

84379-1  
NO 84746-1

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2010 SEP 22 P 3:03  
BY RONALD A. SARWENTER  
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of:	)	
	)	MEMORANDUM OF
MARY JANE McNAMARA,	)	AMICUS CURIAE
	)	NORTHWEST JUSTICE
An Incapacitated Person.	)	PROJECT IN RE
	)	APPELLANT 'S MOTION
	)	TO PURSUE INDIGENT
	)	APPEAL (RAP 15.2)

**I. Introduction and Statement of Interest of Amicus Curiae**

The Northwest Justice Project (NJP) submits this Memorandum of Amicus Curiae in regard to the Appellant's motion to pursue this appeal at public expense under RAP 15.2. NJP is the largest statewide provider of free civil legal services for low-income persons in Washington. NJP has a significant interest in and expertise on issues that impair access to justice for low-income persons in Washington and is especially interested in ensuring that access to the courts for resolution of civil disputes, at all levels of the judicial system, is barrier-free and not deterred by the cost of getting through the courthouse door. NJP frequently provides input to the Court on matters related to fee waivers and access to the courts for vulnerable and disabled persons and is well-suited to provide additional perspective on the matters under consideration in the instant motion. NJP addresses solely the issue of waiver of fees and costs under RAP 15.2 and

takes no position on the merits of the underlying issue before the court or the reasonableness of the proposed guardianship fees incurred from engaging in advocacy on behalf of the Incapacitated Persons, issues currently pending in *Guardianship of Lamb*, Supreme Court No. 84379-1.

## II. Statement of the Case

The parties have adequately stated the procedural history of the case with regard to the pending motion. On July 21, 2010 the King County Superior Court entered an order pursuant to RAP 15.2(b) finding that the Incapacitated Persons whose interests are the subject of this appeal to be indigent. At issue in the underlying appeal appears to be whether the guardians are entitled to compensation from the Incapacitated Persons' estates for guardianship services related to advocacy performed allegedly for the benefit of the Incapacitated Persons and related attorney services.

## III. Argument

### A. Fees and Costs for Pursuing an Appeal as a Matter of Right Must be Waived for Indigent Persons Who have a Right to Counsel at Public Expense.

There is no dispute that Mary Jane McNamara and the other Incapacitated Persons in this case are indigent. There is also no dispute that they have a right to counsel at public expense at any stage of the guardianship proceedings. RCW 11.88.045(1)(a). Hence, under *In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995), the Incapacitated Persons

have an absolute right to waiver of costs and fees “necessary to provide an adequate record to the court and to present the appeal.” *In re Grove*, 127 Wn.2d at 235, citing RCW 10.101.005. At issue in the appeal is whether the trial court erred in failing to approve the guardians’ fee request submitted in conjunction with the statutorily required triennial report. As indicated in Appellant’s Comments re Access to Justice, the court’s review of the statutorily required report is a recognized stage of guardianship proceedings. RCW 11.92.040(2) and RCW 11.92.043(2).

The Department of Social and Health Services cites *Porter v. Porter*, 107 Wn.2d 43, 57, 726 P.2d 459 (1986) for the principle that guardians must bear their own costs when they sue to vindicate their own interests. In *Porter*, the guardian (decedent’s first wife) had sued the estate of the decedent as guardian on behalf of her minor child ward and in her personal capacity on her own behalf. The claims were independent and based, respectively, on the child’s rights as beneficiary under community term life insurance policies, and the guardian’s personal community property interests in other cash value life insurance policies, which funded a trust. *Id.*

The State fails to say how *Porter* applies to this case, other than to imply that the guardians in this case seek compensation for actions and activities in pursuit of their own interests as opposed to the interests of

their ward(s). However, this contention is the precise issue that is the subject of the underlying appeal and should not be resolved upon consideration of the appellant's application to proceed *in forma pauperis*. See, *Richland v. Kiehl*, 87 Wn. App. 418, 423, 942 P.2d 988 (1997) (notwithstanding RAP 15.2, appellate court has inherent power to waive filing fees and costs for indigent criminal defendants seeking discretionary review from court of limited jurisdiction and not entitled to counsel until review is accepted, to prevent deprivation of opportunity to seek discretionary review in first place).

Moreover, while the issue on appeal may be whether the guardians' actions and activities are compensable under the guardianship law or as a matter of state or federal constitutional law, there is nothing in the decision of the trial court to suggest that the guardians acted in pursuit of their own personal interests or received any personal benefit from them. Thus, the issue seems to be a straight legal question as to whether general advocacy activities engaged in by the guardians in regard to issues that impact residents of state institutions for the disabled are compensable as a matter of law. Consideration and resolution of this issue as to these Incapacitated Persons should not be foreclosed for lack of the wards' ability to pursue the appeal. *In re Grove*, 127 Wn.2d at 233.

