

NO. 41399-0-II

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

In the Matter of the
GUARDIANSHIP OF SEAN SEXTON

**BRIEF OF AMICUS CURIAE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTEREST AND IDENTITY OF AMICUS CURIAE

This amicus curiae brief is submitted by the Department of Social and Health Services (DSHS) at the request of the Court. DSHS provides long-term care services to at least 1800 legally incapacitated adults, and each year files over 200 guardianship petitions in cases involving vulnerable adults who are abused, neglected or exploited. As a participant in guardianship cases DSHS has an interest in assisting this Court in developing a fair standard for removing guardians while protecting incapacitated adults.

II. ISSUES

The Court asked amicus DSHS to address the following issues:

1. Whether the trial court erred in removing the guardian for failing to obtain the court's permission prior to applying to become the incapacitated person's Social Security representative payee.
2. Whether due process requires demonstrating a "good reason" for removal by clear and convincing evidence before removing a certified professional guardian.
3. Whether DSHS's argument in the guardianship proceeding was an improper appearance.

4. Whether the guardian is entitled to attorney fees under RCW 91.96A.150 from DSHS as a result of its appearance in the guardianship proceeding.

III. STATEMENT OF THE CASE¹

Sean Sexton is a resident of Rainier School, a state-run institution for developmentally disabled adults. CP at 55. Mr. Sexton's income consists of Social Security benefits and a small amount of wages. CP at 6, 49-50. In 1985, the Pierce County Superior Court found Mr. Sexton to be an incapacitated person under Title 11 RCW. Pierce Co. Super. Ct. No. 85-4-00367-8, Order Appointing Guardian (Apr. 23, 1985).²

James Hardman is a professional guardian, certified under GR 23 to provide guardianship services to three or more incapacitated persons. CP at 85; RCW 11.88.020(1). Prior to October 8, 2010, when Mr. Hardman was removed, Mr. Hardman and his mother Alice Hardman acted as co-guardians of Mr. Sexton's person and estate. CP at 1, 96.³

¹ References are to the Clerk's Papers (CP), the Verbatim Report of Proceedings for July 16, 2010 (July VRP), the Verbatim Report of Proceedings for August 20, 2010 (Aug. VRP), and the Verbatim Report of Proceedings for October 8, 2010 (Oct. VRP).

² The record on appeal fails to include a number of foundational documents. We cite to entries from the superior court's docket, *available online* at http://www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=85-4-00367-8.

³ Alice Hardman was not removed by the court in the order on appeal. However, she has since resigned as guardian of Sean Sexton. Pierce Co. Superior Ct. No. 85-4-00367-8, Order Approving Resignation of Co Guardian (Nov. 19, 2010). It appears the superior court may not have been aware at the time it removed Mr. Hardman that Mr. Sexton had a second guardian, as the court immediately appointed Mr. Sexton a

A. Guardian Fees For Medicaid Recipients

Medicaid-eligible residents of institutions such as Rainier School are required by state law to contribute their income toward the cost of the institution. RCW 43.20B.415. The monthly amount paid by a resident is customarily referred to as “participation in cost of care,” or simply “participation.” *See, e.g.*, WAC 388-79-020; WAC 388-515-1505(8). As of June 2010, Mr. Sexton paid part of his income toward participation. CP at 6-7. Participation is calculated by deducting any allowable expenses from the individual’s total income. WAC 388-513-1380. Under Washington’s Medicaid state plan, court-ordered guardian fees are one allowable expense that may be deducted from the individual’s income as part of the participation calculation. WAC 388-513-1380(4)(d).

Generally, institutionalized Medicaid recipients like Mr. Sexton cannot be ordered to pay more than \$175 per month in guardian fees. WAC 388-79-030; *see* RCW 11.92.180 (superior court award of guardian fees and costs for certain Medicaid recipients “shall not exceed” the maximum amount allowed by DSHS). This case arises against the background of Mr. Hardman’s efforts to collect fees in excess of the \$175 cap. *See* CP at 77 (Mr. Hardman seeks to “avoid costs and burdens

guardian *ad litem*. Pierce Co. Superior Ct. No. 85-4-00367-8, Order Appointing Guardian Ad Litem (Oct. 8, 2010). Following the resignation of Alice Hardman, the guardian *ad litem* continues to serve as Mr. Sexton’s temporary guardian pending the outcome of this appeal.

associated [with] defending against litigation brought by DSHS over guardian fees.”), 79 (“DSHS commenced protracted litigation in numerous other cases against [Mr. Sexton]’s guardian.”).⁴ In his other cases, Mr. Hardman has argued that he is entitled to charge his wards additional fees for political activism. *Guardianship of Lamb*, 154 Wn. App. 536, 548, 228 P.3d 32 (2009) (holding that Mr. Hardman and his co-guardian were not entitled to additional fees for lobbying and community advocacy), *review granted*, 169 Wn.2d 1010 (2010). As in *Lamb*, Mr. Hardman’s proposed care plan for Mr. Sexton includes advocacy and lobbying efforts on behalf of the collective interests of Rainier School residents. CP at 58; *see Lamb*, 154 Wn. App. at 540-542.

B. Procedural History

From March 2007 through February 2010, the Hardmans charged \$175 per month for their services from Mr. Sexton’s estate. *See* CP at 4 (period of report), 8 (requesting court approval of those fees).⁵ During that period, DSHS received and distributed Mr. Sexton’s income as his Social Security representative payee. *See* Aug. VRP at 7.

