

NO. 29052-2-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

IN RE THE GUARDIANSHIP OF JOHANNA LEE, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY

---

APPELLANT'S REPLY BRIEF

Brett T. Sullivan  
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## I. REPLY TO ARGUMENTS OF RESPONDENTS

### A. *An Evidentiary Hearing to Determine Whether Johanna Lee Would Suffer Substantial Hardship by Imposing Guardian Ad Litem Fees on Her is Warranted*

Respondents Meg Irwin and David Thompson (appearing *pro se*) argue that allegations made by Meg Irwin in a Petition for Order to Appoint Guardian serve as conclusory evidence that Johanna Lee (“Ms. Lee”), the Appellant in this matter, would not suffer hardship by being ordered to pay for the fees of the guardian ad litem. Respondents claim that Ms. Lee had substantial assets in which she can pay the fees of the guardian ad litem. Resp. Brief 9.

Unfortunately, Respondents’ arguments fail to take into consideration the statements in the guardian ad litem report as to the removal of Ms. Lee’s valuable property that was removed from her home and upon which she depended for her income. CP 122.

Respondents attempt to distinguish the holding in *In re Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997) (ordering an evidentiary hearing to be conducted at the trial court to determine whether the imposition of guardian ad litem fees imposed substantial hardship on the allegedly incapacitated person) from the present case by applying a

mathematical formula to determine if substantial hardship exists, based upon simple ratio of guardian ad litem fees to net worth, without taking into account Ms. Lee's cash flow and other obligations. Further, as noted by Mr. Mellote, Ms. Lee has experienced a substantial loss of her valuable inventory with resulting hardship. CP 122. RCW §11.96A.150(1) (the "fee shifting" statute) expressly allows the trial court to take into account "any and all factors" that it deems "relevant and appropriate." RCW §11.96A.150(1). Surely such factors would include more than Respondents' limited analysis of net worth. Respondents also fail to acknowledge that Ms. Irwin alleged in her Petition that the "AIP [Ms. Lee] has income from the following sources: Social Security benefits – approximately \$900.00 per month, plus an unpredictable but modest amount from her business (when it is open)." CP 102. According to Ms. Irwin's Petition, if the store is not open (such as when Ms. Lee is in hospital), then her income is approximately \$900.00 per month. At this rate, it would take approximately five (5) months for Ms. Lee to pay the fees of the guardian ad litem, not to mention the other attorneys fees and costs that were imposed against her as a result of Ms. Irwin's guardianship petition.

Ms. Lee is not asking that Mr. Mellotte, the guardian ad litem, not be paid; rather, she is asking for the opportunity to be heard in an

evidentiary hearing in the trial court that the imposition of such fees on her would impose a substantial hardship and as a result, Yakima County should pay for the costs of the guardian ad litem.

*2. The Petitioner's Withdrawal of the Petition for Order Appointing Guardian Should Bar the Imposition of All Fees and Costs Against the AIP.*

Respondents contend, in essence, that Ms. Irwin was performing a favor for Ms. Lee by withdrawing her Petition for Order Appointing Guardian, by claiming that more attorney fees and costs would have been required for a contested hearing, and implying that Ms. Lee would be responsible for such fees and costs. Resp. Brief 10. However, such a hearing did not take place; Ms. Irwin withdrew her Petition after a strongly worded guardian ad litem report stating that no grounds exist to impose a guardianship. CP 133. Ms. Irwin knew of Ms. Lee's meager resources as she alleged in her Petition that Ms. Lee had very minimal income. CP 102. Ms. Irwin may have subjectively thought that she was helping Ms. Lee; however, her actions had a devastating impact as Ms. Lee was ordered to pay \$24,256.56 in attorney fees and costs for a Petition that was withdrawn. CP 6.

*3. The Inclusion of Ms. Lee's Own Attorney Fees and Costs in a Judgment Against Her is a Proper Issue to be Heard on Appeal.*

Ms. Lee was represented by counsel in the underlying guardianship proceeding who inserted a sum for fees and costs to be awarded him in the final judgment. CP 6. Respondents do not address Ms. Lee's argument on appeal that this judgment by her attorney is unsupported by cost bill and motion. The first opportunity for Ms. Lee to be heard on this particular issue is in this appeal, as Mr. Kirkevold as the attorney receiving benefit of the judgment was not in a position to make a claim of error at the trial court level. To apply RAP 2.5(a) in a manner proposed by Respondents would result in substantial and manifest injustice to Ms. Lee.

*4. Bradley Melotte and Kevin Kirkevold Have Not Joined in Respondents Brief.*

RAP 10.1(g) provides that "... in a case with more than one party to a side, a party may (1) join with one or more other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another." Respondents Bradley Mellotte and Kevin Kirkevold have not filed a brief in this matter nor have they requested to join with Respondents Meg Irwin or David Thompson in their brief. Mr. Thompson's brief, to the extent that it argues that judgment against Ms. Lee in favor of Bradley Mellotte and Kevin Kirkevold in the underlying proceeding should not be reversed, constitutes an *amicus curiae* brief that

should not be considered by this Court. *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 728 n.18, 985 P.2d 262 (1998).

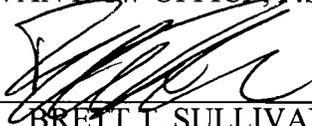
**V. CONCLUSION**

Ms. Lee respectfully requests that the April 16, 2010 judgment in favor of Kevin Kirkevold as judgment creditor be reversed, that the April 16, 2010 judgment in favor of David Thompson as attorney for Ms. Irwin be reversed and that the April 16, 2010 judgment in favor of Bradley Mellote as the GAL be reversed and remanded to the trial court to conduct further evidentiary proceedings to determine whether Yakima County should be ordered to pay for the fees and costs of the guardian ad litem in the underlying proceedings.

DATED this 5<sup>th</sup> day of October, 2010.

SULLIVAN LAW OFFICE, P.S.

By:



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BRETT T. SULLIVAN, WSBA #24131  
Attorney for Appellant Johanna H. Lee

CERTIFICATE OF SERVICE

I do hereby certify that on October 13, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

|   |   |
|---|---|
| BRADLEY A. MELLOTTTE<br>331 N. 1 <sup>st</sup> Street<br>Yakima, WA 98901 | <input checked="" type="checkbox"/> Delivery Service<br><input type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> Hand Delivery |
| MEG IRWIN<br>105 N. Third Street<br>P.O. Box 797<br>Yakima, WA 98907      | <input checked="" type="checkbox"/> Delivery Service<br><input type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> Hand Delivery |
| DAVID THOMPSON<br>105 N. Third Street<br>P.O. Box 797<br>Yakima, WA 98907 | <input checked="" type="checkbox"/> Delivery Service<br><input type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> Hand Delivery |
| KEVIN KIRKEVOLD<br>24 N. 2 <sup>nd</sup> Street<br>Yakima, WA 98901       | <input checked="" type="checkbox"/> Delivery Service<br><input type="checkbox"/> U.S. Mail, postage prepaid<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> Hand Delivery |

DATED this 13<sup>th</sup> day of October, 2010.

By:



**BRETT T. SULLIVAN, WSBA #24131**  
 Attorney for Appellant Johanna H. Lee