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NO. 64144-1-I

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

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In the Matter of the  
GUARDIANSHIP OF JANETTE KNUTSON,  
An Incapacitated Person.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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**RESPONSE BRIEF**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER-STATEMENT OF ISSUES .....	1
III.	COUNTER-STATEMENT OF THE CASE.....	2
IV.	ARGUMENT IN RESPONSE .....	7
	A. Standard Of Review .....	8
	B. DSHS’s Motion Was Properly Before The Guardianship Court .....	9
	1. DSHS had standing to bring a motion before the guardianship court as an entity allegedly subject to an order of the court. ....	10
	2. DSHS’s Motion to Direct Payment was properly before the court because DSHS has Ms. Knutson in its care and custody. ....	11
	3. DSHS’s Motion to Amend was properly before the court because the 2008 Order was not final. ....	11
	4. DSHS is not barred from bringing a motion in the guardianship court by its failure to object to a non- final order. ....	14
	5. The superior court’s order did not materially amend the 2008 Order because the 2008 Order did not require DSHS to reduce participation based on Ms. Knutson’s charitable giving.....	17
	C. The Social Security Anti-Attachment Provision Does Not Prevent A State Court From Overseeing The Estate Of A Social Security Beneficiary.....	20

1.	The anti-attachment provision bars only legal process similar to execution, levy, attachment, or garnishment. ....	20
2.	Representative payees are under the control of the federal Social Security Administration, not state guardianship courts.....	22
3.	The superior court’s order amending its earlier grant of authority to the guardians does not violate the anti-attachment provision. ....	24
a.	An order directed to the guardian of an incapacitated person does not transfer property controlled by the person’s representative payee. ....	24
b.	The procedure under RCW 11.92.040(6) for ensuring that an incapacitated person’s care and maintenance needs are met is not concerned with discharging a legally enforceable liability. ....	27
D.	The Superior Court Properly Amended Its Prior Order To Eliminate Clearly Erroneous Directions To The Guardians .....	29
1.	Charitable donations of a ward’s assets may not take precedence over the ward’s cost of care.....	29
2.	Charitable donations are not a valid deduction from Ms. Knutson’s cost of care. ....	32
3.	Charitable donations constitute a misuse of Ms. Knutson’s Social Security benefits.....	33
E.	Attorney Fees .....	35
V.	CONCLUSION .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Dix v. ICT Group, Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (2007).....	9
<i>Ecolono v. Div. of Reimbursements</i> , 137 Md. App. 639, 769 A.2d 296 (2001) .....	26
<i>Estate of Burks v. Kidd</i> , 124 Wn. App. 327, 100 P.3d 328, <i>review denied</i> , 154 Wn.2d 1029 (2005).....	36
<i>Estate of D'Agosto</i> , 134 Wn. App. 390, 139 P.3d 1125, <i>review denied</i> , 160 Wn.2d 1016 (2007).....	35, 36
<i>Florence Nightingale Nursing Home v. Perales</i> , 782 F.2d 26, <i>cert. denied</i> , 479 U.S. 815, 107 S. Ct. 68, 93 L. Ed. 2d 26 (1986).....	33
<i>In re Guardianship of Johnson</i> , 112 Wn. App. 384, 48 P.3d 1029 (2002).....	8, 9
<i>In re Marriage of Goodell</i> , 130 Wn. App. 381, 122 P.3d 929 (2005).....	10
<i>In the Matter of J.G.</i> , 186 N.C. App. 496, 652 S.E.2d 266 (2007).....	25
<i>Kolbeson v. DSHS</i> , 129 Wn. App. 194, 118 P.3d 901 (2005).....	34
<i>Mearns v. Scharbach</i> , 103 Wn. App. 498, 12 P.3d 1048, <i>review denied</i> , 143 Wn.2d 1011 (2001).....	35
<i>Parsons v. Dep't of Social &amp; Health Servs.</i> , 129 Wn. App. 293, 118 P.3d 930 (2005), <i>review denied</i> , 157 Wn.2d 1004 (2006).....	3

<i>Philpott v. Essex County Welfare Bd.</i> , 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).....	21
<i>Seattle-First National Bank v. Brommers</i> , 89 Wn.2d 190, 570 P.2d 1035 (1977).....	14, 25
<i>Shelley v. Elfstrom</i> , 13 Wn. App. 887, 538 P.2d 149 (1975).....	9, 34
<i>State ex rel. Beck v. Carter</i> , 2 Wn. App. 974, 471 P.2d 127 (1970).....	9
<i>State v. Wicker</i> , 105 Wn. App. 428, 432-33, 20 P.3d 1007 (2001).....	9
<i>Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler</i> , 537 U.S. 371, 123 S. Ct. 1017 (2003).....	passim

**Statutes**

42 U.S.C. § 1381.....	20
42 U.S.C. § 1383(a)(2)(A)-(C) .....	22
42 U.S.C. § 1383(a)(2)(A)(ii)(I) .....	22
42 U.S.C. § 1383(a)(2)(A)(iii) .....	23
42 U.S.C. § 1383(a)(2)(A)(iv) .....	23
42 U.S.C. § 1383(a)(2)(C)(iv).....	23
42 U.S.C. § 1383(a)(2)(iii).....	26
42 U.S.C. § 1383(a)(ii) .....	22
42 U.S.C. § 1383(d)(1) .....	20
42 U.S.C. § 1383a(a)(4).....	23

42 U.S.C. § 1396o(a)(2)(C) .....	32
42 U.S.C. § 401 .....	20
42 U.S.C. § 405(j)(1)-(3) .....	22
42 U.S.C. § 405(j)(1)(A).....	22, 23
42 U.S.C. § 405(j)(3)(D).....	23
42 U.S.C. § 405(j)(7)(A).....	26
42 U.S.C. § 405(j)(8) .....	23
42 U.S.C. § 407(a) .....	passim
42 U.S.C. § 408(a)(5).....	23
Balanced Budget Act of 1997, Pub. L. 105-33, § 5522(c)(1) (1997).....	32
RCW 11.88.120 .....	13, 16
RCW 11.92.010 .....	8, 14, 25
RCW 11.92.035(2).....	27, 28
RCW 11.92.040(2)-(3).....	4
RCW 11.92.040(4).....	30
RCW 11.92.040(6).....	passim
RCW 11.92.050 .....	13
RCW 11.92.053 .....	12, 13
RCW 11.92.140 .....	passim
RCW 11.92.150 .....	2, 15, 17

RCW 11.92.180 .....	passim
RCW 11.96A.150.....	2, 35, 36
RCW 11.96A.150(1).....	35
RCW 11.96A.150(2).....	35
RCW 34.05.510 .....	29
RCW 4.28.080 .....	18
RCW 4.92.020 .....	18
RCW 43.20B.....	34
RCW 43.20B.410.....	19, 29, 30
RCW 43.20B.410 - .455 .....	30, 32
RCW 43.20B.415.....	4, 30
RCW 43.20B.420.....	29
RCW 71A.20.020.....	3

**Other Authorities**

Department of Social and Health Services, <i>Division of Developmental Disabilities – Services Provided</i> , at <a href="http://www.dshs.wa.gov/ddd/services.shtml">http://www.dshs.wa.gov/ddd/services.shtml</a> (last visited Jan. 27, 2010) .....	3
Washington State Office of Financial Management, <i>Feasibility Study for the Closure of State Institutional Facilities</i> (November 2009), at 3.18, available at <a href="http://www.ofm.wa.gov/facilities/report/part3_rh.pdf">http://www.ofm.wa.gov/facilities/report/part3_rh.pdf</a> (last visited Jan. 27, 2010).....	3
<i>Webster’s Third New International Dictionary</i> 800 (2002) .....	18