⁴ While not pertinent to this appeal, DSHS disagrees with those characterizations of its involvement in Mr. Hardman’s other guardianship cases.

⁵ The superior court’s previous order provided the Hardmans with the authority to collect \$175 per month as an allowance, subject to future court approval. Pierce Co. Super. Ct. No. 85-4-00367-8, Order Approving Report (Jul. 6, 2007). Mr. Hardman alleges that DSHS, as Mr. Sexton’s previous representative payee, did not forward those payments to the Hardmans. CP at 76. The record does not indicate that Mr. Hardman ever requested that DSHS make payment, nor that he ever provided DSHS with the previous court order.

In June 2010, the Hardmans filed their triennial accounting. CP at 4-14. They asked the superior court to approve an increase in their fees to \$325 per month. CP at 8. A hearing to review the Hardmans' report, originally scheduled for June 11, was continued until July 16, 2010. CP at 2, 47. In the meantime, on July 14, 2010, Mr. Hardman asked the Social Security Administration to appoint him as Mr. Sexton's representative payee to receive and handle Mr. Sexton's Social Security benefit checks. Aug. VRP at 19. Mr. Hardman was appointed as Mr. Sexton's representative payee the same day. CP at 69.

1. July 2010: Mr. Hardman's motion to change the scope of guardianship.

On July 16, 2010, Judge Van Doornick held a hearing to review the triennial guardianship report. CP at 47; July VRP at 1. Counsel for the guardians informed the court that "Mr. Hardman has become the representative payee for [Mr. Sexton's] Social Security benefits[.]" July VRP at 2. The Hardmans made an oral motion to change the scope of the guardianship to no longer include most court oversight of Mr. Sexton's estate. July VRP at 2. Counsel explained that doing so "would take . . . the future [guardian] fee issue out of the purview of the Court." July VRP at 3. Counsel further told the court that by becoming representative payee—and able to pay Mr. Sexton's bills out of his Social Security

benefit—Mr. Hardman “can ensure that the guardianship fees are paid in a timely fashion.” July VRP at 3.

The court declined to sign the proposed order. July VRP at 3. Instead, the court ordered the guardians to file a Personal Care Plan, and provide a written explanation for why the court should change the scope of the guardianship. CP at 51; July VRP at 3-4.

2. August 2010: the court’s concerns about Mr. Hardman’s conduct.

The Hardmans filed a new Personal Care Plan for Mr. Sexton. CP at 55-66. They also provided a “Memorandum on Representative Payee Status.” CP at 52-54. In their Memorandum the guardians argued that Mr. Sexton’s Social Security benefits and resident trust account⁶ were not subject to court administration under the guardianship statute, and therefore, the court had no authority to supervise Mr. Hardman’s administration of those funds. CP at 52-53.⁷ The guardians argued that Mr. Hardman’s discretion as representative payee to pay his own and his co-guardian’s fees was unchecked by state laws limiting guardian

⁶ As custodian for residents of Rainier School, DSHS has the authority to hold and disburse each resident’s funds. RCW 71A.20.100. The funds held by DSHS are known as a “resident trust account.” The appointment of a court-appointed guardian ends DSHS’s authority over those funds. RCW 71A.20.100(5). However, for practical reasons it is common for DSHS to continue to hold funds on behalf of residents, with guardians approving expenditures over \$100.

⁷ In his Brief, Mr. Hardman now concedes that resident trust accounts are subject to guardianship administration. Opening Br. at 13, n. 4. He appears to stand by his claim that this state’s courts have no jurisdiction to review how Mr. Sexton’s Social Security funds are used by Mr. Sexton’s court-appointed guardian.

compensation for Medicaid recipients. CP at 53. The guardians requested that the court set “an hourly rate of guardian fees and counsel fees” and allow Mr. Hardman, in his role as representative payee, to determine how much total compensation they should be allowed to collect. CP at 53. Additionally, the guardians argued that Mr. Sexton is not required to contribute to the cost of services he receives as a resident of Rainier School. CP at 53 n.2.

At a hearing held on August 20, 2010, the court expressed a number of concerns with the Hardmans’ position. First, the court was under the incorrect impression that Mr. Hardman had requested court pre-approval to become Mr. Sexton’s Social Security payee. Aug. VRP at 3.⁸ Second, the court stated that the guardian should have “petition[ed] to change the status of the guardianship” prior to applying to become the representative payee. Aug. VRP at 13. Third, the court believed that the guardians’ conduct violated the certified professional guardianship rules of ethics. Aug. VRP at 12. Finally, the court did not see how making Mr. Hardman the direct payee would benefit Mr. Sexton. Aug. VRP at 25.

⁸ At the July hearing, counsel did in fact inform the court that “Mr. Hardman has become the representative payee[.]” July VRP at 2. Counsel also made arguments to the court about the desirability of the change. *E.g.*, July VRP at 3 (“By becoming representative payee he [Mr. Hardman] can ensure that the guardianship fees are paid in a timely fashion.”). Those arguments seem to have led the court to believe—incorrectly—that it had some power over whether Mr. Hardman would become the payee. Aug. VRP at 26.

The court was concerned that Mr. Hardman had “made himself payee so his [own] financial interests are the primary concern.” Aug. VRP at 23.⁹

Initially, the trial court wanted to “vacate the payee status” of Mr. Hardman because it did not believe that the arrangement was “appropriate.” Aug. VRP at 6. Counsel for Mr. Hardman informed the court that it lacked jurisdiction to undo Mr. Hardman’s federal appointment. Aug. VRP at 6. Instead, the court proposed that it could “remove Mr. Hardman as the guardian of the person[.]” Aug. VRP at 12. The court set a show cause hearing for removal of Mr. Hardman as guardian. CP at 75. The court requested briefing regarding whether Mr. Hardman’s conduct was ethical or appropriate under the professional guardianship standards of practice, and whether it was in Mr. Sexton’s best interests. CP at 75; Aug. VRP at 27:11-14.

a. DSHS involvement in the August 2010 hearing.

