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I. INTRODUCTION

This case involves a contested Petition for Guardianship filed by Rena Keith, Appellant. CP 232-235. Sherwood Assisted Living (herein Sherwood) was substituted as Petitioner in this Guardianship proceeding by the trial court's Order on Rena Keith's Motions to Substitute Party and Reconsideration. CP 336-337. Respondent and Cross Appellant Irma Matthews Finn and Michael Finn (herein Irma) intervened and successfully contested Sherwood's Petition for Guardianship which was dismissed by the trial court's Order Dismissing Guardianship and Award of Fees entered on July 11, 2008. CP 9.

Irma asks this court to affirm the trial court's award of fees against Sherwood, but requests that the amount of fees awarded be increased, and that the court award of fees for pursuit of this appeal.

II. ASSIGNMENTS OF ERROR

- A. The trial court did not err in substituting Sherwood as Petitioner.
- B. The trial court did not err in awarding attorney fees against Sherwood, under RCW 11.96A.150.
- C. The trial court erred in not awarding more attorney fees to Irma against Sherwood under RCW 11.96A.150.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

A. Does the trial court have the authority to change the designation of the name of the Petitioner, whose Manager of the facility initially filed the petition in her individual capacity, and states in her Motion to Substitute Party "The acts I perform in the accomplishment of those duties is at the behest of and for the benefit of my employer."? CP 361.

B. Does RCW 11.96A.150 control the award of attorney fees and costs over RCW 11.88.030(1) even in the absence of a finding of bad faith?

C. Does RCW 11.88.030(1) which provides in part that "No liability for filing a petition for guardianship. . .shall attach to a petitioner acting in good faith and upon a reasonable basis," preclude the trial court from awarding attorney fees and costs against a petitioning party?

D. Did the trial court abuse its discretion in not awarding more attorney fees to Irma against Sherwood when the reasonableness of Irma's fee application was not challenged?

IV. STATEMENT OF CASE

Joseph Matthews, Irma's father, moved to Sherwood in November, 2001. CP180, 293-294. Sherwood received monthly payments from Irma for her father, but the cost of his care continued to rise rapidly. CP 212-215, 219-225, 74, 413. There were months when Irma could not make full payment, or payments were delayed. When their requests to Irma to bring her account current did not produce results acceptable to Sherwood it threatened to evict Joseph Matthews, CP 167, and also started looking for assets. CP 155, 158, 311

“ . . .the guardianship was filed because we wanted money. . .now that is a legitimate reason to file the guardianship.” “So is the fact that you are wearing a green hat.” CP 311. (Statement by Sherwood's attorney Craig Ritchie).

Sherwood was at that time transitioning to a private pay facility which no longer accepted Medicaid patients. CP 375-379.

In July, 2007, Rena Keith, Sherwood's manager, conducted a title search on the apartment building owned in part by Joseph Matthews. That search disclosed that the building was titled in the name of both Joseph Matthews and his daughter, Irma. CP 65-66, 69-70, 72.

With this prior knowledge, on October 26, 2007, Rena Keith petitioned in her individual capacity to have a guardian appointed for Joseph Matthews alleging financial mismanagement by Irma. CP 232-235. Her attorney, Erwin Jones, was also the attorney for Sherwood.

Sherwood delayed mailing notice of the guardianship case to Irma until December 14, 2007. CP 414, 445, 453. Sherwood set the final hearing on its guardianship petition for January 4, 2008. CP 414, 451.

At all times relevant herein, Irma held the unrevoked Power of Attorney for Joseph Matthews signed on August 14, 1995. CP 78-83. Prior to December 10, 2007, Irma learned of a "problem" from Sherwood concerning Joseph Matthews. CP 292. Still lacking any notice of a guardianship petition, Irma found an alternate care facility for Joseph Matthews in California and informed Sherwood of her intent to move her father. CP 292, 444-445. Additionally, on December 18, 2007, Irma brought current Joseph Matthews' bill with Sherwood. CP 74 (\$7,698.19 payment under December 2, 2007 entries).

