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 SUPREME COURT
 STATE OF WASHINGTON
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**IN THE SUPREME COURT
 FOR THE STATE OF WASHINGTON**

In the Matter of the Guardianship of)	Supreme Court
)	No. 84746-1 84379-1
)	
MARY JANE McNAMARA,)	COMMENTS RE
)	ACCESS TO JUSTICE
)	
)	King Co. Superior
An Incapacitated Person.)	No. 06-4-02645-1 SEA
_____)	(Consolidated)

I. Relief Requested.

Mary Jane McNamara and other indigent incapacitated persons in the consolidated cases through their Guardians are the Appellants in this case. Pursuant to letter order of the Clerk dated August 2, 2010, McNamara now submits comments showing that an order waiving the filing fee, court fees and costs is just and equitable in this case.

II. Comments.

There is no dispute as a factual matter that McNamara and the others (collectively called McNamara) are indigent. The question here is

whether or not they are entitled to a waiver of the filing fee for appeal, the cost of the clerk's papers, and the costs of reproducing the briefs.

The applicable Rule of Appellate Procedure (RAP) is RAP 15.2. An indigent person is entitled appellate review partially or wholly at public expense in certain types of cases. RAP 15.2(b)(1)(a)-(f). This right extends to "case[s] in which a party has a constitutional or statutory right to counsel at all stages of the proceedings." RAP 15.2(1)(f).

McNamara has a clear statutory right to counsel at public expense and is therefore entitled to the fee waiver on appeal. In a guardianship case, an incapacitated person has a right to counsel at public expense "at any stage in guardianship proceedings." RCW 11.88.045(1)(a). The approval of a periodic guardian's report is a recognized stage of guardianship proceedings. RCW 11.92.040(2); RCW 11.92.043(2). An appeal of a final order is also a stage of guardianship proceedings. See RCW 11.96A.200 (statutory authority for appellate review of a "final order"). Because McNamara is entitled to counsel at public expense, she is entitled to the fee waiver on appeal. **Appendix A.**

RAP 15.2(d) provides:

If the Supreme Court decides the party seeking review is seeking review in good faith, that an issue of probable merit is presented, and that the party is entitled to review partially or wholly at public expense,

the Supreme Court will enter an order directing the trial court to enter an order of indigency.

In this case, McNamara has a clear right of review partially or wholly a public expense under RAP 15.2(b)(1)(f), described above. Furthermore, RAP 15.2(d) is wider in scope than RAP 15.2(b)(1)(f). The former rule ^{15.2b} encompasses more types of cases than the latter rule because the former does not expressly limit partial or whole review at public expense to the non-exclusive list in the latter rule. So even if RAP 15.2(b)(1)(f) were (for some unknown reason) construed against McNamara, the procedure in RAP 15.2(d) would still apply to her request for an order of indigency.

Access to the courts – including the protection afforded by a guardian – is a fundamental Constitutional right generally, see, e.g., Washington Const. art. I, §§ 1, 4, 12, 29; *Dependency of Grove*, 127 Wn.2d 221 (1995) (civil costs on appeal); *O'Connor v. Matzdorff*, 76 Wash.2d 589, 458 P.2d 154 (1969) (same); *Iverson v. Marine Bancorporation*, 83 Wash.2d 163, 517 P.2d 197 (1973) (same), as well as for incapacitated persons in particular, see, e.g., *Covey v. Town of Somers*, 351 U.S. 141 (1956) (notice to person known to be incompetent and without protection of guardian “does not measure up” to Due Process); *Udd v. Massanari*, 245 F.3d 1096 (9th Cir.2001) (similar). McNamara

squarely fits within the need for Constitutional protection RAP 15.2(d) is intended to afford.

The McNamara appeal is undertaken in good faith and has probable merit. The Guardians appeal the trial court order affirming a court commissioner's ruling. The commissioner's ruling is attached. **Appendix B.** The issues in McNamara are substantially similar to those raised in *Guardianship of Lamb*, Supreme Court No. 84379-1 (review granted 8/5/2010) and are identified here: (1) advocacy protecting McNamara from potential death or injury pursuant to her Constitutional rights of legislative, executive, and community advocacy; (2) guardian and attorney fee compensation for such protection; and the constitutionality as applied of legislative limitations on that guardian and fee compensation.¹

The Guardians' arguments on appeal are consistent with public policy; advance McNamara's fundamental Constitutional right to petition the other branches of government (manifest right); and, raise issues of significant public importance to the provision of guardianship services for the indigent, of which there is a significant unmet need. **Appendix C.**

At the heart of the request for payment of costs at public expense² is the nature of a guardianship case and the court's role in protecting an

¹ The instant consolidated case brings a different record than *Guardianship of Lamb*, as well as appeal of a procedural ruling limiting the record McNamara is entitled to present.

² What is requested is a waiver of fees, not a direct payment from appropriated funds.

incapacitated person (IP) such as McNamara. Our State's public policy provides that the guardian is the legal representative of the IP for purposes of protecting the IP. RCW 11.88.005; RCW 11.92.040(4); RCW 11.92.043(4). The issues raised in the instant appeal are consistent with that public policy and have probable merit.

The guardianship statutes expressly recognize a significant need to protect person and property and provide a remedy for that need by appointment of a guardian. Chapters 11.88 and 11.92 RCW are a comprehensive and remedial statutory scheme whose purpose it is to protect. Empowering a legal representative empowers the IP. Courts empower guardians to protect the best interests of the IP. An unmet need is met by appointment of a legal representative who can access the courts and advocate protection of the IP.

There is also a unique legal framework in place that applies to McNamara. Washington Const. art. § 13 expresses the second paramount Constitutional duty of the State: to provide state-operated facilities like Fircrest School for McNamara to those who are eligible and need services there. RCW 71A.10.050(2) provides a guardian may appeal a placement proposed by the Department of Social and Health Services when the change is not in best interests of IP.