Pursuant to RCW 11.92.180, DSHS was given notice of the August hearing. CP at 68. Counsel for DSHS was present at the hearing. Aug. VRP at 16. DSHS had no objection to the guardians’ proposed order. Aug. VRP at 2. However, counsel for DSHS explained that the proposed order was unusual and DSHS wanted to be available to ensure

⁹ The court also noted that, although a guardian is expected to be personally present at accounting hearings, Mr. Hardman himself was absent from both the July and the August hearing. Aug. VRP at 21. Alice Hardman was absent from both of those hearings, as well as the October hearing at which Mr. Hardman was removed.

the court understood its position regarding how the Hardmans' proposed order would impact Mr. Sexton's benefits. Aug. VRP at 2. DSHS's concern was that the proposed order did not allow for any adjustment to Mr. Sexton's participation. Aug. VRP at 7.¹⁰ Of particular concern to DSHS was Mr. Hardman's proposal that he be given authority to determine his overall fees. Aug. VRP at 28. DSHS was concerned that if the court were to enter the proposed order it might create a conflict of interest between Mr. Sexton and his guardians. Aug. VRP at 28.

When counsel for Mr. Hardman informed the court that the court had no jurisdiction to vacate Mr. Hardman's status as representative payee, the court asked counsel for DSHS to provide "insight into any of this." Aug. VRP at 6. Over Mr. Hardman's objection, Aug. VRP at 6, counsel for DSHS agreed with Mr. Hardman that the representative payee status is a federal agency designation that cannot be revoked by the superior court. Aug. VRP at 7.

Other than those statements, DSHS had no involvement with the August hearing. DSHS took no position on the court's *sua sponte* order to show cause for removal. Aug. VRP at 27.

¹⁰ DSHS reduces an individual's participation to allow for guardian fees as ordered by a court. WAC 388-79-030, -050. Because the proposed order did not include a set amount of monthly fees, but only an hourly rate, no deduction from participation would have been allowed under DSHS's rules. Mr. Sexton would then have been required to pay more for Medicaid services, even as he was asked to pay additional guardian fees.

3. October 2010: Mr. Hardman's removal.

Following the August hearing, the Hardmans filed a Memorandum in Support of Decision to Apply to be Representative Payee. CP at 76-83. The guardians argued that DSHS had commenced litigation in other, unrelated cases against them and that Mr. Hardman thus was obligated to take steps to protect Mr. Sexton's interests against intrusion by DSHS. CP at 79-80.¹¹ According to Mr. Hardman, DSHS as Mr. Sexton's previous representative payee had not applied Mr. Sexton's Social Security benefits to any of the services Mr. Sexton receives, and instead "gifted" that money "to the State General Fund, where it provides no discernable benefit at all" to Mr. Sexton. CP at 79. The Hardmans further argued that it is not unethical for a representative payee to self-pay guardian fees and defended the plan for the court to approve the hourly rate, but not the number of hours, of guardian fees. CP at 82.

A hearing was held on October 8, 2010. Oct. VRP at 1. DSHS was not present. After reviewing Mr. Hardman's memorandum and the July hearing transcript, the court continued to have "grave concerns" with Mr. Hardman's course of conduct. Oct. VRP at 4. The court believed it would have been appropriate for Mr. Hardman to ask the court for permission to become the payee. Oct. VRP at 4. The court stated it was

¹¹ Mr. Hardman later confirmed that the litigation he was involved in against DSHS was "unrelated to Sean Sexton." Oct. VRP at 3.

uncomfortable with Mr. Hardman's actions "in terms of what is in Mr. Sexton's best interest." Oct. VRP at 4. It appeared to the court "that there's some self-dealing" by Mr. Hardman in changing Mr. Sexton's longstanding plan of care in order to collect his own fees. Oct. VRP at 6. The court then entered an order removing Mr. Hardman as guardian. CP at 96.¹²

Mr. Hardman timely appeals his removal.

IV. ARGUMENT

This Court has asked DSHS to address four discrete issues. As a preliminary matter, DSHS also asks the Court to consider whether a former guardian has standing to appeal his removal as guardian.

A. A Former Guardian Lacks Standing To Appeal His Removal

A guardian has no legally cognizable interest in his court appointment. Thus, a guardian who is removed from his appointment by the court is not an "aggrieved party" under RAP 3.1, and cannot contest his removal in either an individual or representative capacity. *Guardianship of Lasky*, 54 Wn. App. 841, 850, 776 P.2d 695 (1989). In *Lasky*, the superior court removed the guardian, denied his request for attorney fees, and imposed CR 11 sanctions against him. *Id.* at 848. With regard to the fees and sanctions, the removed guardian was an aggrieved

¹² Alice Hardman was not removed as co-guardian. *See supra* at 2-3 n.3.

party with a right to appeal. *Id.* However, a guardian “has no interest in the guardianship . . . other than for compensation due” and thus has no standing to appeal his removal. *Id.* at 850. In reaching that conclusion the court relied on cases involving probate estate administrators, who also lack standing to appeal their removal as court-appointed fiduciaries. *Id.* at 849-50 (citing *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 145 P.2d 1017 (1944)).

