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

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**No. 41399-0-II**

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**In the Matter of the  
GUARDIANSHIP OF SEAN SEXTON**

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**THE GUARDIANS' BRIEF**

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**ORIGINAL**

## TABLE OF CONTENTS

I. Summary of Argument.....	1
II. Assignments of Error.....	1
ISSUE 1. The Court Abused Its Discretion by Removing the Guardian	
ISSUE 2. Due Process Requires a Clear and Convincing Evidence Standard for Removal	
ISSUE 3. Guardian is Entitled to an Award of Attorney Fees Under RCW 11.96A.150	
III. Statement of the Case.....	1
A. Statement of Facts.....	1
B. Procedural Facts.....	4
IV. Argument.....	6
A. Guardianship Proceedings Generally.....	6
B. The Trial Court Abused Its Discretion by Removing the Guardian for Many Reasons.....	12
1. The Guardian’s Exercise of Discretion was Proper and Consistent with Sean’s Best Interests.....	13
2. The Court’s Order of Removal Constitutes an Abuse of Discretion.....	15
C. Due Process Requires a Clear and Convincing Evidence Standard for Removal of a Certified Professional Guardian.....	18
1. Liberty and Property Interests at Stake...	19
2. High Risk of Erroneous Deprivation.....	22
3. Government Interest.....	24
D. Attorney Fees and Costs Should be Awarded Under RCW 11.96A.150.....	25
V. Relief Sought.....	26

## TABLE OF AUTHORITIES

### **Cases**

<i>Bang Nguyen v. Dep't of Health</i> , 144 Wn.2d 516, 522-23, 29 P.2d 689 (2001).....	passim
<i>Estate of Montgomery</i> , 140 Wash. 51, 53, 248 P. 64 (1926) .....	10
<i>Giles v. Dep't of Soc. &amp; Health Servs.</i> , 90 Wn.2d 457, 461, 583 P.2d 1213 (1978).....	20
<i>Guardianship of Brown</i> , 6 Wn.2d 215, 101 P.2d 1003 (1940). .....	10, 13
<i>Guardianship of Keffeler</i> , 151 Wn.2d 331, 88 P.3d 949 (2004).....	12
<i>Guardianship of Sall</i> , 59 Wash. 539, 542-43, 110 P. 32 (1910).....	6
<i>In re Donnelly's Estates</i> , 81 Wn.2d 430, 502 P.2d 1163 (1972) .....	6
<i>In re Revocation of License of Kindschi</i> , 52 Wn.2d 8, 319 P.2d 824 (1958).....	21
<i>In re Rohne</i> , 157 Wash. 62, 74, 288 P. 269 (1930).....	9, 16, 21, 24
<i>Matthews v. Eldridge</i> , 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) .....	19
<i>Ritter v. Board of Commissioners of Adams County Public Hospital Dist. No. 1</i> , 96 Wn.2d 503, 510, 637 P.2d 940 (1981), .....	19
<i>Seattle-First National Bank v. Brommers</i> , 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).....	7
<i>State ex rel Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	12
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 33 P.2d 735 (2001).....	7

<i>Weber v. Doust</i> , 84 Wash. 330, 333-34, 146 Pac. 623 (1915) .....	6
---	---

**Statutes**

Chapter 11.88 RCW .....	7
Chapter 11.92 RCW .....	7
RCW 11.88.010(2) .....	9
RCW 11.88.020 .....	9
RCW 11.88.120 .....	11
RCW 11.88.120(1) .....	15
RCW 11.88.120(4) .....	15
RCW 11.92.035 .....	11
RCW 11.92.150 .....	10
RCW 11.96A.150 .....	25, 26
RCW 71A.20.100(2) .....	13
RCW 71A.20.100(5) .....	13

**Other Authorities**

CJC 3(A)(4) .....	18
Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1279-95 (1975) .....	16
RPC 3.5(b) .....	18

**Rules**

CR 19 ..... 11

CR 24 ..... 11

RAP 18.1 ..... 26

**Regulations**

Chapter 388-79 WAC ..... 10, 23

**Constitutional Provisions**

Due Process Clause of the United States Constitution ..... 19

Wash. const. Art. IV, § 6..... 6

## **I. SUMMARY OF ARGUMENT**

Sean Sexton is a profoundly intellectually disabled individual who resides at Rainier School and who needs total assistance with his minimal finances. His guardian improved Sean's financial picture by applying for appointment as representative payee of Sean's social security benefits but was removed as guardian by the trial court.

