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COURT OF APPEALS
DIVISION II

No. 38105-2-II

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STATE OF WASHINGTON

BY **COURT OF APPEALS**

DEPT **DIVISION II**

OF THE STATE OF WASHINGTON

IN THE MATTER OF THE GUARDIANSHIP OF

JOSEPH MATTHEWS,

An Incompetent Person.

**OPENING BRIEF OF APPELLANT
SHERWOOD ASSISTED LIVING**

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I. INTRODUCTION

This case involves a petition for guardianship and the authority of the court to add or substitute petitioners, and impose attorneys' fees against the added petitioner, in the absence of bad faith in violation of RCW 11.88.030(1), which provides "No liability for filing a petition for guardianship ... shall attach to a petitioner acting in good faith and upon reasonable basis.". Sherwood Assisted Living is appealing the order assessing attorney fees against it. CP 13.

II. ASSIGNMENTS OF ERROR

1. The court erred in ordering the change in designation of the original petitioner in a guardianship petition to Sherwood Assisted Living.
2. The court erred in awarding attorneys' fees against Sherwood Assisted Living in the absence of bad faith.
3. The award of attorneys' fees against Sherwood Assisted Living violates RCW 11.88.030(1).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the court have the authority to change the petitioner in a guardianship petition?
2. May the court award attorneys' fees against substituted petitioner Sherwood Assisted Living in a guardianship in the absence of bad faith?
3. Does the award of attorneys' fees against a guardianship petitioner who is not found to be acting in bad faith or upon an unreasonable basis "attach" a "liability" for filing the petition?

IV. STATEMENT OF THE CASE

Rena Keith, an employee of Sherwood Assisted Living, an assisted care facility, received information from an attorney representing an ombudsman under the State Long Term Care Ombudsman Program (RCW 43.190) indicating that an elderly resident of Sherwood, Mr. Joseph Matthews, appeared to be taken advantage of financially. See Ombudsman's attorney's letter. CP 232, CP 161.

Ms. Keith filed a petition for guardianship (CP 232) with the assistance of Sherwood's attorney, Erwin Jones. A guardian ad litem — Rayna Abrams — was appointed pursuant to motion (CP 228),

performed an investigation, and submitted a report to the court. CP 161.

Mr. Matthews's daughter and son-in-law (mentioned in the ombudsman's attorney's letter) filed a petition to intervene, and were granted intervention.

Ms. Abrams, the guardian ad litem, sought an order preventing the intervenors from removing the alleged incapacitated person, Mr. Matthews, from the jurisdiction and from the assisted care facility.

A temporary order was entered by Commissioner William Knebes, who specifically provided that it was issued without a bond. CP 154. At a later date, the intervenors sought to require a bond and a trial court judge ordered a bond in the amount of \$10,000. CP 125. But instead of ordering that the bond be paid by the State (who appointed the guardian ad litem) or by the guardian ad litem (who sought and obtained the temporary order), the judge ordered that the bond be posted by Sherwood Assisted Living and that the care facility be substituted as the petitioner in lieu of Rena Keith, the health care professional manager who had filed it. CP 125.

Interlocutory review was sought by the assisted care facility, but denied.

The alleged incompetent person was then removed from the assisted care facility and taken to California by the intervenors. RP 23-4.

A trial date was set. The parties agreed that the alleged incompetent person was in fact incompetent (RP 20-22, 21-1), but that if guardianship or conservatorship proceedings were occurring in California, jurisdiction could be relinquished to the California court. RP 21-4.

The trial court entered a dispositional order (CP 13) but also required that the assisted care facility pay all of the attorney's fees for the attorney for the guardian ad litem, and pay \$10,000 of attorney fees for the intervenors.

The assisted care facility appeals from this final decision.

V. SUMMARY OF ARGUMENT

Guardianship is a procedure at law designed to protect the assets and/or health of an incompetent person. Substantial procedural protections to an alleged incompetent person are provided. The statute was also intended to protect a petitioner against liability, including against an award of attorneys' fees against the petitioner. The trial court in this case did not follow the statute and punished the petitioner for

trying to protect the interests of an incompetent elderly man. The trial court should be reversed.

