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NO. 66436-1-I

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

In the Matter of the
GUARDIANSHIP OF RICK LEAVITT,
An Incapacitated Person;
CAROLINE KLINE GALLAND HOME,
Appellant,
v.
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent.

RESPONSE BRIEF

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I. INTRODUCTION

Medicaid recipients who receive care in an institution such as a nursing home are required by state and federal law to spend nearly all of their income to help pay for their costs of care. Costs of care that are not covered by a recipient's "participation" are paid from state and federal Medicaid funds. Federal and state law provide that, in calculating a recipient's participation, only a limited set of expenses take priority as deductions over participation in cost of care. Under Washington law, one such expense is up to \$700 in administrative costs directly related to establishing a guardianship for the Medicaid recipient. The state Medicaid agency is charged with calculating cost of care, including determining the patient's income and the applicability of any deductions.

Pursuant to the request of Caroline Kline Galland Home ("the Home"), the guardianship court ordered Rick Leavitt, a Medicaid recipient and resident of the Home, to pay the Home \$700 for attorney fees it incurred when it petitioned to have a guardian appointed for Mr. Leavitt. On appeal, the Home argues that Mr. Leavitt should have been ordered to pay the entire requested amount (over \$1700) and that the state Medicaid agency should have been ordered to allow the entire amount as a deduction from Mr. Leavitt's cost of care, resulting in a corresponding

increase in the agency's Medicaid payment to the Home on Mr. Leavitt's behalf.

The guardianship court's jurisdiction encompasses determining the amount that Mr. Leavitt must pay in attorney fees. In ordering Mr. Leavitt to pay \$700, the court acted within its discretion. However, the court exceeded its jurisdiction when it issued an order directing the state Medicaid agency how to calculate deductions applicable to cost of care. Because the agency is charged with determining, in the first instance, whether an expense is allowable as a deduction, a superior court correspondingly lacks jurisdiction to determine, in the first instance, how those deductions will be applied in a particular case.

II. STATEMENT OF ISSUES

1. Under RCW 11.96A.150 a superior court may, in its discretion and as equitable, award attorney fees out of an incapacitated person's estate to reimburse a party that files a petition for guardianship of that incapacitated person. Did the superior court abuse its discretion in determining that \$700 was an equitable award of attorney fees from the estate of an indigent incapacitated person, where the guardianship petitioner based its request for attorney fees on the argument that the incapacitated person would be eligible for a Medicaid subsidy to cover

those fees, and where the subsidy, if available, is limited by law to no more than \$700?

2. State and federal law require a state Medicaid agency to reduce its payments to a nursing facility by the amount of a patient's income, minus certain deductions, because the patient is presumed to pay those remaining costs himself. Does a superior court have subject matter jurisdiction in a non-Administrative Procedure Act proceeding to determine, in the first instance, how a Medicaid patient's income and deductions will be calculated by a state agency to determine the extent of Medicaid assistance available to the patient?

3. Under WAC 388-513-1380 and WAC 388-79-030, the state Medicaid agency will deduct up to \$700 of "guardianship fees and administrative costs" "directly related to establishing a guardianship" from a Medicaid patient's responsibility to pay for his costs of care. Under RCW 11.92.180, a court may not award "guardianship fees and . . . administrative costs" against a Medicaid patient in excess of that amount. To the extent that attorney fees awarded to a guardianship petitioner under RCW 11.96A.150 qualify for a cost of care deduction under WAC 388-513-1380, is that deduction limited to no more than \$700?

4. Does this Court have subject matter jurisdiction over a challenge to the validity of an agency rule in this non-Administrative Procedure Act proceeding?

5. Do federal regulations providing an institutionalized Medicaid recipient with an “allowance that is reasonable in amount for clothing and other personal needs” require states to include as part of that allowance payments of a third party’s attorney fees incurred in a guardianship proceeding, such that WAC 388-513-1380 is invalid to the extent it fails to increase Medicaid payments to a patient who incurs such an expense, or to the extent it places any limit on such an expense?

6. The anti-attachment provision of the Social Security Act, 42 U.S.C. § 407(a), prevents any person from using legal process similar to execution, levy, attachment, or garnishment to reach a recipient’s Social Security benefits. Does that provision forbid a state agency from objecting to a nursing home’s request for a guardianship court order requiring a Medicaid patient to pay the nursing home’s attorney fees from his Social Security income?

7. Should attorney fees and costs be awarded on appeal under RCW 11.96A.150 or the Equal Access to Justice Act?

III. STATEMENT OF THE CASE

A. Legal Background

1. Medicaid cost of care, generally.

The Medicaid program provides “joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs.” *Ark. Dep’t of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). Washington’s Medicaid program is administered by the State Department of Social and Health Services (“DSHS”). Former RCW 74.04.050 (2010).¹ For a state to receive federal funding for its Medicaid program, the federal government must determine that the state’s plan for granting assistance complies with the requirements of the Medicaid Act and its implementing regulations. *See* 42 U.S.C. § 1396a(a); *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479, 122 S. Ct. 962, 151 L. Ed. 2d 935 (2002). A state’s plan must include, *inter alia*, “reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan.” 42 U.S.C. § 1396a(a)(17). Section 1396a(a)(17) thus requires a state to make two separate determinations: (1) whether an individual is

¹ In the 2011 legislative session, the Health Care Authority (HCA) was designated the Medicaid state agency; DSHS was ordered to cooperate with HCA in administering Medicaid services. Laws of 2011 ch. 15, §§ 24, 64. We cite to the statutes in effect at the time of the proceedings below, although the result would be the same if the Home were challenging HCA’s administration of the Medicaid program under the revised statutes.

“eligib[le] for” Medicaid and, if so, (2) the “extent of” benefits to which he is entitled. *Id.*² The second determination, known as the “post-eligibility” calculation, is at issue in this case.³

The purpose of the post-eligibility calculation is to determine the patient’s share of the cost for medical services he receives. *E.g.*, WAC 388-513-1380. To calculate this amount for a nursing home resident, a state first determines the patient’s total income. 42 C.F.R. § 435.832. The state then subtracts from that total certain required deductions. *Id.* If the patient has available income remaining, the federal Medicaid agency assumes the patient will use those funds to defray his current medical costs; the state is thus required to subtract that amount from the Medicaid payments it makes to the patient’s nursing facility. 42 C.F.R. § 435.832; *Wong v. Doar*, 571 F.3d 247, 251 (2d Cir. 2009). The patient is expected to pay the remaining charges directly to the nursing facility. *E.g.*, *Md. Dep’t of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424, 430 (4th Cir. 2008).

Federal regulations label this patient contribution “application of patient income to the cost of care,” 42 C.F.R. § 435.832; it is commonly

² Both determinations are informed by an individual’s available “income” and “resources,” “as determined in accordance with standards prescribed” by the federal Medicaid agency. 42 U.S.C. § 1396a(a)(17)(B); *Wong v. Doar*, 571 F.3d 247, 251 (2d Cir. 2009); *see also* 42 U.S.C. § 1382a (defining income), 42 U.S.C. § 1382b (defining resources).

³ There is no dispute that Mr. Leavitt is eligible for Medicaid.

referred to in Washington as a client's financial "participation in cost of care" or simply "participation." *E.g.*, WAC 388-79-020; WAC 388-515-1505(8). The participation requirement prohibits the state Medicaid program "from paying any amounts that are the responsibility of the patient." *Guardianship of Lamb*, 154 Wn. App. 536, 548, 228 P.3d 32 (2009), *review granted on other grounds*, 169 Wn.2d 1010 (2010).