The predominant public policy -- state and federal³ -- contemplates the guardian as the legal representative of the IP who addresses an otherwise unmet need to protect the IP. The point of a guardianship is to provide the court's protection to incapacitated persons. This purpose is frustrated if access to the courts is denied due to indigence.

McNamara may very well be entitled to have the fees of the Guardian and fees of the Guardian's counsel paid at public expense. However, the that point is not pressed here. A waiver of fees and costs on appeal is justified in this case.

Finally, there are other aspects to access to justice at work in this case. The application of statutes limiting guardian and counsel fees also undermines McNamara's rights to access to justice. *See* RCW 11.92.150 and RCW 43.20B.460 (authorizing the Department of Social and Health Services to limit guardian and counsel fees and costs of indigent persons residing (in relevant part) in residential habilitation centers such as Fircrest School). Limiting the payment of such fees -- from McNamara's own money, no less -- prevents her payment for advocacy directed at preventing her own death or harm, and prevents her payment for advocacy promoting

³ Federal statutes and regulations, like Chapters 11.88 and 11.92 RCW, recognize the need for guardianship protection, and federal survey standards require that state facilities provide for this protection when necessary and at risk of being cited for violation and losing federal funding for failing to do so.

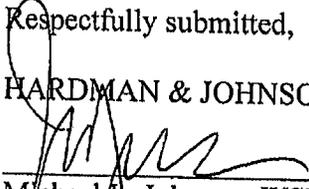
her health and safety. This application of these statutes is inimical to McNamara's best interests. This argument is reserved for subsequent briefing in the context of the issues presented.

In conclusion, the Guardians respectfully request the Court grant the fee waiver request pursuant to RAP 15.2, and grant such other relief as may be just and equitable.

August 31, 2010

Respectfully submitted,

HARDMAN & JOHNSON



Michael L. Johnson, WSBA #28172
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2010, I served a true and correct copy of the foregoing Comments to Jonathon Bashford, Assitant Attorney General, at 7141 Cleanwater Drive SW, Olympia, WA 98504-0124, by e-mail/PDF and by first class mail, postage prepaid.

August 31, 2010



Michael L. Johnson, WSBA #28172

App. A

PRESENT IN PERSON

EXPO 1
EXPO 1

[Handwritten signature]

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN KING COUNTY

8 In the Guardianship of 9 MARY JANE McNAMARA, 10 An Incapacitated Person 11 _____ 12 _____) No. 06-4-02645-1 SEA))) MOTION AND ORDER OF INDIGENCY) TO WAIVE COURT FEES) <i>(Clark's Action Required)</i>
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James R. Hardman, J.D., C.P.G. and Alice L. Hardman, M.S.W., C.P.G. filed a Notice of Appeal in the above-referenced guardianship case, and moves the Court for an Order of Indigency waiving the filing fee, superior court fees, and brief publication costs for the Notice of Appeal to the Supreme Court.

The following certificate is made in support of this motion.

Respectfully submitted,

HARDMAN & JOHNSON

July 21, 2010

[Handwritten signature]

 Michael L. Johnson, WSBA # 28172
 Counsel for Guardians of Mary Jame McNamara

MOTION AND ORDER OF INDIGENCY
FOR WAIVER OF COURT FEES - 1

ORIGINAL

HARDMAN & JOHNSON
93 S. JACKSON ST -#55940
SEATTLE, WA 98104-2818
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CERTIFICATE

I, JAMES R. HARDMAN, J.D., C.P.G., certify as follows:

1. I am the Guardian of the Person and Estate of the Incapacitated Person and am appealing the judgment in the superior court issued in the above-captioned cause.

2. That the Incapacitated Person owns:

a. No real property

b. Real property valued at \$_____.

3. That the Incapacitated Person owns:

a. No personal property other than personal effects

b. Personal property (automobile, money, inmate account, motors, tools, etc.)
valued at \$_____.

3. That the Incapacitated Person has the following income:

a. No income from any source. I received \$ N/A after taxes over the past year.

b. Income from employment, disability payments, SSI, insurance, annuities, stocks, bonds, interests, etc., in the amount of approximately \$ 1000.00 per month.

These funds are in the custody of an managed by the Fircrest School in a resident trust account.

4. That the Incapacitated Person has:

a. Undischarged debts in the amount of \$_____.

b. No debts other than guardian fees and attorney fees.

5. ////

MOTION AND ORDER OF INDIGENCY
FOR WAIVER OF COURT FEES - 2

HARDMAN & JOHNSON
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SEATTLE, WA 98104-2818
PH: (206) 623-3030 FAX: (888) 279-5527

1 6. That the Incapacitated Person can contribute the following amount toward the expense of
2 review: \$ -0-.

3 7. The following is a brief statement of the nature of the case and the issues sought to be
4 reviewed:

5 Guardians and their attorneys provide access to justice to protect the civil rights of an
6 Incapacitated Person. Guardians and their attorneys are nominal parties and are not legally
7 responsible for incurring fees in their respective individual capacity. It is Incapacitated Persons
8 who bear their own fees from their own estate as the real party-in-interest under supervision of
9 the trial court.

10 The Incapacitated Person is entitled to access to justice on Constitutional questions and
11 questions raised to protect those rights. See, e.g., Wash. Const. Art. I, §§ 1, 32. However,
12 without compensation of guardians and their attorneys, the Incapacitated Person does not have
13 access to justice to protect those rights. There is no basis for shifting the responsibility to bear
14 fees and costs to guardians and their attorneys in their individual capacity, or shifting a
15 significant risk of non-payment when acting to protect the Incapacitated Person's rights and
16 interests, creating a disincentive to protect the Incapacitated Person from death or harm.

17 The superior court's decision implicates the following issues of law:

18 (1) May courts apply a rule of guardian compensation requiring a "direct" benefit in a
19 guardianship of the person to the exclusion of all other rules of compensation, and if so, under
20 what circumstances?