Knowing Irma's intent to move her father, on December 11, 2007, Rayna Abrahams, the Guardian ad Litem, through

Sherwood's attorney Erwin P. Jones, obtained an ex parte restraining order forbidding Irma from moving Joseph Matthews from Sherwood's facility. CP 121-122, 154, 372. This order was obtained without any notice to Irma either prior to the application, or after, and no bond was required. No final hearing was scheduled to make the temporary order permanent. CP 154-157,160.

Irma engaged counsel on December 26, 2007. CP 446-448. Protracted litigation then followed as Sherwood fought to keep Joseph Matthews in its possession, while Irma pursued moving her father to a location that not only cost less than one-half (1/2) of what Sherwood charged, but also was much nearer to her. CP 260-264, 430-431. The parties engaged in extensive discovery, which included both written interrogatories and depositions, and requests for production of documents. CP 1-3, 139-140, 141-149, 237-239, 256, 374-378, 425-429.

On April 3, 2008, Rena Keith moved to substitute herself "in her individual capacity" to "in her capacity as mandatory reporter and in her capacity as representative of Sherwood." CP 361-362. The court found Sherwood was the real party in interest, and ordered it substituted for Rena Keith. CP 336-337. The court also ruled that the ex parte restraining order required the posting of a

\$10,000.00 bond. CP 336-337. However, Rayna Abrahams, the Guardian ad Litem, told the court that she would not post such a bond. CP 357-358.

Rather than post the bond, Sherwood sought discretionary review of the court's bond requirement. CP 38. After briefing, the Commissioner for Court of Appeals, Division II, denied review. However, Court Commissioner Eric B. Schmidt gave Sherwood more time in which to post the bond. CP 295-299.

Having lost its appeal, Sherwood's next move was to file a petition for a Vulnerable Adult Protection Order in a separate action, brought before a commissioner who had no knowledge of the guardianship proceeding or the bond requirement. Sherwood again asked for an ex parte restraining order without a hearing, but the commissioner was informed of the guardianship action by Joseph Matthews' attorney, and a hearing was held. The commissioner then required the posting of a \$10,000 bond. CP 48.

Sherwood again refused to post a bond, and the restraining order expired on May 9, 2008. Joseph Matthews was moved the following day and now resides in Ontario, California, in the facility that Irma had intended for him in December, 2007. He is not suffering any apparent ill effects from this move, CP 108 – 113,

notwithstanding Sherwood's persistent predictions to the contrary. CP 93- 94, 260. Irma then brought a motion to dismiss the action in this state, and that motion was granted.

Irma sought reimbursement from Sherwood for the \$62,000.00 in attorneys fees and costs she incurred to defend against the guardianship and to move her father. Complete itemization of details of service rendered are found at CP 33-52, 53-54. Neither Sherwood nor the Guardian ad Litem objected to the amount or reasonableness of the fees sought by Irma. However, the trial court awarded her only \$10,000.00 despite stating that Sherwood had abandoned the litigation on the eve of trial, and by not posting the bond. CP 9-12. There was never a finding that Irma had financially abused Joseph Matthews or that she violated her fiduciary duties under the Durable Power of Attorney. CP 9-12.

V. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN FINDING SHERWOOD TO BE THE TRUE PARTY IN INTEREST AND PROPERLY ORDERED SHERWOOD SUBSTITUTED AS PETITIONER.

An appellate court reviews a trial court's application of the Rules of Civil Procedure for an abuse of discretion. *Sprague*

v. Sysco Corp., 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).

The trial court correctly found that Sherwood was the true party in interest and petitioner in this guardianship. Rena Keith, Manager of Sherwood, initially filed this petition in her individual capacity. On April 3, 2008, she filed a Motion to Substitute Party. In her statement in support of the Motion, Keith states: "The acts I perform in the accomplishment of those duties is at the behest of and for the benefit of my employer." CP 361-362.

CR 17(a) provides in part that every action shall be prosecuted in the name of the real party in interest. CR 19(a) mandates that the court shall join a party when;

"in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." See **Gildon v. Simon Property Group, Inc.**, 158 Wn. 2d 483, 145 P.3d 1196, 1202 (2006)(citing **Crosby v. Spokane County**, 137 Wash.2d 296, 306, 971 P.2d 32(1999), CR 19(a)(1).

