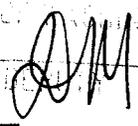


COURT OF APPEALS
DIVISION II

11 AUG 2011 PM 4:50

STATE OF WASHINGTON
BY 

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

No. 41399-0-II

**In the Matter of the
GUARDIANSHIP OF SEAN SEXTON**

THE GUARDIANS' RESPONSE TO DSHS AMICUS BRIEF

**Michael L. Johnson, Counsel for the Guardians
93 S. Jackson St., Seattle, WA 98104
(206) 623-3030 - FAX (888) 279-5517
WSBA #28172
August 24, 2011**

ORIGINAL

TABLE OF CONTENTS

I. Introduction	1
II. Standard of Review.....	2
III. Legal Framework	2
Defining DSHS' Interest	2
Defining Sean's Interest	7
IV. Analysis	10
DSHS May Not Assert an Interest Against a Representative Payee	10
DSHS May Assert a Limited Interest Against the Resident Trust Account	10
Removing the Guardian was Detrimental to Sean's Interests	13
Due Process Implications for Removal of a Certified Professional Guardian	16

TABLE OF AUTHORITIES

This Table will be supplemented.

I. INTRODUCTION.

In its amicus brief, the Department of Social and Health Services (DSHS) fails to paint a clear picture of its interest in this case. Sean has a property interest in his social security benefit. DSHS has a limited interest in his financial responsibility (also called cost of care or participation). This needs further elaboration.¹

In July 2010, the Guardian analyzed the law and the facts surrounding Sean Sexton's resident trust account and reasonably concluded it was in Sean's best interests to apply for representative payee status. A representative payee is a separate fiduciary capacity, not personal capacity.

The following papers were before the trial court:

Guardians' Report and Accounting, *Appendix to Motion on the Merits* (AP 7-18);
Motion and Order to Extend Time for Approval, AP 17A-18A;
Notice of Issue, AP 19;
Supplemental Accounting, AP 20-22;
7/16/2010 Report of Proceedings, AP 23-27;
7/16/2010 Order, AP 28;
Personal Care Plan, AP 29-41;

¹ Giving amicus status to a hostile creditor results in some peculiarities: it lengthens the DSHS briefing time, allows a grossly overlength brief, and shortens the Guardian's response time. With only 15 days to respond to DSHS' overlength brief, counsel did not have sufficient time to attribute each and every legal proposition included here, and reserves the right to supplement or correct the Brief with the appropriate citations.

Memorandum on Representative Payee Status, AP 42-44;
Verified Report of Substantial Change, AP 45-46;
Notice of Issue, AP 47;
8/20/2010 Report of Proceedings, AP 48-79;
8/20/2010 Order, AP 80;
Guardians' Memorandum, AP 81-88;
Declaration of Michael L. Johnson, AP 89-95;
Declaration of James R. Hardman, AP 96-100;
10/8/2010 Report of Proceedings, AP 101-110;
10/8/2010 Order of Removal, AP 111.

II. STANDARD OF REVIEW IN A GUARDIANSHIP CASE.

The superior court is the "superior guardian". *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). The guardian is an officer or agent of the court. *Id.*; *In re Guardianship of Gaddis*, 12 Wn.2d 114, 123, 120 P.2d 849 (1942). These are truisms, not a standard of review.

A guardian has deference to administer the guardianship. *In re Rohne*, 157 Wash. 62, 74, 288 P. 269 (1930). The court supervises the guardian in order to carry out IP's interests. *Gaddis*, 12 Wn.2d at 123. The ultimate duty of a reviewing court is to ensure the interests of the IP are protected. *Brommers*, 89 Wn.2d at 200. No deference is due a guardian when there is a substantial detriment to the IP's interests. *Rohne*, 157 Wash. at 74.

III. LEGAL FRAMEWORK.

A. DEFINING DSHS' INTERESTS.

1. DSHS INTEREST AS STATE MEDICAID AGENCY.

DSHS has interest in Medicaid administration in calculating the correct federal

match. There is no federal statute or regulation concerning federal reimbursement either creating a lien or property interest in a beneficiary's income or requiring a State to assert such an interest.