## **II. ASSIGNMENTS OF ERROR**

ISSUE 1: The Court abused its discretion in removing Sean's guardian.

ISSUE 2: Due process requires a clear and convincing evidentiary standard before removing a certified professional guardian.

ISSUE 3: Sean's guardian's counsel is entitled to payment of attorney fees from the Department of Social and Health Services (DSHS) because of its improper "stealth" appearance in the case.

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

### **A. Statement of Facts.**

Sean Sexton is a profoundly cognitively disabled individual with serious behavioral challenges who resides at Rainier School in Buckley, Washington. CP 4-5; 16-43. Sean is non-verbal, non-ambulatory (walks only with assistance), aggressive behavior, and self-injurious behavior. He requires 24 hour care and supervision. He requires skilled supervision and

a structured environment for his treatment, training and care. Sean needs and well-utilizes the multi-services which Rainier School provides. CP 63.

During the past reporting period, he began falling and lost his ability to walk independently. He participates in a sensory stimulation program and has basic self-help programs, but demonstrated very little interest in them. Sean has times when he seems to be happy and enjoy outings and social contact with staff. He responds, to some extent, to the visits of the Guardians and attention paid to him. Guardians are Sean's only contacts other than staff. CP 63. His covered Medicaid services are in the intermediate care facilities for the intellectually disabled program (ICF/MR). CP 55-56. Under federal guidelines, it is the facility's duty to ensure guardianship or advocacy for those who have this unmet need. CP 64. Sean's needs for guardianship and advocacy are set forth in the Personal Care Plan and are implemented by the Guardians. CP 55-63.

Sean has no significant assets or income. CP 6. Before July 2010, Sean's only income (aside from an amount of "client wages" from the Adult Training Program he no longer receives) consisted of Title II social security income which was received by Rainier School as representative payee, deposited into his resident account, and managed by Rainier School. CP 6-7; 48-50.

James R. Hardman, co-guardian of the person and estate of Sean Sexton, is a Seattle attorney and certified professional guardian with extensive qualifications related to the guardianship and advocacy needs of individuals with disability generally and residents of the residential habilitation centers (RHCs), including Rainier School, in particular. CP 84-87. Alice L. Hardman, co-guardian, also has extensive experience with residents of RHCs. CP 85-86.

Mr. Hardman applied to be representative payee and was appointed by the Social Security Administration on July 14, 2010. CP 69-70. This was reported to the court contemporaneously at the July 16, 2010 hearing. 1RP 2. The legal framework for representative payee status is described in a Memorandum of Representative Payee Status. CP 52-54. The decision in the context of the legal framework, the surrounding facts, and the Certified Professional Guardianship Board (CPG Board) Standards of Practice (SOPs), is set forth in the Guardians' Memorandum in Support of Decision to Apply to be Representative Payee. CP 76-83. He applied to be the representative payee because of his objective reasonable belief the application was in Sean's best interests as set forth in the latter Memorandum. CP 86.