Facts and circumstances presented to the trial court showed that the petition was filed (a) at a time when Sherwood and its agents were frustrated over the status of Mr. Matthews' account,

and (b) after Sherwood's asset search turned up a valuable asset in Mr. Matthews' name, jointly with his daughter. The timing of the action, along with the substitution motion, spoke to Sherwood's interest in securing its financial claims regarding Mr. Matthews.

Seeing these facts, the trial court correctly ordered Sherwood substituted as the petitioner. CP 336-337. This decision is more than supported by the evidence; it can be argued that joinder, at least, was mandatory in these circumstances. Substitution of Sherwood for its employee in her individual capacity was a more fitting remedy in these circumstances. The ruling was not an abuse of discretion and should not be overturned.

B. THE AWARD OF ATTORNEY FEES TO IRMA WAS PROPER AND DID NOT VIOLATE RCW 11.88.030(1).

RCW 11.88.030(1) states, in part: "No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon a reasonable basis."

Appellant's position is that this statute prohibits an award of attorney fees against a petitioner in a guardianship case, absent a finding of bad faith. Not only does this interpretation fly in the face of RCW 11.96A.150, discussed below, but also flies in the face of

judicial decisions, such as the one cited by appellant, *In re Guardianship of McKean*, 136 Wn.App. 906,151 P.3d 223 (2007).

The *McKean* case has some similarities to the instant case: the party that was ordered to pay fees engaged in fighting the opposing party “at each stage” of the litigation.

In the instant case, however, the court had the following problems, all created by Sherwood, before it:

1. Statutory requirements for notifying family of the filing of a guardianship petition were ignored. RCW 11.88.030
2. Statutory requirements for providing Mr. Matthews with a speedy trial were ignored. RCW 11.88.030(5)
3. Statutory requirements for serving Mr. Matthews with the guardianship petition were ignored. RCW 11.88.030.
4. Statutory requirements safeguarding Mr. Matthews’ right to counsel in the proceedings were ignored, causing him to lose this right for the first five months of the litigation.
5. Statutory requirements regarding notice to parties of GAL information were ignored. (RCW 11.88.090)
6. Statutory requirements for obtaining a restraining order *ex parte* were ignored. (RCW 7.40.050)

7. Allegations of financial malfeasance that were set forth in the petition as the basis for the guardianship were patently false, and the petitioner knew of the falsehood at the time the allegations were made. CP 9-12.

8. After six months of litigation, Sherwood refused to post a bond and abandoned the case. In the trial court's findings, this fact was prominent: "The instant petition was not filed in bad faith, but the refusal to post a bond amounted to a failure to follow through on the petitioner's obligation in this matter." CP 9-12.

An appellate court reviews a trial court's interpretation of statutes *de novo*, ***Ino Ino, Inv. v. City of Bellevue***, 132 Wash.2d 103, 937 P.2d 154 (1997).

RCW 11.96A.150 addresses attorney fee awards in guardianship cases, while RCW 11.88.030(1) does not. The court properly awarded Irma attorneys fees under 11.96A.150.

R.C.W.11.96A.150 is clear and unambiguous on its face and is set forth in Appendix "A". A court must give effect to the clear and unambiguous language of a statute when construing it. ***Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30***, 97 Wash.2d 118, 641 P.2d 163 (1982).

RCW 11.96A.150 subsection (2) states in part as follows:

. . . . This section shall not be construed as being limited by any other specific statutory provisions providing for the payment of costs, including RCW 11.68.07 and 11.24.050, **unless such statute specifically provides otherwise.** This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10) [emphasis added]

RCW 11.88.030(1) is not a statute that provides otherwise.