21
22
23 MOTION AND ORDER OF INDIGENCY
FOR WAIVER OF COURT FEES - 3

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1 (2) May courts apply a rule of attorney compensation precluding compensation because
2 of "unique issues", or because a party is not the prevailing party, to the exclusion of RCW
3 11.96A.150, and if so, under what circumstances?

4 (3) Is there a violation of IP's right to petition legislative, executive and community
5 officials under Article I, Section 4 of the Washington Constitution and the 1st and 14th
6 Amendments to the United States Constitution?

7 8. The Guardian requests that Court waive fees for the following:

- 8 (a) filing fees;
9 (b) clerk's papers;
10 (b) preparation, reproduction, and distribution of briefs.

11 9. The Guardian authorizes the court to obtain verification information regarding the financial
12 status from banks, employers, or other individuals or institutions, if appropriate.

13 10. I certify that I will immediately report any change in the financial status of the Incapacitated
14 Person to the court.

15 11. I certify that review is being sought in good faith.

16 12. The Movant is also "of counsel" to the firm of Hardman & Johnson and does not share
17 profits from the firm in this matter.

18 /

19 /

20 /

21 /

22 /

23 MOTION AND ORDER OF INDIGENCY
.. FOR WAIVER OF COURT FEES - 4

1 I, JAMES R. HARDMAN, certify under penalty of perjury under the laws of the State of
2 Washington that the foregoing is true and correct.

3 Seattle, Washington

4 July 21, 2010

5 
6 JAMES R. HARDMAN
Guardian for Mary Jane McNamara

7 **ORDER**

8 The Court finds that the Incapacitated Person lacks sufficient funds to prosecute an
9 appeal. ** THE MATTER WAS REFERRED BY THE COURT'S STAFF TO EX PARTE DEPARTMENT.*

10 The Court now ORDERS:

11 1. The Incapacitated Person is entitled to a waiver of fees for the following:

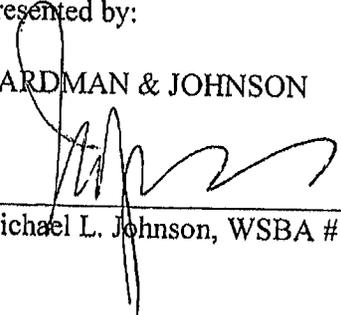
- 12 (a) filing fees;
13 (b) preparation of the clerk's papers; and,
14 (b) preparation, reproduction, and distribution of briefs.

15 DONE IN OPEN COURT THIS 21st DAY OF JULY 2010.

16 
JUDGE / COMMISSIONER

17 Presented by:

18 HARDMAN & JOHNSON

19 
20 Michael L. Johnson, WSBA # 28172

JUL 21 2010

JUDGE / COMMISSIONER

21
22
23 MOTION AND ORDER OF INDIGENCY
FOR WAIVER OF COURT FEES - 5

HARDMAN & JOHNSON
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App. B

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JUDICIAL ADMINISTRATION
5150 CORNELL AVENUE SE
TACOMA WA 98409

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

In the Guardianship of: SUZANNE MACKENZIE, An Incapacitated Person.	NO. 92-4-00732-8 SEA ORDER APPROVING GUARDIAN FEES
---	--

This matter came before the Court on the Guardians' Petition for Order Approving and Directing Payment of Fees, and on an Objection to Guardians' Fee Request filed by the Department of Social and Health Services (DSHS). The Guardians' triennial report and accounting was approved on October 29, 2009, with the question of Guardians' fees and costs reserved. The Court considered arguments and documents submitted by both parties, as well as oral arguments presented by counsel on November 13, 2009.

On December 18, 2009, the Court issued the attached Memorandum Decision in this and five other related cases. In accordance with findings of fact, legal analysis, and conclusions of law contained in that Memorandum, **IT IS HEREBY ORDERED:**

1. Notice has been properly provided to persons and agencies entitled to notice of this presentation.
2. Guardian fees of \$6,300.00 (\$175.00 per month) for the reporting period of April 1, 2006, through March 31, 2009, are approved for payment from the assets of the guardianship

ORDER APPROVING
GUARDIAN FEES

ATTORNEY GENERAL OF WASHINGTON
670 Woodland Square Loop SE
PO Box 40124
Olympia, WA 98504-0124
(360) 459-6558

EXHIBIT A

1 estate as just, reasonable, necessary, and consistent with RCW 11.92.180 and chapter 388-79
2 WAC. ~~To the extent that Guardians have advanced themselves funds from the guardianship~~
3 ~~estate in excess of that amount, such funds shall be returned to the guardianship estate.~~ *008*
4

5 3. The Guardians are authorized to collect \$175.00 per month as an advance allowance
6 toward fees and expenses for the current reporting period beginning April 1, 2009, to be paid
7 from SUZANNE MACKENZIE's monthly income. All sums so paid shall be subject to Court
8 approval at the next regular accounting, with no prejudice to the award of additional
9 compensation to the extent that Guardians provide "extraordinary" guardianship services under
10 WAC 388-79-050 that are necessary and directly beneficial to the ward.

11 4. DSHS shall confirm the Guardians' advance allowance by adjusting SUZANNE
12 MACKENZIE's participation in the cost of care accordingly, to the extent allowed by
13 applicable laws and regulations.