Mr. Hardman thus lacks standing to appeal his removal. The proper party to appeal an order replacing a guardian is the incapacitated person himself, through his successor guardian. *Lasky*, 54 Wn. App. at 850 (the new guardian “was free to appeal the [removal] order on behalf of [the ward] if he deemed it to be in [the ward]’s best interest.”).¹³

B. Standard Of Review

The management of a guardianship by the superior court is reviewed for abuse of discretion. *Guardianship of Knutson*, 160 Wn. App. 854, 863, 250 P.3d 1072 (2011), *as amended*, __ Wn. App. __ (June 17, 2011) (citing RCW 11.92.010); *see also In re Marriage of Petrie*, 105 Wn.

¹³ Even if Mr. Hardman had standing to appeal, Mr. Sexton has not been joined through his temporary guardian, although as the only true party in interest in this guardianship matter Mr. Sexton is almost certainly a necessary party. *See* CR 19; 39 Am. Jur. 2d Guardian and Ward § 84, at 86-87 (2010) (“Where an appeal [from an order of removal] is permissible, the successor guardian is a proper and necessary party, even though he or she was not the applicant on whose petition the guardian was removed.”). Mr. Hardman has disclaimed any intent to make the temporary guardian a party to this appeal. Letter to court clerk from Michael Johnson, dated December 3, 2010 (docketed Feb. 1, 2011).

App. 268, 275, 19 P.3d 443 (2001) (removal of trustee reviewed for abuse of discretion). Under an abuse of discretion standard, the trial court's decision should be upheld unless it is manifestly unreasonable, or based upon untenable grounds or reasons. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004).

C. The Trial Court Did Not Err In Removing The Guardian For Applying To Become Mr. Sexton's Social Security Representative Payee Without Seeking Court Permission

Whether a superior court abuses its discretion by removing a guardian for failing to obtain the court's permission prior to applying to become the incapacitated person's Social Security representative payee depends on the facts of any given case. Here, the trial court did not abuse its discretion when it determined that Mr. Hardman's actions created a conflict of interest and the appearance of self-dealing, which provide good reason for removal.

A superior court has the authority to appoint a guardian to protect the person and estate of an incapacitated person. RCW 11.88.010. The guardian is "at all times . . . under the general direction and control" of the court. RCW 11.92.010. A court having jurisdiction over a guardianship matter is considered the "superior guardian" of the ward, while the person appointed guardian is deemed an officer of the court. *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). The

guardian is thus “in effect an agent of the court, and through him the court seeks to protect the ward’s interest.” *In re Guardianship of Gaddis*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942).

Among the court’s powers is the authority to remove the current guardian from his appointment:

(1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other **good reason**, . . . replace the guardian or limited guardian. . . .

(4) In a hearing on an application [by any person] . . . to replace a guardian or limited guardian, the court may grant such relief as it deems **just and in the best interest of the incapacitated person**.

RCW 11.88.120 (emphases added).¹⁴ A court cannot remove or replace a guardian arbitrarily. *In re Shapiro’s Estate*, 131 Wash. 653, 230 P. 627 (1924). But nothing in the statute or common law requires that a guardian be in actual dereliction of his duties before he can be removed. For example, a guardian can be removed where “the interests of the [ward] would best be safeguarded” by appointing a different guardian. *Sampson v. Sampson*, 112 Wash. 1, 191 P. 840 (1920).

¹⁴ The legislative history of RCW 11.88.120 shows, if anything, that the legislature is more concerned with providing courts with adequate discretion to protect the ward than with preventing unnecessary guardian removals. *See* Laws of 1990, ch. 122 § 14 (amending RCW 11.88.120 to require “good reason” for removal, rather than “good and sufficient reasons, which shall be entered of record”).

A court has good reason to replace a guardian who fails to seek court approval prior to making a decision in which the guardian has a financial conflict of interest. Here, the superior court had good reason to protect Mr. Sexton's interests by removing the guardian because the guardian admitted that his unilateral decision to become Mr. Sexton's representative payee was animated by his own financial interests.

1. Representative payeeship, generally.

While Social Security benefits are generally paid directly to the beneficiary, the Social Security Administration may instead distribute the check to another individual or entity known as the beneficiary's representative payee. 42 U.S.C. § 405(j)(1)(A); *see* 20 C.F.R. §§ 404.2001, 404.2010. The representative payee is appointed by the Social Security Administration (SSA), and is subject to monitoring by the federal agency. 42 U.S.C. § 405(j)(1)-(3). A state-appointed guardian may act as a representative payee. *E.g.*, 20 C.F.R. § 404.2001(b)(2).

Federal regulations recognize that, where a guardian collects fees from a Social Security beneficiary, he is the beneficiary's creditor. 20 C.F.R. § 404.2022(e). That dual role as creditor and fiduciary creates an obvious conflict of interest. A guardian may nonetheless act as a representative payee as long as the guardian "poses no risk" to the beneficiary and as long as the financial relationship "presents no

substantial conflict of interest.” *Id.* Normally, the state court’s approval and oversight of the fees a guardian may collect ensures that there is no substantial danger from the conflict of interest created by the guardian paying himself from the beneficiary’s Social Security funds.

An otherwise acceptable representative payee may be disqualified by SSA where he seeks only to vindicate his own financial interests. 20 C.F.R. § 404.2022, Example 2 (landlord may not act as representative payee only for the purpose of ensuring receipt of rent because of the substantial conflict of interest). Here, Mr. Hardman’s attempt to avoid court oversight created a conflict of interest that made his dual appointment as guardian and payee highly problematic.