**Rules**

RAP 9.11 ..... 10

WAC 388-513-1380..... 4, 19, 29, 32

WAC 388-513-1380(4) - (5)..... 32

WAC 388-513-1380(5)(e) ..... 33

WAC 388-515-1505(8)..... 4

WAC 388-79 ..... 15

WAC 388-79-020..... 4

WAC 388-79-050..... 19

WAC 388-825-089..... 32

**Regulations**

20 C.F.R. § 404.2001 ..... 22

20 C.F.R. § 404.2010 ..... 22

20 C.F.R. § 404.2040(a)..... 34

20 C.F.R. § 404.2040(b) ..... 23, 34

20 C.F.R. § 404.2040(d) ..... 21

20 C.F.R. § 404.2045 ..... 29, 34

20 C.F.R. § 404.2050 ..... 23

20 C.F.R. § 416.601 ..... 22

20 C.F.R. § 416.610..... 22

20 C.F.R. § 416.640(a)..... 34

20 C.F.R. § 416.640(b) .....	23
20 C.F.R. § 416.640(d) .....	21
20 C.F.R. § 416.645 .....	29, 34
20 C.F.R. § 416.650 .....	23
42 C.F.R. § 435.725 .....	32
42 C.F.R. § 435.725(c).....	33
42 C.F.R. § 435.725(d) .....	33
42 C.F.R. § 435.733 .....	32
42 C.F.R. § 435.733(c).....	33
42 C.F.R. § 435.733(d) .....	33
42 C.F.R. § 435.832 .....	32
42 C.F.R. § 435.832(c).....	33
42 C.F.R. § 435.832(d) .....	33

## I. INTRODUCTION

Janette Knutson is a legally incapacitated adult residing in a state-run facility for the developmentally disabled. Her guardians David Knutson and Susan Hall appeal from an order of the guardianship court overseeing Ms. Knutson's assets, which consist primarily of Social Security income.

In a prior *ex parte* order, the superior court allowed the guardians to distribute most of Ms. Knutson's monthly income to charity. The guardians have argued that prior order also required the Department of Social and Health Services to count such donations as if they were an allowable deduction from Ms. Knutson's responsibility to contribute to her cost of care. On DSHS's motion, filed after the guardians' interpretation of the court's prior order became clear, the guardianship court amended its prior order. The amended order disallows any further donations; allows DSHS to calculate Ms. Knutson's cost of care responsibility in accordance with federal and state regulations, which do not include a deduction for charitable donations; and directs the guardians to pay a portion of the monthly cost of Ms. Knutson's care and maintenance in the state-run facility. The guardians argue that the superior court did not have the power to issue its amended order.

## II. COUNTER-STATEMENT OF ISSUES

1. 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 preempt the authority of a state court, in the context of an ongoing guardianship, to oversee the estate of an incapacitated person whose primary asset consists of Social Security benefit checks?

2. Does a superior court act within its discretion when it directs the guardian of an indigent incapacitated person to pay the ward's monthly costs of care and maintenance, rather than donating the same amount to charity?
3. May a superior court consider a motion, brought in a guardianship matter by a non-party entitled to special notice of proceedings under RCW 11.92.150, to clarify and amend a prior *ex parte* order of the court, where the guardian attempts to apply that order against the non-party in a manner that is contrary to law?
4. Is a guardianship court's order under RCW 11.92.140 permitting a guardian to make donations from a ward's monthly income a final order such that the supervising court is powerless to revoke the guardian's continuing authority to make such donations?
5. Should attorney fees and costs be awarded on appeal under RCW 11.96A.150 where the appeal raises novel issues of statutory construction?

### **III. COUNTER-STATEMENT OF THE CASE**

In 1980, King County Superior Court declared Janette Knutson to be a legally incapacitated person, and appointed her parents Ramona and David Knutson as her guardians. CP at 1-2. At some point Ramona

Knutson was removed as guardian; Susan Hall joined David Knutson as co-guardian in 2007. CP at 7. David Knutson has also been appointed by the Social Security Administration to act as representative payee for Ms. Knutson's Social Security benefits. CP at 76. Those benefits, around \$723.00 per month, are the primary asset in Ms. Knutson's estate. CP at 64. During parts of the relevant time period, Ms. Knutson has also had a small amount of earned income from her work in a sheltered workshop. See CP at 64.

Ms. Knutson is a client of the Department of Social and Health Services' Division of Developmental Disabilities. CP at 34. She resides at Fircrest School, where she is in the care and custody of DSHS. CP at 34. Fircrest, located in Seattle, is one of five residential habilitation centers (RHCs, formerly known as "state residential schools") established by state law to serve persons with developmental disabilities. RCW 71A.20.020. "RHCs provide for those children and adults who are exceptional in their needs for care, treatment, and education by reason of developmental disabilities." *Parsons v. Dep't of Social & Health Servs.*, 129 Wn. App. 293, 296, 118 P.3d 930 (2005), *review denied*, 157 Wn.2d 1004 (2006).<sup>1</sup> As a resident of Fircrest, Ms. Knutson is financially

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<sup>1</sup> Individuals residing at RHCs receive habilitation training, 24-hour supervision, medical and nursing care, and various specialized services. Department of Social and Health Services, *Division of Developmental Disabilities – Services Provided*, at <http://www.dshs.wa.gov/ddd/services.shtml> (last visited Jan. 27, 2010). Over 600 full-time employees serve Fircrest's 210 residents. Washington State Office of Financial Management, *Feasibility Study for the Closure of State Institutional Facilities* (November 2009), at 3.18, available at [http://www.ofm.wa.gov/facilities/report/part3\\_rh.pdf](http://www.ofm.wa.gov/facilities/report/part3_rh.pdf) (last visited Jan. 27, 2010). The

responsible for the cost of her long-term care in that facility. RCW 43.20B.415. As it does with all other Fircrest residents, DSHS periodically calculates the amount that Ms. Knutson can afford to pay each month and sends a letter to that effect to Ms. Knutson and to her guardian. CP at 36-67; *see* WAC 388-513-1380 (describing manner in which DSHS determines an individual's ability to pay). The amount she pays is customarily referred to as her participation in cost of care, or simply "participation." *See, e.g.* WAC 388-79-020; WAC 388-515-1505(8).

Guardians of incapacitated persons are required to file accountings with the appointing court every one to three years. RCW 11.92.040(2)-(3). In January 2008, the guardians filed with the superior court a report and accounting "cover[ing] the period July 1, 2004 through June 30, 2007." CP at 7. Copies of the report and the guardians' proposed order were sent to DSHS as required by RCW 11.92.180. CP at 3. On February 15, 2008, the court entered an Order Approving Guardian's Report, Accounting, Budget, and Personal Care Plan ("2008 Order"). CP at 19-20. The 2008 Order approved the guardian's report and activities for the prior three years, and set the next accounting period for the 36 months beginning July 1, 2007. CP at 19.<sup>2</sup>

In addition to approving the guardians' past activities, the 2008 Order provided certain prospective guidance to the guardian until the next

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cost per resident at Washington's RHCs averages \$543.22 a day, or nearly \$200,000 per year. *Id.* at 3.20.