14 DATED AND SIGNED THE 29 DAY OF JANUARY, 2010.

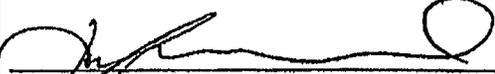
15 
16 **ERIC WATNESS**
COURT COMMISSIONER ERIC B. WATNESS

17 Presented by:

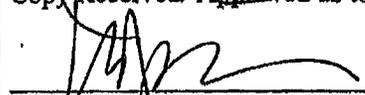
18 ROBERT M. MCKENNA
19 Attorney General

JAN 29 2010

COURT COMMISSIONER

20 
21 JONATHON BASHFORD, Assistant Attorney General, WSBA #39299
Attorneys for Department of Social and Health Services

22 Copy Received/ ~~Approved as to Form:~~

23 
24 MICHAEL L. JOHNSON, WSBA #34498
25 Attorney for Guardians

ORDER APPROVING
GUARDIAN FEES

proceedings also involved the same parties to the issues presented here. In a nutshell the issue is whether a guardian for residents of Fircrest are entitled to an award of fees and costs out of these individual client's public entitlement funds for general advocacy services performed by the guardian that are beyond the usual and customary services and arguably did not directly benefit the individual client but which were intended to benefit all persons who are similarly situated with the client?

The Guardian, James Hardman along with Alice Hardman as co-guardian in two matters, submitted his triennial Guardianship Report and Petition for Approval of Fees to the Court. He provided notice to DSHS of the request for additional fees. The Washington Attorney General appeared on behalf of that agency in opposition. The Court considered the Guardians Petition for Approval of its triennial Report and Approval of Fees, the State's Objection to Guardians' Fee Request and supporting Declarations and the Reply and Amended Reply of the Guardian. The Court also heard from the parties in oral argument and took the matter under advice. While the Guardian's Report was approved without objection, the Court reserved ruling on the Guardian's fee request. It is that issue that is addressed here.

FACTUAL SUMMARY

From the foregoing the Court has learned the following:

David Schmidt is a 69 year old client of DSHS residing at Fircrest since 1964. His guardian is James Hardman. Mr. Schmidt suffers from profound mental retardation, major motor seizure disorder and atypical bipolar illness and is financially supported by state entitlements. He requires 24 hour supervision with ongoing health and medical and health services as well as access to psychiatric and psychological services. These services are augmented by leisure and recreation services, a structured environment and education and social opportunities that are afforded at Fircrest. As a result of the services provided as state expense, a portion of his care is paid out of the public assistance benefits available to Mr. Schmidt with certain limitations being imposed on the fees of his guardian and the guardian's attorney pursuant to WAC 388-79. James Hardman was appointed as Mr. Schmidt's guardian on March 31, 1992 and has submitted his report for the three year period from April 1, 2006 through March 31, 2009. In his application he seeks approval of guardian's fees in the amount of \$325 per month as an exception to the WAC for past serves and \$400 per month for future services.

Kirby Moser is a 52 year old resident of Fircrest with developmental disability with a medical diagnosis of profound mental retardation. He suffers from cerebral palsy, spastic quadriplegia, limited vision and dysphasia. James Hardman is Mr. Moser's guardian and has billed \$325 per month for services incurred and now seeks \$400 as a set aside form Mr. Moser's participation to pay for guardian fees.

Suzanne MacKenzies' Guardians of Person and Estate are James Hardman and Alice Hardman. They were appointed on April 13, 1992 and have presented their Triennial report for the period from April 1, 2006 through March 31, 2009. In that report they indicate that Ms. MacKenzie is a 69 year old Fircrest

resident receiving Skilled Nursing services. She suffers from multiple disabilities with a medical diagnosis of profound mental retardation/developmentally disabled. She has microencephaly, osteopenia, self-injurious behaviors and major motor seizures. They report that she is non-verbal, blind and non-ambulatory. The guardians seek approval of past fees in the amount of \$325 per month and also request an increase of monthly fees to \$400 set aside from Ms. MacKenzie's public entitlement for future fees based on an hourly rate of \$112.50.

Richard Milton is a Fircrest resident who has James Hardman and Alice Hardman as his Co-guardians of person and estate. They were appointed on April 17, 1999. They have filed their guardians report for the period from April 1, 2006 to March 31, 2009. In that report they indicate that Mr. Milton is a Fircrest resident receiving skilled nursing services. Mr. Milton is 51 years of age and suffers from profound mental retardation. His multiple disabilities include microcephaly, major motor seizures, cerebral palsy, spastic quadriplegia, dysphasia, optic atrophy, and thorocolumbar scoliosis. He is non-verbal and non-ambulatory. The guardians have reported payments for their fees at \$325 per month for the past period and are seeking an increase to \$400 per month.

Daniel Werlinger is a Fircrest resident. Alice Hardman was appointed as his guardian on November 10, 1988 and James Hardman was added as co-guardian May 16, 2005. Mr. Werlinger is 64 years old and suffers from multiple disabilities including those with quadriplegic rigidity, dysphasia and no teeth. He is non-verbal as well. His diagnosis is profound mental retardation/developmentally disabled. The guardians report payments for their services of \$325 per month for the past period and are seeking \$400 per month for future services.

Finally, Mary Jane McNamara, age 47, was appointed a guardian in Kitsap county but venue was transferred and on June 23, 2006 Mr. Hardman was appointed successor guardian here in King County. Ms. McNamara requires skilled nursing facility care and resides at Fircrest with social security and VA benefits funding her care. According to the Guardian's report she is non-verbal and non-ambulatory. She suffers hearing loss and is diagnosed profound or severe mental retardation/developmentally disabled. According to her care plan Ms. McNamara has not used the pool which was closed in early 2009 and because she is tube fed she rarely if ever has visited the cafeteria that was recently closed.