2. Mr. Hardman’s application to become representative payee benefitted his own financial interests.

The mere fact that a guardian also acts as the incapacitated person’s representative payee is not a “good reason” to remove the guardian. In many cases the guardian may be the most appropriate person to receive and distribute the incapacitated person’s Social Security benefits, while the court’s responsibility to oversee the guardian’s fees and accountings can minimize the danger from any resulting conflict of interest.¹⁵ Nor is it necessarily grounds for removal where the guardian

¹⁵ As Mr. Hardman has pointed out, in some cases a representative payee can adequately protect an incapacitated person’s financial interests at lower cost than a

applies for payee status without explicit court permission. However, failure to get prior court approval for such a significant change is highly unusual, as noted by the superior court. Aug. VRP at 27.

While Mr. Hardman's appointment as Mr. Sexton's payee is not *per se* grounds for removal, the record in this case supports the superior court's findings that Mr. Hardman's course of conduct was not in Mr. Sexton's best interests and created the appearance of self-dealing. The superior court noted that Mr. Hardman "made himself payee so his [own] financial interests are the primary concern." Aug. VRP at 23. The court determined that it appeared that Mr. Hardman was engaged in some self-dealing. Oct. VRP at 6. As explained below, those findings are supported by the record. A conflict of interest and an appearance of self-dealing constitute "good reason" to replace a guardian under RCW 11.88.120.

Less than a month before applying to become Mr. Sexton's payee, Mr. Hardman filed a report with the court that specifically declined to identify who would be acting as payee. CP at 6. He requested fees in excess of the amount generally allowed under state law. *Compare* CP at 7

guardian of the estate. CP at 81. Representative payees, unlike guardians, generally receive no compensation at all. *See* 20 C.F.R. § 404.2040a (exceptions). Replacing a paid guardian of the estate with an unpaid representative payee can be a benefit to the estate in an appropriate case. Given that Mr. Hardman's stated purpose was to increase rather than decrease his fees, that argument fails here.

(seeking \$325 per month) *with* WAC 388-79-030 (maximum of \$175 per month). Mr. Hardman then presented his appointment as payee as a *fait accompli* that removed the superior court's authority to oversee how Mr. Hardman would use Mr. Sexton's income. Aug. VRP at 9 ("there's no court intervention in reviewing what happens to the Social Security money"). His reason for seeking appointment as representative payee was to "ensure that the guardianship fees are paid in a timely fashion." July VRP at 3. Mr. Hardman took the position that the superior court had no authority to supervise his use of Mr. Sexton's Social Security benefits. CP at 52-53. He argued that his discretion as representative payee to pay himself guardian fees was unchecked by state laws limiting guardian compensation for Medicaid recipients. CP at 53. He asked that the guardianship of Mr. Sexton's estate be changed to indicate the future guardian fee issue was outside the purview of the Court. July VRP at 2. The guardians requested that the court set an hourly rate of guardian fees and allow Mr. Hardman, in his role as representative payee, to determine how much total compensation he should be allowed to collect as guardian. CP at 53.

The superior court had overseen Mr. Sexton's estate, including fees collected by his guardians, for 25 years. Aug. VRP at 13. Essentially, Mr. Hardman asked the court to abdicate that role and trust

that Mr. Hardman would not charge excessive fees in the absence of any oversight.

Mr. Hardman may simply be mistaken as to the proper role of a state court in overseeing a guardian who also acts as representative payee. At least in some circumstances, a guardianship court retains jurisdiction over the ward's estate even where the guardian has also been appointed as representative payee. *Knutson*, 160 Wn. App. at 870 (where the guardian is also the payee, guardianship court has authority to order guardian to use Social Security income to pay for the ward's cost of care in a Medicaid institution); see *In re J.G.*, 652 S.E.2d 266, 272 (N.C. 2007) (noting split among state courts on the question of a guardianship court's authority over the payee; collecting cases).¹⁶ But Mr. Hardman's admitted attempt to avoid court oversight by becoming Mr. Sexton's Social Security representative payee—even if that act would not have the legal effect that Mr. Hardman hoped, and regardless of the scope of court authority over Mr. Sexton's finances—presented the superior court with good reason to appoint a replacement guardian. On the basis of Mr. Hardman's own filings and arguments, the superior court could reasonably conclude that

¹⁶ Prior to Mr. Hardman's appointment, DSHS had acted as Mr. Sexton's representative payee for many years. See Aug. VRP at 7. It is far from clear why the superior court had jurisdiction over Mr. Sexton's Social Security funds when those funds were held by DSHS, but not once the funds were held by Mr. Hardman, such that a change in payee should result in a change to the guardianship.

Mr. Hardman had made his own financial interests—rather than Mr. Sexton’s best interests—his primary concern. Aug. VRP at 23.

Moreover, Mr. Hardman’s failure to disclose his potential conflict of interest to the court prior to applying to become representative payee may have violated his ethical obligations as a certified professional guardian (CPG). A CPG has an ethical duty to avoid even the appearance of conflicts of interest. *E.g.*, CPG Reg. 403.1 (“The guardian shall avoid self-dealing, conflict of interest, and the appearance of a conflict of interest. . . . Any potential conflict shall be disclosed to the court immediately.”), 406.9 (“There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.”).¹⁷

Mr. Hardman’s admitted self-interest in seeking to determine and pay his own fees, and his failure to recognize his conflict of interest as such, were also “good reasons” supporting the superior court’s decision to replace him.