<sup>2</sup> According to the Washington Courts case records website, the next guardianship report and accounting for Ms. Knutson is due September 9, 2010.

accounting. CP at 19-20. The court permitted the guardians to collect a provisional allowance of guardian fees of \$175 per month until the next report is due, "subject to future court approval." CP at 19. Paragraph 4 of the order provides that the guardians:

may exercise his [sic] discretion to donate up [sic] the remaining balance of each monthly social security benefit amount (a) to organizations advocating on behalf of the developmentally disabled, including the following organizations: Action RHC, Friends of Fircrest, VOR, or similar organizations, and/or (b) for lobbying expense for legislation that benefits or advances the rights and interests of Janette Knutson. Those expenses are reasonable and necessary and are approved for payment.

CP at 19-20. The order goes on in Paragraph 10 to provide that certain other entities are subject to the order:

The foregoing fees and expenses shall be paid by David Knutson as representative payee of Janette Knutson's social security benefits, who shall deduct these fees and expenses from the benefits when calculating participation in cost of care, and prior to transmittal of any benefits to the DSHS Office of Financial Recovery. No part of said income paid for guardian or attorney fees or any of the foregoing expenses shall be deemed available to the recipient of such benefits. DSHS shall, within 30 days of receipt of this Order, confirm payment of such fees by adjusting the award letter or other document calculating client participation for each calendar month.

CP at 20. DSHS was not present at the February 15, 2008, hearing. Following the entry of the 2008 Order, the guardians ceased sending cost of care payments to Fircrest. CP at 35.

On April 23, 2009, DSHS filed a motion in the guardianship case, titled “Motion to Direct Payment and Amend Order Approving Guardian’s Report.” CP at 23-31. DSHS’s motion requested that the court remove the guardians’ authority to donate Ms. Knutson’s income each month; direct the guardians to instead pay Ms. Knutson’s participation cost at Fircrest; and require the guardians to repay the guardianship estate for the amounts improperly donated from February 2008 through April 2009, or in the alternative to eliminate the guardians’ fee allowance to allow Ms. Knutson to pay her outstanding balance to Fircrest. CP at 29-30.

A hearing on DSHS’s motion was held before the court commissioner on May 8, 2009, and the motion denied. CP at 78. DSHS’s motion for reconsideration was also denied, though on slightly different grounds. CP at 99-100. DSHS and the guardians filed cross-motions for revision of the commissioner’s ruling. CP at 102-114; *see* CP at 165.<sup>3</sup> On revision, the superior court removed the guardians’ authority to donate Ms. Knutson’s income; clarified that the guardianship court’s order did not prevent DSHS from making a proper determination of Ms. Knutson’s cost of care; and directed the guardians to resume paying Ms. Knutson’s cost of care to Fircrest. CP at 166. The guardians timely appealed.

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<sup>3</sup> The guardians have not included their motion for revision as part of the clerk’s papers. However, that motion is not necessary to permit the court to decide this case on the merits.

#### IV. ARGUMENT IN RESPONSE

The anti-alienation provision of the federal Social Security Act, 42 U.S.C. § 407(a), bans the use of attachment, garnishment, or similar “legal process” to collect against an individual’s Social Security benefits. The central question in this case is to what extent that provision preempts a state court’s power to oversee the activities of a court-appointed guardian of the estate of an incapacitated person whose primary asset is a monthly Social Security check. In this case the guardian appointed by the State of Washington has also been appointed by the federal Social Security Administration to act as the representative payee of the ward’s Social Security benefits. While the state courts have no authority to order David Knutson in his role as representative payee to dispose of Ms. Knutson’s Social Security benefits in any particular fashion, the guardianship court retains jurisdiction over his activities as guardian. Because the superior court’s order is directed to David Knutson in his capacity as guardian, and not in his capacity as representative payee, the court’s authority was not preempted by federal law.

The guardians’ additional arguments, regarding the finality of the court’s 2008 order and the ability of a third party to bring a motion in the guardianship court, also fail. The superior court has the power to amend its directives to a guardian at any time, upon motion of any person or even *sua sponte*.

**A. Standard Of Review**

Appellant guardians begin their case by mis-stating the standard of review. The management of the guardianship of an incapacitated person is largely left to the discretion of the superior court. *See* RCW 11.92.010 (the guardian remains “under the general direction and control of the court making the appointment”). Where a matter is left to the discretion of the superior court, the proper standard of review is abuse of discretion. *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002).

In this case the superior court was exercising its power under RCW 11.92.040(6) and RCW 11.92.140. Both statutes grant wide discretion to the superior court. Under RCW 11.92.040(6) a guardian is required to apply to the court for an order authorizing disbursements from the estate of the incapacitated person. Other persons or entities “having the care and custody of the incapacitated person” may apply to the court for an order directing the guardian to make payments for the maintenance of the incapacitated person “as the court may direct[.]” *Id.* “The amounts authorized under this section may be decreased or increased from time to time by direction of the court.” *Id.* Likewise, under RCW 11.92.140 a guardianship court “may authorize the guardian to take any action, or to apply funds not required for the incapacitated person's own maintenance and support, in any fashion the court approves . . . .”

“The general rule of statutory construction has long been that the word ‘may’ when used in a statute or ordinance is permissive and operates

to confer discretion.” *State ex rel. Beck v. Carter*, 2 Wn. App. 974, 977, 471 P.2d 127 (1970). Where the word “may” is used in regard to a guardianship court’s authority, the proper standard of review is abuse of discretion. *In re Guardianship of Johnson*, 112 Wn. App. at 387-88; *but see Shelley v. Elfstrom*, 13 Wn. App. 887, 889, 538 P.2d 149 (1975) (an appellate court may “act *sua sponte* to protect the apparent interests of a ward”).

“Under [the abuse of discretion] standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (internal citations omitted). 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).

**B. DSHS’s Motion Was Properly Before The Guardianship Court**

DSHS’s Motion of April 26, 2009 was styled a “Motion to Direct Payment and Amend Order Approving Guardian’s Report.” The superior court correctly treated it as both a motion to show cause why the 2008 Order should not be amended, and a motion to direct payment by the guardian to pay for the ward’s current care and maintenance. Because the relevant portions of the 2008 order were not final, and because DSHS had

standing to bring its motion, the superior court did not abuse its discretion by hearing the motion.

**1. DSHS had standing to bring a motion before the guardianship court as an entity allegedly subject to an order of the court.**

The guardians' argument that DSHS did not have standing is frivolous. Their basic argument is that DSHS has not proven in this proceeding that Ms. Knutson has a legally-enforceable debt to DSHS, or that DSHS has not properly made an administrative determination of Ms. Knutson's monthly participation in cost of care. Because this case is neither a collection action nor an administrative appeal, DSHS was not required to prove those facts.<sup>4</sup> And in any case, DSHS clearly had standing to petition the guardianship court to amend or clarify an order to which DSHS was purportedly subject. CP at 20.

