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SUPREME COURT
STATE OF WASHINGTON
Jun 17, 2011, 1:11 pm
BY RONALD R. CARPENTER
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No. 84379-1
(Consolidated with No. 84746-1)

**SUPREME COURT OF
THE STATE OF WASHINGTON**

**In the Matter of the Guardianship of
SANDRA J. LAMB**

**State of Washington,
Department of Social & Health Services**

Respondent.

**LAMB'S GUARDIANS' RESPONSE TO
SUPPLEMENTAL BRIEF OF AMICI
DISABILITIES RIGHTS WASHINGTON &
NATIONAL DISABILITIES RIGHTS NETWORK**

**Michael L. Johnson, Hardman & Johnson
Counsel for Guardians
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WSBA #28172
June 17, 2011**

TABLE OF AUTHORITIES

Cases

Olmstead v. L.C. ex rel Zimring, 527 U.S. 581 (1991).....4
United States v. Arkansas, No. 4:0900033 JLH (E.D.Ark. 6/08/2011).....1

Other Authorities

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Introduction.

The Amicus Brief of Disabilities Rights Washington (DRW) and National Disabilities Rights Network (NDRN) (collectively called DRW) contains significant flaws.

DRW simply takes arguments from the Department of Social and Health Services (DSHS), reasserts them as facts, raises issues never before the trial court or on appeal, and argues the law as it ought to be rather than as it is.

DRW is not an expert on the law of residential habilitation centers (RHCs), guardianships, or compensation of fiduciaries. DRW acts more like a party litigant, promoting its own interest in closing RHCs, an interest in common with DSHS, and contrary to the rights of the residents here. A recent court case, though referring to the Department of Justice, applies equally to the position of DRW in this case:

Most lawsuits are brought by persons who believe their rights have been violated. Not this one . . . All or nearly all of those residents have parents or guardians who have the power to assert the legal rights of their children or wards. Those parents and guardians, so far as the record shows, oppose the claims of the United States. Thus, the United States [Department of

Justice] is in the odd position of asserting that certain persons' rights have been and are being violated while those persons – through their parents and guardians disagree.

United States v. State of Arkansas et al, No. 4:0900033 JLH (E.D.Ark. 6/08/2011). Like that case, DRW masquerades here a friend of the residents in this case and treats all residents of all RHCs as a group who must be moved without regard to individualized need. This is precisely why advocacy is needed by the Guardians in this case.

A. DSHS and DRW's Treatment of Residents as a Group and Opposing Their Best Interests Necessitates Legislative and Executive Advocacy.

The Guardians' Reply Brief in *McNamara* is the basic roadmap of the Guardians' arguments on appeal. There are four levels of care in the Medicaid program commonly implicated in care: hospitals, nursing facilities, intermediate care facilities, and community waiver services.¹ DRW has been *successful* over in ensuring that residents are not unduly restricted to living in RHCs. The residents remaining there remain because of the severity of their disability.

¹ Under Medicaid, waivers from federal law requirements are obtained in order to provide services through private vendors in the community. The standard of care is lower than an RHC. Enrollment may be capped. The waiver program is chronically underfunded with a large waiting list.

The Guardians in this case are intimately involved with each of the incapacitated persons (or wards) in this case. The Guardians continually examine the medical records of each. The Guardians are familiar with the particular care needs of each. The Guardians attend multiple assessments by the interdisciplinary team² throughout the year. The Guardians attended more recent Support Intensity Scale (SIS) assessments, ordered by the Legislature in 2010, which confirm the skilled nursing and intermediate levels of care are appropriate. DRW seems unaware.

The residents in this case need the care they receive at Fircrest. The residents in this case cannot formulate abstract thinking about residential placement. They can, however, communicate dissatisfaction by changes in behavior if not outright distress arising from moves within the facility; changes of routine in everyday life; past experience with community living; or from past eviction. Six evicted in the 2004 downsizing lost their ability to communicate dissatisfaction because of death.