## **B. Procedural Facts.**

The review hearing on the Guardians' Report came on for hearing in July 2010. The Department of Social and Health Services (DSHS) was notified of the July 2010 hearing. CP 47. DSHS did not appear or file any papers. At the hearing, counsel for the Guardians disclosed that Mr. Hardman applied for and was appointed as representative payee by the Social Security Administration two days earlier. 1RP 2. Counsel submitted an alternative Proposed Order to limit the guardianship of the estate, approve guardians' activities, and set an hourly guardian fee rate so the Order was consistent with the appointment. CP 89; 1RP 2-3. Since the reason for the appointment "in part" was to ensure the payment of 3 years' unpaid guardian fees, the court was "very uncomfortable" in signing the Proposed Order until a new care plan was filed and "more detailed information" about why the decision was made to apply to be representative payee. 1RP 3-4; CP 51.

Pursuant to the court's instructions, the Guardians filed a Personal Care Plan, CP 55-65, and a Memorandum on Representative Payee Status,

CP 52-54.<sup>1</sup> Notice was given to DSHS. CP 68.

At the August 2010 hearing, DSHS appeared by an assistant attorney general (AAG) who argued DSHS had no objection to the Proposed Order “because it doesn’t have any impact” on DSHS. “But this is an order written in a way we’ve never seen before and I wanted to be available to make clear the Department’s position of what’s likely to happen going forward.” 2RP 2. The court invited argument from the AAG. 2RP 6. Counsel for the Guardians objected to argument or testimony by the AAG. 2RP 6. The court did not rule on the objection. *Id.* The AAG conceded it was not a party, 2RP 7, but nonetheless presented legal argument to the court which was accepted despite the objection. 2RP 6-8, 16, 27-28. See also 3RP 4.

The court orally ordered a hearing to show cause why the guardian should not be removed, and the court asked for briefing on the issue of application to be representative payee in the context of both the CPG Board SOPs and Sean’s best interests. 2RP 26, 27; CP 75.

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<sup>1</sup> A Verified Report of a Substantial Change in Circumstances was also filed to formalize the oral disclosure of appointment made at the July 2010 hearing.

Again, pursuant to the court's instructions, Mr. Hardman filed a Guardians' Memorandum, CP 76-83, a Declaration of Michael Johnson, CP 89-95, and a Declaration of James Hardman, CP 84-88. DSHS was given notice. CP 83.

In the October 2010 hearing, the court removed Mr. Hardman for failing to obtain court permission prior to applying to be representative payee, 3RP 4, and seemingly for other reasons that are not clear, 3RP 5-8. No findings of fact or conclusions of law support the Order Removing Guardian. CP 96.

A Notice of Appeal was timely filed. CP 97-100.

#### **IV. ARGUMENT**

##### **A. Guardianship Proceedings Generally.**

###### **1. Guardianship Cases.**

Guardianship cases are part of the exclusive, original jurisdiction of the superior court. Wash. const. Art. IV, § 6. Cases are administered and decided as cases in equity. *Guardianship of Sall*, 59 Wash. 539, 542-43, 110 P. 32 (1910). Guardianship statutes are thus declaratory of the power already given to the court. *Weber v. Doust*, 84 Wash. 330, 333-34, 146 Pac. 623 (1915). Such statutes are given an equitable construction. *In re Donnelly's Estates*, 81 Wn.2d 430, 502 P.2d 1163 (1972).

The statutory scheme provides for appointing guardians, Chapter 11.88 RCW and administration of guardianship cases, Chapter 11.92 RCW. This scheme is intended to empower individuals who cannot make decisions or advocate for themselves. In guardianship cases, the focus remains on the equities involved between the parties-in-interest – based on the specific facts presented in the case and guided by case law principles, rather than one’s legal status as guardian. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.2d 735 (2001). Thus, cases are decided predominantly on declarations.

## **2. Standard of Review.**

The focus is on the equities existing between the guardian and the incapacitated person (IP). The court stands in the shoes of the IP to see if a decision is in the IP’s best interests. Any reviewing court determines cases under this standard. “[U]ltimately, it is the court’s duty to protect the ward’s interests.” *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). The end is justice in a particular case for the incapacitated person, not promotion of public policy for DSHS or other interest groups who may have an adverse interest in these proceedings.