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<sup>4</sup> Moreover, DSHS did prove those facts. CP at 36-67, 162-164. The benefit letters that announce an individual's expected participation do not in themselves create a legally-binding debt obligation; that obligation is set by a separate process. For instance, in 1986 DSHS determined that Ms. Knutson would be liable to pay \$142.38 per month in participation, leaving \$36.62 for clothing and personal incidentals. CP at 149. Notice of that determination was sent to Ms. Knutson and her guardian by certified mail. CP at 147-52. Following a request by Ms. Knutson for an administrative hearing, a settlement was reached between DSHS and Ms. Knutson in which Ms. Knutson would pay all of her Social Security income, minus \$121.62 in various deductions, to DSHS to cover her cost of care obligation; the deduction was to increase to \$201.62 beginning in July 1987. CP at 162-164. On the current record, it appears that liability is still binding and collectable.

The archived documents from 1986 were unavailable at the initial hearing before the commissioner, and were entered into the record on DSHS's motion to supplement the record on revision, which was granted by the superior court judge. RP at 41; see CP at 165 (conclusion of law based on 1986 records). Granting the motion to supplement the record may have been in error. See *In re Marriage of Goodell*, 130 Wn. App. 381, 389, 122 P.3d 929 (2005) (error for superior court to consider additional evidence on revision); RAP 9.11 (standard for taking additional evidence on appeal includes that the additional evidence is likely to change the outcome). Because this is not a collection action, the existence of a legally-enforceable debt dating to the 1980s is irrelevant to this case; any error in granting that motion is also irrelevant.

**2. DSHS's Motion to Direct Payment was properly before the court because DSHS has Ms. Knutson in its care and custody.**

In its motion below, DSHS requested that the court direct the guardian to pay Ms. Knutson's participation in the costs of her care at Fircrest School, rather than donating Ms. Knutson's entire income (other than the portion used to pay the guardians' own fees) to charitable organizations that advocate for the disabled. RCW 11.92.040(6) provides that a person or department "having the care and custody of an incapacitated person, may apply to the court for an order directing the guardian... of the estate to pay... an amount... to be expended in the care, maintenance, and education of the incapacitated person[.]" As the department having care and custody of Ms. Knutson, DSHS is an entity allowed to bring a motion under RCW 11.92.040(6). The statute does not place any limitations upon when such a motion can be brought. The superior court did not abuse its discretion by considering the motion.

**3. DSHS's Motion to Amend was properly before the court because the 2008 Order was not final.**

In its 2008 Order, the court granted the guardians the ongoing authority to make donations of Ms. Knutson's income each month. The guardians also interpret the 2008 Order to require DSHS to count such donations as an allowable deduction when calculating Ms. Knutson's cost of care responsibility.<sup>5</sup> DSHS requested that the superior court amend the 2008 Order to require in the future that the guardians direct Ms. Knutson's

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<sup>5</sup> As discussed *infra* at 17, DSHS disputes that interpretation.

assets toward her care and maintenance needs prior to making any donations; and to clarify that DSHS should calculate Ms. Knutson's cost of care in accordance with applicable laws and regulations. Because the 2008 Order was not final, the court retained the authority to clarify or amend it at any time up to a final accounting.

RCW 11.92.053 requires that a final accounting be made by the guardian upon the termination of a guardianship. After conducting that accounting, the court enters a final, appealable order which terminates the guardianship case, settles all accounts, and approves the guardian's exercise of his duties. *Id.* However, the guardian is not required to wait until his ward dies or is restored to competency prior to receiving court approval of his actions:

Upon the filing of any intermediate guardianship or limited guardianship account required by statute, or of any intermediate account required by court rule or order, the guardian or limited guardian may petition the court for an order settling his or her account with regard to any receipts, expenditures, and investments made and acts done by the guardian or limited guardian **to the date of the interim report**. Upon such petition being filed . . . the court may also appoint a guardian ad litem, whose duty it shall be to investigate the report of the guardian or limited guardian of the estate and to advise the court thereon at the hearing, in writing . . . . [I]f the court is satisfied that the actions of the guardian or limited guardian have been proper . . . the court shall enter an order approving such account. **If the court has appointed a guardian ad litem, the order shall be final** and binding upon the incapacitated person, subject only to the right of appeal as upon a final order; provided that at the time of final account of said guardian or limited guardian or within one year after the incapacitated person

attains his or her majority any such interim account may be challenged by the incapacitated person on the ground of fraud.

RCW 11.92.050 (emphasis added). While a guardian may thus request intermediate approval of the discharge of his duties, such an order only settles the accounts up to the date of the guardian's report; and even then, is still subject to amendment at a future time unless a guardian *ad litem* (who, unlike the guardian, has no conflict of interest) was appointed to ensure that the guardian reported accurately.

Paragraph 1 of the 2008 Order approved the guardians' activities for the period covered by their report, CP at 19; that is, through June 30, 2007. CP at 7. As no guardian *ad litem* investigated the veracity of the 2007 report, even that approval is merely provisional, still subject to a final accounting under RCW 11.92.053. The remaining paragraphs of the 2008 Order do not involve the guardians' past actions at all, but rather provide some direction from the court as to how the guardians should properly administer the guardianship until the court next reviews the case. Those parts of the 2008 Order were merely preliminary and subject to amendment at any future time, upon the court's own motion or the motion of the guardian or any other person. RCW 11.92.040(6) ("order authorizing disbursements on behalf of the incapacitated person" may be amended and "decreased or increased from time to time by direction of the court"); RCW 11.88.120 ("Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a

guardianship”); see RCW 11.92.180 (guardian may request fees “at any time during the administration of the estate”).

Moreover, the superior court’s amending order does not pass judgment upon the guardians’ prior actions, but merely provides new direction for their future activities. CP at 165-67. The guardians here appear to argue that after entering its 2008 Order authorizing the guardians to take certain actions over the following three years, the court could not revisit that order at any time prior to when the guardians themselves next file a report and accounting.<sup>6</sup> That argument flies in the face of the court’s ongoing jurisdiction and control over the guardianship, RCW 11.92.010; the court has a duty as the “superior guardian of the ward” to ensure that the guardianship is at all times administered in a manner that is both legal and in the best interests of the incapacitated ward. *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). The court had the power to amend its prior, non-final order on its own motion; the fact that a third party rather than the court itself brought the motion does not eliminate the court’s authority to amend the prior order.

**4. DSHS is not barred from bringing a motion in the guardianship court by its failure to object to a non-final order.**

The guardians argue that because DSHS did not appear at the hearing in February 2008, it cannot now request that the order entered at

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<sup>6</sup> While a guardian is legally required to file such reports within 90 days of the anniversary of the guardianship, RCW 11.92.040(2), in practice a guardian may not file his report for many months. See CP at 7 (report filed in January 2008 for the period ending June 2007).

that hearing be amended in a forward-looking manner. DSHS's absence did not constitute a default such that it waived any claim relevant to the forward-looking amendment of the 2008 Order. As discussed *supra*, the 2008 Order challenged by DSHS was not final, but rather authorized certain activities by the guardians, the ultimate approval of which must await a final guardianship report and accounting. The superior court did not abuse its discretion by rejecting the guardians' attempt to treat the *ex parte* 2008 Order as if it were a final judgment against DSHS.

