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Court of Appeals No. 62711-2-I
(Consolidated Number)

**SUPREME COURT OF
OF THE STATE OF WASHINGTON**

**In the Matter of the
GUARDIANSHIP OF SANDRA LAMB**

**James R. Hardman and Alice L. Hardman, Guardians
Petitioners**

v.

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

Respondent.

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
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PETITION FOR REVIEW

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March 18, 2010**

ORIGINAL

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I. IDENTITY OF PETITIONER.

The Petitioners are court-appointed certified professional guardians (CPGs) of the person and estate of Sandra Lamb and Rebecca Robins.

They are nominal parties representing the rights and interests of Sandy and Rebecca, whose respective estates and persons are before the Court.

In the Court of Appeals, the Petitioners were the Appellants and Cross-Respondents.

II. CITATION TO COURT OF APPEALS DECISION.

Guardianship of Sandra Lamb, James R. Hardman and Alice L. Hardman, Guardians, Appellants and Cross-Respondents, v. State of Washington Department of Social and Health Services, No. 62711-2-I, filed 12/21/2009 (Appendix A) (Opinion).¹ The Court of Appeals decision is published at ___ Wn.App. ___, 169 P.3d 847 (2010).

III. ISSUES PRESENTED FOR REVIEW.

Many issues were raised in the courts below. However, the Guardians seek review of the following narrow questions of law concerning the application of rules of compensation by a guardianship court which were wrongly decided by the Court of Appeals.

¹ The case was consolidated with *Guardianship of Rebecca Robins, James R. Hardman and Alice L. Hardman, Guardians, Appellants and Cross-Respondents, v. State of Washington Department of Social and Health Services*, No. 62613-2-I.

(1) May courts apply a rule of guardian compensation requiring a “direct” benefit to the person to the exclusion of all other rules of compensation, and if so, under what circumstances?

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

IV. STATEMENT OF THE CASE.

The Guardians represent the rights and interests of Sandra Lamb and Rebecca Robins. They are persons with profound or severe developmental disability and within that category constitute a miniscule percentage (1-3%) of those developmentally disabled who are intellectually disabled.² They are developmentally two year olds in adult bodies. They are residents of Fircrest School in Shoreline, Washington.

Guardians are decision-makers and advocates, not caregivers. Pursuant to federal and state law pertaining to facilities such as Fircrest School, the Guardians advocate for Sandy’s and Rebecca’s interests (a) at the RHC level concerning day to day care, informed consent, development and monitoring of the individual plan of care, and behavioral issues, on an

² Intellectually disabled is the preferred term for mental retardation. The latter term is used as legal term in federal statutes and regulations.

individualized basis, as well as (2) outside the RHC level and on the basis of shared characteristics, predominantly the following areas: educating the Legislature about the care needs and characteristics of Sandy and Rebecca, the potential death or injury, or the potential loss and diminishment of effective services, that might occur if their placement is changed for non-therapeutic reasons; by corresponding or meeting with executive branch officials; by attending community meetings for the developmentally disabled; by engaging in the land use decision-making process of the City of Shoreline and the Department of Social and Health Services relative to development of the Fircrest campus; and, by participation with a Department of Health land use decision-making process regarding the enhancement of the public health lab on the Fircrest campus and the storage of radioactive materials and biological samples there. The focus of advocacy efforts frequently shift because of proposed legislation, executive action, municipal activity, or community planning.

The Department of Social and Health Services (DSHS) opposes the Guardians' exercise of these advocacy efforts and the content of the advocacy. They challenge the compensation of the Guardians as well as compensation of their attorney. At the heart of the issue are the civil rights of Sandy and Rebecca, and the Guardians advocated on behalf of Sandy's and Rebecca's best interests. DSHS sees the case as a

compensation issue, denies Guardians may exercise rights of incapacitated persons, minimizes the advocacy as “politicking”, and enhances the State’s own financial position by putting into the General Fund what the guardian and the attorney for the guardian does not receive as fair compensation.