2. Washington's cost of care deduction for guardianship fees and costs.

In calculating patient participation for a medically needy Medicaid recipient, a state is required to deduct from the recipient's income, in order: a personal needs allowance; spousal maintenance; family maintenance; and necessary medical expenses not covered by Medicaid. 42 C.F.R. § 435.832(c); WAC 388-513-1380(4) and (5). A state may also elect, as Washington has done, to allow a final deduction for the costs of maintaining a home under certain circumstances. 42 C.F.R. § 435.832(d); WAC 388-513-1380(5)(e). For every dollar a patient's participation is reduced, a dollar must instead be spent from state and federal Medicaid funds to cover the patient's bill at the nursing facility.⁴ Nursing facilities are given notice of the participation owed by their Medicaid patients, and

⁴ The Home appears to argue that the list of acceptable participation deductions under 42 C.F.R. § 435.832 is not exclusive, but may be expanded at the discretion of a representative payee or guardian. Opening Br. at 38. That argument finds no support in the language of the regulation, especially given that the regulation expressly distinguishes between those deductions that are compulsory and those that are elective.

are required to collect those amounts from the patients and “account for any authorized reductions from the participation.” WAC 388-96-803(1).

Guardianship-related expenses are not expressly named in the federal regulations as a required or optional deduction from participation. *See* 42 C.F.R. § 435.832(c).⁵ However, DSHS interprets the “personal needs allowance” to include guardian fees and administrative costs including the guardian’s attorney fees, where the Medicaid recipient is ordered by a court to pay those fees or costs. The federal Medicaid agency has approved that deduction as part of Washington’s Medicaid State Plan. CP at 289. Effectively, this means that the state and federal governments subsidize guardianships of Medicaid recipients in Washington.

The guardianship deduction is subject to specific limitations:

- (1) The amount of guardianship fees shall not exceed one hundred seventy-five dollars per month;
- (2) **The amount of administrative costs directly related to establishing a guardianship for a department client shall not exceed seven hundred dollars;** and
- (3) The amount of administrative costs shall not exceed a total of six hundred dollars during any three-year period.

⁵ There is some disagreement over whether guardianship expenses are an appropriate deduction from Medicaid cost of care at all, and if so under which deduction. *See Day v. Az. Health Care Cost Containment Sys. Admin.*, 109 P.3d 102 (Az. 2005) (guardianship expenses cannot be deducted as necessary medical expense); *Dep’t of Health & Mental Hygiene v. Campbell*, 771 A.2d 1051 (Md. 2001) (cannot be deducted as personal needs allowance); *Rudow v. Div. of Med. Assistance*, 707 N.E.2d 339 (Ma. 1999) (must be deducted as necessary medical expense); *Mo. Div. of Family Servs. v. Barclay*, 705 S.W.2d 518 (Mo. 1985) (same).

WAC 388-79-030 (emphasis added); *see* CP at 289 (Medicaid State Plan restricting attorney fees “to an amount not to exceed \$700 for the initial establishment of a guardianship.”). Additional amounts may be allowed in “extraordinary” circumstances. WAC 388-79-050.

The superior courts have the authority to award “just and reasonable” attorney fees to a court-appointed guardian. RCW 11.92.180. However, WAC 388-79-030 acts as a limitation upon the superior court’s discretion to award guardianship fees or costs against the estate of a Medicaid recipient. *Id.* (“The amount of guardianship fees and additional compensation for administrative costs [awarded by the court] shall not exceed the amount allowed by the department of social and health services by rule.”); RCW 43.20B.460.

A superior court also has general authority in all Title 11 cases, including guardianship proceedings, to award attorney fees to any party from any other party. RCW 11.96A.150. There is no question in this case that under RCW 11.96A.150 a superior court has the authority to order the estate of an incapacitated Medicaid patient to pay attorney fees to any party, including a nursing home that files a guardianship petition against the incapacitated patient, in any amount that is equitable. The dispute in this case arises because the Home believes that attorney fees under RCW 11.96A.150, paid by a Medicaid patient, fall within the cost of care

deduction for “guardianship fees and administrative costs” described by WAC 388-513-1380, but are not “guardianship fees and administrative costs” for the purpose of WAC 388-79-030; and therefore that Medicaid provides an unlimited subsidy for such attorney fees.

B. Mr. Leavitt

Rick Leavitt is 56 years old. CP at 348. He suffers from advanced Multiple Sclerosis, which causes him “both physical and cognitive impairment.” CP at 349. Due to his disability, Mr. Leavitt has qualified since 2001 for medical services through Medicaid. CP at 43. Since August 2008, Mr. Leavitt has resided at Caroline Kline Galland Home, a nursing facility located in Seattle. CP at 4, 348.

Mr. Leavitt’s sole income is \$1,118 per month in Social Security benefits. CP at 352. Mr. Leavitt does not receive those checks directly; rather, the Home receives and disburses Mr. Leavitt’s income as his Social Security representative payee. *See* Opening Br. at 37 n.8. Prior to the guardianship proceedings in this case, Mr. Leavitt kept \$57.28 of his income each month as a “personal needs allowance.” CP at 43; *see* WAC 388-513-1380(4)(a)(v). The remainder of his income was paid to the Home to cover Mr. Leavitt’s nursing care. CP at 43. Because the costs of Mr. Leavitt’s care at the Home far exceed his income, the

Medicaid program pays an additional \$4,577.18 per month to the Home to cover those costs. CP at 43.

C. Procedural History

In May 2010, the Home filed a petition for guardianship in King County Superior Court, alleging that Mr. Leavitt was incapacitated as to both person and estate. CP at 1-8. Because Mr. Leavitt was believed to be indigent, the court appointed a guardian *ad litem* at public expense to investigate Mr. Leavitt's capacity to make medical and financial decisions. CP at 10-13. While Mr. Leavitt did not oppose the guardianship petition, he was appointed counsel at public expense. CP at 17-18. Following a hearing on July 7, 2010, Mr. Leavitt was found to be incapacitated, and a guardian was appointed to act on his behalf. CP at 86-99.

The issues on appeal have to do with the Home's request that its attorney fees be paid by Mr. Leavitt. In the guardianship petition, the Home requested that its legal fees and costs be paid by Mr. Leavitt. CP at 6. Specifically, the Home requested an order directing that the Home's attorney fees:

shall be allowed as a deduction against Mr. Leavitt's participation and shall be paid from guardianship income prior to its application for cost of care; pursuant to RCW 11.92.035 and 11.92.180 and to WAC 388-79, said funds shall not be considered available to Mr. Leavitt or his guardian to pay for the costs of his institutional or medical care, and they shall not be considered by the Department of

Social and Health Services or any other entity or person to be assets of Mr. Leavitt.

CP at 35 (proposed order); *see* CP at 7 (request for relief). The Home requested a total of \$1,740.65 in attorney fees. CP at 28.