Guardianship accountings are typically *ex parte* proceedings, which presents a problem for the court which has only the guardian's potentially self-interested reports to inform it when making decisions that will affect the incapacitated person. One way in which this conflict is tempered is by RCW 11.92.150, which provides that any interested person or entity may ask to receive notice of "any account, report, petition, or proceeding" filed in the case. Because Ms. Knutson is required to participate in her cost of care, DSHS is automatically entitled to such notice. RCW 11.92.180. However, a person who receives such "special notice of proceedings" is not a party to the case. DSHS's interest is not in the manner of an adversary relationship to the ward. Rather, DSHS is given notice in those circumstances in order to allow it to respond to guardian fee requests in cases controlled by DSHS's rules in chapter 388-79 WAC; and because DSHS, as the agency with the incapacitated person in its care, is in a good position to alert the court to any problems with the administration of the guardianship.

Nothing prevents a guardian, in the middle of a guardianship reporting period, from requesting the court to amend its order concerning the guardian's authority for the current reporting period. *See* RCW 11.92.180 (guardian may request fees "at any time during the administration of the estate"). Nor should anything prevent an interested third party, such as DSHS, from requesting such an amendment. *See* RCW 11.92.040(6) ("order authorizing disbursements on behalf of the incapacitated person" may be amended and "decreased or increased from time to time by direction of the court"); RCW 11.88.120 ("Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship" at any time).

Because a guardian's actions are ultimately subject to court approval at a guardianship accounting, the failure of DSHS to object to *prospective* guardianship activities does not result in any prejudice to the guardian or his ward, and does not constitute a waiver of any of DSHS's interest in seeing that the final guardianship accounting comply with state and federal law. DSHS and any other interested party retain the right to challenge the final guardianship accounting at the end of the current reporting period. At that time any improper disposal of guardianship assets may be rectified by the court. It would ill-serve incapacitated persons if third parties could only approach the court with potential problems at times of the guardian's own choosing, which is why the guardianship statute does not require that resolution be delayed. *See* RCW 11.88.120 (third-party modification or termination of guardianship).

Given that Ms. Knutson's guardian's disposal of guardianship assets for the current guardianship period has not yet been given final approval by the court, DSHS was not barred from bringing to the court's attention its concerns regarding the appropriateness of the guardians' actions under the 2008 Order.

**5. The superior court's order did not materially amend the 2008 Order because the 2008 Order did not require DSHS to reduce participation based on Ms. Knutson's charitable giving.**

The superior court in its order below concluded: "The language of the 2008 Order is unclear. However, the Guardian reasonably relied upon the February 2008 Order when making donations of Ms. Knutson's month [sic] Social Security income." CP at 166. The court did not attempt to construe the actual meaning of the text of the 2008 Order. Because the 2008 Order in fact did not require DSHS to reduce Ms. Knutson's participation on the basis of her charitable donations, the court's order below in fact clarified but did not materially change the terms of the 2008 Order.

Following the entry of the 2008 Order, the guardians requested that DSHS find that Ms. Knutson's cost of care obligation is reduced by any amount donated by the guardians. Their position throughout these proceedings has been that the 2008 Order required DSHS to do so.<sup>7</sup>

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<sup>7</sup> In fact, the guardianship court lacked personal jurisdiction over DSHS, so that portion of the order requiring DSHS to take certain actions was void and unenforceable. Nothing in the "special notice of proceedings" statute, RCW 11.92.150, allows such special notice to take the place of normal methods of obtaining personal jurisdiction over

DSHS brought its motion in part to clarify that the guardian's interpretation of the 2008 Order was incorrect. The language of the order on its face did not require DSHS to deduct amounts donated by the guardians from Ms. Knutson's cost of care.

The text of the 2008 Order consistently differentiates between "fees"—those of the guardians and their attorney, discussed in Paragraph 3 of the order; and "expenses"—the amount of Ms. Knutson's income donated to charity by guardians, discussed in Paragraph 4.<sup>8</sup> In Paragraph 10 the difference becomes important with respect to what DSHS was and was not asked to do:

The foregoing **fees and expenses** shall be paid by David Knutson as representative payee ... who shall deduct these **fees and expenses** from the benefits when calculating participation in cost of care, and prior to transmittal of any benefits to the DSHS Office of Financial Recovery. No part of said income paid for guardian or attorney **fees** or any of the foregoing **expenses** shall be deemed available to the recipient of such benefits. **DSHS shall ... confirm payment of such fees** by adjusting the award letter or other document calculating client participation for each calendar month.

CP at 20. The portion of the order purportedly controlling DSHS's conduct refers only to the fees, not to "expenses" or donations. Given that

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a party. Personal jurisdiction over a state agency requires service of a summons, not merely mailing of a letter. RCW 4.28.080; RCW 4.92.020.

<sup>8</sup> A donation made without consideration in return is not an "expense" under any normal understanding of that term. The definition of "expense" is, in relevant part, "something that is expended in order to secure a benefit or bring about a result." *Webster's Third New International Dictionary* 800 (2002). The disposal of money is not made to "secure a benefit" nor to "bring about" a particular "result" if nothing valuable is received in return. Nothing in the record describes what benefit or result the donation of Ms. Knutson's assets might possibly secure for her.

the clear meaning of the text thus differs from the manner in which the guardian has attempted to enforce it, DSHS was not defaulted, estopped or otherwise barred from asking for clarification or amendment by the court of its 2008 Order.

Even if its text is, as the court below held, “unclear”, the order should be read in the manner urged by DSHS. A guardian has a duty to pay for a ward’s actual needs and expenses prior to charitable donation of estate assets, RCW 11.92.140; and a court may only authorize the deduction of guardian fees and costs (not demand the deduction of a ward’s donations or expenses) from a DSHS client’s cost of care, RCW 11.92.180; WAC 388-79-050. The order should also be read in light of the clear public policy in favor of a Fircrest resident participating in her cost of care, RCW 43.20B.410; and the legal difference between guardian fees and a ward’s expenses in the context of calculating a client’s participation obligation, WAC 388-513-1380; *see discussion infra* at 32. On those bases, the clearest way to read the 2008 Order is that it did not require DSHS to deduct charitable donations from Ms. Knutson’s cost of care, and authorized charitable donations only in the absence of any other financial obligations. The superior court’s amendment of the 2008 Order thus did not substantially change the rights or obligations of Ms. Knutson, her guardians, or DSHS; but rather clarified the language of the previous order to foreclose an erroneous interpretation of the order by the guardians.

**C. The Social Security Anti-Attachment Provision Does Not Prevent A State Court From Overseeing The Estate Of A Social Security Beneficiary**

Ms. Knutson's primary source of income is a monthly benefit check from the Social Security Administration. CP at 7, 64.<sup>9</sup> The Social Security Act's anti-attachment provision provides that such income is not subject to "execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a); *see* § 1383(d)(1) (incorporating § 407). The guardians argue that the superior court's order effectively "attached" Janette Knutson's Social Security benefits. The superior court correctly rejected that argument in light of the particular facts of this case and the court's complete control over David Knutson's actions as guardian, as distinct from his actions as representative payee.

**1. The anti-attachment provision bars only legal process similar to execution, levy, attachment, or garnishment.**

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

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<sup>9</sup> The record does not specify under which title of the Social Security Act Ms. Knutson's qualifies for benefits. The federal money in question is either Title II (Old-Age, Survivors, and Disability Insurance) benefits, 42 U.S.C. § 401 *et seq.*; or Title XVI (Supplemental Security Income) benefits, 42 U.S.C. § 1381 *et seq.* Either way, substantially identical federal statutes and regulations apply; this brief cites to the relevant provisions for both programs, where appropriate.