In addition to contesting the content of the advocacy, DSHS raised many novel issues in its opposition to compensation. The Guardians were forced to respond to the litigation, including extensive research and review of complex Medicaid rules.

The advocacy and the myriad issues raised in the courts below are not presented for review here. The Court of Appeals did not squarely address the advocacy issues and decided the compensation issues on alternative grounds without additional briefing: the record did not show they had conferred a “direct benefit” to Sandy and Rebecca, Opinion, at 1 (“under the facts of this case”), and the Guardians’ attorney was precluded from compensation because of the “unique issues” in the case before the trial court and because they did not prevail in the Court of Appeals, Opinion, at 15.

Accordingly, rules of compensation and how they should be applied in guardianship cases statewide are the only issues presented for review here.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

The Court of Appeals decision is in conflict with decisions of the Supreme Court. RAP 13.4(b)(1).

It has long been the rule in Washington that a guardian should receive compensation for its services based on the value of services performed, absent significant wrongdoing. *In Re Montgomery's Estate*, 140 Wash. 51, 53, 248 P. 64 (1926). See also *In Re Leslie's Estate*, 137 Wash. 20, 23, 241 P. 301 (1925) ("fair and reasonable compensation" of attorneys); *In the Matter of the Guardianship of Raymond A. Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966) (guardian and attorney compensation largely within discretion of the trial court).

However, the Court of Appeals juxtaposed the rule and stated the Guardians are not entitled to compensation absent a "direct" benefit. Opinion, at 10 ("The Hardmans have not shown that their advocacy activities directly benefit Lamb and Robins"). This abrogation of the Supreme Court's general rule of compensation should be reviewed as a matter of substantial public interest.

The Court of Appeals decision involves issues of "substantial public interest" that this Court should review. RAP 13.4(b)(4).

A decision involves an issue of substantial public interest if (1) the issue is of a public nature, (2) an authoritative determination is desirable to provide future guidance to public officers, and (3) the issue is likely to

recur. *Philadelphia II v. Gregoire*, 127 Wn.2d 707, 712, 911 P.2d 389 (1996).

The Public Nature of the Case. The Guardians in this case are certified professional guardians. Certified professional guardians serve incapacitated persons throughout the State and are regulated by the Certified Professional Guardianship Board (CPG Board) created by the Supreme Court. General principles of compensation for their decision-making and advocacy and that of their attorneys -- applied in the superior courts -- are therefore public in nature.

Guidance to the Courts and Officers of the Court. Future guidance to the superior courts and to certified professional guardians as officers of the courts is necessary. The general principle of compensation enunciated by the Supreme Court should be retained, and applied to guardians and their attorneys, mediated by a requirement that the compensation be just and reasonable.

The "direct" benefit rule should be abolished. All compensation fits within the general principle just described. The rule invites litigation because it is both overly broad and overly narrow. The rule goes in the wrong direction because the trend is to impose more and more statutory and regulatory duties on CPGs and thus demand a more intensive use of resources by their attorneys. The rule appears to preclude compensation

when applied to compliance with guardian duties or CPG Board Standards of Practice which -- despite best efforts -- might fail to achieve a tangible or measurable benefit.

There is case authority on a “benefit”. There is also case authority on a “direct” benefit to an incapacitated person’s estate. Counsel did not, however, find any authority concerning a “direct” benefit to the incapacitated person’s *person*.³

The Court of Appeals declared a “direct” benefit must be conferred and found the trial court record did not support that standard. However, it did not explain why the rule is appropriate with respect to the person (as opposed to estate)⁴ or how the rule is to be applied to a person. A direct benefit may imply a nexus or causation. Or it may be confused with a rule of exclusive or incidental benefit. It certainly cannot mean an “actual” or “substantial” benefit when applied to the person. Guardians and courts

³ *Estate of Niehenke*, 117 Wn.2d 631, 818 P.2d 1324 (1991) (probate estate; estate assets; attorney fees); *Estate of Morris*, 89 Wn.App. 431, 919 P.2d 401 (1998) (probate estate; management of estate assets; attorney fees); *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983) (trust; loss of market value; attorney fees); *Guardianship of Hallauer*, 44 Wn.App. 795, 723 P.2d 1161 (1986) (guardianship; recovery of money or property; attorney fees); *In re Guardianship of McKean*, 136 Wn.App. 906, 151 P.3d 223 (2007) (guardianship; recovery of money or property; guardian fees).