The Home provided notice of its request to DSHS, as required by RCW 11.92.180. CP at 30. DSHS entered a notice of appearance on June 2, 2010. CP at 22. On June 18, DSHS filed an objection to the Home's request for attorney fees. CP at 34-41. DSHS argued (1) that while a guardian's attorney fees awarded under RCW 11.92.180 are an acceptable deduction from a Medicaid recipient's participation payments, a third party's attorney fees for filing a petition for guardianship and awarded under RCW 11.96A.150 are not; and (2) that under the Administrative Procedure Act the superior court lacked subject matter jurisdiction over whether or how DSHS should calculate Mr. Leavitt's participation payments. CP at 38-40. In its response, the Home disagreed with DSHS and further argued that DSHS lacked standing. CP at 48-56.

Following a hearing, the superior court commissioner issued a memorandum decision rejecting a number of arguments made by both DSHS and the Home. CP at 100-106. In the resulting order, the commissioner held that the court had subject matter jurisdiction over the "appropriate set aside of Medicaid funds to pay petitioner's attorney fees

and costs.” CP at 115. The commissioner ordered that the Home’s attorney fees could be deducted from Mr. Leavitt’s participation payments, but limited the Home’s attorney fees to \$700 based on WAC 388-79-030, which limits the deduction for administrative costs directly related to establishing a guardianship. CP at 116-117.

The Home moved for revision of the commissioner’s order. CP at 120-26. The superior court judge denied the motion for revision and affirmed that the Home’s attorney fees were limited to \$700 to be paid by Mr. Leavitt. CP at 334-37. The Home timely appeals.

IV. ARGUMENT

The superior court had jurisdiction to determine what amount, if any, of attorney fees Mr. Leavitt should be ordered to pay to the Home as guardianship petitioner. The court acted within its discretion pursuant to RCW 11.96A.150 when it determined in equity that Mr. Leavitt should pay only \$700 of the Home’s requested amount.

A superior court does not have jurisdiction in a guardianship case to adjudicate how DSHS will apply Medicaid regulations to the incapacitated person. By seeking a court order requiring DSHS to adjust Mr. Leavitt’s participation and thus increase DSHS’s payments to the Home—and now by seeking to invalidate DSHS regulations without following the procedures of the Administrative Procedure Act (APA),

chapter 34.05 RCW—the Home has needlessly complicated what should have been a straightforward guardianship case. This Court should hold that the superior court lacked subject matter jurisdiction over the Home’s claims against DSHS.

Although it had no jurisdiction to order DSHS how to calculate Mr. Leavitt’s participation, the superior court was correct that DSHS regulations will not allow Mr. Leavitt to deduct more than \$700 of the Home’s attorney fees from his participation. The Home’s contrary reading of the regulations is clearly incorrect. To the extent that the Court reaches the question, it should uphold the Department’s interpretation of its own rules, especially in light of the deference due to that interpretation. Further, even assuming that the Home’s challenge to the validity of DSHS’s rules could be heard in this appeal from a guardianship proceeding, federal law expressly anticipates and requires limitations on the expenses that can be deducted from patient participation in the post-eligibility calculation.

A. Standard of Review

In this case, the Home sought attorney fees from Mr. Leavitt’s estate under RCW 11.96A.150. The award of attorney fees under RCW 11.96A.150 is left to the discretion of the superior court. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004). 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. *Id.* Where the trial court applies an erroneous view of the law, it necessarily abuses its discretion. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

When a party appeals a superior court judge's ruling revising a commissioner's ruling, the appellate court reviews the ruling of the superior court judge, not the commissioner. *State v. Wicker*, 105 Wn. App. 428, 432-33, 20 P.3d 1007 (2001).

A challenge to the trial court's subject matter jurisdiction is a threshold issue that may be raised for the first time on appeal. RAP 2.5(a)(1). Subject matter jurisdiction is a question of law reviewed de novo. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

B. DSHS Has Standing

The Home requests a court order in a non-APA proceeding interpreting the guardian fee deduction in WAC 388-513-1380 as applying to an award of attorney fees under RCW 11.96A.150; holding that the limitations in WAC 388-79 WAC do not apply to such a deduction; and ordering DSHS to increase a Medicaid patient's public assistance to cover

those fees. The Home nonetheless argues that DSHS has no standing to object. Opening Br. at 20-23.⁶

DSHS clearly has standing because the Home petitioned for a court order to which the Department would purportedly be subject. CP at 35 (proposed order that DSHS “shall not” consider Mr. Leavitt’s Social Security income among his assets). While DSHS believes that such an order would have been void for lack of personal jurisdiction, clearly a non-party has standing to object when a party to a proceeding requests a court order controlling the non-party’s actions. *E.g.*, *State v. G.A.H.*, 133 Wn. App. 567, 575-76, 137 P.2d 66 (2006). In *G.A.H.*, a juvenile court ruling ordered DSHS to assume responsibility for a minor’s welfare, in a case in which DSHS was not a party. *Id.* at 570-71. This Court held that DSHS was an aggrieved party with standing to appeal, and that the juvenile court’s order was void for lack of personal jurisdiction. *Id.* at 575-76.

⁶ The Home may also mean to renew their assertion that DSHS was required to bring a formal motion to intervene under CR 24. Opening Br. at 21. But as they provide no argument, that claim is waived. RAP 10.3(a)(6). Regardless, the superior court appropriately held that no formal motion for intervention was required. CP at 115. The civil rules are liberally construed in favor of intervention. *Columbia Gorge Audubon Soc’y v. Klickitat Cy.*, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999). Given the relief requested by the Home against DSHS, the Department was an indispensable party that should have been joined under CR 19. *See In re Guardianship of Grant*, 109 Wn.2d 545, 569, 747 P.2d 445, 757 P.2d 534 (1987) (CR 19 would have required joinder of the State absent State agreement to abide by guardianship court’s decision). Even if there were a formal procedural defect, the appropriate remedy would be leave to formally intervene *nunc pro tunc*. *See Tucker v. Clare Bros. Ltd.*, 493 N.W.2d 918 (Mich. App. 1992).

Second, DSHS has a duty as the state Medicaid agency to ensure that Washington remains in compliance with its Medicaid obligations. The legislature requires DSHS to place limitations on guardianship expenses for certain Medicaid recipients. RCW 43.20B.460. DSHS is thus given notice and an opportunity to participate in guardianship proceedings having an impact on those expenses. RCW 11.92.180; *see* Final Bill Report on SHB 1865, 54th Leg. Reg. Sess. (Wash. 1995) (DSHS “is given the right to notice of, access to, and participation in any hearings which affect the assets of an incapacitated person” who pays participation); *see also* *Guardianship of Knutson*, 160 Wn. App. 854, 864, 250 P.3d 1072 (2011), *as amended on denial of reconsideration*, 2011 WL 1107225 (June 17, 2011) (DSHS has standing in Medicaid guardianship cases).⁷ DSHS’s status as the state Medicaid agency provides an independent basis for standing in this case.⁸

⁷ The Home contends that DSHS is not entitled to notice unless it files a request to that effect. Opening Br. at 20-21. Reading RCW 11.92.180 as merely giving DSHS an opportunity to request notice would render it meaningless, as that opportunity is already given by RCW 11.92.150. “Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). While RCW 11.92.150 *allows* DSHS to request notice in any case, RCW 11.92.180 *requires* that DSHS receive notice in certain cases.

⁸ However, neither the Home nor DSHS represents the interests of Mr. Leavitt in this appeal. It is doubtful that this Court could order the Home’s requested relief, additional attorney fees from Mr. Leavitt’s estate, without joining him (through his guardians) as a party to this appeal. CR 19.

