pay that attorney for her services from her own funds.

These are rights that could not be waived by her attorney, Mr. Quick, or even by a guardian ad litem. Indeed, the discretion to

appoint a guardian is subject only to the paramount constitutional guarantee of effective assistance of counsel, with that duty of full representation vested in a private attorney. *See In re Ervay*, 64 Wash. 138, 139, 116 P. 591 (1911).

Although an attorney is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate a hearing, an attorney may not waive her client's substantial rights. *See In re Houts,* 7 Wn. App. 476, 481, 499 P.2d 1276 (1972); *see also Russell v. Maas,* 166 Wn. App. 885, 890, 272 P.3d 273 (2012); *Graves v. P.J. Taggares Co.,* 94 Wn.2d 298, 303, 616 P.2d 1223 (1980). Nor may a GAL waive a client's substantial right. *In re Matter of Quesnell,* 83 Wn.2d 224, 238–39, 517 P.2d 568 (1973) (quoting *Houts,* 7 Wn. App. at 481, 499 P.2d 1276). Instead, the client must specifically authorize waiver of a substantial right. *Graves*, 94 Wn.2d at 303, 616 P.2d 1223 (quoting *Houts*, 7 Wn. App. at 481, 499 P.2d 1276).

It is well-established that the rights at stake in guardianship proceedings, including the right fight the guardianship with a private attorney, are substantial rights. These are rights that Mr. Quick could not waive without the knowing and voluntary authorization of Mrs. Decker. *In re Houts, supra,* is on point. That case arose from an order permanently severing parental rights on the grounds that the parents' attorney, who did not have authority from his clients, unconstitutionally stipulated that terminating parental rights was

appropriate. At the outset of the hearing below, the parents' attorney agreed that the parents should not be present at the hearing, and was then appointed their guardian ad litem. There was no showing that the parents were aware of the stipulation, or the appointment, nor were they present for the testimony by the State against them. At the conclusion of the hearing, the court entered an order of permanent deprivation. The Court of Appeals found that the hearing did not conform to due process requirements.

In reversing the order, Judge Horowitz relied on and quoted *Graham v. Graham,* 40 Wn.2d 64, 240 P.2d 564 (1952), to explain that if the appointment of a guardian ad litem is for an adult, and there is objection or resistance to the appointment, then:

> (A)n adjudication of incompetency must precede or at least be contemporaneous with the appointment of a guardian Ad litem; **and in that connection that an *alleged* incompetent has a right to defend** and is entitled to be heard.

40 Wn.2d at 68 (emphasis added). The court explained:

> (A) guardian Ad litem should not be appointed by the court unless a full and fair opportunity is given to the *alleged* incompetent to defend and to be heard. There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the alleged incompetent. Furthermore, there is something fundamental in a party litigant being able to employ an attorney of his voluntary choice to represent him in court and in being free to reject or accept the advice of such attorney. The interposition of a guardian Ad litem could

> very well substitute his judgment, inclinations and intelligence for an alleged incompetent's; furthermore, the retention of legal counsel or the employment of a different attorney could be determined by the guardian Ad litem, subject, of course, to some direction and control by the court, and the latter might be open to some question.

In re Houts, 7 Wn. App. 476, 482, 499 P.2d 1276 (1972) (quoting *Graham v. Graham*, 40 Wn.2d 64, 67-68, 240 P.2d 564 (1952) (emphasis added).

A year after *Houts,* the Supreme Court addressed the issue of both proper representation of a person *alleged* to be incompetent and waiver of their fundamental rights in *Quesnell v. State*, 83 Wn. 2d 224, 517 P.2d 568 (1973). It is quoted herein at length to emphasize the longstanding fundamental aspect of the principles it contains, and frankly, to minimize expense to Mr. Quick. The Court thus explained in *Quesnell*:

> Of utmost importance, and consistent with the earlier-stated duty of a guardian ad litem to actively protect the rights of his client and the right of that client to his or her ***own*** representation to contest the proposed commitment, is the prohibition against waiver of such rights:
>
> > As an attorney, he is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing. However, in his capacity as attorney, he has no authority to waive any substantial right of his client. Such waiver, to be binding upon the client, must be specially authorized by him. As stated in *Wagner v. Peshastin Lumber Co.*, 149 Wash. 328, 337, 270 P. 1032 (1928), 'It will be readily admitted that an attorney without special authority has no right to stipulate away a valuable right of his client.' . . .