“legal terms of art”, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383, 123 S. Ct. 1017 (2003); none of them apply here. The final category, “other legal process,” is read “restrictively” under the interpretive canons of *noscitur a sociis* and *ejusdem 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.

42 U.S.C. § 407(a) does not treat government entities differently from other persons. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973). The statute is not focused on creditor claims *per se*, *see Keffeler*, 537 U.S. at 382 (“neither § 407(a) nor the Commissioner’s regulations interpreting that provision say anything about ‘creditors’”); *Philpott*, 409 U.S. at 417 (§ 407(a) imposes a bar “against the use of any legal process” rather than referring to any “claim of creditors”); and does not block the payee from paying outstanding debts if to do so is in the beneficiary’s best interests. 20 C.F.R. §§ 404.2040(d), 416.640(d) (payee may apply benefits to satisfy old debts if current and reasonably foreseeable needs of the beneficiary have been met).

**2. Representative payees are under the control of the federal Social Security Administration, not state guardianship courts.**

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). While a state-appointed guardian may also act as a federal-appointed representative payee, the two need not be the same person; and in fact a payee may be appointed by the federal government even where the beneficiary has not been found to be legally incapacitated. 42 U.S.C. §§ 405(j)(1)(A), 1383(a)(ii). In Ms. Knutson’s case, one of her guardians—David Knutson—has also been appointed her representative payee. CP at 76.

“Detailed regulations govern a representative payee’s use of benefits.” *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 376, 123 S. Ct. 1017 (2003). 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 regulations also specifically provide that current maintenance includes “the customary charges for the care and services provided” by a state-run institution. 20 C.F.R. §§ 404.2040(b), 416.640(b).

The Social Security Administration may order a report any time it “has reason to believe” that a payee is misusing a beneficiary’s funds, 42 U.S.C. §§ 405(j)(3)(D), 1383(a)(2)(C)(iv), a criminal offense that calls for revocation of the payee’s appointment, §§ 405(j)(1)(A), 408(a)(5), 1383(a)(2)(A)(iii), 1383a(a)(4); *see* 20 C.F.R. §§ 404.2050, 416.650. It is “misuse” to dispose of Social Security funds in any manner other than for the beneficiary’s use and benefit, as defined in the regulations. §§ 405(j)(8), 1383(a)(2)(A)(iv).

**3. The superior court's order amending its earlier grant of authority to the guardians does not violate the anti-attachment provision.**

The superior court's order in this case is not akin to any of the prohibited processes, and thus does not run afoul of 42 U.S.C. § 407(a). Under *Keffeler*, legal process other than those processes specifically 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. Clearly this case does involve a judicial mechanism, that of a guardianship court. But because the superior court's order in this case is directed to the guardians and not to the representative payee, the court's order does not transfer control of any Social Security benefits. The guardians and their supervising court retain control of Ms. Knutson's non-Social Security funds; and the representative payee retains control of Ms. Knutson's Social Security funds.<sup>10</sup> Moreover, whether or not a ward would be liable for her costs of care and maintenance is irrelevant under the procedure for directing payment under RCW 11.92.040(6).

**a. An order directed to the guardian of an incapacitated person does not transfer property controlled by the person's representative payee.**

If 42 U.S.C. § 407(a) were read expansively, nearly any action taken by a guardianship court in a case involving Social Security benefits

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<sup>10</sup> The anti-attachment provision clearly does not bar the guardianship court from issuing orders regarding non-Social Security funds, such as Ms. Knutson's earned wages. Under the superior court's order in this case, the guardians must at a minimum direct Ms. Knutson's non-Social Security income toward cost of care at Fircrest.

might run afoul of federal law. For instance, the establishment of a guardianship removes the incapacitated person's control of her own property, handing that control to a guardian so that the guardian may distribute the ward's assets among creditors and others providing care and services to the ward. Or, as in this case, the court may grant a guardian's fee request by issuing an order which transfers funds from the incapacitated person to the guardian in order to discharge the ward's debt for services rendered by the guardian.

Under *Keffeler*, such an expansive reading of the statute would be erroneous. Decisions and oversight by the guardianship court, as directed *to the guardian*, are not prohibited by the anti-attachment provision because they do not transfer control of the Social Security funds—the representative payee retains control of those funds, and is not subject to the direct control of the guardianship court. The guardianship court has a duty to oversee the ward's estate and ensure that the guardian's activities are in the best interests of the ward. RCW 11.92.010; *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). In that role, the superior court is entirely correct to issue an order directing the guardian to direct funds toward the ward's current maintenance rather than donating such funds.

What 42 U.S.C. § 407(a) does prohibit is a court order directed *to the representative payee* to disburse Social Security funds in a particular fashion. *But see In the Matter of J.G.*, 186 N.C. App. 496, 652 S.E.2d 266, 272-73 (2007) (state court may resolve dispute between beneficiary

and payee over the use of funds); *Ecolono v. Div. of Reimbursements*, 137 Md. App. 639, 769 A.2d 296, 305 (2001) (“we find nothing in federal law to indicated an intent by Congress . . . to prohibit State courts from exercising jurisdiction... when the relief requested is not the removal of the payee but a reallocation of the benefits”).<sup>11</sup> While state law places the guardian and the superior court in the role of determining the incapacitated person’s best interests and directing assets accordingly, for the purpose of federal Social Security benefits those roles belong to the payee and to the Social Security Administration. The guardianship court’s authority over the estate of Ms. Knutson is preempted by federal law only to the extent that the assets of the estate are Social Security benefits certified for payment to a federally-appointed payee.<sup>12</sup>

Thus the guardian may ask the Social Security Administration that a payee be removed. The guardian may also bring a conversion action against the payee. 42 U.S.C. §§ 405(j)(7)(A), 1383(a)(2)(iii) (if “a court of competent jurisdiction” determines that a payee has misused the

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<sup>11</sup> There is obviously some confusion that arises in a case like this, where the guardian and the representative payee are one and the same. However, it is made more clear by considering that the guardianship court and its appointed guardian stand in the same position to the representative payee as would the beneficiary herself were she not legally incapacitated. The purpose of payeeship is to remove the beneficiary’s discretion to dispose of the funds in her own manner, on the belief that she is not capable of using the funds for their intended purpose (to pay for the ongoing costs of care and maintenance).

<sup>12</sup> For an indication of what kind of court order might run afoul of 42 U.S.C. § 407(a), one need look no further than the 2008 Order in this case. Paragraph 10 of the 2008 Order specifically orders David Knutson “as representative payee” to direct Social Security funds to certain uses as determined by the guardians. CP at 20.

beneficiary's benefits, the payee is liable for the amount misused).<sup>13</sup> However, neither the guardian nor the guardianship court can directly order that the representative payee use the Social Security funds in any particular manner. It is the payee who has the responsibility to see that the funds are put to proper use, who is potentially civilly and criminally liable if the funds are misused, whose actions in that representative capacity are not subject to legal process akin to attachment or garnishment. The superior court's order in this case does not disturb that responsibility in any way.