APPLICABLE LAW

Before fees and costs of administration of the guardianship can be approved, the court must determine what benefit was conferred on the estate. Authorities make it clear that whatever benefit was conferred must also be substantial. Without finding a benefit, the court is not permitted to award fees. *Matter of Estate of Niehenke*, 117 Wash.2d 631, 818 P.2d 1324 (1991). *Estate of Morris*, 89 Wn. App. 431, 949 P.2d 401 (1998). And the court must consider the result was obtained and apply certain factors. *Allard v. Pacific Nat'l Bank*, 99 Wash.2d 394, 406-07, 663 P.2d 104 (1983). Relevant factors include whether litigation is indispensable to the proper trust administration; issues presented are neither immaterial nor trifling; conduct of the parties or counsel is not vexatious or litigious; and there has been no unnecessary delay or expense. *Allard, supra*. Additional authorities have set out specific factors

necessary for determining attorney fees. *Matter of Estate of Larson*, 103 Wash.2d 517, at 522, 694 P.2d 1051 (1985); *In Re Guardianship of Hallauer*, 44 Wash. App. 795, 723 P.2d 1161 (1986). The factors include the amount and nature of the services rendered, time required in performing them, diligence with which they have been executed, value of the estate, novelty and difficulty of the legal questions involved, skill and training required in handling them, good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance. And such authorities have similarly referred to the Rules of Professional Conduct at RPC 1.5(a)(1)-(8) for guidance in settling fees. Those include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly and the terms of a fee agreement between the lawyer and the client;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved in the matter on which legal services are rendered and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

It is also said that the Court cannot grant attorneys fees incurred to establish and collect fees because the beneficiary of those services is the attorney, not the estate that is involved in the controversy. *Larson* at 532-533.

As the state points out in each of these cases, the client is required to contribute a portion of his or her entitlement to the costs of care. This, in turn reduces the burden to the state. The law prohibits the state from paying the guardian's fees but pursuant to RCW 11.92.180 and WAC 388-79-030 the amount of \$175 of the client's monthly funds can be "set-aside" to pay for usual and customary guardian's fees. WAC 388-79-050. And "extraordinary fees" provided by the guardian can be additionally compensated on a further showing. Usual and customary services include acting as representative payee, managing the client's finances, preserving or disposing of property, making health care decisions, visiting the client, accessing public assistance benefits, communicating with service providers and preparing court reports. See WAC 388-79-050(4)(b)(ii). These are viewed as the essential core duties of a guardian.

However, where there are extraordinary services, the guardian can be compensated at a higher rate. Examples of extraordinary services include such things as unusually complicated property transactions, substantial interactions with adult protective services or criminal justice agencies, extensive medical services or emergency hospitalizations and litigation other than awarding fees and costs. WAC 388-79-050(4)(b)(iii).

In addition, legal services, as distinguished from guardian services, are capped by WAC at \$600 for every three year period. WAC 388-79-030.

The purpose of these rules is to make sure that Medicaid funding is not jeopardized by fees that are in excess of the funding rules. The State asserts that it expends \$150000 per year for the care of each resident and that the majority of income from federal public entitlements should be used to offset some of that expense. By a reading of the statute and WACs it is clear that the Department is entitled to make a determination of the appropriate characterization of services as usual and customary or extraordinary.

However, the Court has the power to make its own judgment on those issues. WAC 388-79-050(4)(c). It is the court's duty to insure that guardians are adequately compensated such that they will not simply withdraw and decline to provide services to those most in need of protection. In service of that duty the Washington Code permits the Court to "...determine after consideration of the facts and law that fees and costs in excess of the amount allowed in WAC 388-79-030 are just and reasonable. The state asserts that the only remedy for the review of administrative action concerning the set aside is a review under the APA. But RCW 11.92.180 and the WACs permit the court to make an independent judgment on the question. Therefore the APA is not the exclusive remedy for review of guardian fee determinations. Furthermore, since the State has an interest in the application of public funds to guardians' fees and costs, the State has standing to appear in this proceeding to contest any fees that might be in excess of the WAC standards.

ANALYSIS

The issue presented given these facts and principles of law is this: does the Guardian adequately demonstrate that advocacy in a general sense is compensable as a set aside out of Medicaid funds available to the individual client and did the guardian in each case provide such a benefit to the ward in particular?

The guardian seeks a fee future award out of the income of each client in the amount of \$400 per month. In support of that request he explains the work he performs as a guardian in his advocacy role. The guardian has expended advocacy efforts in such areas as patient transfer to other facilities, patient abuse litigation, opposition to facility closure, zoning, planning and Growth Management Act issues, participation in a Risk and Safety Assessment, mobilization of local agencies, opposition to closure of a pool and cafeteria and efforts to protect and maximize financial resources for his clients. In particular the Guardian has stated in its report that it has participated in chairing Friends of Fircrest meetings as well as acting as a member of Friends of Rainier, Action DD, VOR, Washington State Democrats

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Disabilities Issues Caucus (WSDIC), WAPG, and the Fircrest Human Rights Committee in public advocacy, legislative organizing, coordinating with allied organizations such as Action DD, parent/guardian organizations from the RHCs, WSDIC, consultants, lawyers, and unions concerning the interests of the incapacitated person. The guardian's activities are directed toward the preservation of clients' homes, care staff and professional staff who are familiar with the client's needs. These needs are documented in each of the guardian's reports. It is these generalized services provided by the guardian that, he asserts, constitutes the benefit conferred on the clients justifying the fee request.

Here the guardian is seeking compensation for advocacy services that have generally benefited all of the guardian's clients. As is clear from the Petition by the Guardian and the Declarations of DSHS in Response, none of the advocacy services were provided specifically for any of these particular clients. None of the clients involved in these motions faced eviction proceedings, none of them were shown to have made significant use of the closed pool or the cafeteria and, even if they had used those facilities, no detriment was shown to their care plan by the closures. Mary McNamara never used the pool while Suzanne McKenzie may have used it sometime at least 9 months before it closed, Kirby Moser used it 9 times, and David Schmidt rarely, if ever, used it. Richard Milton used the pool 7 times in the last year the pool was open. The effect of the closure of the pool on these clients was not demonstrated here. Before the cafeteria was closed there is little or no evidence that Mary Jane McNamara, Suzanne McKenzie, Kirby Moser, David Schmidt or Richard Milton ever used that facility. A few are not ambulatory and have been tube fed. There are vending machines available for the residents who are able to access them. Finally, no actual impairment of the clients' needs was shown by this action. Daniel Werlinger was moved during the reporting period but no evidence was offered to show that his move was detrimental in any way given that he has made the transition successfully. And any efforts to oppose closure of those facilities were unsuccessful. Finally, a review of the billing statements in each case fails to reveal any advocacy activity taken on behalf of any particular client.