## **3. Real Parties-In-Interest and Stages of Proceedings.**

The statutes reflect that the guardian and the incapacitated person

are the only real parties-in-interest. In a civil case, there is a plaintiff and a defendant, and in a guardianship case, the guardian and the incapacitated person. Guardianship cases consist of stages of proceeding. The review of triennial (3-year) reports is such a stage of proceeding.

Generally, guardian and counsel fees are awarded for appointment, administration, and for defending against adverse interests of others.

This case arose on the review and approval of the Guardians' Report. The court on review of the report approves or not the report, the activities of the guardian, and the fees for the last reporting period.<sup>2</sup> The court also approves or not a Personal Care Plan. The implementation of the Plan becomes the basis for approving future guardian activities.

Counsel fees are also approved. Revision and appeal can follow in the same manner as any other case.

#### **4. Incapacitated Persons (f/k/a "Wards").**

As noted earlier, a court's job is to protect the "best interests" of the incapacitated person at every level of proceedings. The court in this case already determined that it is in the best interests of the incapacitated person to have a guardian. The standards for decision-making are

substituted judgment (applying known or historical preferences of the incapacitated person) and best interests (which includes “standing in the shoes” of the individual and asking what is objectively reasonable under the circumstances).

Sean’s best interests are controlling in this case. For an analysis of Sean’s best interests, see CP 78-81.

### **5. Guardianship Protection and Empowerment.**

When a guardian is appointed, the court adjudicates two issues: the incapacity of the individual, and the qualifications of a guardian. RCW 11.88.010(2); RCW 11.88.020. The Guardians in this case are especially well-qualified to protect and advance Sean’s best interests. CP 84-88.

When the court reviews a guardian’s activities, it does so with deference and with the trust accorded to any officer of the court. *In re Rohne*, 157 Wash. 62, 74, 288 P. 269 (1930). Suspicion, fears, speculation, or dissension with the court is not enough to dispel this deference. There must be evidence of actual wrongdoing. *Id.*

In this case, the Guardian applied the best interests standard and

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<sup>2</sup> In this case, there were no fees paid, so the Court was asked to approve the activities of the Guardians contained in their Guardians’ Service Report.

possessed an objectively reasonable belief those interests were served. CP 78-81; 86. For further analysis of how the Guardians empower and protect Sean's non-financial interests, see Personal Care Plan. CP 55-67.

In guardianship administration, a guardian bringing some benefit or value to the incapacitated person is entitled to compensation absent material wrongdoing. *Estate of Montgomery*, 140 Wash. 51, 53, 248 P. 64 (1926). In litigation matters, a guardian also has a duty to appear and defend in all proceedings against the incapacitated person and against third party interests. *Guardianship of Brown*, 6 Wn.2d 215, 101 P.2d 1003 (1940).

#### **6. Third Party Causes of Action and Financial Claims**

DSHS does not have any statutory authority to appear in guardianship cases simply because it provides services to an incapacitated person. As noted earlier, the guardian and incapacitated person are the real parties-in-interest in a guardianship case. Guardianship statutes provide for providing notice upon request. RCW 11.92.150. Other regulations requiring notice might apply. See Chapter 388-79 WAC. However, these statutes do not confer party-in-interest status. Guardianship statutes also provide for standing of other persons in other discrete stages of procedure, none of which are applicable here. Fact witnesses have a special role in

guardianship proceedings. Fact witnesses with any information bearing on the best interests of the individual may appear at any time and the court will hear them. Finally, any person can send a letter to the court and ask the court to modify or terminate a guardianship or remove or replace the guardian. RCW 11.88.120.

Those with their own financial interests to protect or legal arguments to advance against the guardianship need to intervene or be joined, CR 19, CR 24; use the claims procedure under RCW 11.92.035; or, file an action against the guardianship estate.<sup>3</sup>

In this case, there is absolutely no basis for DSHS to appear in a removal proceeding and make legal argument, especially because it has a financial interest in the outcome that is contrary to Sean's interests.