VI. ARGUMENT PERTAINING TO ASSIGNMENTS OF ERROR

The court found that Sherwood Assisted Living was the “real party at interest” in the guardianship petition. The guardianship statute provides that any person or entity may file a guardianship petition. In this case, although a guardian ad litem was appointed, no limited guardian or guardian was ever appointed.

There are numerous cases involving the awarding of attorneys’ fees against various parties in probate/guardianship proceedings pursuant to RCW 11.96A.150. However, the appellate courts have held that “equity requires some finding of fault that in fairness requires a party to pay.” In Re: Guardianship of McKean, 136 Wn App 906, ___, 151 P3d 223, 229 (2007). The issue of “liability for attorneys’ fees” has been discussed in many cases. See Talisen Corp. v. Razore Land Co., 135 Wn App 106, 144 P3d 1185, 1206 (2006), Boeing v. Lee, 102 Wn App 552, 558, 8 P3d 1064 (2000), Heal v. Hearings Board, 96 Wn App 522, 535, 979 P2d 864 (1999), and State Farm v. Johnson, 75 Wn App 580, 594,

871 P2d 1066 (1994). Thus it is respectfully submitted that a statute stating that, “No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis” includes liability for attorney fees. RCW 11.88.030(1).

RCW 11.96A.150(2) states that the attorneys’ fees apportionment statute applies to guardianship matters, and is not limited by certain specific statutory provisions providing for the payment of costs, but states “*unless such statute specifically provides otherwise.*” It is respectfully submitted that RCW 11.88.030(1) *specifically provides otherwise.* “No liability ... shall attach to a petitioner acting in good faith and upon a reasonable basis.”

The statutory theme is logical because RCW 11.88.030 provides for an award of attorneys’ fees against a petitioner for guardianship if the petition is made in bad faith. Particularly in a case such as this where the petitioner is seeking to have a guardian ad litem appointed in order to protect assets of the ward after a report from the attorney for the ombudsman and a report from the guardian ad litem, the court could not and did not find that the petition was made in bad faith.

The substitution of Sherwood Assisted Living for the petitioner, Rena Keith, who was a health care provider and manager of that facility, was ordered by the court. Such substitution was not a substitution of the “real party in interest” because the guardianship statute allows “any person” to file a guardianship petition. RCW 8.88.030(1). The requirements of Rule 19 (CR 19) for joinder involve the requirement of joinder of persons in whose absence complete relief cannot be accorded amongst those already parties, or where the non-joined person may have his or her rights impaired or it may impede such person’s ability to protect that interest, or where the situation may result in multiple litigation. None of those situations are true here.

VII. CONCLUSION

The court did impose liability against the substituted petitioner Sherwood Assisted Living after finding that there was no bad faith on the part of the petitioner.

It is respectfully submitted that, particularly in a situation of long-term care health care providers, the possible imposition of liability for attorneys’ fees when filing in good faith a petition for guardianship, will prevent the filing of guardianships in situations just like this one, where

the attorney for the ombudsman expressed clear, cogent and convincing reasons for a guardianship, and where the guardian ad litem, after investigating the case, expressed clear, cogent and convincing reasons for a guardianship. In other words, no Good Samaritan is going to come forth to try to protect the interests of an incompetent person when the risk of liability for substantial attorneys' fees of the other parties is possible.

This case should not stand for the principle that, "No good deed goes unpunished."

The trial court should be reversed on its award of attorneys' fees against the petitioner or substituted petitioner.

DATED this 6th day of November,
2008.

RITCHIE LAW FIRM, P.S.



CRAIG A. RITCHIE, WSBA #4818
Attorney for Sherwood Assisted Living

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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 each of the OPENING BRIEF OF APPELLANT PETITIONER SHERWOOD ASSISTED LIVING upon the following individuals, by mailing by first class mail to their respective offices, as follows:

Ron Bell and Jeff Davis
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Attorney at Law
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Carlsborg WA 98324

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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 NOV., 2008, at Sequim, Clallam
County, Washington.


ERIKA HAMERQUIST
Secretary