As noted in the case authorities, there must be a benefit conferred on the ward in a guardianship proceeding before the Court is permitted to compensate the Guardian. Furthermore, that benefit must be substantial. Here there is no direct connection between the services provided by the guardian and the benefit to the client. Even where it is argued that the work of the guardian serves a collateral benefit to the client, there is little if any effect those services have made on the welfare of these residents of Fircrest. And the guardian acknowledges that he was unsuccessful in a number of his advocacy projects.

CONCLUSION AND DECISION

There is no benefit realized by these clients from the general advocacy activities of the Guardian. An order allowing such fees will operate as an assessment or tax on all clients to fund advocacy activities of the Guardian whether or not those services actually provide a benefit to anyone let alone the individuals involved in this case. That result is not contemplated by WAC 388-79 and is not permitted by case law governing the award of fees and costs in a guardianship. Accordingly, the Motion to Approve fees of the guardian at the rate of \$400 per month is denied. The fees permitted by the Washington Administrative

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Code at the rate of \$175 per month should be approved. However, no evidence exists that the Guardian will provide extraordinary services for any of these clients in the future. Nonetheless, where the Guardian provides actual services that do not fall within the definition of "usual and customary" services provided in WAC 388-79-050 and are in fact "extraordinary services," he shall be permitted to seek reimbursement in excess of the limit set by regulation and this decision. Finally, the request for additional compensation for fees incurred to establish the right to fees is denied because such legal services benefit counsel, not the ward.

The Washington State Attorney General's Office shall prepare and present an Order consistent with this memorandum decision.

Respectfully submitted this 18th Day of December 2009.



Eric B. Watness
Court Commissioner

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App. C

EXCERPT

**Report of the Public Guardianship Task Force
to the WSBA Elder Law Section Executive Committee**

August 22, 2005

**Elder Law Section
Washington State Bar Association
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330**

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Introduction

The Public Guardianship Task Force of the Washington State Bar Association Elder Law Section was formed to propose a solution to the problem faced by Washington residents who need the help of a guardian but who can't pay for it. By definition, members of the population affected by the problem are poor individuals who face significant risk of personal or financial harm because they are unable "to adequately provide for nutrition, health, and housing or physical safety" or "to adequately manage property or financial affairs."¹

Approximately 16,000 current Washington residents have been determined by courts to face such risks and to need full or limited guardians.² Frequently, those appointed to serve as guardians are family members or friends who serve without fee. Sometimes those appointed are professional guardians; their fees are typically paid from the estates of the individuals for whom they serve as guardians. But not every individual who needs guardianship services has either volunteers available to provide such services or the wherewithal to pay for them. In most states public guardianship services in some form are available for those who have neither.³ In Washington, however, public guardianship services are not currently available. (For some individuals receiving Medicaid assistance in nursing homes or in other long-term-care settings, there may be indirect public subsidies for guardianship services.⁴)

¹ The quoted language is from RCW 11.88.010(1), which establishes a standard that must be met before a guardian may be appointed by a Washington court. Whether any individual needs a guardian under this statutory standard must, of course, be determined by a court in a proceeding that affords the person claimed to be in need of guardianship services the significant procedural protections due in connection with such an important determination.

² According to information provided to the task force by the King County Clerk's office, there were 4,150 active guardianship cases in King County in May 2005. Approximately 26% of Washington residents live in King County. Extrapolating from the King County figure (without adjusting for any special factors that might apply to King County) would yield 15,962 active cases in the state.

³ One survey, described in a 1993 article, found some provision for public guardianship in 42 states. Siemon, Hurme and Sabatino, *Public Guardianship: Where Is It and What Does It Need?*, 27 Clearinghouse Review 558 (1993). In addition to Washington, there was no provision for public guardianship in Iowa, Montana, Nebraska, Rhode Island, Texas, Utah and West Virginia.

⁴ Such subsidies apply primarily to Medicaid-funded nursing-home residents and to people receiving services under the alternative Community Options Program Entry System (COPES) program. Under either program most clients must pay for part of the cost of their care. Under certain circumstances and as limited by statute and rule, their payment obligation may be reduced to allow them to use their funds to pay for guardianship services. See RCW 11.92.180 and Chapter 388-79 WAC.

What happens to Washington residents who need but don't get guardianship services? Each, of course, has a unique story. Some go without needed medical treatment, or get treatment that is inappropriate or untimely. Some lose housing that might have been preserved and end up in nursing homes or other institutional settings. Some cycle repeatedly from the street to a mental hospital or jail and then back to the street. Some lose property or benefits to which they were entitled. Some are exploited or abused. And in a great many cases, significant avoidable individual misery is associated with correspondingly significant avoidable public expense.

Task force members gave their time to their assigned task with a shared belief that an organized society can and should address the needs of this vulnerable population.⁵

I. There is a significant need for public guardianship services

The task force considered both reports of individual instances of unmet need for guardianship services and published systematic research on the subject. Members concluded that there are probably approximately 4,500 Washington residents who need guardianship services and who, because of their poverty and lack of volunteer resources, are currently without them.