**B. Guardians Who Pursue Legal Claims on Behalf of their Wards Stand in the Shoes of the Ward and Must not be Deterred by the Costs of Litigation.**

Access to the courts is a fundamental right in Washington. *Bullock v. Roberts*, 84 Wn.2d 101, 524 P.2d 385 (1974). The right is no less fundamental for an incapacitated person and must be available for an incapacitated person to pursue legitimate claims. The only possible way a person determined to be incapacitated and subject to a full guardianship can pursue legal claims is through his or her guardian. It is often the case that proposed guardians for incapacitated persons are family members or close personal friends, who take on a responsibility to care for a ward out of necessity and a sense of personal or familial responsibility. See Report of the Public Guardianship Task Force of the WSBA Elder Law Section Executive Committee, August 22, 2005 (Excerpt) at p. 1 (attached to Comments Re Access to Justice submitted Guardian). These persons may not themselves be indigent, but also may not be able to afford the significant costs of litigation, including the costs of an appeal. As a result, if the ability to pursue a legal claim for an indigent incapacitated person is determined on the basis of the income, wealth or other resources of the guardian, a significant disincentive would exist for the guardian to pursue the claim (or in this case an appeal).

If the guardian is unwilling to pay for the costs of litigation or of an appeal, the ward, having no capacity to pursue the claim or appeal in their own right, would be denied access to the courts. Pitting the guardian's financial interests against the legal interests of the ward creates an inherent conflict of interest as between the guardian and the ward contrary to the goals and purposes of the guardianship law. RCW 11.88.005 provides, in part:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and *to enable them to exercise their rights under the law to the maximum extent*, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and *that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian.*

Emphasis added.

The stated purpose of the guardianship law is to enable incapacitated persons to exercise their rights to the maximum extent. *Id.* The guardian has the duty "to assert the incapacitated person's rights and best interests...." RCW 11.92.043(4). Placing the burden of paying court fees and costs on the guardian, in order to pursue a claim or appeal on behalf of the incapacitated person, defeats this expressly stated purpose.

If an indigent incapacitated person is allowed to pursue their claim or appeal without payment of fees and costs in their own right, then the

guardian must similarly be allowed to pursue the claim or appeal for an indigent ward without costs. This is true regardless of whether the guardian obtains some indirect benefit from the matter before the court. In *Porter v. Porter*, 107 Wn.2d 43, 726 P. 2d 459 (1986), the guardian pursued a claim for her minor child ward as the beneficiary of life insurance policies. In that case, the guardian was the child's mother and caretaker. Any financial benefit the minor received as a result of the claim asserted as guardian would indirectly inure to her benefit her as his caretaker. Nevertheless, the claim was asserted for the child and the guardian mother was not foreclosed from an award of attorney fees related to that claim.

While the court is authorized to monitor the expenses incurred for litigation on behalf of an incapacitated person and is responsible for ensuring that such claims are not frivolous and/or that costs are not unreasonably incurred, there is no suggestion or determination in this case that the claim or appeal is frivolous or that the costs incurred for an appeal are unreasonable or incurred in bad faith. Thus, the Court should not foreclose a determination as to the merits of the underlying claim at the outset through the *in forma pauperis* determination process. Denial of *in forma pauperis* status on the basis of the wealth of the guardian creates a chilling effect on guardians to enforce the rights and represent the legal

interests of their wards and, thus, poses a significant access to justice issue for our most vulnerable citizens.

#### IV. Conclusion

This case involves an important issue and legal principle involving the exercise of First Amendment rights of incapacitated persons through their guardians and the scope of guardians' authority to undertake advocacy on behalf of incapacitated persons. The ability of the courts to consider and resolve important questions of law, should not be determined on the basis of the financial ability of the guardian to pursue the cause. For the foregoing reasons, *amicus curiae* urges the Court to approve the *in forma pauperis* motion sought in this appeal.

DATED THIS 7<sup>th</sup> DAY OF SEPTEMBER, 2010.

Respectfully submitted,

NORTHWEST JUSTICE ROJECT



Deborah Perluss, WSBA No. 8719

Northwest Justice Project

Attorney for Amicus Curiae

401 Second Avenue, Suite 407

Seattle, WA 98104

(206) 464-1519, debip@nwjustice.org

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NO 84746-1

BY RONALD R. CARPENTER **SUPREME COURT OF THE STATE OF WASHINGTON**

In the Matter of the Guardianship of: )  
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MARY JANE McNAMARA, )  
An Incapacitated Person. )  
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CERTIFICATE OF SERVICE

