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DIVISION II

No. 38105-2-II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

IN THE MATTER OF THE GUARDIANSHIP OF

JOSEPH MATTHEWS,

An Incompetent Person.

REPLY TO CROSS-APPEAL

AND

**RESPONSE BRIEF OF APPELLANT
SHERWOOD ASSISTED LIVING**

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REPLY TO CROSS-APPEAL AND REPLY BRIEF

Cross-appellants' Assignments of Error A and B are that the trial court *did not* err. It is respectfully submitted that these are not proper assignments of error and should be disregarded. RAP 10.3(4).

Cross-appellants' Assignment of Error C alleges that the trial court erred in not awarding *more* attorneys' fees.

**ARGUMENT IN RESPONSE TO ASSIGNMENT OF
ERROR C THAT THE TRIAL COURT ERRED IN
NOT AWARDING MORE ATTORNEYS' FEES TO
IRMA FINN AGAINST SHERWOOD UNDER RCW
11.96A.150**

The court reviews a Superior Court's fees and costs awards under an abuse of discretion standard. See In re: Guardianship of Spiecker, 69 Wn 2d 32, 34, 35, 416 P2d 465 (1966). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. State ex rel Carroll v. Junker, 79 Wn 2d 12, 26, 482 P2d 775 (1971) [as cited in In re: Guardianship of McKean, 136 Wn App 906, 151 P3d 223 at 228 (2007)].

The court is also required to determine not simply that work was performed, but that the work benefitted the guardianship. In re: Guardianship of Halluer, 44 Wn App 795, 800, 723 P2d 1161 (1986) [citing In re: Estate of Larson, 103 Wn 2d 517, 523-24, 530-32, 694 P2d 1051 (1985)].

In the McKean case cited above, the court pointed out that “equity requires some finding of fault that in fairness requires a party to pay.” [Citing cases involving breaches of fiduciary duties and dealing in bad faith and self-dealing.]

Here, there is no basis for even arguing that the trial court committed error in not awarding *more* attorneys’ fees.

**RESPONSE TO CROSS-APPELLANTS’
ARGUMENT REGARDING AWARD
OF ATTORNEYS’ FEES AGAINST
GUARDIANSHIP PETITIONER**

The State of Washington has strong policy to protect elderly from financial as well as physical abuse. See Endicott v. Saul, 175 P3d 560 (February 4, 2008 — Division I).

An absolute power of attorney over the prospective ward creates a fiduciary relationship. See Endicott v. Saul at 573.

In this case, it is not disputed that property of the grantor of the power of attorney was transferred into the name of Irma Finn, the attorney-in-fact. It apparently was later transferred back. It is not disputed that bills for the care of Mr. Matthews were not being paid by Irma (the one with the absolute power of attorney). This, too, was later remedied, *after* the petition for appointment of a guardian was filed. The guardian ad litem, independently appointed by the court — not by Sherwood or by the original petitioner — found that a guardian should be appointed for Mr. Matthews. Further, at several of the various hearings it was admitted by the attorney for the ward that the ward was incompetent. Thus the issue was *who* should be appointed as a guardian, or whether the power of attorney, being exercised by Irma, who had transferred the grantor of the power of attorney/ward's assets into her name (and then back out), provided adequate protection for Mr. Matthews.

With that background, Irma Finn argues that it was proper for the court to award attorneys' fees against Sherwood Assisted Living, not against the petitioner. In order to reach this conclusion, Irma Finn (and the court) had to change the actual petitioner to an entity that was not the

petitioner (Sherwood Assisted Living). Although this was objected to by the actual petitioner, the substitution of Sherwood as petitioner occurred. Thus the actions of the original petitioner up to the time of the substitution of Sherwood cannot result in an award of attorneys' fees against Sherwood for activities occurring prior to that substitution. Sherwood simply was not in the case.

RCW 11.88.030 provides that even the original petitioner should have "no liability." It is important to note that the trial court *did not* find bad faith.

Although Irma Finn argues that the statutory requirements of RCW 11.88.030 were not precisely followed, the court did not find that this created any jeopardy for Irma Finn. Further, Irma Finn argues that the guardianship petitioner fought Irma at every step, but the converse was true. Irma Finn opposed a hearing on a guardianship, opposed revealing information regarding the alleged incompetent's financial affairs, and opposed anyone being appointed guardian.

Irma Finn cites the above-cited McKean case as authority for awarding attorneys' fees against someone petitioning for a guardianship. The case does not stand for that proposition. In fact, in the McKean case

the trial court vacated attorneys' fees against Michael McKean and remanded. Michael McKean did not petition for appointment of a guardian or a limited guardian. The court found at page 229,

Although Michael's deceptive manipulation of his children's assets would support an order requiring him to pay some or all of the fees and costs, the court did not enter such a finding. *See* RCW 11.96A.150(1) (the court may order fees and costs "in such manner as the court determines to be equitable"). Instead the court apparently ordered Michael to pay because the guardianship could not.