C. The Superior Court Did Not Abuse Its Discretion In Determining That The Home Should Be Awarded No More Than \$700 In Attorney Fees From Mr. Leavitt's Estate

In a Title 11 proceeding the superior court may, in its discretion and as equitable, order that reasonable attorney fees be paid from an incapacitated person's estate to any party. RCW 11.96A.150(1). That provision applies explicitly to guardianships. RCW 11.96A.150(2). It is common for a party that appropriately petitions for guardianship to be awarded attorney fees if the incapacitated person has adequate resources to cover that expense. *See* CP at 105 (superior court commissioner's memorandum decision) ("the court in every guardianship proceeding enters an order . . . allocating and approving the amount and source of payment of the petitioner's fees."). There is no doubt that the superior court had the authority to determine that an award of attorney fees was warranted under RCW 11.96A.150.⁹

The superior court determined that under equitable considerations, an award of \$700 in this case was fair. CP at 342. The Home has not met its burden of showing that the court abused its discretion by not ordering additional fees. The \$700 award was reasonable given that the Home, in

⁹ There was some argument below about the necessity of the Home's petition in this case, and therefore about the equity of requiring Mr. Leavitt to cover the Home's legal expenses. *E.g.*, CP at 160. The superior court determined that an attorney fee award was equitable, finding that the petition was "necessary and was appropriately filed" by the Home. CP at 115-116. Since that finding is a verity on appeal, there is no need to respond to the Home's argument defending it. *See* Opening Br. at 23-26.

arguing for fees, relied on the possibility of a deduction from Mr. Leavitt's participation to fund its fees. Such deduction, to the extent it is available, is limited to no more than \$700.

- 1. The Home relied on an alleged Medicaid subsidy to argue it would be equitable to require Mr. Leavitt to pay the Home's attorney fees.**

Mr. Leavitt has limited income, and is required to pay nearly all of it to the Home as payment for the nursing services he receives there. CP at 43. If Mr. Leavitt were forced to choose between paying the Home's attorney fees or paying for his nursing services, opting to pay the attorney fees could put him at risk of eviction. WAC 388-97-0120 (allowing a nursing facility to discharge a resident for nonpayment); 42 U.S.C. § 1395i-3(c)(2). The equities would probably not support an award of attorney fees in those circumstances.

To mitigate the appearance of unfairness, the Home argued that if Mr. Leavitt were ordered to pay attorney fees, the full costs of Mr. Leavitt's nursing care would nonetheless continue to be paid because DSHS would increase its payment to the Home. In fact, the Home requested a court order *requiring* DSHS to decrease Mr. Leavitt's participation, which would correspondingly increase the Medicaid program's payments on Mr. Leavitt's behalf. CP at 7, 35. The superior court apparently granted that request, relying on its "jurisdiction over the

question of appropriate set aside of Medicaid funds to pay petitioner's attorney fees and costs." CP at 115, 117.¹⁰

DSHS does not agree that every award of attorney fees under RCW 11.96A.150 qualifies as an appropriate deduction from participation.¹¹ Moreover, the superior court did not have jurisdiction to order DSHS to determine that the fees qualified as a deduction in this case. *Infra* at 23-28. But to the extent that the Home relied on the possibility of that deduction in arguing for fees, the superior court acting in equity properly took into account any limitations that would apply to the alleged subsidy.

2. To the extent the Medicaid program subsidizes patients to allow them to pay attorney fees under RCW 11.96A.150, such a subsidy is limited to \$700.

The Home makes a contorted argument in its attempt to explain that its attorney fees are "guardianship fees and administrative costs"

¹⁰ The superior court judge's order on revision makes no reference to Mr. Leavitt's participation or how DSHS is to go about calculating it. CP at 334-336. However, the court commissioner had ordered that the Home's attorney fees be paid "as a set-aside . . . before funds are allocated to offset" Mr. Leavitt's cost of care. CP at 117. On revision, the judge "affirmed" that earlier order. CP at 336. It thus appears that the superior court meant its final order to require DSHS to treat the Home's attorney fees as a deduction or "set aside" from Mr. Leavitt's participation.

¹¹ DSHS argued at the superior court commissioner level that a guardianship petitioner's attorney fees under RCW 11.96A.150 do not qualify as a deduction from Medicaid participation. CP at 38-40. DSHS now agrees that fees awarded under RCW 11.96A.150 may, where directly related to establishing a guardianship, constitute "guardianship fees and administrative costs" pursuant to WAC 388-513-1380. However, DSHS maintains that it, not the guardianship court, is responsible for determining whether or not attorney fees are directly related to establishing a guardianship, and therefore deductible, in any particular case. *See* discussion *infra* at 23-28.

under WAC 388-513-1380 and so qualify as a deduction; but simultaneously are not “guardianship fees and . . . administrative costs” under WAC 388-79-010 or RCW 11.92.180, and so are unlimited by the \$700 cap. The argument is both inconsistent and absurd. The deduction and the limitation are coextensive. To the extent that the Home wishes to argue that attorney fees awarded under RCW 11.96A.150 to a petitioning party in a guardianship action are an allowable participation deduction, the Home must accept the limits on that deduction.

A court awarding “guardianship fees and additional compensation for *administrative costs*” from the estate of an institutionalized Medicaid recipient “shall not” award fees in excess of the amount allowed by DSHS rule. RCW 11.92.180 (emphasis added). DSHS has promulgated, under explicit statutory authority, rules establishing “the maximum amount of guardianship fees and additional compensation for *administrative costs* that may be allowed by the court[.]” WAC 388-79-010 (emphasis added); RCW 43.20B.460. DSHS then allows a participation deduction for “[g]uardianship fees and *administrative costs*”, but “only as allowed by chapter 388-79 WAC.” WAC 388-513-1380(4)(d) (emphasis added). These rules and statutes are *in peri materia*, on the same subject, and so “must be construed together.” *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999).

The Home makes no coherent argument for why the consistent term “administrative costs” should be interpreted inconsistently across these related contexts. The inconsistent reading the Home urges on the Court would lead to the absurd result of the Medicaid program providing a limitless subsidy for attorney fee awards against impoverished Medicaid patients, while closely limiting the subsidy for necessary guardianship services to those same patients. The courts “avoid constructions that yield unlikely, absurd or strained consequences.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Even if the Home’s interpretation were plausible, the Department’s reasonable and consistent interpretation should be given considerable deference as an agency’s interpretation of its own rules. *D.W. Close Co. v. Dep’t of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008). The natural reading of the statutes and regulations is that where a deduction for guardianship administrative costs directly related to the establishment of a guardianship is available under WAC 388-513-1380, such deduction is limited to no more than \$700 as allowed by WAC 388-79-030.

Chapter 388-79 WAC limits “administrative costs directly related to establishing a guardianship” to no more than a one-time \$700 amount. WAC 388-79-030. The superior court cannot award “administrative costs” in excess of that amount. RCW 11.92.180. To the extent that the

Home argues that its attorney fees are guardianship “administrative costs” under WAC 388-513-1380, the superior court was required to apply the \$700 cap. The superior court did not abuse its discretion in determining that Mr. Leavitt should not be ordered to pay more than \$700 of the Home’s attorney fees.¹²

D. The Home’s Administrative Law Claims Are Outside The Subject Matter Jurisdiction Of The Courts In This Guardianship Proceeding

“A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). The Home asks this Court to correct DSHS’s application of state Medicaid regulations, or to declare those regulations invalid. Those claims are subject to court review only under the Administrative Procedure Act (APA), chapter 34.05 RCW. They are not properly before the Court in this case.