> Even if the appointment is one made after hearing and determination of incompetency, the guardian ad litem is no more permitted to waive a substantial right of the ward than is an attorney for a competent client. *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.E.2d 182 (1949); *Fox v. Starbuck*, 115 W.Va. 39, 174 S.E. 484 (1934); *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N.W. 144 (1941); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931).

In re Houts, 7 Wn.App. 476, 481, 482, 499 P.2d 1276 (1972). The rationale in support of this rule was stated by this court in *Graham v. Graham*, 40 Wn.2d 64, 67-68, 240 P.2d 564 (1952) as follows:

> There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the *alleged* incompetent. Furthermore, there is something fundamental in a party litigant being able to employ an attorney of his voluntary choice to represent him in court and in being free to reject or accept the advice of such attorney.

See Note, [*Civil Commitment of the Mentally Ill: Theories and Procedures*],79 HARV. L. REV. 1288, 1295, 1297 (1966). Before proceeding further, however, we are faced with a contention by the respondent that, owing to the 'serious mental illness' of the accused, the guardian ad litem is in a better position to determine the advisability of waiver. However, it being the very function of the mental illness hearing to adjudicate the issue of sanity, the legislature specifically has accorded the accused all presumptions of mental competence in RCW 71.02.650:

\# \# \#

Accompanying this presumption of competency is a presumption against waiver of fundamental rights:

> It has been pointed out that 'court indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.
>
> (Footnote omitted) *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 82 L.Ed. 1461 (1938). Accord: *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). Therefore, in the absence of knowing consent by the person *alleged* to be mentally ill, a guardian ad litem may not waive any fundamental right relevant to the mental illness commitment proceeding. *See Hagen v. Rekow*, 253 Minn. 341, 91 N.W.2d 768, 771 (1958); *Anderson v. Anderson*, 133 N.J.Eq. 311, 32 A.2d 83 (1943); *Hodges v. Hale*, 20 Tenn.App. 233, 97 S.W.2d 454 (1936); *Rausch v. Cozian*, 86 Colo. 389, 282 P. 251 (1929).[21] In the case before us, it is apparent from the fact of the appellant's demand for trial by jury that she had no intention of relinquishing this right. The only remaining question in this regard then is whether the right to trial by jury is sufficiently 'fundamental' as to fall within the rule prohibiting waiver without the consent of the *alleged* mentally ill person. In this there can be no doubt.

Quesnell v. State, 83 Wn. 2d 224, 238-40, 517 P.2d 568 (1973) (text of fn. 21 omitted) (italics added).

Of particular interest in this appeal, and entirely consistent with *Beecher,* is what the concurring four justices concluded in *Quesnell*: that where there is disagreement "between court-appointed guardian ad litem and private counsel with respect to trial by jury [for the ward], the views of the latter should prevail even though that

decision ultimately may turn out not to be in the patient's best interests." *Quesnell,* 83 Wn.2d at 252.

D. The Limited Guardian's Efforts In The Trial Court And On Appeal Have Been Of No Benefit To Mrs. Decker And Ignored Controlling Law Such That The Limited Guardian Should Be Responsible For His Own Fees And For Mr. Decker's Fees.

Finally, Mr. Quick points the Court to the continuing, unnecessary actions of the Limited Guardian in the face of controlling law that have done nothing to benefit Mrs. Decker or her estate. Those efforts could, instead, impose great costs on her if this Court were to authorize payment of the Limited Guardian's fees from her estate. This Court can – and should -- deny fees to the guardian when as here, "the litigation has not benefited the guardianship estate[]." *Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011) (unanimous) (affirming the Court of Appeals decision which denied guardians their fees ***both*** in the trial court ***and*** on appeal). *See Guardianship of Lamb.,* 154 Wn. App. 536, 539, 549, 228 P.3d 32 (2009) ("the court may award fees only for work performed by the guardian that directly benefits the ward.").