Analysis of the Guardians' entitlement to an award of counsel fees against DSHS for this "stealth appearance", see Part D, below.

### **7. Alternatives to Guardianship.**

There are several alternatives to guardianship, including powers of attorney, trust arrangements, and custodial accounts for minors. The alternative that has relevance in this case is a representative payee who

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<sup>3</sup> Actions against the guardian are not contemplated here.

accepts monthly federal benefit checks for social security, VA benefits, and the like. Representative payee is an administration of benefit income that is parallel or ancillary to guardianship administration. For further analysis of the legal framework of the representative payee system, see CP 52-54; 76-83.

A guardianship court does not have jurisdiction to review use of funds by a representative payee. *Guardianship of Keffeler*, 151 Wn.2d 331, 88 P.3d 949 (2004) (court will decline to decide issues of misuse because Social Security Administration is the proper place to address the complaint). However, the Guardian promised to cooperate with the court on the appropriate extent of disclosure. CP 82-83; 2RP 8.

**B. The Trial Court Abused Its Discretion by Removing the Guardian.**

The trial court's contrary decision is an abuse of discretion. A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). First, the application to be representative payee was in Sean's best interests. Second, the trial court, when removing the guardian, did not articulate the standard of removal or cite any existing rule which was violated. Third, there are no facts in the record supporting a breach of duty, much less a significant breach. Fourth, there are no facts

in the record demonstrating any actual financial harm to Sean. Finally, admitting a lack of expertise in guardianship cases, the trial court relied on an unfounded mistrust of the Guardian and counsel, buttressed by improper legal argument from DSHS, as the basis for removing the guardian.

**1. The Guardian's Exercise of Discretion was Proper and Consistent with Sean's Best Interests.**

The Guardian's application to be representative payee was proper and consistent with Sean's best interests. The decision to apply provided a direct benefit to Sean and/or the Guardian possessed an objectively reasonable belief Sean's best interests were served. CP 76-83.

The guardianship estate is maximized by allowing resources to accumulate to \$2,000.<sup>4</sup> A guardian owes a duty to protect the guardianship estate against third party interests. *Guardianship of Brown*, 6 Wn.2d 215, 101 P.2d 1003 (1940). Replacing DSHS as representative payee prevents

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<sup>4</sup> The Guardians argued below that the resident trust account at the facility was not part of the guardianship estate. However, RCW 71A.20.100(2) and RCW 71A.20.100(5) indicate that when a guardian is appointed, the resident trust account is subject to control of the guardian.

further misuse of funds. This duty is owed to Sean, not to the facility in which he lives and not to the State General Fund. Representative payee status facilitates autonomy of the IP and provides for unmet needs. Representative payee status ensures continuity of the guardianship case, ensuring access to justice for Sean without dependence on the approval of DSHS. The representative payee is a less restrictive alternative to a guardianship of the estate. A federal entitlement to benefits is supervised by the Social Security Administration.

When confronted with two courses of action, one of which is more beneficial to the IP, and the other more beneficial to DSHS, the Guardian's choice to proceed was based on the course most beneficial to Sean, and upon an objectively reasonable belief. For a complete analysis, see CP 76-83.

The decision had no significant financial effect on the guardian. Continued entitlement to guardian fees is not self-dealing. Payment to oneself as a guardian/creditor from a source of funds administered as representative payee is not self-dealing as a matter of federal law. See CP 82.

Because the best interests of the IP were served by either providing a direct benefit to the IP's estate, or because the Guardian possessed an

objectively reasonable belief the best interests of the IP were served, on this basis alone the Guardian should be reinstated.

## **2. The Court's Order of Removal Constitutes an Abuse of Discretion.**

The Guardian should also be reinstated because the trial court's order of removal is an abuse of discretion. First, the trial court did not articulate the standard of removal or cite any known, existing rule which was violated. The relevant statutes governing removal permit a court to remove a guardian for a "good reason":

At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian.