The Guardians are fully aware of their duties and authority under state and federal law and are carrying them out. Based on the detailed knowledge of

² The team is a group of medical professionals, including the physicians, nurses, psychologists, psychiatrists, vocational specialists, speech therapists, etc.

each of the residents, the Guardians determined on their behalf that Fircrest should not be closed.

In contrast, DRW treats residents in the RHCs as a group and masquerades as a friend of the residents in this case. DRW and others do not have personal knowledge of any of the residents in this case. They have a gross misunderstanding of the community of life at an RHC. The expertise of DRW is based on gestures to the horrible past. They do not represent anyone at Fircrest now. They oppose equal rights for residents there. They misrepresent *Olmstead*. They promote abolishing entirely the intermediate level of care, and “dumping” residents *as a group* into a lower standard of community care where they will no longer receive active treatment.

DRW’s self-professed interest is closure with grossly inadequate regard to individualized need.

All of this is surprising in light of DRW’s excellent work in protecting and advocating for the other 97% of its constituency. DRW does not seek to enlarge the pie for its entire constituency. It promotes closure to allow stealing from Peter in the RHCs (the 3% most profoundly disabled) to pay for Paul in the waiver program (the 97% more able). This disparate treatment of RHC residents *as a group* by DRW necessitates a collective

response by pooling resources to protect and preserve the intermediate standard of care and its funding.

B. DRW's Ad Hominem Attacks Should be Rejected by the Court.

DRW "Swift boats" the Guardians by alleging the professional guardian services provided in this case are inherently self-serving. This issue was not raised in the trial court. And there is no factual basis to support any breach of the duty of loyalty.

Existing law defines self-serving as diverting funds for personal use, for use of relatives, use of a business entity, use by friends or the like. See, e.g., 76 AmJur2d *Trusts*, § 468. Receipt of compensation, or anticipation of receipt of compensation, is not within the definition. Judicial officers receive pay from the State of Washington and expect and deserve their next check, yet there is no appearance of self-serving when deciding a case in which the State of Washington is a party.

DRW allegations seem intended solely for the purpose of discrediting the professional work of the Guardians and disparaging them personally because they dare disagree with the anti-RHC ideology of DRW.

C. DRW's Arguments on Billing Practices Should be Rejected.

The Guardians are fully aware of their authority and duties with regard to financial issues. The Guardians are fully aware that each resident's funds belong to the residents. The Guardians are conservative and careful with the expenditure of the residents' funds.

Moreover, the Guardians received advance approval for advocacy activities. Judge (then Commissioner) Prochnau approved the pooling of resources and the methodology of fees. (App 1) The policy was established in a contested case with DSHS pursuant to a motion to revise where the Guardians were successful. That case became the policy in the Ex Parte Department. DSHS subsequently changed its mind and found a different judge on revision to provide another result in the *Lamb* case, unsettling the existing practice and policy and ultimately leading to this appeal.

Finally, the Guardians requested fee in *Lamb* -- originally granted by Commissioner Watness -- provided that the Guardians provide a "nexus" with more detailed information to the court at the next reporting period. The review of the past reporting period has not yet occurred.

D. DRW's Minimization of the Decision-Making Role of the Guardians Should be Rejected.

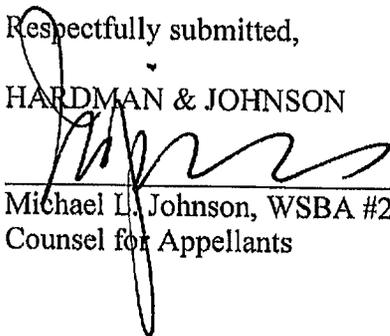
There is no evidence the Guardians failed to discharge a duty. That issue was not raised or decided in the trial court. DRW apparently attacks and disparages guardians who disagree with their political ideology.