⁴ At the time of the filing of the opinion in the Court of Appeals in this case, a Commissioner in the Ex parte Department apparently interpreted “direct” benefit to mean “substantial” benefit in 6 other guardianship cases. Those cases are now pending on Motions to Revise and involve the same Guardians and residents of Fircrest School with similar characteristics.

need to know how the direct benefit rule would be applied, even though it should be abolished.

Similarly, there is confusion about the rules of attorney compensation both in the trial court and on appeal which need clarification. The Court of Appeals decided that “unique issues” before the trial court are a basis for denying attorney compensation. Opinion, at 15 (citing *Estate of D’Agosto*, 134 Wn.App. 390, 402, 139 P.2d. 1125 (2006)). Opinion, at 15. However, the “unique issue” exclusion for attorney compensation simply does not fit in a guardianship case.

Guardianship cases sound in equity and are governed by equitable principles analyzed on the specific facts presented in each case. See *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.2d 735 (2001). Every guardianship case is unique. The relative disability and corresponding powers of the guardian, the care needs, the parties, the family members, the assets, the income and expenses, and the public benefits are each different in any given case. Since each guardianship case inherently presents unique issues, it is wrong to apply this rule of compensation.

The Court of Appeals also failed to grasp the fact that DSHS initiated the litigation and raised the complex and unique issues in this case. Any meaningful ability for the incapacitated person’s interests to be

promoted or protected or defended is automatically diminished or eliminated by the possible application of this rule.

The Court of Appeals also imposed a prevailing party requirement for attorney compensation on appeal. Opinion, at 15. However, RCW 11.96A.150 is controlling at the trial and appellate court levels. The statute does not require that a party prevail. The statute does not require that compensation be denied if “unique issues” are presented. The statute specifically says that whether litigation benefits the estate is not dispositive.⁵

The application of the “direct” benefit rules for guardian compensation, the “unique issues” exclusion for attorney compensation in the trial court, and the prevailing party rule for attorney compensation on appeal are unjust. First, the application of these rules create disincentives for guardians or their attorneys to promote, maintain, or even defend the rights and interests of our most vulnerable adults, leaving them totally to the whim of DSHS or others until a harm actually occurs. (Appendix B)

Second, these disincentives occur in a regulatory context where CPGs provide more extensive services pursuant to ever-increasing

⁵ An amendment to the statute limits the holding of case law so that a benefit to an estate need not be proven, though it may be a factor, in attorney compensation. See, e.g., *Estate of Larsen*, 103 Wn.2d 517, 694 P.2d 1051 (1985) (probate estate; estate; attorney fees; objectors’ fees).

enforcement of statutory duties and ever-more demanding Standards of Practice promulgated by the CPG Board. It is unjust to create disincentives to compensation while at the same time increasing the standards of performance required to protect and defend the rights and interests of incapacitated persons, especially when it may be impossible to show a tangible, successful benefit arising from the prevention of harm or death.

Third, and finally, Guardians do not bear attorney fees and costs for the incapacitated person in their individual capacity, nor should they. The general rule is that an incapacitated person bears their own attorney fees and costs from their estate. The application of these rules in this case precludes recovery of attorney compensation from DSHS which could reimburse Sandy's or Rebecca's estate for the costs of defending against DSHS' litigation. The application of RCW 11.96A.150 provides a basis for that reimbursement from DSHS.

Recurrence of Issues. Compensation issues recur in guardianship cases with each request. CPGs and their attorneys apply for compensation throughout the State during the different stages of proceedings in a guardianship case on a regular basis, and is likely a daily occurrence.

