

No. 84379-1

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**SUPREME COURT OF  
THE STATE OF WASHINGTON**

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**In the Matter of the  
GUARDIANSHIP OF SANDRA LAMB**

**James R. Hardman and Alice L. Hardman, Guardians  
Petitioners**

v.

**State of Washington,  
Department of Social & Health Services**

**Respondent.**

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**REPLY TO  
STATE'S ANSWER TO PETITION FOR REVIEW**

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May 4, 2010**

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## **I. BACKGROUND.**

In their Petition for Review, Sandy and Rebecca identify two issues for discretionary review:

(1) May courts apply a rule of guardian compensation requiring a "direct" benefit to the person to the exclusion of all other rules of compensation, and if so, under what circumstances?

(2) May courts apply a rule of attorney compensation precluding compensation because of "unique issues", or because a party is not the prevailing party, to the exclusion of RCW 11.96A.150, and if so, under what circumstances?

Sandy and Rebecca's interests depend on a guardian to advocate regarding their care and treatment. They ask for discretionary review because denial or significant risk of non-payment of guardian and a guardian's attorney compensation in cases throughout the State generally deprives incapacitated persons access to the courts and to legislative and executive agencies that make decisions that affects their welfare and their lives. Sandy and Rebecca ask the Court to review compensation rules that conflict with general rules of compensation of guardians in case law and of attorneys in statute, as set forth in the Petition.

In its Answer, the State identifies new issues for review in a "Counter-Statement of the Issues" and a "Counter-Statement of the Case." In these Counter-Statements, the State cites RCW 11.92.180 and RCW 11.96A.150 to support denial of compensation. The State also -- in the

"Counter-Statement of the Case" -- implicitly argues Sandy and Rebecca cannot exercise their Constitutional rights through a guardian, "cherry-picking" facts out of context from the record. Their factual allegations in the case and on appeal are unsupported.

The Rules of Appellate Procedure provide, in relevant part, "A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer." RAP 13.4(d).

In Reply, Sandy and Rebecca respond to the new issues raised by the State, and ask the Court to accept review of them.

## **II. IDENTIFICATION OF NEW ISSUES.**

At the heart of this case is the State's dual conflict of interest in asserting compensation limits. No party with a claim in a guardianship case with such striking conflicts of interest should be rewarded with deference to their position.

The State's primary argument is implicit in its "Counter-Statement of the Case": guardians lack authority as fiduciaries to exercise Sandy's and Rebecca's Constitutional right to petition and to associate. *State's Answer, Counter-Statement of the Case*. The State asserts that the guardians are acting in their individual capacity even though there is no

evidence in support of that proposition. *Answer*, at 4-7. To the extent these allegations raise factual objections to compensation, such specific objections to fee requests must be made at the trial court level and were not. Thus, the State is asserting as a new issue in the Counter-Statement the general objection that no compensation is owed because the exercise of Constitutional rights through a guardian is not within the scope of a guardian's authority.<sup>1</sup>

In particular, the State's view is that Sandy and Rebecca cannot exercise their Constitutional rights through a guardian even though they cannot exercise the same without the assistance of a guardian. The effect of court decisions to date supporting this view has been to deny Sandy and Rebecca the exercise of their Constitutional rights. Guardians are decision-makers and advocates, and these lower court decisions inexplicably eviscerate the powers of guardians to exercise the role of advocate for those whose disabilities are at the severe end of the spectrum, i.e., those who cannot speak for themselves and those who need advocacy the most.

The State acts purely in self-interest when it controls the exercise of Sandy and Rebecca's federal and state Constitutional rights. Guardians

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<sup>1</sup> The Court of Appeals did not determine this issue.

advocate against involuntary evictions, contrary to the position of the executive branch of government, and react to annual closure and/or "downsizing" bills in the legislature, forcing such evictions. The State would have no one challenge executive or legislative proposals which are contrary to Sandy and Rebecca's interests. The State would have no one tell legislators about the death of 6 Fircrest residents shortly after the "downsizing" of approximately 60 residents in 2004. And the State would have no one inform the new Secretary of Social and Health Services about civil damages obtained by 5 other residents who survived the eviction yet suffered emotional abuse and harm. In fact, the State argues Sandy and Rebecca should not be heard at all by legislators or executive branch officials. By controlling compensation in this and all guardianship cases, the State is controlling advocacy against itself. This is an actual and irreconcilable conflict of interest.

The question presented by the State's Counter-Statement of the Case is as follows:

(3) Does the superior court's order violate Art. I, sec. 4 of the Washington Constitution and the First and Fourteenth Amendments of the United States Constitution?