⁵ The premise of the task force's recommendations is that the provision of appropriate public guardianship services is warranted as a matter of sound public policy. Accordingly, this report focuses on empirical assessments of need, and on the costs and benefits of public guardianship. The task force did not attempt to resolve legal questions about when a state may be obligated to initiate guardianship proceedings or to provide public guardianship services. But it is relevant to note that there is some constitutional case law bearing on such questions. An important line of cases invalidates governmental actions based on notices that were given to incompetent individuals for whom no guardians had been appointed. For example, in *Covey v. Town of Somers*, 351 U.S. 141, 100 L.Ed 1021, 76 S.Ct. 724 (1956), a deed based on a tax foreclosure sale was set aside. Although there had been technical compliance with the notice requirements of the foreclosure statute, the Court held that "[n]otice to a person known to be incompetent who is without the protection of a guardian does not measure up to [the constitutional due process] requirement." *Id.* at 146. The federal courts of appeal have applied similar reasoning in the Social Security context. See, e.g., *Stieberger v. Apfel*, 134 F.3d 37 (2nd Cir. 1997)(as a matter of due process, an individual with a mental impairment that prevents understanding a Social Security Administration decision and the appeal process may be entitled to an extension of an appeal deadline); *Udd v. Massanari*, 245 F.3d 1096 (9th Cir. 2001)(as a matter of due process, an individual "who lacked the mental capacity . . . to understand the cessation of his disability benefits and to take the steps necessary to pursue an [SSA] appeal" may be entitled to a reopening of an adverse benefit decision and to retroactive benefits). In addition to any obligations imposed by federal and state due process clauses, the anti-discrimination provisions of the Americans with Disabilities Act may require a state to provide guardianship services when they are needed to allow an otherwise qualified individual to take advantage of a state program. See 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or the service, programs, or activities of a public entity . . .").

Task force members had both direct and indirect acquaintance with individuals in need of guardianship services but without access to them. Typical examples described to task force members have included: individuals who appear to have Alzheimer's disease or conditions with similar symptoms and who are without family support and alone; developmentally disabled adults whose aging parents are no longer able to serve as guardians because of their own deteriorating health conditions; individuals who, under the Involuntary Treatment Act, have faced extended hospitalization and repeated detentions because of crises that might have been avoided with the assistance a guardian might have provided; individuals with mental illnesses who face avoidable evictions from their apartments or foreclosures on home loans; individuals for whom significant medical-treatment decisions need to be made, who lack the capacity to make them, and for whom there is no one else with legal authority to make such decisions.

One social worker, whose clients are often disabled individuals at risk of institutionalization, related the following facts about a woman she has been trying to assist:⁶

Mary is a 73-year-old woman living alone in a rented mobile home. She has monthly income of \$800, which would be enough to meet her necessary expenses; but rather than paying her rent, utility bills and medication expenses, she purchases items of furniture or other consumer items. Her mobile home is packed with furniture and dirty dishes and "overflowing with cat litter." There is also an insect infestation. Mary had the assistance of a volunteer chore program, but the program declined to provide further services because of the condition of her home. She has been diagnosed with schizoaffective disorder, dementia and diabetes. It is only temporary help from a neighbor that has so far kept Mary from losing housing she doesn't want to leave.

Without the help of a surrogate decision maker, Mary is likely to lose her housing and to wind up in some kind of institutional setting.

Another disturbing example was related by a task force member:

David, a young adult with developmental disabilities, was living in an adult family home. His mother was his guardian. Not long after he moved

⁶ The clients' names in the examples in this section have been altered to protect their privacy.

into the home, his mother died. Over an extended period of time, David was subjected to sexual and other physical abuse in the adult family home. There was no guardian to monitor his care or to intercede. No family member or other volunteer had been available to serve.

A third example was related by another task force member:

Jane is a young woman with a subsistence income, facing an adverse action by the Department of Social & Health Services. A hearing request was made on her behalf by a caregiver; but the caregiver did not have the authority to represent her in the hearing process. After a pre-hearing conference, the administrative law judge determined that "a substantial question existed as to whether [Jane] possessed sufficient mental capacity to comprehend the nature of the proceedings." But with no public guardianship program, there was no resource available either to obtain a capacity determination or to provide guardianship services if they were needed.⁷

Social workers, judges, doctors, hospital discharge planners, staff of case management programs and information and assistance programs, nurses, lawyers, ministers, librarians and police officers are often unable to find needed help for people in situations such as those described above. Only a small fraction of the identified need for guardianship services is met by professional guardians who take some cases without fee. The absence of resources may be especially pronounced in rural areas or for individuals who speak a language other than English. In some cases in which the Office of the Attorney General would otherwise initiate a guardianship proceeding at the request of the Department of

⁷ The ALJ dismissed the proceeding without prejudice, to give the Department an opportunity to seek a capacity adjudication and, if warranted, appointment of a guardian or a guardian ad litem. The ALJ's decision was reversed by the DSHS Board of Appeals (BOA), which sent the case back to the ALJ for a hearing on the merits. The decision on review did not imply that the ALJ's judgment about capacity was mistaken; it ruled that the ALJ must simply proceed in any case, because administrative rules did not provide for a capacity determination. The BOA decision is currently awaiting judicial review. Regardless of how the legal issues are resolved by the court, this story illustrates a practical problem that may arise when needed guardianship services are not available. State agencies serve, and at times find themselves in adversary hearing proceedings against, individuals who lack the mental capacity to understand official notices or to exercise administrative hearing rights. Some of those individuals need guardians but do not have access to guardianship services today.

Social & Health Services it will not do so if there is no one to serve as guardian without fee and there are inadequate resources to pay a guardian.

To quantify the problem exemplified by individual cases described to it, the task force turned to the published results of research in other states. Its objective was to provide an approximate quantitative assessment of need, one that policy makers might consider in projecting both the cost of providing public guardianship services and the cost of failing to provide such services (or the savings that such services might generate).

The most systematic empirical study the task force considered was done in Florida in 1983 and described in an article published in the Bulletin of the American Academy of Psychiatry and the Law in 1987.⁸ A survey found 11,147 identifiable persons reportedly in need of public guardianship services.⁹ The survey did not include residents of nursing homes or adult congregate living facilities. Washington's population in 2003 was approximately 36% of Florida's.¹⁰ Extrapolating from the 11,147 figure based on the current population ratio would yield slightly over 4,000 Washington residents in need of public guardianship services.