¹⁷ The CPG Board was established by the Washington Supreme Court to certify professional guardians as required by RCW 11.88.008, GR 23(a); and to adopt minimum standards of practice for professional guardians. GR 23(c)(2)(ii). The CPG standards of practice regulations are available online at http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=117.

3. Mr. Hardman's appointment as representative payee did not benefit Mr. Sexton.

Mr. Hardman defends his unilateral decision to apply for representative payeeship on the grounds that payment of Mr. Sexton's cost of care constitutes "misuse" of his Social Security benefits, and that replacing DSHS as representative payee was thus a benefit to Mr. Sexton. Opening Br. at 13-14. He is mistaken. Federal regulations specifically provide that charges for the care and services provided by a state-run institution are an appropriate use of Social Security benefits. 20 C.F.R. § 404.2040(b); *Knutson*, 160 Wn. App. at 870-871. There is thus no misuse when Mr. Sexton's income is applied toward his cost of care.¹⁸ Moreover, the U.S. Supreme Court has specifically rejected the argument that using Social Security benefits to reimburse the state for its public assistance expenditure is not in the best interests of the beneficiary. *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 389, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003).

Mr. Hardman is also mistaken in his assertion that Mr. Sexton is not required to contribute to his cost of care because DSHS cannot bring a collection action against Mr. Sexton's Social Security checks. CP at 79

¹⁸ SSA's administrative rulings confirm that benefits should be applied to current maintenance costs even where government would otherwise provide for the beneficiary's care. Social Security Ruling 68-18, 1968 WL 3918; Social Security Ruling 66-20, 1966 WL 3055.

(Opening Br. at 14). First, by providing notice to DSHS under RCW 11.92.180—which only requires notice to DSHS in cases where the incapacitated person is required to contribute a portion of his income towards the cost of residential or supportive services—the guardians effectively conceded that Mr. Sexton is required to pay participation. CP at 47, 68; see RCW 11.92.180. And second, DSHS regularly sends Mr. Sexton and his guardian notices setting the amount that Mr. Sexton must pay toward his cost of care each month, based on the calculations in WAC 388-513-1380. If Mr. Sexton wishes to challenge the amount that DSHS has determined he owes, his remedy is to request an administrative hearing. There is no indication that he or his guardian has done so.

Mr. Hardman's plan to avoid payment of Mr. Sexton's participation in cost of care does not constitute a benefit to Mr. Sexton. Even if it did, any benefit to Mr. Sexton would not excuse Mr. Hardman's course of conduct. When a fiduciary's acts involve self-dealing or create a conflict of interest, a breach of fiduciary duty has occurred even if it results in a benefit to the beneficiary. *Petrie*, 105 Wn. App. at 276. The superior court acted within its discretion when it found good reason to replace Mr. Hardman as guardian.

D. Due Process Does Not Require Demonstrating A Good Reason For Removal By Clear And Convincing Evidence Before Removing A Certified Professional Guardian

Mr. Hardman argues that he was entitled to additional procedural protections prior to the superior court's decision to remove and replace him. Opening Br. at 19-25. Due process guarantees arise when the individual interests at issue fall within the constitutional protections for life, liberty, and property. *Ritter v. Bd. of Comm'rs of Adams Cy. Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 508, 637 P.2d 940 (1981) (citing *Paul v. Davis*, 424 U.S. 693, 712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). A guardian's appointment or removal does not involve a protected interest of the guardian. The court's duty, and any process due, is to the ward. No process is constitutionally due to the guardian, let alone the heightened burden of a "clear and convincing evidence" standard.

1. A professional guardian has no protected property or liberty interest in his appointment in a particular case.

In determining a guardian has no standing to contest his removal, Washington courts have already ruled that a guardian has no personal right or pecuniary interest in his guardianship appointment. *Lasky*, 54 Wn. App. at 849-850. Similarly, a court-appointed guardian has no constitutionally-protected property or liberty interest in his appointment.

a. A guardian has no legitimate claim of entitlement to his appointment as a property interest.

Property interests are defined by state law. *Bishop v. Wood*, 426 U.S. 341, 344-45, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). While no published cases appear to address the property rights of court-appointed fiduciaries in the due process context, cases involving public employees are instructive. In order to have a property interest in holding a particular employment post, an individual must be able to point to a rule or mutual understanding that supports his claim of entitlement. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Ritter*, 96 Wn.2d at 509; *Giles v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 457, 461, 583 P.2d 1213 (1978). Subjective expectations of continued employment do not give rise to a property interest. *Ritter*, 96 Wn.2d at 509-10.

Washington law does not give guardians a property right in their continued appointment in a given case. A guardian is an agent of the court, appointed by and accountable to the court. *Brommers*, 89 Wn.2d at 200; *Gaddis*, 12 Wn.2d at 123. The court can remove the guardian for any "good reason" upon the request of any person or on the court's own motion. RCW 11.88.120. A former guardian's only interest in a guardianship case is the "compensation due him." *Lasky*, 54 Wn. App. at

850. A professional guardian thus has no right to an appointment, any more than the doctor in *Ritter* had a constitutional right to practice in a public hospital simply because he was a licensed physician. *Ritter*, 96 Wn.2d at 509.

b. A guardian's removal does not involve a liberty interest.