2. DSHS INTEREST AS HEALTH CARE PROVIDER.

DSHS also has an interest as a health care provider. The Medicaid program regulates the State as a provider of RHC level services. Nursing care (NF) and intermediate care (ICF/ID) are distinct levels of care. Room and board is part of the Medicaid entitlement for those levels of service.² Because of this entitlement, services cannot be denied or refused because of failure to pay financial responsibility.

State laws -- under unique rules applying only to residents of RHCs -- create an interest arising from receipt of services called "financial responsibility." RCW 43.20B.410 et seq. DSHS likes to call it "participation". The amount established is approximately 1/30 of the monthly total costs of care.

Financial responsibility is "established" by serving legal process directed to the guardian of the estate plus the passage of 28 days. RCW 43.20B.430. The

² Other privately provided or state-operated or state-supervised residential settings have a lower level of care, i.e., they do not have active treatment or specialized services for ID. Privately operated residential settings are distinguished because they might not include room and board as an entitlement.

amount may be adjusted. Created by state law, DSHS thus has an interest in monthly payments in advance from income. RCW 43.20B.440.

The other 29/30 of total monthly costs accrues over the lifetime of a resident. A limited interest is created under federal and state law in the probate estate under estate recovery rules.

All else being equal, DSHS has a financial interest in prospective income, after-acquired property, as well as reimbursement from the probate estate after death.

3. DSHS INTEREST AS "SUPER-WARD".

When it appeared in the trial court, DSHS did not state its interest and how any objection connected to its interest. Its appearance is rather Kafkaesque, complete with distortion of facts, hints of impending danger, and lack of *any* evidence. For example, DSHS claims there are "unusual aspects of the case". *DSHS Br. at 31*. However, it is not unusual for private payees or other fiduciaries to separately administer income under a separate set of rules.

(a) Any person may appear and present evidence to the trial court bearing on the best interests of the incapacitated person, and that applies to any residential provider. However, DSHS did not appear for that purpose now admits its true interest is its *own* financial one as the Medicaid provider. *DSHS Br. at 31-31*. **DSHS decided not to intervene and protect its interest.** In any

event, its financial interest is not substantially affected by the Proposed Order: DSHS cannot dip into income received by a private payee and cannot dip into the resident trust account except when funds exceed \$2000, and the Guardian has no objection to that.³

(b) DSHS makes accusations of unethical acts in this case which coincidentally promote its own limited financial interest. DSHS is not the “super ward” and has no role in supervising a guardian’s ethics. There is no statute conferring powers on DSHS to supervise guardians or their ethics. There is no authority for granting deference to DSHS’ opinion on a guardian’s ethics. DSHS lacks agency expertise regarding guardianship ethics or even generally.

At a fundamental level, DSHS (and apparently the trial court as well) is unaware of the distinction between individual and fiduciary capacity, and the distinction between different fiduciary capacities.

First, DSHS argues – without citing any evidence on the record -- that a financial

³ DSHS is not a real party-in-interest in a guardianship case. DSHS did not request special notice of proceedings under RCW 11.92.150. DSHS did not pursue proceedings under the claims or payment order statutes concerning guardianships. It did not file a motion to become an amicus and disclose in advance its legal arguments (now being heard for the first time on appeal). It did not file a motion to intervene to protect its financial interest. It still made a legal argument objecting to the Proposed Order and questioning the Guardian’s ethics. *DSHS Br., at 30*. Though counsel agreed that DSHS’ comments could be valuable, *DSHS Br. at 30*, this did not obviate the objection that they should follow court rules regarding appearance and intervention.

conflict of interest” existed. *DSHS Br. at 13*. However, applying to be payee puts the social security benefit in the hands of Mr. Hardman in his *payee capacity*, not in his individual capacity.