**b. The procedure under RCW 11.92.040(6) for ensuring that an incapacitated person's care and maintenance needs are met is not concerned with discharging a legally enforceable liability.**

Even if there had been no representative payee in this case, the superior court's order would not have violated 42 U.S.C. § 407(a). Contrary to the guardians' reasoning, the procedures followed by DSHS in this case do not amount to a collection action. Washington's guardianship statute does provide a mechanism for creditors to bring claims against the estate of an incapacitated person. RCW 11.92.035(2) ("Any person having a claim against the estate of an incapacitated person" may file that claim with the court). That statute is concerned with providing a mechanism for the guardianship estate to discharge legally enforceable debts. The use of that statute to reach and effectively "garnish" Social

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<sup>13</sup> As discussed *infra* at 33, Ms. Knutson's guardians may well have a responsibility to bring such an action in this case; there is of course a conflict of interest given that the representative payee is one of the guardians.

Security checks is presumably the type of “other legal process” that would run afoul of 42 U.S.C. § 407(a).

The guardianship statute provides an entirely separate mechanism under RCW 11.92.040(6) for entities currently caring for the incapacitated person to seek an order directing payment. Unlike RCW 11.92.035(2), RCW 11.92.040(6) does not require the person or agency having custody of the incapacitated person to show that their custody gives rise to an enforceable claim or debt. The statute is instead focused on ensuring that the needs of the incapacitated person are not overlooked by the guardian or the court. When the entity currently caring for the incapacitated person asks that the ongoing costs of care and maintenance be paid by the guardian, the court is concerned not with discharging debts, but rather with providing for the “care, maintenance, and education of the incapacitated person and of his or her dependents.” RCW 11.92.040(6). That procedure is meant as a counterweight to the guardian’s otherwise *ex parte* presentation of an inventory with planned disbursements. *Id.* Because it is not a procedure for discharging liability, RCW 11.92.040(6) is not “other legal process” preempted by federal law.

Nothing in the Social Security Act prevents a recipient from spending her benefits. To the extent that a guardian has any authority over his ward’s Social Security funds (which, as discussed above, is not the case where a representative payee has been appointed), the appointing court has the authority to oversee the manner in which those funds are spent, including upon a motion to direct payment under

RCW 11.92.040(6).

**D. The Superior Court Properly Amended Its Prior Order To Eliminate Clearly Erroneous Directions To The Guardians**

The 2008 Order approved charitable donations by an indigent person from funds that were required for her ongoing and foreseeable costs of care and maintenance, in violation of RCW 11.92.140 and contrary to the public policy expressed in RCW 43.20B.410; required DSHS to treat such donations as a valid deduction from cost of care,<sup>14</sup> in violation of RCW 34.05.510, RCW 43.20B.420, and WAC 388-513-1380; and required the representative payee to make such donations, in violation of 42 U.S.C. § 407(a) and 20 C.F.R. §§ 404.2045 or 416.645. The superior court was thus correct to, at a minimum, clarify or amend the 2008 Order to correct those problems.

**1. Charitable donations of a ward's assets may not take precedence over the ward's cost of care.**

As guardian of Janette Knutson's estate, David Knutson has a duty to make payments on her behalf for her financial obligations, including her monthly payment to her care provider, the state-run Fircrest School, for a portion of her cost of care. By instead depleting the estate by giving away Janette Knutson's entire income each month, David Knutson was in breach of that duty. No law allows, much less requires, that David Knutson be given the discretion to give away Janette Knutson's assets

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<sup>14</sup> Under the guardians' interpretation of the 2008 Order; as discussed *supra* at 17, that interpretation is incorrect.

rather than using them to pay toward her costs of care. The superior court did not abuse its discretion by remedying that situation.

It is the duty of a guardian of the estate “[t]o protect and preserve the guardianship estate, to apply it as provided in [chapter 11.92 RCW], [and] to perform all of the duties required by law . . . .” RCW 11.92.040(4). While it is sometimes permissible for a guardian with court approval to donate guardianship estate funds to charitable causes if there are adequate resources to do so, the primary use of estate funds is for the maintenance of the incapacitated ward:

The court . . . may authorize the guardian . . . to apply funds not required for the incapacitated person’s own maintenance and support, in any fashion the court approves as being in keeping with the incapacitated person’s wishes so far as they can be ascertained and as designed to minimize . . . taxes, permit entitlement under otherwise available federal or state medical or other assistance programs, and to provide for gifts to such charities . . . as would be likely recipients of donations from the incapacitated person.

RCW 11.92.140. The statute makes clear that only “funds not required for” maintaining the incapacitated person may be used “to provide for gifts[.]” *Id.*

The legislature, through RCW 43.20B.410 - .455, has placed “financial responsibility for cost of care, support and treatment upon those residents of residential habilitation centers[.]” RCW 43.20B.410. RHC residents are “liable for their per capita costs of care, support and treatment.” RCW 43.20B.415. The legislature has found these payments

to relate to the care of RHC residents, and requires DSHS to collect those payments.<sup>15</sup> Although the payments cover only a fraction of the costs of care, all persons similarly situated make such payments and overall they help offset the very significant costs associated with providing comprehensive residential services to individuals like Ms. Knutson. See fn.1, *supra* at 3. The financial responsibility statutes constitute a clear public policy to maximize resources to help provide these essential services.

The guardian's request that charitable donations take precedence over cost of care was contrary to that public policy, and the superior court was correct to deny it. To rule otherwise would allow persons receiving around the clock, comprehensive residential care from the state to avoid any financial contribution to that care, simply by diverting their assets to a charitable organization of their choice—a result that would be contrary to public policy and common sense. The superior court did not abuse its discretion by recognizing the guardians' obligation to use any of Janette Knutson's funds under their control to pay for a portion of her Medicaid costs of care.

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<sup>15</sup> As discussed *infra* at 33, David Knutson may also have an obligation to make those payments as Social Security representative payee.

**2. Charitable donations are not a valid deduction from Ms. Knutson's cost of care.**

Individuals residing in Washington medical institutions—including residential habilitation centers such as Fircrest<sup>16</sup>—are required to pay a portion of their income toward the cost of their institutional care. RCW 43.20B.410 - .455; WAC 388-513-1380. This “participation” payment is computed by DSHS by subtracting a number of allowable deductions from the individual’s countable income. WAC 388-513-1380(4) - (5) provide an exclusive list of the deductions that can be taken from the resident’s income when computing participation: a personal needs allowance (which includes court-approved guardian fees and costs); spousal maintenance; family maintenance; necessary medical expenses not covered by Medicaid; SSI payments received by a person who is admitted to a medical facility for 90 days or less; and the costs of maintaining a home under certain circumstances.<sup>17</sup> No deduction is allowed for the

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<sup>16</sup> “Medical institutions” operated in Washington include Nursing Homes (NF), Hospitals, Hospice Care Centers, State Veteran Nursing Homes, Intermediate Care Facilities for the Mentally Retarded (ICF/MR), Residential Habilitation Centers (RHC), and Institutions for the Medically Diseased (IMD). See Balanced Budget Act of 1997, Pub. L. 105-33, § 5522(c)(1) (1997) (clarifying that a hospital, extended care facility, nursing home, or intermediate care facility is a “medical institution” for purposes of SSI), codified at 42 U.S.C. 1382(e)(1)(B); see also 42 U.S.C. § 1396o(a)(2)(C) (“hospital, nursing facility, intermediate care facility for the mentally retarded, or other medical institution” (emphasis added)). RHCs provide intermediate care facility for the mentally retarded (ICF/MR) services and/or nursing facility services. WAC 388-825-089.