Nor does Mr. Hardman have a liberty interest at stake in this case. Liberty interests may be implicated where a government entity calls into question an employee's integrity or honor, or imposes a stigma that forecloses an employee's freedom to obtain other employment. *Ritter*, 96 Wn.2d at 510-511 (employer made public statements questioning physician's diligence and integrity); *but see Giles*, 90 Wn.2d at 461 (no liberty interest implicated in dismissal based on inefficiency). Where employment opportunities are merely diminished, not foreclosed, there is no deprivation of a liberty interest. *Ritter*, 96 Wn.2d at 510; *Giles*, 90 Wn.2d at 461.

An order removing a guardian does not in itself impose a stigma foreclosing a guardian's future employment. Guided by the ward's best interests, a guardian can be replaced for any "good reason." RCW 11.88.120(1). Examples from other states show that replacing a guardian may serve an incapacitated person's interests in any number of

situations in which the guardian has done nothing wrong. For instance, a remote guardian may be replaced by a guardian who lives in a more convenient location. *Interdiction of Cade*, 899 So.2d 844, 848 (La. App. 2005). It may be in the ward's best interest to replace a guardian on the basis of family friction, even if the guardian is not at fault. *Guardianship of Vesa*, 892 S.W.2d 491, 495 (Ark. 1995) (noting that no dereliction in duty need be shown). Or, a guardian may be removed where there is a potential for a conflict of interest, even absent an actual conflict. *Estate of Armfield*, 439 S.E.2d 216, 220 (N.C. App. 1994). Such orders do not impugn the guardian's integrity in a manner that interferes with his liberty interests. Because a guardian's removal does not involve any protected interest, he is not due any process at all.

2. Assuming for the sake of argument that a guardian's removal involves a protected interest, due process does not require a "clear and convincing" evidentiary standard.

To the extent a guardian's removal may be found to implicate a protected interest of the guardian, due process does not require that good reason for replacement be established by clear and convincing evidence.

Procedural due process prohibits the state from depriving an individual of protected property or liberty interests without appropriate procedural safeguards. *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704,

193 P.3d 103 (2008). To determine what process is due in a particular circumstance, a court must consider (1) the individual's interest, (2) the risk of erroneous deprivation of that interest and the value of additional or substitute procedural safeguards, and (3) the state's interest, including fiscal and administrative burdens of additional or substitute procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Given the guardian's limited individual interest *vis à vis* the state's interest in protecting incapacitated persons, a heightened evidentiary burden is not warranted.

The license revocation cases cited by Mr. Hardman are inapposite. The superior court removed Mr. Hardman as guardian for Mr. Sexton; it did not revoke his professional guardian certification.¹⁹ The revocation of a license is constitutionally distinct from the loss of one specific job. *See Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 534, 29 P.3d 689 (2001). Unlike license revocation, removal in any particular guardianship case does not preclude future employment in that field. Removal as guardian does not in itself constitute grounds for disciplinary action, much less automatic loss of certification. *See* CPG Reg. 503 (grounds for disciplinary action).

¹⁹ As the Supreme Court recently noted, "not all state-granted credentials constitute a *professional* license." *Hardee v. Dep't of Soc. & Health Servs.*, No. 83728-7, slip op. at 10 (Wash. Sup. Ct., Jul. 7, 2011). There is no need in this case to determine whether a professional guardian certificate is a professional license under *Hardee*.

Unlike a guardian's appointment, a professional license is a property interest for which revocation requires due process. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 732, 818 P.2d 1062 (1991). A heightened evidentiary standard may apply to certain state-issued licenses or certifications that are personal to the practitioner and involve significant investments of time and money. *Nguyen*, 144 Wn.2d at 518 (revocation of medical license). But even where a license is revoked, a clear and convincing evidentiary standard is not always required. *Hardee v. Dep't of Soc. & Health Servs.*, No. 83728-7, slip op. at 12 (Wash. Sup. Ct., Jul. 7, 2011) (revocation of child care license). The requirements for obtaining a professional guardian certification pale in comparison to those that call for a clear and convincing standard of evidence. Compare GR 23(d) (requirements for professional guardians), with *Hardee*, slip op. at 15-17 (requirements for physicians).

Applying a heightened evidentiary standard to protect a guardian's interests would also endanger the court's ability to protect the interests of the incapacitated ward. Guardianship cases are generally not adversarial proceedings. As in this case, it is common for the guardian to be the court's only source of information about the ward's interests and the guardian's performance. Given a guardian's special relationship to the court, the risk of erroneous deprivation of the *guardian's* interests is thus

slim. Far outweighing that risk is the danger to the ward's interests from a guardian's potentially self-serving reports to the court. The state's interest in protecting vulnerable members of society must be taken into account in weighing the impacts of a higher evidentiary burden. *See Hardee*, slip op. at 15 (taking into account the welfare of children when considering revocation of child care license). A higher burden of proof in *ex parte* guardian removal cases would require courts to gather their own information to build a case against the current guardian, even where some evidence or a preponderance of evidence already suggests that the guardian is not protecting the ward's best interests. A guardian's interest, if any, in avoiding erroneous removal cannot justify imposing such costs upon the courts and such risks upon incapacitated persons.

Mr. Hardman had notice and an opportunity to be heard prior to his removal. The court had substantial evidence of Mr. Hardman's actions and motives. If any process was due, the procedures employed in the present case are more than sufficient to satisfy constitutional requirements.

E. The Attendance Of DSHS, An Interested Entity, At A Guardianship Accounting Is Not An "Improper Appearance"

Mr. Hardman argues that "there is absolutely no basis for DSHS to appear in a removal proceeding and make legal argument." Opening Br. at 11. In fact, DSHS took no position on the court's *sua sponte* motion to

remove Mr. Hardman and was not present at the removal hearing. Aug. VRP at 27.