The APA applies to most agency action. “‘Agency action’ means the implementation or enforcement of a statute, *the adoption or application of an agency rule* or order, the issuance, denial or suspension

¹² Even if the Home were to abandon its argument that their fees must be paid as a Medicaid deduction, the superior court did not abuse its discretion in applying a discounted attorney fee rate in this case, given Mr. Leavitt’s limited resources. *See* CP at 103 (superior court commissioner’s memorandum decision) (“Given the lack of any significant estate belonging to Mr. Leavitt, compensation at counsel’s regular hourly rate is prohibitive.”).

of a license, the imposition of sanctions, or *the granting or withholding of benefits.*” RCW 34.05.010(3) (emphases added). This definition of agency action is construed broadly, and exceptions are construed narrowly. *Muckleshoot Indian Tribe v. Dep’t of Ecology*, 112 Wn. App. 712, 721, 50 P.3d 668 (2002). The APA provides the exclusive means for judicial review of agency action. RCW 34.05.510. The exclusive nature of APA judicial review procedures is interpreted strictly. *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 468–69, 832 P.2d 1310 (1992).

1. The proper calculation of deductions from a Medicaid patient’s cost of care is cognizable in the first instance with DSHS.

The Home asked the superior court to award it attorney fees from the estate of Mr. Leavitt, an issue that the court clearly had authority to adjudicate under the guardianship statute. However, the Home also requested an order requiring DSHS to treat Mr. Leavitt’s payment of those fees as a deduction from his participation, and thereby increase Mr. Leavitt’s Medicaid assistance. CP at 6-7, 35. To the extent the superior court granted that request,¹³ it acted beyond its jurisdiction. The calculation of a Medicaid patient’s benefits is not subject in the first

¹³ It is unclear whether the superior court’s order on revision was meant to incorporate the earlier commissioner’s order requiring DSHS to reduce Mr. Leavitt’s participation amount. *Supra* at 19 n.9. Regardless, this Court does not have the jurisdiction over the identical argument made by the Home on appeal.

instance to the jurisdiction of the courts. Rather, it is a question of Medicaid administration subject in the first instance to the authority of DSHS. It is improper for the courts to oversee DSHS's administration of the Medicaid program through guardianship proceedings.

At the time of the proceedings below, DSHS was the single state agency tasked by the legislature with administering Washington's public assistance programs, including Medicaid. Former RCW 74.04.050 (2010). The legislature authorized DSHS to secure federal matching funds for Medicaid expenditures by ensuring that the state complies with federal program requirements. Former RCW 74.09.500 (2010). DSHS was given the responsibility to determine the amount of medical assistance available to Medicaid recipients. Former RCW 74.09.530 (2010).

The calculations that the Home requested the superior court to make in this case clearly fell within the administration of the Medicaid program, and thus within DSHS's primary jurisdiction. Federal regulations require DSHS to reduce its Medicaid payment to a nursing home on behalf of a patient, and thereby increase the patient's participation amount, by the full amount of the patient's income minus certain federally-approved deductions. 42 C.F.R. § 435.832. What funds count as "income", and what circumstances qualify for a deduction from participation, are questions of Medicaid administration within DSHS's

authority. E.g., Former RCW 74.04.005(12) (2010) (definition of “income” providing that DSHS may by rule exempt income from assistance calculations). DSHS has promulgated detailed regulations to govern how a patient’s participation is calculated in various circumstances. WAC 388-513 WAC. In its role as the administrator of Washington’s Medicaid program, it is DSHS’s job to apply those regulations, subject to judicial review under the APA.¹⁴

The guardianship court’s equitable jurisdiction under RCW 11.96A.150 does not create jurisdiction over how the incapacitated person’s estate is treated under agency regulations. A party may not avoid the requirements of the APA by invoking the trial court’s authority to grant equitable relief. *See Davis v. Dep’t of Labor & Indus.*, 159 Wn. App. 437, 443, 245 P.3d 253 (2011) (so holding as to the Industrial Insurance Act, which like the APA provides an exclusive remedy against agency action). The guardianship court can no more adjudicate a ward’s Medicaid entitlement than it can order the Department of Revenue to disregard certain business income as non-taxable, or order that part of the ward’s real property does not fall within the Department of Ecology’s definition of a wetland. Those legal conclusions, while undoubtedly

¹⁴ To the extent the Home seeks to challenge DSHS’s application of WAC 388-513-1380 before it has actually been applied, their challenge is also unripe. *See Asarco, Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 760-62, 43 P.3d 471 (2002).

pertaining to the estate that the court is overseeing, must be made by executive agencies. Administrative determinations do not belong to the jurisdiction of the courts in the first instance. *See, e.g., Rabon v. City of Seattle*, 107 Wn. App. 734, 34 P.3d 821 (2001) (proceeding for destruction of a vicious dog is administrative proceeding not originally cognizable in superior court); *In re Welfare of J.H.*, 75 Wn. App. 887, 880 P.2d 1030 (1994) (juvenile court could not order expenditure of housing assistance funds even if it would be more cost effective than foster care placement). The exclusive means for court review of DSHS's application of its rules or its granting of Medicaid benefits is through the APA. RCW 34.05.010(3); RCW 34.05.510.

The superior court may properly determine what attorney fees, if any, Mr. Leavitt is liable to pay to the Home as the guardianship petitioner. But the court has no part to play in the original determination of how much income Mr. Leavitt has for post-eligibility purposes; what deductions may apply and in what amounts; or how Mr. Leavitt's nursing home expenses will be divided between payments from the Medicaid program and Mr. Leavitt's own responsibility to pay participation. In particular, the superior court had no jurisdiction to determine whether the court's attorney fee award in this case was "directly related to establishing

a guardianship” under the meaning of WAC 388-79-030; or to order that \$700 be deducted or set aside from Mr. Leavitt’s Medicaid costs of care.

This Court should make clear that DSHS has the authority to calculate Mr. Leavitt’s participation without court interference with that essentially executive function. If Mr. Leavitt or his guardian disagrees with the Department’s determination of how the court’s order for attorney fees affects his participation amount, he may pursue an administrative appeal. If the Home disagrees with the Department’s decision or the validity of its rules, it may bring an APA action for a declaratory judgment. A guardianship court has no original jurisdiction over the question. To the extent that the superior court’s order was meant to determine how DSHS must apply WAC 388-513-1380 to the facts of this case, the order is void.

2. Court administration of Medicaid participation deduction rules violates the separation of powers.

The administration of Medicaid is an executive, not a judicial, function. The legislature requires DSHS to determine the extent of Medicaid assistance available to nursing home residents. Former RCW 74.09.530 (2010). A guardianship court’s order requiring DSHS to increase the amount of Medicaid assistance it provides to a nursing home resident would violate the separation of powers doctrine. *See G.A.H.*, 133

Wn. App. at 580 (court could not order DSHS to place child in foster care); *In re Dependency of A.N.*, 92 Wn. App. 249, 253-54, 973 P.2d 1 (1998) (court's well-meaning intent must still be exercised within the bounds of legislatively granted authority). A court cannot substitute its judgment for that of DSHS in areas where DSHS has been charged by law with providing services to the disabled.