The guardian's fees were denied in *Lamb* primarily because the activities nominally taken on behalf of the developmentally disabled wards, various advocacy activities for the developmentally disabled generally, did not "directly" benefit the individual wards. *Lamb,* 173 Wn.2d at 191-193. Attorney's fees also were denied

under RCW 11.96A.150 because the guardian was unsuccessful in the litigation and the case presented difficult or novel issues. *Id.*, 173 Wn.2d at 197-98, expressly affirming the Court of Appeals' ruling on that basis. The Supreme Court also denied the guardians attorney's fees "because the litigation has not benefitted the guardianship estates." *Id.*, 173 Wn.2d at 198. These same principles apply here such that attorney's fees should be denied to the Limited Guardian because his actions in this appeal and in the appeal-related trial court proceedings in July through September have not benefitted the estate.

The clear lesson from *Lamb,* beginning minimally with the published Court of Appeals decision in December 2009, is that guardians ***may not*** take chances with a ward's estate funds but must ***only*** take actions – including litigation – that directly benefits the ward and his or her estate. Guardians are thus charged by statute and case law with taking a conservative approach to litigation to minimize risk and expense. *See Lamb.*

In addition to resisting the challenge to the obviously flawed August 7 Order under *Mahler* on a ruling and record for which there is no defense, the Limited Guardian belatedly sought to obtain a judgment against Mr. Quick, which required three hearings in superior court and ultimately a ruling by this Court's Commissioner Schmidt that no judgment should be entered because it would affect

the judgment on appeal, denying permission to enter the requested judgment under RAP 7.2(e).[7]

The Limited Guardian has most recently sought to have the trial court award his appeal fees from Mrs. Decker's Estate (CP 622-633), even though the issue of whether such appeal-related fees should be awarded from her estate is an issue pending before this court and has been at issue since the Opening Brief was first filed on April 7. *See* Opening Brief, issue 4 and pp. 31-33(fee argument). This required Mr. Quick to object to any such award as premature and infringing on this Court's authority over the case. *See* CP 599-617. Fortunately, the trial court deferred any award of fees for the appeal when considering the Limited Guardian's annual report on September 19. *See* CP 634-635 (September 19, 2014 order).

On this record, the Limited Guardian should be required to pay his own fees for the unnecessary efforts on appeal, and also be responsible for Mr. Quick's fees on appeal and for the trial court hearings and briefing related to the judgment issue and the premature, potentially pre-emptive effort to obtain fees for the appeal. But at minimum, the Limited Guardian should not be permitted to obtain funds from Mrs. Decker's estate for pursuing a

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[7] *See* CP 544-593 ("Report to the Court," attaching the superior court filings by Mr. Quick detailing procedural and substantive reasons why the proposed judgment should not be entered and that the effort was wasteful, Mr. Quick's request for instructions directed to this Court as required by the trial court, and Commissioner Schmidt's ruling).

strategy that was not supported by controlling law and which did not advantage her, but denigrates her decision-making during the period before she agreed to the limited guardianship.

IV. CONCLUSION

Daniel Quick respectfully requests this court vacate the August 7 Order for the reasons given above and remand for a determination of what additional unpaid fees, if any, are owing to Mr. Quick for the period he represented through the settlement on May 7, 2013, with her agreement to accept the limited guardianship, and any additional work he performed on her behalf after May 7, 2013. Mr. Quick also respectfully requests that the Court not award fees to the Limited Guardian from his former client's estate because there was no benefit to her given the settled law on fee awards and the rights of persons before a guardianship or limited guardianship is formally established and, due to the unnecessary litigation, consider awarding him some or all of his fees on appeal and for the unnecessary trial court proceedings in July through September, 2014.