RCW 11.88.120(1). Further the court is to consider the "best interest" of the IP:

In a hearing on an application to modify or terminate a guardianship, or to replace a guardian or limited guardian, the court may grant such relief as it deems just and in the best interest of the incapacitated person.

RCW 11.88.120(4). According to the plain language, "good reason" includes death of a guardian and other similar circumstances when the guardian may be unwilling (because of intent to resign) or unable to serve (because of disability). The removal must also be in the best interests of the IP. There is no "good reason" to remove a guardian who applies to be

representative payee without advance court permission. The existing rule is that a guardian has discretion and the court will defer to that discretion absent a significant breach of duty. *In re Rohne*, 157 Wash. 62, 74, 288 P. 269 (1930) (“*Rohne* discretion”). The court cited no existing rule which obviates that discretion and requires court approval prior to applying for representative payee status and cited no evidence that the removal is in the best interests of the IP.

Furthermore, fair notice should be given to guardians about what will constitute a violation and advance notice of what the standard is rather than finding out after-the-fact that particular court has a unique standard not found in writing anywhere.<sup>5</sup> Violation of a rule which does not exist at the time of alleged violation and for which the guardian has *Rohne* deference is not a “good reason” to remove a guardian.

Second, there are no facts in the record supporting any breach of duty, much less a significant one. There is no exception to *Rohne*

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<sup>5</sup> Judge Friendly listed what he called the “elements of a fair hearing”: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against one; (6) the right to have the decision based only on the evidence presented; (7) counsel; (8) the making of a record; (9) a statement of the reasons; (10) public attendance; (11) judicial review. Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1279-95 (1975).

discretion and deference. Assuming without agreeing the Guardian should apply to the court in advance, the failure to apply to do so is a technical breach of duty which does not justify the disproportionate punishment of removal. The court could have taken less drastic alternatives like requiring the guardian to resign as representative payee.

Third, there are no facts in the record demonstrating any actual financial harm to Sean. Assuming without agreeing the Guardian should apply to the court in advance, the failure to make formal application to the court in advance did not cause Sean any financial harm.

Fourth, removal is also untenable because the trial court, admitting a lack of expertise in guardianship cases, 2RP 4, apparently relied instead on a general mistrust of the Guardian and counsel, 2RP 20, buttressed by improper legal argument from DSHS, 2RP 28, as the basis for removing the Guardian.

DSHS admitted it was not a party to this guardianship proceeding. 2RP 6-7. It has not filed a request for special notice of proceedings. No DSHS employee appeared as a fact witness. The AAG appearing did not have personal knowledge regarding Sean and was not a fact witness. DSHS did not follow any procedures to become an *amicus curiae*.

There is no authority for the trial court to accept legal argument

from a non-party. See, e.g. CJC 3(A)(4). There is also no authority for the Office of Attorney General to induce a court to accept such legal argument. See, e.g., RPC 3.5(b). In addition to being highly improper, the inducement and the acceptance of legal argument are prejudicial because the Guardians were not given notice in advance of the legal arguments DSHS would make in its “stealth” appearance. 2RP 6-7.

For the foregoing reasons, the trial court abused its discretion by removing the Guardian for applying to become representative payee without prior court permission. The court should reinstate the guardian and remand with instructions to assign to another judge.

**C. What is the Process Due a Certified Professional Guardian before he or she may be Removed?**

The theory of the Guardian’s case is not obtaining prior court approval prior to applying to be representative payee is not a “good reason” for removal of a guardian. Thus, granting the relief sought that the trial court abused its discretion, an order of reinstatement and reassignment of the case, and disposition of the issue of attorney fees, provides complete relief to the Guardian and Sean Sexton. The following analysis is provided in the event this Court determines the trial court did not abuse its discretion.

### **1. The Liberty and Property Interests at Stake.**

The Due Process Clause of the United States Constitution requires procedural protections for certified professional guardians.