Thus, the court was not faced with the issue of whether or not a *petitioner for guardianship* should have liability for filing the guardianship or for pursuing the guardianship if not done in bad faith.

RCW 11.88.030(1) provides that "upon *receipt* of a petition for appointment of a guardian or limited guardian, except as provided herein, the court *shall* appoint a guardian ad litem to represent the best interests of the alleged incapacitated person."

RCW 11.88.030(1) does provide that no liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon a reasonable basis.

The petitioner may be "any person" and need not be an interested party.

The trial court appeared to think that an interested party was necessary, believed that Sherwood Assisted Living was an interested party (perhaps because that's where Mr. Matthews was residing or perhaps because the trial court was aware that Sherwood Assisted Living might have sufficient assets to pay attorneys' fees).

Irma Finn did not object to or assign error to the trial court's order finding no bad faith, thus that finding is a verity on appeal.

Irma Finn argues that RCW 11.96A.150 addresses attorneys' fees in guardianship cases while RCW 11.88.030(1) does not.

It must be remembered that the legislature, when it created RCW 11.88.030, provided that any person could file a guardianship petition. The question must be asked, how could "any person" incur a liability in any manner for filing a guardianship petition *except for* attorneys' fees and costs?

The appellate courts have dealt with the discussion of liability for attorneys' fees in numerous cases. For instance, in In re: Disciplinary Proceedings Against Cohen, 150 Wn 2d 744, 751, 82 P3d 224 (2003), the court discusses liability for attorneys' fees in common parlance by stating, "However, Cohen failed to consult with Erickson before

requesting mandatory arbitration and failed to explain the risks of arbitration, i.e., that he would be *liable* for King County's *attorneys' fees* and *costs* if he lost." See also State v. Trask, a condemnation case, at 91 Wn App 253, 269, 957 P2d 781 (1998), where the court stated, "In short, the state is liable for reasonable attorney and expert witness fees" See also Unigard Insurance Co. v. Leven, 97 Wn App 417, 419, 983 P2d 1155 (1999), where the court stated, "... the insurer was not *liable* for the owner's *attorney fees*, the court reverses the judgment."

Merriam-Webster's online dictionary defines "liable" as "obligated according to law or equity; responsible; subject to appropriation or attachment, or being in a position to incur ... exposed or subject to some usually adverse contingency or action"

Would the "any person" who is entitled to file a guardianship petition understand that incurring "no liability" for filing an action in good faith meant that they could nevertheless have to pay thousands of dollars in attorneys' fees? It is respectfully submitted that this is an unreasonable interpretation of the statute, and the courts have not, to date, so interpreted the statute, even in light of RCW 11.96A.150.

RCW 11.96A.150(2) states, "This section shall not be construed

as being limited by any other specific statutory provision providing for the payment of costs Unless such statute *specifically provides otherwise* this section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by provisions of RCW 11.88.090(10).” The legislature *could have* listed also RCW 11.88.030. What the legislature did is provide that there is “no liability for filing a petition for guardianship [if] acting in good faith and upon a reasonable basis.” In addition, RCW 11.96A.150(2) provides that it’s not limited by any other specific statutory provision *providing for the payment of costs*. RCW 10.88.030 does not provide for the payment of costs. Further, RCW 11.96A.150(2) adds, “... unless such statute specifically provides otherwise.”

While it is submitted that RCW 11.88.030 does not provide for the *payment* of costs, if it does provide for payment of costs it specifically provides *otherwise*. In other words, it specifically provides that a petitioner shall not be liable for costs unless a petition is filed in bad faith or is unreasonable.

CONCLUSION

It is respectfully submitted that to rule otherwise goes against the legislative intent to allow any person to file a guardianship petition in good faith to try to protect a vulnerable adult from financial exploitation or physical harm. It is the stated intent of the State of Washington to protect vulnerable adults. RCW 74.34.005. One way of doing that is a guardianship petition. The court should not put a substantial barrier (threat of attorneys' fees and costs) in the way of such petitions unless, of course, they are filed in bad faith or unreasonably.

The court should reverse the award of attorneys' fees and costs against Sherwood Assisted Living.

DATED this 6th day of January,
2009.

RITCHIE LAW FIRM, P.S.



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**IN THE MATTER OF THE GUARDIANSHIP OF JOSEPH MATTHEWS,
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PROOF OF SERVICE

The undersigned states and declares as follows:

1. I am over the age of 18, am competent to testify, am an employee of Ritchie Law Firm, P.S., and make this declaration of my personal knowledge and belief.
2. I served one copy of the REPLY TO CROSS-APPEAL AND RESPONSE BRIEF OF APPELLANT SHERWOOD ASSISTED LIVING upon the following individuals, by mailing by first class mail to their respective offices, as follows:

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3. I declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED this 6th day of January, 2009,
at Sequim, Clallam County, Washington


ERIKA HAMERQUIST
Secretary