There are some significant factors that this extrapolation fails to reflect. On the one hand, there has been significant population growth in Florida since the 1983 study. Between 1980 and 2000, the total population of Florida grew by 64%.¹¹ The population growth information for Florida would tend to suggest that the current need for public guardianship in Florida has increased and that a corresponding increase in the projection for Washington may be warranted. On the other hand, the percentage of Washington's population that is 65 or older is much lower than Florida's – 11.2% as compared to 17.6%.¹² This difference in the composition of Washington's population would tend to suggest a need to

⁸ Schmidt and Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 Bulletin of the American Academy of Psychiatry and the Law 69 (1987).

⁹ The assessment was based on a survey of 74 public receiving facilities, community mental health centers or clinics, 30 private receiving facilities, 11 Department of Health and Rehabilitative Services Aging and Adult Services district offices and 6 state hospitals. *Id.* at 71. The survey reported staff perceptions, not judicial determinations of legal incapacity. As the authors acknowledged, "Nonjudicial assessments of legal incompetence are of course suspect but, in the absence of better information, must necessarily suffice." *Id.* at 72.

¹⁰ The United States Census Bureau estimated Washington's population in 2003 as 6,131,445, 36% of Florida's, which was estimated as 17,019,068 in the same year. The figures are published at the following Internet address: <http://quickfacts.census.gov/qfd/states/00000.html>.

¹¹ Population growth figures are from the web site [stateofflorida.com](http://www.stateofflorida.com), based on U.S. Census Bureau data: <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95#27103>.

¹² These percentages come from the United States Census Bureau's estimated figures for 2003: <http://quickfacts.census.gov/qfd/states/00000.html>.

decrease the projection for current public guardianship need in Washington. On balance, the 4,000 figure is probably a useful approximation, noting that it does not take into account the needs of residents of nursing homes and adult congregate care facilities.

A study attempting to quantify the unmet need for guardianship services among nursing home residents was done in Tennessee in 1988 and described in an article published in the *Journal of Elder Abuse and Neglect* in 1990.¹³ The study found an unmet need for limited or full guardianship services in 4.3% of the nursing home resident population for which data were available. There are currently approximately 20,000 residents in Washington nursing homes.¹⁴ Taking 4.3% of that number would yield 860 additional individuals in need of public guardianship services.

It may be that the unmet need for guardianship in Washington is less than in Tennessee among residents of nursing homes and of residential settings where services are covered by Washington's long-term care programs. This is because, as previously mentioned, there is an indirect subsidy for private guardianship services available to certain participants in Washington's long-term care programs.¹⁵ When a court has ordered payment of guardianship fees, consistent with Department of Social & Health Services regulations, a portion of the ward's income that would otherwise go toward nursing-home or comparable care may be used to pay a guardianship fee, with the Medicaid funds making up the difference in the cost of care.¹⁶ These subsidies make guardianship services available to some people who could not otherwise afford them; but the fees available are sometimes inadequate to cover the costs of the services needed. So some clients with the greatest need for guardianship services (and in situations in which the greatest savings might be produced by effective guardianship services) remain without them.

¹³ Hightower, Heckert and Schmidt, *Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee*, 2 *Journal of Elder Abuse and Neglect* 105 (1990). Like the Virginia study, the Tennessee study was based on staff judgments, not on judicial determinations of incapacity. Initially the Tennessee study was to include other residential facilities in addition to nursing homes, but the former were ultimately omitted from the study after initial investigation suggested a low likelihood that residents in those facilities would have unmet guardianship needs. *Id.* at 110-112.

¹⁴ The Department of Social & Health Services compiles data periodically from submissions by nursing homes. Based on information provided to the task force by Department staff, its data base showed 19,617 nursing home residents as of March 31, 2005. That data represents the population of 235 out of the state's 243 nursing homes.

¹⁵ See footnote 4 above.

¹⁶ See RCW 11.92.180 and Chapter 388-79 WAC.

Instead of using the 860 figure, extrapolating directly from the Tennessee figures, it seems reasonable to take half that amount, in acknowledgment of the need currently met by indirect subsidies. Adding 430 to the 4,000 projection explained above would yield a total projected unmet need for public guardianship services of 4,430 individuals or (to avoid the impression of greater precision than the data warrant) approximately 4,500 individuals.

Good reason to believe that approximately 4,500 Washington residents need guardianship services but can't get them signals a significant problem that ought to be addressed.

II. Public guardianship would save public funds

There are costs associated with the provision of public guardianship services. There are also significant opportunities to save public funds by providing timely and appropriate services to people in need of them; and experience elsewhere suggests that the savings should more than offset the costs.

A recent study of public guardianship services in Virginia showed annual costs per individual served of \$2,955 over the two year period 2001-02 for programs that contracted to serve a total of 212 individuals.¹⁷ Over the two year period, the programs reported savings to the State (after subtracting the program costs) of \$5.2 million. Savings resulted from, for example, arranging for discharge of individuals from state hospitals or nursing facilities to assisted living, arranging for community-based services, recovering assets and arranging for pre-paid death-related services.

The costs counted in the Virginia study did not include the costs of the judicial proceedings to establish the guardianships. For many people who appear to need public guardianship services, no incapacity determination will have yet been made and a judicial proceeding will be needed. The Office of the Attorney General in Washington currently brings guardianship proceedings in a limited number of cases referred by the Department of Social & Health Services. Its cost experience in the DSHS cases should provide a basis for projecting average costs for establishing guardianships. After a guardianship is established and a public guardian is appointed, responsibility for such matters as annual accountings would lie with the public guardianship program and its counsel. The costs of that representation were included in the Virginia study.

¹⁷ Teaster and Roberto, *Virginia Public Guardianship and Conservator Programs: Evaluation of Program Status and Outcomes*, Blacksburg VA: The Center for Gerontology, Virginia Polytechnic Institute and State University (2003).

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Guardianship of McNamara, No. 84746-1
Comments re Access to Justice

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