“Procedural due process imposes constraints on governmental decisions depriving individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Bang Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 522-23, 29 P.2d 689 (2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). A professional license revocation hearing is quasi-criminal in nature and is entitled to the protections of due process. *Nguyen*, 144 Wn2d. 523.

A removal of a certified professional guardian in a particular case is tantamount to a revocation of the certification to practice in the case.

Certification by the Supreme Court confers a property interest. In addition, there is a liberty interest in preserving one’s professional reputation. See *Nguyen*, 144 Wn.2d 527.

In *Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1*, 96 Wn.2d 503, 510, 637 P.2d 940 (1981), the Supreme Court held a liberty interest could be present if a public

employee's integrity, honor, or good name was called into question by their dismissal from public employment. See also *Giles v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 457, 461, 583 P.2d 1213 (1978). In *Ritter*, the Supreme Court held the physician was entitled to due process to protect his property and liberty interests, but ultimately upheld his loss of hospital staff privileges. In *Giles*, that court noted there is no constitutional property interest in public employment. *Giles*, 90 Wn.2d at 461. In *Ritter*, that court similarly found no property interest in hospital staff privileges. *Ritter*, 96 Wn.2d at 509-10.

Loss or suspension of the ability to practice in one case diminishes a CPG's standing in the guardian, legal, and lay communities, and deprives the guardian of the benefit of the qualifications garnered by countless hours and considerable financial investment. See *Nguyen*, 144 Wn.2d 527. In this case, there are even more negative implications from the removal. The Guardian is also a member of the bar. The Guardian also is a representative payee and removal may affect that status.

The risk to a CPG of having reputation tarnished erroneously is remedied by increasing the burden of proof for removal and providing for protections against removal for disproportionate reasons or based on inappropriate fears or suspicions.

*In re Revocation of License of Kindschi*, 52 Wn.2d 8, 319 P.2d 824

(1958), the Supreme Court described the unique nature of a medical disciplinary proceeding:

It is characterized as civil, not criminal, in nature; yet it is quasi criminal in that it is for the protection of the public, and is brought because of alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose. It is not strictly adversary in nature. It is essentially a special, somewhat unique, statutory proceeding, in which the medical profession . . . inquires into the conduct of a member of the profession and determines whether disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purpose of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public.

*Id.* at 10-11 (first emphasis added).

As officers of the court, guardians have *Rhone* discretion co-extensive with duties owed absent a significant breach of duty. They are akin to lawyers or judges. Indeed, judges are considered the “superior guardian”. The standard of proof for lawyer discipline and professional discipline of judges is clear and convincing. *Nguyen*, 144 Wn.2d 529. The same burden of proof should inform the analysis for CPGs.

Because a certified professional guardian’s interests at stake are more substantial than mere loss of money, a higher standard applies where there are allegations of quasi-criminal wrongdoing alleged. See *Nguyen*,

144 Wn.2d at 527. When instituted by the state – in this case a sua sponte show cause hearing by the court – a clear and convincing standard is required. See *Nguyen*, 144 Wn.2d 529. The Guardian urges the Court to protect these interests by declaring that a certified professional guardian may only be removed for a significant breach of duty with actual harm shown by clear and convincing evidence, and that a certified professional guardian cannot be removed for a technical breach of duty if the guardian can demonstrate that the decision was based on an objectively reasonable belief the decision was made in the best interests of the IP.

### **3. The Risk of Erroneous Deprivation.**

Imposing the appropriate burden of proof is designed to impress upon the fact-finder the importance of the decision and thereby reduce the chance of error. *Nguyen*, 144 Wn.2d 530. The risk of erroneous deprivation in a guardianship case is high because (1) the statutory standard of “good reason” is too subjective, (2) removal must be proportionate to the breach of duty involved; and (3) reliance on fear, suspicion and mistrust alone arising from the status as guardian is an inappropriate reason to remove a guardian.