3. The courts lack subject matter jurisdiction over a challenge to the validity of agency rules in this non-APA proceeding.

The Home argues that DSHS's regulations concerning deductions from participation are in conflict with and "superseded" by federal law. Opening Br. at 38. An agency's rules are presumed valid. *E.g., Anderson, Leech & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 695, 575 P.2d 221 (1978). The APA provides a mechanism for judicial review of the validity of an agency order. RCW 34.05.570(2)(b)(i). Again, the APA is the exclusive means for judicial review of agency action, including the adoption or application of a rule. RCW 34.05.510; RCW 34.05.010(3). If the Home believes that DSHS's Medicaid participation rules are invalid, it may bring a petition under the APA. The Court cannot hear those claims here.

4. Standing.

The Home attempts to raise a number of claims on behalf of disabled Medicaid patients who may benefit from the appointment of guardians. The core of that argument seems to be that if the State fails to subsidize private parties to file guardianship petitions by creating a Medicaid participation deduction for petitioners' attorney fees to be paid from the income of the Medicaid patients, those hypothetical individuals will be denied the right to a guardianship. Opening Br. at 28-29. In addition to failing on APA and separation of powers grounds, that argument fails because the Home has no standing to raise it. The standing doctrine prohibits a litigant from raising another's legal rights. *State v. Bohannon*, 62 Wn. App. 462, 469, 814 P.2d 694 (1991). Mr. Leavitt himself did have access to the courts. He was appointed counsel to represent him at public expense. CP at 17-18. And he was appointed a guardian. CP at 86-99. The interests of hypothetical Medicaid clients who may need a guardian are not properly before this Court on the Home's appeal.

5. Remand is inappropriate.

The Home requests that the Court remand this case to the superior court guardianship commissioner for fact-finding to determine whether DSHS has taken arbitrary and capricious agency action. Opening Br. at

48-49. They supply no argument in support of their remand request, instead pointing the Court to their argument to the superior court. Opening Br. at 49. An appellant’s opening brief “should contain . . . [t]he argument in support of the issues presented for review, together with citations to legal authority.” RAP 10.3(a)(6). Washington courts “have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.” *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008).

Even if the Home had not waived its argument, its request for remand fails because the “exclusive means” for challenging an agency order or rule as arbitrary and capricious is the APA. RCW 34.05.510; *see* RCW 34.05.570(2) (review of rules), .570(3) (review of adjudicative orders), .570(4) (review of other agency action). As discussed above, a superior court lacks jurisdiction over challenges to agency action in a guardianship case.¹⁵

¹⁵ Even under the APA, remand to the superior court for additional fact-finding would be inappropriate because judicial review would be confined to the agency record except in limited circumstances. RCW 34.05.558.

E. Federal Medicaid Regulations Authorizing Deductions From Patient Cost Of Care Do Not Provide A Separate Deduction For Guardianship Expenses

Federal law requires a state to allow a cost of care deduction of no less than \$30 per month for an institutionalized individual. 42 U.S.C. § 1396a(q). The amount should be “reasonable in amount for clothing and other personal needs” of the patient. 42 U.S.C. § 1396a(q)(1)(A)(i). The Home argues that the phrase “other personal needs” is broad enough to affirmatively require Washington to allow a deduction for court-ordered attorney fees, and to forbid any limitation to that deduction. Opening Br. at 42. Even if the Court were to reach that challenge to agency rulemaking in this non-APA case, Washington’s deductions have been approved as reasonable by the federal Medicaid agency, and the Home does not carry its burden of proving otherwise. *See* RCW 34.05.570(1) (under the APA, “[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity”).

- 1. Federal regulations do not create a guardianship expense deduction separate from the deduction allowed under Washington law.**

The federal personal needs allowance does not include a deduction for a guardianship petitioner’s attorney fees, except insofar as that deduction is created by DSHS regulations and Washington’s Medicaid State Plan.

The meaning of words may be indicated or controlled by those with which they are associated. *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999). “[G]eneral terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or ‘comparable to’ the specific terms.” *Simpson Inv. Co. v. Dep’t of Rev.*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). The term “personal needs” in 42 U.S.C. § 1396a(q)(1)(A)(i) should thus be understood to cover personal needs akin to clothing, such as personal hygiene items. *Dep’t of Health & Mental Hygiene v. Campbell*, 771 A.2d 1051 (Md. 2001).

That reading is confirmed by federal and state agency interpretations of the statute. The Centers for Medicare and Medicaid Services (CMS), part of the federal Department of Social and Human Services, administers the federal Medicaid program and has the duty to review a state’s Medicaid State Plan for compliance with all federal statutory and regulatory conditions. 42 C.F.R. § 430.15(b). CMS does not require states to provide a personal needs allowance in excess of \$30 per month. 42 C.F.R. § 435.832. CMS’s determination of whether a State Plan meets the federal requirements is entitled to considerable deference.

Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 938-39 (9th Cir. 2005).¹⁶

While federal law does not require an expansive reading of the personal needs allowance, Washington and CMS have agreed to fund more than the federal minimum deductions, to wit: a cash allowance of \$57.28 rather than the \$30.00 required by federal law, an income tax deduction, a deduction for wages earned in certain rehabilitation programs, and a limited deduction for guardianship fees and costs under RCW 11.92.180. WAC 388-513-1380(4). Washington's decision to restrict the personal needs allowance to those items has CMS approval. See CP at 288-89 (Medicaid State Plan excerpts describing tax and guardianship deductions).¹⁷ The Home argues that WAC 388-513-1380 does not provide an exclusive list of the deductions available from a Medicaid patient's participation. Opening Br. at 42. But "[u]nder *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *In re Detention of Williams*, 147

¹⁶ Similarly, DSHS's administration of the state Medicaid program is entitled to deference. *E.g., Burnham v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003). Assuming that its plan meets federal requirements, a state has considerable discretion in administering its Medicaid program. *Alaska Dep't of Health & Soc. Servs.*, 424 F.3d at 935.

¹⁷ The Home incorrectly relies for some of its argument on the State Plan language, rather than the language of the relevant DSHS rules. Opening Br. at 43-44. The State Plan is an agreement between the state and federal governments. It was not promulgated by DSHS under the APA's procedural requirements, so it is not law.

Wn.2d 476, 491, 55 P.3d 597 (2002) (citations omitted). The specific list of deductions in Washington's regulations and State Plan, and CMS's approval of those deductions, implies that there are no deductions allowed beyond those that are specified.

In fact, many states do not allow a participation deduction for guardianship expenses at all. *E.g.*, *Campbell*, 771 A.2d at 1059 (holding that Maryland's Medicaid regulations do not include guardianship expenses in personal needs allowance); *see also* MD. REGS. CODE tit. 10, § 09.24.10 (2010). Others, such as Massachusetts, allow a smaller deduction than does Washington. *See* 130 MASS. REGS. CODE § 520.026(E)(3) (2009) (allowing \$500 for costs of appointment except in medically complicated cases). The fact that CMS has approved those various state plans illustrates that a state has flexibility in choosing to increase its funding of Medicaid to cover expenses that the state considers important as a matter of policy.