Second, DSHS alleges an “appearance of self-dealing” because the Guardian’s fees were previously approved and unpaid at the time he applied to be payee. *DSHS Br. at 13*. Counsel represents here that the procedural posture of the case had no relation to the application to become payee. It is not on the record, but the Guardian applied to be payee for a group and Mr. Sexton was the only one in the group with unpaid fees. As it happened, the hearing on Mr. Sexton’s Report was imminent. Counsel frankly does not understand why the trial court was suspicious.

Nearly if not all fiduciaries – trustees, guardians, payees, attorneys in fact – pay themselves from the funds they administer. Obtaining funds or merely holding such funds in a fiduciary capacity and paying oneself fees to which one is has earned is never recognized in law as an “appearance of self-dealing” subjecting a fiduciary to removal -- or else nearly all fiduciaries should be removed. Self-dealing involves inappropriate or unearned transfers of funds to one’s personal capacity for one’s own use, or a relative’s use, etc. A transfer to one’s personal capacity for compensation is not self-dealing if one has earned the compensation. In this case, it was disclosed that there were no transfers at all, so how on can there be an “appearance of self-dealing”?

Further, a payee is subject to the rules of payee administration promulgated by the Social Security Administration. Federal regulations specifically permit payees who are also guardians to pay themselves. Many payees, trustees and other fiduciaries act as alternatives to guardianship and without guardianship administration. Their administration is parallel to the guardianship and under separate rules.

B. DEFINING SEAN'S INTERESTS.

1. PROPERTY INTEREST IN THE RESIDENT TRUST ACCOUNT.

Mr. Sexton has a present property interest in the funds in the resident trust account maintained by Rainier School. The social security or other federal benefit is "direct deposited" into the resident trust account of a resident. The resident trust account is a fiduciary account managed by DSHS. All the funds are trust funds. Federal and state regulations govern their use and management of the account.

By operation of state law, the resident trust account becomes part of the guardianship estate. RCW 71A.20.100. The Guardian consents annually to the request by DSHS that they manage the resident trust account. The Guardian approves expenditures of \$100 or more or not from the resident trust account.

State law provides for legal process to establish the amount of charges for financial responsibility. Charges or reimbursements for Medicaid services from

the RTA are prohibited except when the funds exceed the resource limit of \$2,000. RCW 71A.20.100; WAC 388-835-0350. These state laws are unique to RTAs in the RHCs. DSHS has never denied they apply. The limits are consistent with payee discretion to use funds for unmet needs. The funds are intended to provide for the betterment of the beneficiary, not DSHS.

Regardless of who is the payee, the resident trust account may not be used for prospective or reimbursement of financial responsibility except when the funds exceed \$2000 as described in Paragraph 3(d) below.

2. PROPERTY INTEREST IN THE SOCIAL SECURITY BENEFIT.

Sean Sexton has a present property interest in the social security benefit at the time it is received by the representative payee. This is a pension interest based on Title II contributions and is not based on need.

3. THE IP's PROPERTY INTEREST IS PROTECTED BY FEDERAL AND STATE LAW.

State and federal law limits and protects these property interests with special statutory procedures and generally with limitations or prohibitions on the assertion of DSHS interest against indigent, severely disabled individuals.

(a) Federal and state law recognize a State's interest in reimbursement and recovery from probate estates. Laws and regulations limit the assertion of that interest.

(b) A court petition process allows for payment of financial responsibility from *guardianship* income and assets. RCW 11.92.040(6). This court procedure affords due process to the IP. However, in this case there is no guardianship income or assets in this case other than the resident trust account.

(c) In rules unique to RHC residents, legal process is served on guardians of the estate to establish financial responsibility against guardianship income. RCW 43.20B.410 et seq. That process is limited to guardians and does not apply to payees.

(d) In rules unique to RHC residents, state law prohibits taking funds from the resident trust account for prospective Medicaid services or for reimbursement, thus barring the assertion of any interest in financial responsibility from the resident trust account regardless of who is payee, except when the funds exceed \$2000. WAC 388-0350-

(e) A court notice process provides for the allocation of future guardianship income between financial responsibility and guardian and attorney fees and costs. RCW 11.92.180; Chapter 388-79. By reducing fees and costs, DSHS' interest in financial reimbursement increases. Guardians and attorneys thus subsidize the State with their services.