DRW cites Standards of Practice promulgated by the Certified Professional Guardian Board, an agency created by this Court, and claims in its Motion it has participated in the creation of those Standards. The Standards, however, cannot be interpreted to impose the "one size fits all" group approach DRW desires as a special interest. The Guardians' decision-making should be based on individualized assessment and need, and in the best interests of each of the IPs in this case.

June 17, 2011

Respectfully submitted,

HARDMAN & JOHNSON


Michael L. Johnson, WSBA #28172
Counsel for Appellants

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

IN THE GUARDIANSHIP OF
JOHN FITZSIMMONS,
An Incapacitated Person.

NO. 86-4-04977-8 SEA
~~PROPOSED~~ ORDER
APPROVING DISBURSEMENTS

Hearing Date: July 19, 2004
Time of Hearing: 10:30 a.m.
Calendar: Probate/Guardianship
Room W-325, King Co. Courthouse

The Petition for Order Approving Guardian's Report, Accounting and Request for Fees (the "Report") filed on behalf of James R. Hardman, JD, CPG, (the "Guardian"), Guardian of the Person and Estate of JOHN FITZSIMMONS (the "Incapacitated Person"), came on for hearing this day before the undersigned. Appearing for James R. Hardman, JD, CPG, Guardian of the Person and Estate of JOHN FITZSIMMONS was Michael L. Johnson, counsel for the Guardian from the firm of HARDMAN & JOHNSON in this matter. Appearing for the Department of Social and Health Services was John S. Meader, Assistant Attorney General. The Court, having considered the submissions of the parties, the oral arguments presented by counsel, and being fully advised in the matter, now enters the following order:

see separate Findings on Conclusions

[PROPOSED] ORDER APPROVING
DISBURSEMENT

APP. 1

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

W.B.

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

2 1. Fees and Costs:

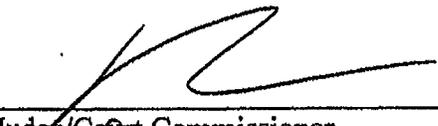
3 a. The Guardian's special advocacy fees claimed for the period from February 1,
4 2003 through January 31, 2004 shall be ~~denied in their entirety.~~ *allowed at the rate of \$150 per month*

5 b. The guardianship fees and costs associated with the ward's thumb amputation
6 and colon surgery are deemed to be usual and customary expenses and are to be included in the
7 \$175 a month routine guardianship fees for the reporting period.

8 c. The Guardian is authorized to collect a monthly guardian fee of ~~\$175~~ *\$325* for the
9 period from February 1, 2004 through the date of approval of the next regularly scheduled
10 annual accounting and report in this matter, with all sums so paid to be subject to Court
11 approval at the next regular accounting.

12 d. The fees and costs, miscellaneous expenses, and additional disbursements
13 incurred by the attorney for the Guardian are to be included in the \$600 administrative cost
14 accounting for the reporting period.

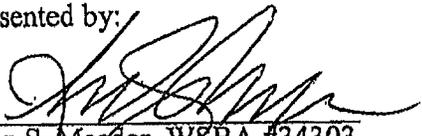
15 DONE IN OPEN COURT this ___ day of _____, 2004:

16
17 
18 Judge/Court Commissioner

18 Approved as to Form: Copy Received:

19
20 Michael L. Johnson, WSBA #34498
21 Attorney for Guardian

22 Presented by:

23 
24 John S. Meader, WSBA #34303
25 Office of Attorney General
Division of Developmental Disabilities
[Per Local Rule 10]

ORDER & ATTACHMENT
APPROVED
AUG 02 2004
Kimberly Prochnau
COURT COMMISSIONER

mailed 8/2/04 sec

IN THE SUPERIOR COURT OF WASHINGTON STATE FOR KING COUNTY

In re
JOHN FITZSIMMONS

NO: 86-4-04977-8 SEA

ORDER

The Court, having heard argument from the Guardian, James Hardman, through counsel, and the Department of Social and Health Services, through counsel, and having taken the matter under advisement, now, therefore enters the following:

FINDINGS OF FACT:

John Fitzsimmons is a 53 year old profoundly developmentally disabled individual who has lived at Fircrest for over 38 years. He requires total care; he cannot bathe, toilet, or feed himself. He is tube-fed and incontinent. He requires 24 hour care. He however is responsive to familiar staff and able to follow simple directions. The guardians are his only visitors; no family members are in touch with him. According to prior reports in the file, he is blind, non-ambulatory, has no speech, with behavior disorders including self abuse, agitation, and spastic quadriplegia. He receives SSDA benefits of roughly \$842 per month of which a portion must be applied to the costs of his care. This contribution is known as his "participation." A client's participation in the cost of care may be reduced by a reasonable amount as set forth in the DSHS rules to allow the client's guardian to be paid fees. When these fees are paid, they reduce the amount of money that is available to the state for reimbursement, thereby increasing the state's costs.

The guardian is already allowed to keep \$175 per month to pay for routine guardianship activities such as visiting the ward, consenting to medical care, paying bills, etc. The guardian is now seeking to keep additional monies to pay for activities involved in arranging for thump amputation and colon surgery, and "special advocacy" related to attending community meetings and lobbying activities. These activities concern the state's announced plans to eventually close Fircrest and relocate its residents to other facilities. Although John is not on the current list to be relocated, the guardian is concerned that it is only a matter of time before all residents will

be relocated.¹ Litigation is currently pending but the guardian is also involved in lobbying the legislature to encourage them to keep Fircrest open.

CONCLUSIONS OF LAW:

The Court adopts as Conclusions of Law those statements in the Guardian's Supplemental Brief, labeled Paragraphs 1-3 inclusive on Pages 3-8.

The State Medicaid plan agreed to and administered by DSHS indicates the wide scope of duties exercised by guardians including advocacy for and participation in the client's health care decisions. John is unable to feed, bathe or toilet himself. He is unable to communicate except on a rudimentary level. Given John's profound retardation and physical limitations, his living arrangements are critical to his health. The Medicaid plan does not distinguish between advocacy directed at a non-governmental entity and advocacy directed at the state. In other words, if John was living in a private facility, and the guardian deemed the facility to be providing substandard care or proposing to move the ward to a dangerous setting, the guardian would be responsible for reporting the problem to the appropriate entity and engaging in appropriate advocacy. In this case (although disputed by the State) the guardian believes that a move from his current surroundings would be dangerous to John's welfare. Thus, the request to engage in lobbying is not outside of the activities that the Plan contemplates nor are these activities necessarily outside the scope of the guardian's appointment.²

The State complains that it risks denial of future grants of Medicaid funds from the Federal court if its statutes are deemed to be too liberally read. However, it is notable that despite or perhaps in response to warnings from the Federal Government over 10 years ago, the State chose to leave the Court with broad discretion to set participation rates. The Legislature enacted legislation which allowed the State to adopt administrative rules that would restrict the Court's discretion. (Fees and Costs "shall not exceed the amount" allowed by DSHS rule. RCW 11.92.180. However, the State rejected the Legislature's invitation to set a ceiling on fees. Although WAC 388-79-030 states that ordinarily fees and costs shall not exceed \$175 per month and costs shall not exceed \$600 in any three year period, WAC 388-79-050 imposes no limit on fees and costs incurred in providing "extraordinary services". WAC 388-79-050 also

¹ The guardian is a lawyer and a professional guardian for approximately 25 other residents of Fircrest. He will apparently be seeking similar fees to be paid out of his other ward's income.

² The citation to Florida authority provided by the State is not helpful given the different statutory scheme.

provides a non-exclusive listing of the types of services, including litigation, substantial interactions with adult protective services and criminal justice agencies.

The regulations thus support an interpretation of the law that allows the guardian to charge in appropriate cases for advocacy activities at least where related to the health or safety of the ward and in extraordinary situations to exceed \$175 per month.