The words “. . . no liability for filing a petition for guardianship . . . shall attach to a petitioner acting in good faith and upon a reasonable basis . . .” is not a more specific statute because attorney fees and costs are not mentioned in that statute. Further, the common usage of the word “liability” when it is used in conjunction with litigation, connotes that a person will be subject to adverse legal action. (Black’s Law Dictionary Revised Fourth Edition (1968) @ page 1060)

A court’s goal in construing statutes is to give force to legislative intent. Accordingly, ‘to resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.’ *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), cert. denied, 121 S.Ct. 1356 (2001). RCW 11.88.030(1) which provides that ‘no liability for filing a petition for guardianship. . . shall attach to a petitioner acting in good faith

and upon reasonable basis. . . .’ However, attorney fees and costs are not mentioned in RCW 11.88.030(1).

Further, Sherwood argues that the court was required to find that the petition was filed in bad faith or without basis before awarding fees. But RCW 11.96A.150, enacted after RCW 11.88.030, authorized the court, ‘in its discretion,’ to grant fees and costs in guardianship matters. Further, RCW 11.96A.150(2) states that the section ‘shall not be construed as being limited by any other specific statutory provision providing for the payment of costs...unless such statute specifically provides otherwise.’ Thus, RCW 11.96A.150, a latter-enacted grant of discretion to the court to award attorney fees, is not limited by the general limitation on ‘liability’ expressed in RCW 11.88.030(1). The court in *Tunstall*, *supra*, wrote at page 211:

“To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute. *In re Estate of Little*, 106 Wn2d 269, 283, 721 P.2d 950 (1986) (more specific statute) (citing cases); *Morris v. Blaker*, 118 Wn.2d 133, 147, 821 P.2d 482 (1992) *fn4. Along these same lines, courts also consider “the sequence of all statutes relating to the same subject matter.” *Department of Labor & Indus. v. Estate of MacMillan*, 117 Wn.2d 222, 229, 814 P.2d 914 (1991) (citation omitted). Based on these principles of statutory interpretation, we examine the Legislature’s statutory scheme regarding education to determine whether the basic education act applies to the inmate class.”

Based on the facts and circumstances surrounding the timing of Sherwood's actions, the trial court certainly could have found that petitioners were not acting in "good faith" and upon a "reasonable basis". Sherwood alleges in its Petition that "The attorney for the Washington State LTC Ombudsman, Jeff Crollard, after investigating the plight of Mr. Matthews, has recommended either a "RCW 74.34 action" against Mr. Matthews' daughter and son-in-law. . ." In his "investigation" Mr. Crollard never contacted the Finns to ascertain their position, CP 385, or Rena Keith, CP 388-389, or Rayna Abrahams, CP 392-393, nor was he told that the current title ownership of the apartment building was in both Irma's name, as Trustee of the Irma Matthews Trust, and Joseph R. Matthews. CP 256. The local Ombudsman for Clallam-Jefferson County, on August 24, 2007, as well Sherwood on September 14, 2007, knew the correct status of title ownership, but neither one ever advised Mr. Crollard of this very material fact. This is not filing a Petition for Guardianship in good faith. CP 72, 245, 22, 23

Finally, an award of attorney fees by the trial court is subject to an abuse of discretion standard. ***In re: Guardianship of***

McKean, 136 Wn. App 906, 151 P.3d 223, 228 (2007), the Court wrote:

“We review a superior court’s fees and costs award for an abuse of discretion. *In re Guardianship of Spieker*, 69 Wash.2d 32, 34-35, 416 P.2d 465 (1966) (citing *In re Estate of Leslie*, 137 Wash.2d, 241 P. 301 (1925)). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carrol v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wash.2d 344, 347 P2d 1062 (1959)).

The trial court did not abuse its discretion in the award of fees to Irma against Sherwood.

C. THE TRIAL COURT DID ABUSE ITS DISCRETION IN NOT AWARDING MORE ATTORNEY FEES TO IRMA AGAINST SHERWOOD

However, the trial court’s award of only \$10,000.00 in attorney’s fees was unreasonably low and therefore an abuse of discretion. Neither Sherwood, nor any other party, challenged the reasonableness of Irma’s request for fees. CP 27.

This proceeding was a collection action disguised as a guardianship. It was intentionally pursued to provide Irma the most minimal notice of proceedings with the hope that she would not be able to participate. Sherwood did not serve Irma with any of the pleadings until well into the holiday season, and very close to

Christmas, 2007. CP 444-445, 453. It set the final hearing for the day after the New Year's holiday. CP 451.