As in *Nguyen*, the superior court monitors the guardian, acted as prosecutor, and as final decision maker. It appeared the court had already

made up its mind at the prior hearing. The appropriate statutory standard of “good cause” is subjective and relative in nature. As in *Nguyen*, the standard was determined in this case by the court’s subjective opinion rather than fact or law.

Removal should also be proportionate to the harm. As a statutory interpretation matter, “good reason” must mean at least a significant breach of duty. This legislative standard, however, did not contemplate certified professional guardians with a liberty and property interest. Lay guardians do not necessarily have such an interest. Removal because of a significant breach of duty must also statutorily have a nexus to some detriment to the best interests of the IP. Written findings and conclusions should also be included in an order of removal.

Punishing guardians based on harm, speculation, and fear existing only in the minds of others and based on a general distaste for guardians is not a legitimate state interest.

Medicaid cases such as this one are characterized on one hand by enforcement of stringent compensation limits by DSHS on one hand, Chapter 388-79 WAC, and DSHS seeking removal of guardians for technical breaches of duty on the other. Defending against technical breaches of duty creates an unacceptable financial and time-consuming

burden, especially when there is no actual harm.

An “objectively reasonable belief” test should be adopted by the court to avoid erroneous deprivation. Focusing on the relationship between the guardian and the IP, and the objective facts, is a clear and intelligible standard. Guardians have *Rhone* discretion to make choices and the court defers to the guardian’s course of action absent significant breach of duty. Courts thus support guardians as their decision-making surrogates but only so long as there is no significant breach of duty. An objectively reasonable belief the discretion was exercised in the best interests of the IP is reconciled with any prescriptive rules that might conflict with the proper exercise of *Rhone* discretion. An “objectively reasonable belief” standard is also compatible with the positive role certified professional guardians play on the front lines in providing overall savings to the State as well as protecting vulnerable adults from financial or physical harm.

#### **4. Government Interests.**

The paramount state interest is the best interests of the IP. The purpose of the entire statutory scheme is to provide for the protection and well-being of an IP by providing empowerment by a guardian. An IP’s interests are advanced by proceedings which reach an accurate and reliable result. Erroneous removal of a guardian may, as in this case, be

detrimental to the best interests of the IP because of a loss of continuity of guardianship protection.

A clear and convincing burden of proof will not have the slightest fiscal impact on the state courts because it would not appreciably change the nature of the hearing per se. See *Nguyen*, 144 Wn.2d 532.

In conclusion, the best interests of an IP are not protected by a low standard of proof resulting in erroneous removal of the person most familiar with the care needs and financial affairs of the IP. Indeed, the best interests of the IP, and of the public, are dependent on guardians performing services, not eliminating them from the scene. The best interests of the IP are advanced by using a higher standard of proof and appropriate objective review of the Guardian's discretion by the court.

#### **D. Attorney Fees and Costs.**

The Guardians request an award of attorney fees from DSHS based on its "stealth" appearance described above. DSHS should be considered a "party" within the meaning of RCW 11.96A.150 for this purpose.

Alternatively, the issue of attorney fees before the trial court and on appeal should be remanded and decided by the trial court consistently with the court's opinion in this case.

**V. RELIEF SOUGHT.**

The Guardians respectfully request that this honorable Court:

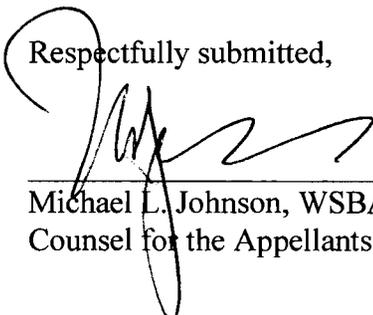
A. Reinstate the Guardian and remand the case with instructions to reassign the case to another judge;

B. Award attorney fees, costs, and expenses pursuant to RCW 11.96A.150, RAP 18.1, other applicable statute, or other applicable rule in equity; and,

C. For such other relief as the Court finds suitable, just, and equitable.

March 11, 2011

Respectfully submitted,



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