DSHS did appear at the August hearing on the Hardmans' triennial accounting. DSHS had no objection to the proposed order approving the accounting. Aug. VRP at 2. However, counsel for DSHS drew the court's attention to the paragraph in the proposed order that would have set an hourly rate for the Hardmans' guardian fees, and explained that DSHS did not interpret that language to allow Mr. Sexton to take advantage of the guardian fee deduction from participation. Aug. VRP at 2, 16, 27-28. Mr. Hardman made no objection to those comments. DSHS also, at the court's request, discussed the court's authority over Mr. Hardman's appointment as representative payee. Aug. VRP at 6-8. Mr. Hardman objected to those comments. Aug. VRP at 6. However, after it became clear that DSHS agreed with him on that point, Mr. Hardman conceded that the comments were "valuable." Aug. VRP at 10. Mr. Hardman now characterizes DSHS's conduct as an improper "stealth appearance" that supports an award of attorney fees on appeal. Opening Br. at 11, 25.

There was nothing improper about counsel for DSHS attending a guardianship accounting for an incapacitated person who is in the care and custody of the state. The legislature charges DSHS with "custody of all residents . . . and control of the medical, educational, therapeutic, and

dietetic treatment of all residents” of the state’s residential habilitation centers, including Rainier School. RCW 71A.20.050(2). DSHS thus has an interest in, and a responsibility toward, the well-being of Rainier School residents. DSHS also has a financial interest in guardianship cases involving residents of Medicaid institutions who contribute toward their cost of care. The legislature requires guardians in such cases to provide DSHS with notice of all proceedings. RCW 11.92.180; *see* RCW 11.92.150; RCW 43.20B.460.

DSHS does not act improperly by ensuring that a court gives an unusual case careful consideration. While DSHS had no objection to the Hardmans’ proposed order, the order was written in a way that DSHS had never seen before, giving Mr. Hardman authority to determine the total amount of his compensation. Aug. VRP at 2, 28. Guardianship accountings are generally *ex parte* proceedings on a busy docket, in which an abnormal case may be lost in the crowd. DSHS thus was present at the triennial report hearing to draw the court’s attention to the unusual aspects of the case. Aug. VRP at 16. The civil rules did not require DSHS to formally intervene where it had no objections and sought no relief.

In any case, the court took no action on the proposed order that DSHS’s remarks addressed. If there were any error by the superior court in allowing DSHS to address the court, it was harmless and therefore not

reversible error. *E.g., Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal).

F. Mr. Hardman Is Not Entitled To Attorney Fees From DSHS

In a Title 11 proceeding, a court “may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party . . . [f]rom any party to the proceedings . . . in such amount and in such manner as the court determines to be equitable” after considering “any and all factors that [the court] deems to be relevant and appropriate[.]” RCW 11.96A.150(1). In this case, Mr. Hardman asserts that DSHS is a “party to the proceedings” within the meaning of RCW 11.96A.150, and requests (without argument) that DSHS be ordered to pay his attorney fees on appeal. Opening Br. at 25.²⁰

DSHS, by its presence at the hearing on August 20, 2010, may have become a “party” to the triennial report proceeding. However, DSHS clearly was not a party to the removal proceedings that gave rise to this appeal. The motion to remove Mr. Hardman was made *sua sponte* by the court, without any involvement by DSHS. Aug. VRP at 12. DSHS took no position on that motion. Aug. VRP at 27. DSHS submitted no argument or evidence, took no part in the removal hearing on October 8,

²⁰ Mr. Hardman also appears to request “attorney fees before the trial court.” Opening Br. at 25. Because Mr. Hardman did not request attorney fees below, he cannot raise such a claim on appeal. RAP 2.5(a).

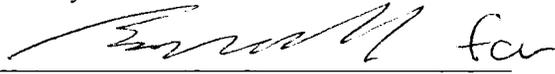
2010, and otherwise had no influence whatsoever on Mr. Hardman's removal. DSHS's mere presence at the accounting hearing does not make DSHS a party to Mr. Hardman's removal, and does not create equitable grounds for charging the state with Mr. Hardman's costs on appeal.

V. CONCLUSION

A superior court may appoint a replacement guardian for an incapacitated adult for any good reason, including where the guardian unilaterally changes the incapacitated person's care plan in order to ensure that the guardian's own financial interests are met. While there is no need in this case to determine the precise evidentiary burden, the "clear and convincing evidence" standard clearly does not apply. DSHS acted properly in being present at the triennial guardianship hearing and in articulating its concerns for Mr. Sexton's well-being; it would be unjust to place the costs of this appeal on DSHS given that DSHS took no position on the superior court's removal of Mr. Hardman as guardian.

RESPECTFULLY SUBMITTED this 9 day of August, 2011.

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NO. 41399-0-II

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

In re the Matter of the Guardianship of:

SEAN SEXTON

An Incapacitated Person.

CERTIFICATE OF
SERVICE

I certify that on August 9, 2011, I served a true and correct copy of the BRIEF OF AMICUS CURIAE DEPARTMENT OF SOCIAL AND HEALTH SERVICES on all parties or their counsel of record, by U.S. Mail with first class postage prepaid and by e-mail PDF attachment, addressed as follows:

Michael L. Johnson
Hardman & Johnson
93 S. Jackson St. - #55940
Seattle, WA 98104-2818
Email: hardmanjohnson@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 9th day of August, 2011, at Tumwater, Washington.


Cheryl Chafin, Legal Assistant