Sherwood's plan of attack by design substantially increased the cost to Irma. By the time Irma's counsel got involved, the case had been pending for two months. Counsel had to seek and obtain a continuance of the final hearing, set for January 4, 2008. CP 446-448, 449-450. They had to obtain all of the pleadings filed to date, review, object, and then pursue their own discovery to build their case against Sherwood.

All of this could have been avoided had Sherwood allowed Irma to move Joseph Matthews in December, 2007. This court should be shocked by the record before it, and by how small the fee award was. Irma should have not have been compelled to expend any monies on attorneys. Joseph Matthews should have been released by Sherwood and moved to California in December, 2007 before Irma had hired counsel. Sherwood's bill was current before Irma hired counsel. However, Sherwood's unjustified actions compelled Irma to incur substantial fees to protect both her and Joe Matthews' assets. The trial court should have awarded Irma all of her requested and unchallenged attorney fees and costs requested, when Sherwood abandoned its case. See *Gillespie v. Seattle First*

National Bank, 70 Wash. App. 150,177-178, 855 P.2d 680 (1993)
(even absent bad faith or self-dealing, attorney's fees equitably
assessed where, but for its breach of fiduciary duty, the beneficiaries
would not have needed to incur the fees.)

All of Sherwood's actions need to be viewed by the end
result of this guardianship. Sherwood's actions did not benefit
Joseph Matthews' estate in any way whatsoever.

A properly prosecuted guardianship would not have required
such extensive litigation nor attorneys fees. Had Irma been served
in October, 2007 with guardianship papers, any counsel she
retained could have defended in a more orderly fashion.

The whole proceeding could have been resolved within the
sixty day time period mandated by statute. Sherwood should have
filed the petition in its own name, properly disclosed to the court that
Irma was a part owner in the Los Angeles property, and given Irma
notice and opportunity to be heard on the motion for the restraining
order.

However, Sherwood knew it had improperly brought the
guardianship. This was always a collection matter. That is the
reason Sherwood did not object to the amount, or challenge the
reasonableness of the fees sought by Irma before the trial court.

This court should award Irma more fees and costs than the \$10,000.00 already awarded.

The end result of this extensively litigated guardianship is the exact plan proposed by Irma from before inception of her involvement in the guardianship, and with a conservatorship now in place in California.

D. IRMA IS ENTITLED TO AN AWARD OF ATTORNEYS FEES ON APPEAL.

Pursuant to RAP 18.1, Irma requests an award of attorney fees for this appeal. RAP 18.1(a) provides:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specified that the request is to be directed to the trial court.

RCW 11.96A.150 starts by stating "(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party . . ."

Irma has been forced to defend against unjust and unsupported accusations against her, protect her father and his assets, and achieve her goal of moving him back to California where he is now living and wants to remain for the rest of his life. Irma requests the court of appeals award her fees on this appeal, as she

is entitled to an award under 11.96A.150, which is applicable law granting a party the right to recover reasonable attorney fees or expenses. *In re Irrevocable Trust of McKean*, 183 P.3d 317, 323 (2008).

VI. CONCLUSION

The court should affirm the trial court finding that Sherwood is the true party in interest, and its award of attorney fees against Sherwood, but reverse and remand for an increase in the amount of attorneys fees and costs to be awarded to Irma against Sherwood.

Finally, this court should also award Irma attorney fees and costs for pursuing this appeal.

RESPECTFULLY SUBMITTED this 18th day of December, 2008.

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Appellants

W. Jeff Davis for

KATHLEEN MCCORMICK *by telephone*
WSBA # 20704 *authorization at 12:10 pm*
Attorney for AIP Matthews *on December 18, 2008*

APPENDIX "A"

RCW 11.96A.150 titled "**Costs – Attorneys' Fees**" is set forth as follows:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved. [emphasis added]

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

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3. I declare under penalty of perjury under the laws of
the State of Washington, that the foregoing is true and correct.

DATED this 18 day of December, 2008 at Sequim, Clallam
County, Washington.

BELL & DAVIS



Matilda E. Henry
Legal Assistant, Bell & Davis