2. Federal regulations do not require an unlimited deduction for guardianship-related expenses.

Washington's decision to provide funding for a personal needs allowance above the minimum required by 42 U.S.C. § 1396a(q)(1)(A)(i) does not prevent the state from regulating the allowance. In fact, allowing deductions in excess of those contained in WAC 388-513-1380 would

violate Washington's State Plan and endanger Washington's billions of dollars of federal Medicaid funding. CP at 47; *see* 42 U.S.C. § 1396c. Federal law does not contemplate, much less require, an unlimited participation deduction for a nursing facility's attorney fees incurred in petitioning for guardianship of one of the facility's residents. *See Peura by Herman v. Mala*, 977 F.2d 484, 491 (9th Cir. 1992).

In *Peura*, the Ninth Circuit considered a challenge to Alaska's Medicaid post-eligibility calculation. *Id.* at 486. The plaintiff, a nursing home resident, had an income of \$1,100 and had been ordered by a state court to pay \$300 per month in child support. *Id.* at 485-86. The state provided a limited monthly Medicaid allowance for child support payments, but the allowance was less than the \$300 court order. *Id.* at 486-87. The court held that the state was not required to deduct the entire amount of court-ordered child support from the patient's portion of his nursing home expenses. *Id.* at 491. In doing so, the court noted that it was "unlikely that Congress would intend the full amount of any child-support obligation to be excluded from the 'available' income of a Medicaid applicant or recipient simply because the amount has been ordered by a court." *Id.* at 490.

This case is no different. Washington, like Alaska, limits the amount of court-ordered obligations that will be subsidized by the

Medicaid program. The decision to provide such a subsidy is a policy determination that requires weighing the needs of institutionalized Medicaid patients against the sustainability of the Medicaid program. Washington does not contravene federal law by providing, but limiting, a subsidy for the guardianship expenses of Medicaid patients.

F. DSHS's Objection To The Home's Request For Attorney Fees Was Not "Legal Process" Akin To Garnishment Barred By The Social Security Anti-Attachment Provision

Mr. Leavitt's sole source of income is a monthly benefit check under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* CP at 352. The Home argues that, by objecting to the Home's proposed order to increase Mr. Leavitt's Medicaid benefits to allow him to use his Social Security funds for other purposes, DSHS effectively garnished Mr. Leavitt's Social Security check in violation of the Social Security Act's anti-attachment provision. Opening Br. at 32-33. That argument is meritless.

42 U.S.C. § 407(a), commonly referred to as the Social Security anti-attachment provision, states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.*

(Emphasis added). Execution, levy, attachment, and garnishment are “legal terms of art.” *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). None of them apply here. The final category, “other legal process,” is read “restrictively” under the interpretive canons of *noscitur a sociis* and *eiusdem generis*. *Id.* at 384. “Thus, ‘other legal process’ should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.” *Id.* at 385.

The anti-attachment provision does not prohibit a state from taking Social Security income into account in determining Medicaid benefits. *Catalano v. Dep’t of Hosps.*, 299 F. Supp. 166, 172-73 (S.D.N.Y. 1969). Even where a guardianship court actually orders the payment of cost of care from a Social Security beneficiary, the anti-attachment provision is not violated where the order is directed to funds controlled by the guardian

rather than by the federally-appointed representative payee. *Knutson*, 160 Wn. App. at 869-70.¹⁸

DSHS's objection to the Home's request for an adjustment to Mr. Leavitt's participation is nothing like a garnishment or attachment proceeding. Under *Keffeler*, legal process other than those processes named in the statute are barred only if they are "much like" the named processes, which "at a minimum" requires three elements: a judicial mechanism, transferring control of property, to discharge a liability. 537 U.S. at 385. DSHS did not seek to use a judicial mechanism requiring Mr. Leavitt's funds to be used in any fashion at all. DSHS objected to the judicial mechanism being used by the Home; it did not utilize that mechanism itself.

If anything, it was the Home's own request in this case that violated the anti-attachment provision. The Home's proposed order would have required Mr. Leavitt's representative payee to pay the Home's attorney fees "prior to" paying his cost of care. CP at 7, 35. Such an order would have constituted a legal process; would have transferred Mr. Leavitt's Social Security funds from Mr. Leavitt to the Home; and would have done so in order to discharge Mr. Leavitt's alleged liability to

¹⁸ As discussed at greater length below, a representative payee is appointed by the federal government to receive and disburse an individual's Social Security income on that individual's behalf.

the Home. An objection to legal process akin to garnishment cannot itself constitute legal process barred by the anti-attachment provision.

G. The Social Security Act's Representative Payee Provisions Do Not Create An Additional Deduction From Medicaid Cost Of Care

The Home appears to argue that, by limiting the deductions that can be taken from a Medicaid patient's cost of care, state and federal regulations infringe on the Home's authority as Mr. Leavitt's Social Security representative payee to spend Mr. Leavitt's Social Security funds with complete discretion. Opening Br. at 38. But the payee's discretion to decide which liabilities to pay first does not mean that any unpaid liabilities cease to exist. Nothing in the representative payee provisions of the Social Security Act requires a state to increase an individual's Medicaid benefits to cover medical expenses that the payee chooses not to pay.

While Social Security benefits are generally paid directly to the beneficiary, the Social Security Administration may instead distribute the check "for [a beneficiary's] use and benefit" to another individual or entity known as the beneficiary's "representative payee." 42 U.S.C. §§ 405(j)(1)(A), 1383(a)(2)(A)(ii)(I); *see* 20 C.F.R. §§ 404.2001, 404.2010, 416.601, 416.610. The representative payee is appointed by the Social Security Administration, and is subject to monitoring by the federal

agency. 42 U.S.C. §§ 405(j)(1)-(3), 1383(a)(2)(A)-(C). “Detailed regulations govern a representative payee’s use of benefits.” *Keffeler*, 537 U.S. at 376. As the *Keffeler* Court described:

Generally, a payee must expend funds “only for the use and benefit of the beneficiary,” in a way the payee determines “to be in the [beneficiary’s] best interests.” 20 CFR §§404.2035(a), 416.635(a). The regulations get more specific in providing that payments made for “current maintenance” are deemed to be “for the use and benefit of the beneficiary,” defining “current maintenance” to include “cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.” §§404.2040(a), 416.640(a). Although a representative payee “may not be required to use benefit payments to satisfy a debt of the beneficiary” that arose before the period the benefit payments are certified to cover, a payee may discharge such a debt “if the current and reasonably foreseeable needs of the beneficiary are met” and it is in the beneficiary’s interest to do so. §§404.2040(d), 416.640(d). Finally, if there are any funds left over after a representative payee has used benefits for current maintenance and other authorized purposes, the payee is required to conserve or invest the funds and to hold them in trust for the beneficiary. §§404.2045, 416.645.

Id. at 376-77. The payee is thus expected to first ensure that the beneficiary’s current needs are met; may then pay other outstanding debts; and must conserve any remaining funds. Improper use of benefits by the payee is a criminal act. 42 U.S.C. § 408(a).

The Social Security regulations give a representative payee the discretion to direct the beneficiary’s funds in his best interests by paying his bills, including his current maintenance. The regulations do not

require Medicaid to fund the full cost of a Social Security beneficiary's nursing care in the event the payee fails to pay the beneficiary's full participation amount. Nothing in the general payee regulations conflicts with, much less supersedes, the specific limitations on Medicaid participation deductions in 42 C.F.R. § 435.832 and DSHS's rules.