(f) A beneficiary's interests in social security benefits are protected by payee regulations and procedures.

These rules should be interpreted in the best interests of the IP.

IV. ANALYSIS.

1. DSHS may not properly assert its interest against income received by a representative payee.

First, a payee is obligated to protect the interests of the IP, not the State.

(Magistrate's Opinion)

Second, RCW 11.92.180 and WAC 388-79 on their face apply only to guardianship proceedings, not to administration of social security funds by a payee. (Knutson.)

DSHS is assuming the court can order garnishment of funds held by a payee – which is prohibited by law – by reducing guardian fees. DSHS as “super ward” tries to convince the court it is in Sean’s best interests to pay DSHS for an entitlement regardless of payment. Thus, his interest in payment of cost of care is limited if it exists at all.

The trial court still has concurrent jurisdiction to review for misuse of social security funds and if the court finds misuse the court may refer the matter to the Social Security Administration. There was no misuse in this case.

2. DSHS may properly assert a limited interest against the IP’s resident trust account.

The only guardianship asset is the resident trust account, and DSHS manages and controls it. There is no guardianship administration of the resident trust account except for approval or non-approval of expenditures over \$100.

The laws limiting use of the rep payee account for payments to the State was described earlier. The entire legal framework is intended to protect the IP's funds for the IPs use and to limit or prohibit use or payment to the State. DSHS still has a statutory cognizable interest in funds over \$2000 for reimbursement for financial responsibility. RCW 71A.20.100.

Scenario 1: DSHS is Payee and Manages Resident Trust Account

When DSHS is representative payee, the resident trust account (RTA) consists of social security funds which are "direct deposited" together with wages from the Adult Training Program (ATP) and contributions from family members or volunteers. Under state law unique to RHCs, the RTA becomes part of the guardianship estate; the RTA may not be used for Medicaid services; and, the RTA may not be used to reimburse DSHS. Payee discretion includes payment of "customary charges" for current maintenance.

When DSHS took money from the RTA, DSHS failed to abide by these laws. Not only were "customary charges" not legally established by legal process, as described earlier, the state law limits on those charges were ignored. DSHS took money from the RTA and it used it for a purpose other than current

maintenance. Misuse is defined as using for self or for others. DSHS has never denied in pleadings that the funds are paid into the General Fund, and has never disclosed the transfer destination or use of the funds. This appears to be "misuse" under federal law.

Consequence of Scenario 1 of DSHS as Payee: Personal allowance payments are limited to \$60. Guardian and attorney fees are limited, meaning fewer funds are available to implement the Personal Care Plan. DSHS transfers funds to itself and uses for a purpose other than current maintenance. Its transfers violate the laws of resident accounts. These transfers appear to be a misuse. This is a detriment to Sean's interests when compared to Scenario 2.

Scenario 2: Private Payee and DSHS Manages Resident Trust Account.

First, contrary to claims by DSHS, the consequences of private payee do not reduce guardian oversight. (a) There is continuing court oversight by approval or not of the guardian's hourly rate, and approval or not of the number of authorized hours per month to implement the Personal Care Plan. (b) There is continuing Social Security Administration oversight of a private payee. (c) There is concurrent court jurisdiction to review for misuse of funds and refer to the Social Security Administration.

Second, after payee discretion is exercised under federal guidelines, the private payee pays the balance of the funds to the resident trust account. DSHS manages and controls the account. The IP does not have any interest in what happens to any funds over \$2000.00.

Consequence of Scenario 2: Personal needs allowance is increased up to the Medicaid resource limit of \$2000, allowing other uses for the funds. The IP is less impoverished and has suitable funds to buy shoes or a suitable bed when the IP needs to, or a modest funeral / remains plan. Federal implementing guidelines list other permissible uses of the funds for unmet needs including advocacy. Guardian and attorney fee limits do not apply and funds are available to implement the Personal Care Plan. Payee discretion ends with the deposit into the resident trust account. Scenario 2 is obviously the best scenario serving Sean's interests. Serving his needs now and deferring payment of financial responsibility until his funds go over \$2000 or after his death is more beneficial to him than Scenario 1.