Given John's profound disabilities and medical needs, his quality of life and very existence is predicated on safe and stable housing. The guardian believes that a move from his familiar surroundings would be unsafe; the state disagrees. While litigation is pending on this issue, the parties are not bound to exclusively make their case in the courtroom.

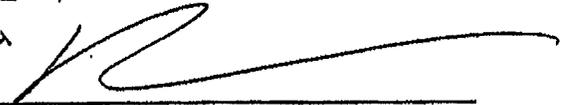
Any lawyer representing a client in a dispute with the state might evaluate the costs and opportunities of litigating vs. lobbying for a desired result. The State itself employs people who speak to the legislature about its issues and desires and certainly values that as an advocacy forum. Certainly the State has and will continue to present its reasons and plans for downsizing "Fircrest" to the Legislature. John is however wholly unable to advocate for himself except through his guardian. The ability to seek redress from the Government is a precious right that should not be wholly cut-off because of one's disability. John's interests should also have a chance to be presented.

However, such efforts should still be deemed reasonable and related to the immediate needs of the client. In this case, the guardian may seek reasonable fees for communicating directly with legislators and their staff on issues related to John's medical care and continued placement at Fircrest. John's guardian does not need to spearhead the advocacy efforts or necessarily engage in extensive community meetings, etc, given that there are other individuals with family members or guardians involved who may also be expected to contribute to these efforts. The court will authorize an additional \$150 per month for the "medical advocacy" costs related to the lobbying efforts. As to the request for additional fees related to the thumb amputation and colon surgery, the court finds that although the medical services performed were certainly extraordinary, the guardian has failed to show that his services related to such were extraordinary and could not be accomplished using the \$175 per month fees already allocated.

Based on the aforesaid Findings and Conclusions, the Court enters a separate order.

ORDER & ATTACHMENT
APPROVED
AUG 02 2004
Kimberly Prochnau
COURT COMMISSIONER

DATED and signed in open court this _____ day of _____, 2004.



Court Commissioner Kimberley Prochnau

I certify that I mailed a copy of this order and the Order Approving Disbursements to the Guardian, through counsel Michael Johnson, and to the Department of Social and Health Services, through counsel John Meader, on 8/2/04

Bgc

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re Guardianship of

JOHN FITZSIMMONS,

an incapacitated person.

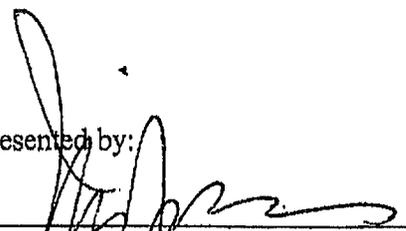
)
) No. 86-4-04977-8 SEA
)
) ORDER RE GUARDIAN'S FEES
)
) Hearing Date: August 25, 2004
)

THIS MATTER came regularly before the Court on a Motion to Revise. The Court, having heard argument of counsel, and having reviewed the record and papers in the case, being fully advised in the premises, THEREFORE, the Court orders as follows:

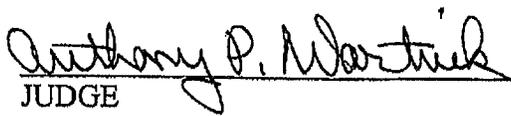
1. Commissioner Prochnau's Findings of Fact and Conclusions of Law entered August 2, 2004 are affirmed in their entirety.

2. Commissioner Prochnau's Order Approving Disbursements dated August 2, 2004 is affirmed, except for Paragraph 1(d), which is stricken.

SIGNED IN OPEN COURT THIS 15th DAY OF ~~AUGUST~~ ^{September}, 2004.

Presented by: 

Michael L. Johnson, WSBA No. 28172



JUDGE

ORDER RE GUARDIAN'S FEES - 1

ORIGINAL

HARDMAN & JOHNSON
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