<sup>17</sup> The DSHS regulations track federal regulations dealing with a Medicaid recipient’s responsibility to participate in her own cost of care. Federal regulations require that a state Medicaid agency such as DSHS “*must* reduce its payment to an institution, for services provided an individual,” by the amount of that individual’s total income, minus any applicable deductions. 42 C.F.R. §§ 435.725, 435.733, and 435.832 (emphasis added). The participation requirement prohibits state agencies from paying any amounts that are the responsibility of the patient. The participation requirement is “consistent with the statutory plan that Medicaid funds not be paid to reimburse those

purpose of charitable donations, nor for any other expense not specifically listed.<sup>18</sup>

By amending its 2008 Order to the extent it required DSHS to count charitable contributions as if they were an allowable deduction from cost of care, the court thus corrected an earlier clear error of law with continuing implications for both Ms. Knutson and DSHS. It was not abuse of discretion to do so.

**3. Charitable donations constitute a misuse of Ms. Knutson's Social Security benefits.**

In addition to purportedly ordering DSHS to calculate participation in a certain manner, the 2008 Order purported to require David Knutson, as the federally-appointed representative payee certified to receive Ms. Knutson's Social Security check each month, to direct those funds toward guardian fees and charitable donations, as chosen by the guardians. That order was likely a violation of 42 U.S.C. § 407(a), both because it transferred control of Ms. Knutson's benefits from the representative

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costs that patients with resources of their own can afford.” *Florence Nightingale Nursing Home v. Perales*, 782 F.2d 26, 29 (2d Cir. 1986), *cert. denied*, 479 U.S. 815, 107 S. Ct. 68, 93 L. Ed. 2d 26 (1986). States are required to calculate participation by deducting, in order: a personal needs allowance; spousal maintenance; family maintenance; necessary medical expenses not covered by Medicaid; and SSI payments received by a person who is admitted to a medical facility for 90 days or less. 42 C.F.R. §§ 435.725(c), 435.733(c), and 435.832(c). A state may also elect, as Washington has at WAC 388-513-1380(5)(e), to allow a final deduction for the costs of maintaining a home under certain circumstances. 42 C.F.R. §§ 435.725(d), 435.733(d), and 435.832(d). No federal statute or regulation allows Washington to apply a Medicaid deduction to a client who disposes of her income by gifting it rather than paying her assessed participation.

<sup>18</sup> The task of applying deductions to a client's participation is an administrative decision, not a judicial one. While a court may approve guardian fees and spousal/family maintenance, the calculation of a client's proper participation payment is done by DSHS after taking such court-approved awards into account.

payee to the guardians, and because it required the representative payee to hand over benefits to discharge Ms. Knutson's debt to her guardians. What's more, if David Knutson actually made such donations—which he appears to have done—he did so in violation of federal law, and may be personally liable to the estate of Ms. Knutson for misuse of her Social Security funds.<sup>19</sup> Federal regulations require a payee to conserve or invest any benefits not used for current maintenance and other authorized purposes. 20 C.F.R. §§ 404.2045, 416.645. Charitable giving is not an authorized purpose of Social Security benefits. See 20 C.F.R. §§ 404.2040(a), 416.640(a).

David Knutson is both guardian and representative payee for Ms. Knutson. In his role as guardian, it would be his duty to represent Ms. Knutson's interests in any action against the representative payee to recoup misused Social Security funds. Under circumstances where the guardian has such a clear conflict of interest, the superior court probably should have appointed a GAL to represent Ms. Knutson's best interests and investigate the possibility of holding David Knutson accountable for violating his obligations as representative payee.<sup>20</sup> At a minimum, the

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<sup>19</sup> He may also be subject to additional sanctions. As Division II has said in the parallel Ch. 43.20B RCW context of mental institutions, "payees must use benefits for the beneficiary's current maintenance, including care from a state mental institution. 20 C.F.R. § 404.2040(b). Certainly, a private payee could refuse to apply benefits toward hospitalization costs. And the State could not reach those benefits through legal action. But should the payee misuse those funds, he is subject to criminal sanction and removal." *Kolbeson v. DSHS*, 129 Wn. App. 194, 209, 118 P.3d 901 (2005).

<sup>20</sup> If the appointment of a GAL would be in Ms. Knutson's best interests, nothing prevents this court from so ordering. *Shelley v. Elfstrom*, 13 Wn. App. 887, 889, 538 P.2d 149 (1975) (an appellate court may "act *sua sponte* to protect the apparent interests of a ward").

superior court did not abuse its discretion by eliminating the part of its 2008 Order that placed the imprimatur of the court on that misuse.

**E. Attorney Fees**

The guardians request that their attorney fees on appeal be paid by the state under RCW 11.96A.150, and that the reserved issue of fees below be remanded for consideration by the trial court. Even if the guardians are successful in their claims, the court should deny both requests given the novel issues presented and the equities of the case.

Courts have broad discretion to order attorney fees in any Title 11 proceeding or appeal to be paid “[f]rom any party to the proceedings” as well as from the estate, trust, or other assets involved. RCW 11.96A.150(1). While a guardian’s costs generally cannot be paid with state funds, RCW 11.92.180, the award of costs in a Title 11 proceeding are not “limited by any other specific statutory provision providing for the payment of costs... unless such statute specifically provides otherwise.” RCW 11.96A.150(2).

However, “[a]n award of fees to either party is unwarranted” under RCW 11.96A.150 where “there are novel issues of statutory construction.” *Estate of D’Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (Div. I 2006), *review denied*, 160 Wn.2d 1016 (2007). In *D’Agosto*, this court followed Divisions Two and Three in denying fees on appeal in probate cases presenting unique issues. *Id.* (citing *Mearns v. Scharbach*, 103 Wn. App. 498, 514-15, 12 P.3d 1048 (Div. III 2000), *review denied*, 143 Wn.2d 1011 (2001); *Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d

328 (Div. II 2004), *review denied*, 154 Wn.2d 1029 (2005)). The *D'Agosto* court further reversed the award of attorney fees at the trial level. 134 Wn. App. at 402.

The present case presents both unique factual circumstances and legal questions of first impression. While this case involves guardianships rather than estates, RCW 11.96A.150 does not differentiate between probate and guardianship matters, and the reasoning in *D'Agosto* applies equally to both.

Moreover, even if the guardians were to prevail on the basis that the procedure followed by the state was improper, the guardians' actions in this case were contrary to law and an abuse of their position as officers of the court. The courts should hesitate to award fees against third parties who bring actions by guardians that are contrary to law to the attention of the courts. Such an award would have a chilling effect on such third-party disclosures.

An award of fees to the guardians from the state would be inappropriate either on appeal or in the proceedings below. The request should be denied.

## V. CONCLUSION

For over a year, Ms. Knutson's court-appointed guardians gave away most of her meager funds. Federal Social Security regulations and Washington's laws and public policy require that those funds instead be used to defray the costs of her care and maintenance at Fircrest School. DSHS properly brought a motion before the superior court to clarify and

amend the 2008 Order. Because DSHS's motion was addressed to the activities and responsibilities of the guardians, not Ms. Knutson's representative payee, the motion was not barred by the Social Security anti-attachment provision.

The superior court did not abuse its discretion by exercising its power to oversee and direct the activities of the guardians. Its order should be upheld.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of January, 2010.

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**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of this document upon all parties or their counsel of record on the date below as indicated:

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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 29th day of January, 2010, at Tumwater, Washington.

  
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Cheryl Chafin, Legal Assistant