As the Home points out, just because a liability exists does not mean that the beneficiary or payee must necessarily pay it. Opening Br. at 39. For instance, a payee may prioritize paying for current personal needs such as shoes, or even recreation such as a movie, over paying the full charges of the institution where the beneficiary resides. 20 C.F.R. § 404.2040. And under the anti-attachment provision, the institution where the beneficiary resides cannot garnish or execute on the beneficiary's Social Security income to ensure that it gets paid first. But nothing in 20 C.F.R. § 404.2040, which governs whether a payee's use of benefits is proper, requires that the unpaid creditor forgive the beneficiary's debt, or requires the Medicaid program to increase its payments to the facility.

In the example given in the Social Security regulations, there is an assumption that the beneficiary will suffer no ill results from nonpayment of his institutional charges—for instance, because the beneficiary resides in a state institution from which he cannot be evicted. If the beneficiary lives in his own home and must pay his rent or his mortgage, the purchase

of new shoes may take lower priority; certainly the Home does not mean to argue that a private landlord is required to reduce the beneficiary's rent if the payee decides to prioritize other bills. Similarly, if Mr. Leavitt were held liable for the Home's attorney fees but no participation deduction were available to allow for such an expense, his payee would have to choose between paying the full participation amount or paying the court-ordered attorney fees. Weighing the beneficiary's best interests to determine how best to disburse a fixed amount of Social Security income is precisely the job of the representative payee. The payee's decision to pay the Home's attorney fees first would no more invalidate the participation Mr. Leavitt owes than the opposite decision would invalidate the court-ordered attorney fees. One or the other simply becomes a debt that may be paid at a later date. The anti-attachment provision means that a creditor cannot force the payee to pay one bill before another, not that a Social Security beneficiary has no creditors.

The Home is, in fact, Mr. Leavitt's creditor twice over: as his nursing home, it collects participation payments from him to cover the portion of his costs of care that are not covered by Medicaid; and as the petitioner in this case, it seeks attorney fees against him. Further complicating the picture, it is the Home itself as Mr. Leavitt's representative payee that could be put in the position of having to decide

between paying Mr. Leavitt's outstanding attorney fee judgment or paying Mr. Leavitt's participation to his nursing facility. That conflict may well be the motivating force behind the Home's arguments in this case. Placed in the position of having to choose between paying itself attorney fees, or paying itself cost of care, the Home attempts to find a third option: get a court order requiring DSHS to foot the bill, even if DSHS regulations do not allow it.

DSHS regulations specifically speak to the situation where a nursing facility is unable to collect everything it is owed from a patient. Collecting the patient's participation is up to the facility. WAC 388-96-803. If the facility is unable to collect, the solution is to report the uncollected amount as a cost of business, which is factored into the facility's Medicaid payment rate. WAC 388-96-585(2)(j). The Home's proposed solution, that DSHS increase its Medicaid payments to the Home to cover any funds the Home is unable to collect, finds no support in the law. Because nothing in the state or federal Medicaid rules allows, much less requires, an unlimited deduction for court-ordered attorney fees, the Home's claims fail.

H. Attorney Fees

The Home requests attorney fees on appeal from DSHS under RCW 11.96A.150. Opening Br. at 47. In a Title 11 proceeding, a court

may order reasonable attorney fees to any party from any other party. RCW 11.96A.150(1). One factor that may be relevant to the equity of awarding fees is “whether the litigation benefits the estate” involved. *Id.* “An award of fees to either party is unwarranted” under RCW 11.96A.150 where the case raises “novel issues of statutory construction.” *Estate of D’Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (collecting cases). Novel issues also provide a reason for reversal of an award of attorney fees at the trial level. *Id.* at 402. The Home’s appeal presents legal questions of first impression and is brought not to benefit Mr. Leavitt’s estate, but rather to seek additional fees to be awarded against his estate. Even if the Home’s appeal is successful, attorney fees under RCW 11.96A.150 are inappropriate.

The Home also requests fees under the Equal Access to Justice Act (EAJA), RCW 4.84.350. Opening Br. at 48. Under the EAJA, a court “shall award” attorney fees to “a qualified party that prevails in a judicial review of an agency action.” Judicial review “means a judicial review as defined by chapter 34.05 RCW”, the APA. RCW 4.84.340(4). Contrary to the Home’s reasoning, judicial review under the APA does not simply refer to any case in which a state agency appears, or in which agency regulations provide substantive law. Rather, judicial review refers to a particular statutory process that the Home clearly did not follow in this

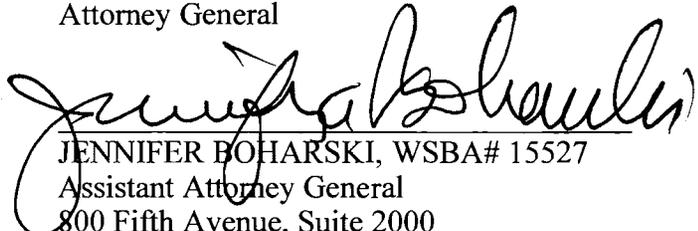
case. *E.g.*, RCW 34.05.546 (required contents of petition for judicial review). The EAJA does not provide for attorney fees in RCW Title 11 guardianship cases.

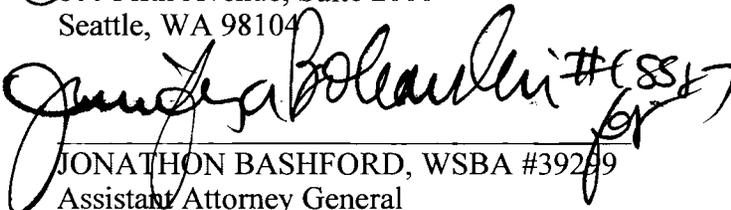
V. CONCLUSION

The Home is incorrect that the courts may preemptively adjudicate questions of Medicaid assistance and effectively enjoin the state Medicaid program in a guardianship proceeding. But having alleged that the state Medicaid program would subsidize any attorney fees that Mr. Leavitt was ordered to pay by increasing his medical assistance, the Home cannot avoid the clear cap placed on such subsidies. Given the equities in this case, the superior court did not abuse its discretion in awarding only \$700 of attorney fees against the estate of Mr. Leavitt.

RESPECTFULLY SUBMITTED this 15th day of August, 2011.

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

In the Matter of the

GUARDIANSHIP OF RICK LEAVITT
An Incapacitated Person;

CAROLINE KLINE GALLAND HOME,
Appellant,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,
Respondent.

NO. 66436-1-I

CERTIFICATE OF
SERVICE

I certify that on August 11, 2011, I caused to be served a true and correct copy of the RESPONSE BRIEF, NOTICE OF APPEARANCE OF ASSISTANT ATTORNEY GENERAL, JONATHAN BASHFORD, AND CERTIFICATE OF SERVICE on all parties or their counsel of record, as follows:

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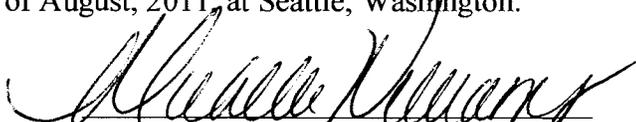
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 11th day of August, 2011, at Seattle, Washington.


Michelle Williams, Legal Assistant

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STATE OF WASHINGTON
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