3. Removing the Guardian was Detrimental to Sean's Best Interests.

DSHS asserts for the first time on appeal that a former Guardian may not appeal a removal. *Department's Brief (DSHS Br.), at 11-12.* However, the guardian fee request remains outstanding, as does the payment of attorney fees. The case cited is not on point because the former Guardian is a certified professional guardian. While there are good policy reasons to generally not

allow appeals for a guardian's removal, no fees are sought against or incurred by the guardianship estate for this appeal. An award is sought against DSHS. There is no successor guardian in this case to bring an appeal. Finally, the former Guardian's reputational and occupational interest is sufficient to confer standing as set forth in the Guardian's Brief.

There is not dispute that the removal of a guardian is reviewed as an abuse of discretion; that there must be a "good reason" under RCW 11.88.120; and that the removal cannot be arbitrary. *Department's Brief (DSHS Br.) at 13-14*. Sean's interests relative to DSHS's interests and the actions taken by the former Guardian are not only objectively reasonable but protected Sean's interests. Protecting and enhancing the IP's interests is not a "good reason" for removal.

Moreover, as pointed out by DSHS, the trial court was not aware there was a co-guardian. It appeared the trial court had not reviewed the materials submitted. The trial court did not ask about the law cited in the briefs, did not point out any disagreement with any of the law cited in the briefs, she did not state that any of the law cited in the briefs was unconvincing, and in never referred to any of the law cited in the brief. Counsel asked if there were any questions, and the trial court had no questions. The trial court subsequently cut off all further argument. These factors all indicate she did was not familiar with all of the briefing submitted specifically for the hearing.

This Court should review the qualifications of the Guardian submitted for the hearing and see if there is anything in there that arouses suspicion of unethical behavior. Had the trial court read the declaration, how could the trial court so easily jump to the conclusion that the Guardian is engaging or was engaging in unethical behavior, and express no surprise that a guardian with such a background would suddenly turn unethical.

This Court should also consider that there are specific statutes that require prior court permission such as the sale of real property, making gifts, and litigation. Applying for payee status is not among those activities requiring pre-authorization by the court.

DSHS defends the court's power but not the court's diligence. DSHS does not say the Guardian's show cause briefing was wrong or unconvincing. They only promote the raw power of the court over a guardian; they omit the wisdom and critical thinking entirely.

DSHS promotes a dubious argument that it is beneficial to Sean to seize his income and limit his ability of his legal advocates to speak to those who control his life; to those who

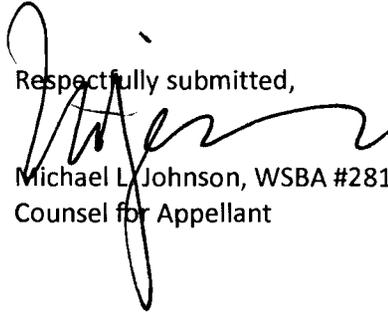
income of RHC residents and limiting the ability of the Sean's legal advocate to speak to those who control his life; to those who have a Constitutional duty to foster and support RHCs; to those who provide Sean's home and successful

services delivery system; to those who routinely propose his eviction and separation from that system; and to those who set the budget and thus the level of services he receives.

4. Due Process Implications for Removal of A Certified Professional Guardian.

There was insufficient time to respond to brief this issue given the grossly overlength brief and the shortened time to respond.

August 24, 2011

Respectfully submitted,

Michael L. Johnson, WSBA #28172
Counsel for Appellant

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THIS DAY I SERVED A COPY OF THE GUARDIAN'S ~~STATE~~ RESPONSE TO AMICALS BRIEF OF DSHS BY EMAIL/PDF ATTACHMENT AND WITH FIRST CLASS MAIL TO FOLLOW.

August 24, 2011



MICHAEL L JOHNSON
WSBA # 2872

UNITED STATES
DISTRICT COURT
BY _____
JURY