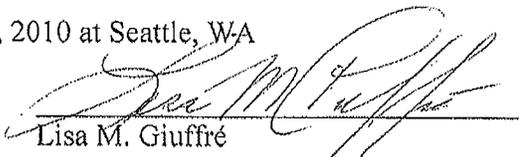
I, Lisa Giuffré, hereby certify that on September 7, 2010, I caused to be served by email and regular U.S. Post a true and correct copy of the Northwest Justice Project's Motion to Participate as Amicus Curiae re Appellant's Motion to Pursue Indigent Appeal (RAP 15.2) and Memorandum of Amicus Curiae re Appellant's Motion to Pursue Indigent Appeal (RAP 15.2) to the following:

Michael L. Johnson                      Attorney for Guardians of Mary Jane McNamara, et. al.  
Hardman & Johnson  
93 S. Jackson St. #55940  
Seattle, WA 98104-2818  
[hardmanjohnson@gmail.com](mailto:hardmanjohnson@gmail.com)

Jonathon Bashford                      Attorney for the Department of Social and Health Services  
Assistant Attorney General  
Office of the Attorney General  
7141 Cleanwater Drive S.W.  
P.O. Box 40124  
Olympia, WA 98504-0124  
[jonb@atj.wa.gov](mailto:jonb@atj.wa.gov)

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

DATED this 7<sup>th</sup> day of September, 2010 at Seattle, WA

  
\_\_\_\_\_  
Lisa M. Giuffré

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**Subject:** RE: In the Matter of the Guardianship of Mary Jane McNamara

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**From:** Lisa Giuffre [mailto:LisaG@nwjustice.org]  
**Sent:** Tuesday, September 07, 2010 1:51 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** In the Matter of the Guardianship of Mary Jane McNamara

Attached are the Motion of Northwest Justice Project to Participate as Amicus Curiae Re: Appellant's Motion to Pursue Indigent Appeal (RAP 15.2), Memorandum of Amicus Curiae Northwest Justice Project In Re Motion to Pursue Indigent Appeal (RAP 15.2, and Certificate of Service relating to the same.

The Case name is In the Matter of the Guardianship of Mary Jane McNamara, an Incapacitated Person  
The Case number is 84746-1  
The attorney information is: Deborah Perluss, WSBA#8719, [debip@nwjustice.org](mailto:debip@nwjustice.org)

If you should need anything further, please do not hesitate to contact me. Thank you.

Lisa M. Giuffre  
Northwest Justice Project  
402 Second Avenue S, Suite 407  
Seattle, WA 98104  
206-464-1519  
[lisag@nwjustice.org](mailto:lisag@nwjustice.org)



NJP Please consider the environment before printing.

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SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

In the Matter of the Guardianship of: )  
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MARY JANE McNAMARA, )  
 )  
An Incapacitated Person. )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

CLERK

*bjh*

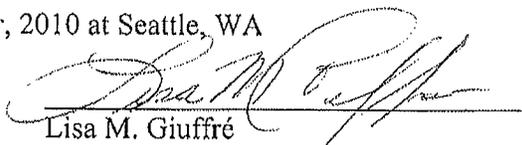
I, Lisa Giuffré, hereby certify that on September 7, 2010, I caused to be served by email and regular U.S. Post a true and correct copy of the Northwest Justice Project's Motion to Participate as Amicus Curiae re Appellant's Motion to Pursue Indigent Appeal (RAP 15.2) and Memorandum of Amicus Curiae re Appellant's Motion to Pursue Indigent Appeal (RAP 15.2) to the following:

Michael L. Johnson                      Attorney for Guardians of Mary Jane McNamara, et. al.  
Hardman & Johnson  
93 S. Jackson St. #55940  
Seattle, WA 98104-2818  
[hardmanjohnson@gmail.com](mailto:hardmanjohnson@gmail.com)

Jonathon Bashford                      Attorney for the Department of Social and Health Services  
Assistant Attorney General  
Office of the Attorney General  
7141 Cleanwater Drive S.W.  
P.O. Box 40124  
Olympia, WA 98504-0124  
[jonb@atg.wa.gov](mailto:jonb@atg.wa.gov)

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

DATED this 7<sup>th</sup> day of September, 2010 at Seattle, WA

  
\_\_\_\_\_  
Lisa M. Giuffré

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**To:** Lisa Giuffre  
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**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Corrected Certificate

Subsequent to sending you the pleadings in the below referenced case I discovered an error in the email address for the Attorney for DSHS, Jonathon Bashford. I have corrected that error, resent the pleadings to his correct email address and am attaching herewith a pdf of the corrected Certificate of Service.

The Case name is In the Matter of the Guardianship of Mary Jane McNamara, an Incapacitated Person  
The Case number is 84746-1  
The attorney information is: Deborah Perluss, WSBA#8719, [debip@nwjustice.org](mailto:debip@nwjustice.org)

If you should need anything further, please do not hesitate to contact me. Thank you.

Lisa M. Giuffre  
Northwest Justice Project  
402 Second Avenue S, Suite 407  
Seattle, WA 98104  
206-464-1519  
[lisag@nwjustice.org](mailto:lisag@nwjustice.org)



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