Further, the State argues, RCW 11.92.180 and RCW 11.96A.150 should be interpreted to impose limits on guardian and attorney compensation. *State's Answer, Counter-Statement of Issues*. These

presuppose Sandy and Rebecca may not exercise Constitutional rights through a guardian as discussed above. In addition, the State seeks to increase its own financial stake at the expense of Sandy and Rebecca's by taking their cash benefits from their trust account. In particular, the State alleges that RCW 11.92.180 is controlling. *Id.*, Issue 1.<sup>2</sup>

RCW 11.92.180 is read in *para materia* with other relevant statutes. A general statute, RCW 11.92.035(1), provides guardian and attorney compensation is not legally available for cost of care. More specific statutes and regulations -- RCW 11.92.180 and RCW 43.20B.460, and Chapter 388-79 WAC -- apply when charges for cost of care are owed. However, RCW 11.92.180, RCW 43.20B.460 and Chapter 388-79 do not apply in this case. Rather, more specific statutes apply: liability for cost of care has not been established according to the procedures in RCW 43.20B.410-.455; charges for cost of care may not be paid from a resident trust account, RCW 71A.20.100; and, charges for cost of Medicaid services cannot be paid from a resident trust account. WAC 388-835-0350.

As residents of Fircrest School, Sandy and Rebecca are entitled to expend their own public cash benefits as they see fit because the funds are

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<sup>2</sup> Because Sandy and Rebecca have already presented RCW 11.96A.150 as an issue for review, they do not Reply further because this is not a new issue raised by the State.

not legally available for cost of care. Sandy and Rebecca do not owe charges for cost of care; and even if they do, they do not owe it from their resident trust account.

Alternatively, in cases where RCW 11.92.180, RCW 43.20B.460, and Chapter 388-79 apply, there is no reduction of the guardianship estate -- the limited public cash benefits are exhausted and expended for guardian and attorney compensation or are deposited in the General Fund where the funds provide no benefit at all to Sandy and Rebecca. These rules are unconstitutional as applied in this case because they abridge the power of the courts.

The question presented by the State's Counter-Statement of Issues, Issue 1, is as follows:

(4) Does the State lack standing because liability for cost of care is not established and Sandy's and Rebecca's public cash benefits are not legally available for cost of care?

(5) Alternatively, is the statutory and regulatory limitation of guardian and/or attorney compensation as applied in this case a violation of the separation of powers?

### III. SUBSTANTIAL PUBLIC SIGNIFICANCE.

The issues identified in the Petition, Answer and here are issues of substantial public significance. Incapacitated persons do not lose their rights simply because they cannot speak. Throughout the State, there are many guardians and attorneys who represent the interests of incapacitated

persons. The Court of Appeals opinion is published. This Court created the Certified Professional Guardian Board to protect the rights and interests of incapacitated persons by guardians. A state agency actively appears in the superior courts throughout the State tainted with actual conflicts of interest or lack of standing. The exercise of the rights of incapacitated persons by guardians, the compensation regime, and the State's actual conflicts of interest are issues of serious and substantial public importance relating to the protection of our most vulnerable citizens of our State.

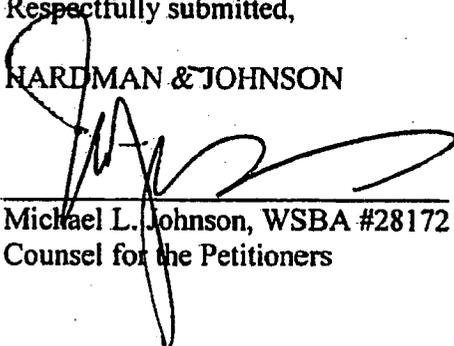
#### **IV. CONCLUSION AND RELIEF SOUGHT.**

For all these reasons, the State cannot seriously contend the issues raised in the Petition and here lack statewide public importance. Sandy and Rebecca respectfully request the Court to accept review on the issues identified in the Petition, the Answer and this Reply pursuant to RAP 13.4(b)(4).

May 4, 2010

Respectfully submitted,

HARDMAN & JOHNSON



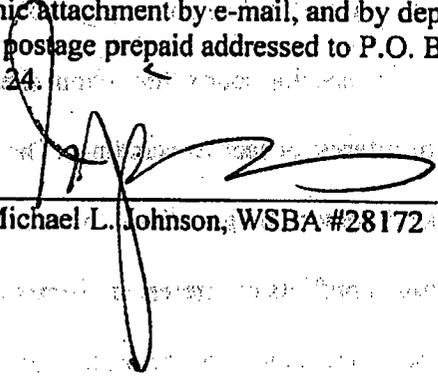
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Michael L. Johnson, WSBA #28172  
Counsel for the Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I caused a copy of the foregoing Reply to be served on Jonathon Bashford, counsel for the State of Washington, by electronic attachment by e-mail, and by depositing the same in first class mail, postage prepaid addressed to P.O. Box 40124, Olympia, WA 98504-0124.

May 4, 2010

  
Michael L. Johnson, WSBA #28172