Dated this 3rd day of October, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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February 7, 2014

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Via email & U.S. Mail
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Re: *In re Guardianship of Decker*, COA No. – 45465-3-III

Dear Ms. Peterson:

Thank you for your letter of last December and your interest in resolving this matter with minimal litigation expense. Please accept my apologies for the delay in my response. It is not for tactical reasons, but only due to my particular press of matters. As you no doubt surmised, we are not inclined to accept your offer. That does not mean that we are not interested in minimizing the expense of resolving the matter. Indeed, we believe the substantive law provides a definitive answer to the matter in our favor and wish to apprise you of it before either of us is forced to incur much more expense.

The central issue of Ms. Decker's authority to engage the counsel of her choice at her expense and without court interference during the time she is an ***alleged*** incompetent person, and that she is entitled to fight the proposed guardianship and have her counsel wage that fight without court interference or restriction on her use of her own resources has been settled since at least 2005 by the decision of *In re the Guardianship of Beecher*, 130 Wn. App. 66, 121 P.3d 743 (2005). That case has a virtually identical posture to this one, as there the trial court drastically reduced the fees sought by the attorney for the alleged incompetent person. In *Beecher*, the Court of Appeals held that the trial court did not have the authority to review attorney's fees incurred by Ms. Beecher, an alleged incapacitated person, since she was not declared incapacitated at the time the fees were incurred. The appellate court therefore reversed the trial court's reduction in attorney's fees and judgment against the attorney, remanding the case with instructions to vacate the judgment against Ms. Beecher's attorney. A copy of the decision is attached for your easy reference. We see no material difference between that case and this one and will argue on appeal that it controls and requires the order against Mr. Quick be vacated.

In addition, I suspect you are aware that even if the trial court had the authority to set fees for Mr. Quick, which it did not, the case would have to be remanded because the court failed to go through a lodestar analysis on the record to provide a basis for review of the amount of the award, as required under *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 651-52, 966 P.2d 305 (1998), and its progeny, *e.g.*, *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."). These cases also require the order against Mr. Quick be vacated, independent of *Beecher.*

We thus believe we will win the appeal on both issues: 1) the trial court's lack of legal authority to determine Mr. Quick's fees during the period before Ms. Decker was subject to the guardianship; and 2) even assuming such authority, the failure to engage in the proper analysis of the amount of the fee award and, thus the amount, if any, of the fees Mr. Quick would have to return.

Because the law is clear on both issues, and because the statute authorizes fees, we could be awarded fees if requested on appeal. However, as you know, Ms. Decker was Mr. Quick's client and he has no desire to have imposed on her any more fees than those he has billed her for, whether his fees on this appeal or your fees defending the appeal. He understands that the guardianship statutes are written broadly enough that such an award or awards are possible. However, Mr. Quick wishes to spare the Estate and the State any further expense in responding to a full appeal by the appellate process. We therefore ask you to review the *Beecher* case and consider the following proposal.

We ask you to consider resolving the case by stipulating to vacating the underlying order of disgorgement imposed on Mr. Quick on the basis of *Beecher,* and allow for payment by Ms. Decker of the unpaid balance of Mr. Quick's fees owing as of last summer's hearing in August, 2013. On those terms we also will forgo the full appellate process and any claim Mr. Quick may have against any entity or person (other than Ms. Decker) for the fees and costs incurred since the August, 2013 hearing.

In the meantime, enforcement of the disgorgement order against Mr. Quick must be foreclosed. If we cannot agree quickly on resolving the appeal in the above manner, and again in light of the above authorities, we ask that you 1) agree to not seek to enforce the order pending the appeal; or (2) to stipulate to, or to agree to not oppose, a stay of the order requiring payment by February 7.

I invite you to call and discuss next week, after you have had a chance to review the *Beecher* case, and look forward to your early response.

Very Truly Yours,

CARNEY BADLEY SPELLMAN, P.S.

Gregory M. Miller

GMM:can
cc: Client

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 true and correct copy of *Daniel Quick's Consolidated Reply Brief* and this *Certificate of Service* on the following parties:

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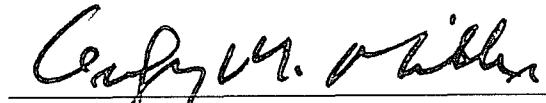
DATED this 3rd day of October, 2014.



Gregory M. Miller