VI. CONCLUSION AND RELIEF SOUGHT.

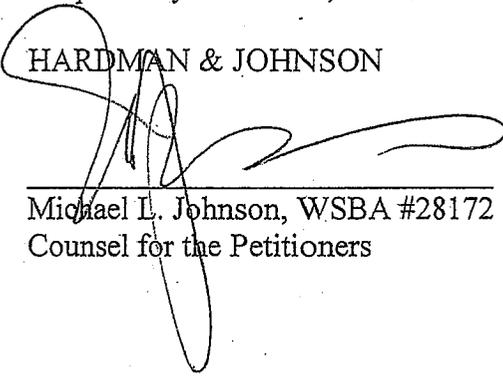
Division One juxtaposed its own rule in conflict with Supreme

Court precedent. Substantial public issues are at stake. This Court should accept review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and take any other action as the merits of the case and the interest of justice may require.

March 18, 2010

Respectfully submitted,

HARDMAN & JOHNSON

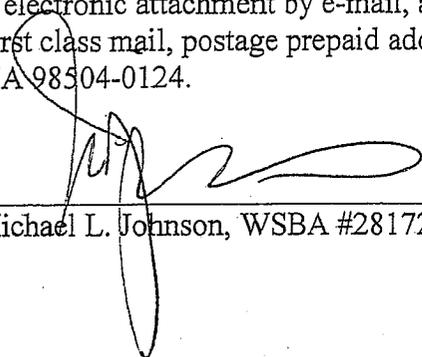


Michael L. Johnson, WSBA #28172
Counsel for the Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a copy of the foregoing Petition for Review to be served on Jonathon Bashford, counsel for the State of Washington, by electronic attachment by e-mail, and by depositing the same in first class mail, postage prepaid addressed to P.O. Box 40124, Olympia, WA 98504-0124.

March 18, 2010



Michael L. Johnson, WSBA #28172

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of)

SANDRA J. LAMB,)

Incapacitated
An Incompetent Person.)

No. 62711-2-1
(consolidated with
No. 62613-2-1)

DIVISION ONE

UNPUBLISHED OPINION

In the Matter of the Guardianship of)

REBECCA ROBINS,)

An Incapacitated Person.)

FILED: December 21, 2009

LEACH, J. — The decision to award guardian fees lies within the discretion of the superior court. But the court may only award fees for work performed by the guardian that directly benefits the ward. In this appeal, we are asked to decide whether James and Alice Hardman, the co-guardians of Sandra Lamb and Rebecca Robins, may be compensated for engaging in the specific advocacy activities listed in their advocacy report. Because the Hardmans fail to establish that these activities provide a direct benefit to their wards, we hold that they are not entitled to compensation under the facts of this case.

Appendix A

FACTS

James Hardman and his mother, Alice Hardman, are certified professional guardians.¹ Approximately 23 of their wards are clients of the Department of Social and Health Services (DSHS) residing at Fircrest School. Fircrest is one of five residential habilitation centers (RHCs) established by state law to serve people with developmental disabilities. Among the Hardmans' wards residing at Fircrest are Sandra Lamb and Rebecca Robins.

A. Sandra Lamb

Lamb is a 53-year-old woman with a medical diagnosis of "profound mental retardation" resulting from a meningitis infection she suffered sometime before age three. With communication skills level comparable to a two-and-a-half- to three-year-old, Lamb has multiple disabilities, including limited speech and articulation, seizure disorder, mild microcephaly, hearing loss, and hemiplegia. She receives a monthly income of \$1,106 in Social Security Administration benefits and is the beneficiary of a special needs trust established in 2008.

Lamb has resided at Fircrest since 1964. In 1982, she was placed in a community group home but was returned to Fircrest due to her "fits of anger and

¹ RCW 11.88.008 defines a "professional guardian" as "a guardian appointed under this chapter who is not a member of the incapacitated person's family and who charges fees for carrying out the duties of court-appointed guardian of three or more incapacitated persons."

anti-social behavior.” In 1986, the King County Superior Court declared Lamb an incapacitated person (IP). Dr. Lee Miller, a staff physician at Fircrest, recommended against community placement in favor of a structured environment. In 1993, Ms. Hardman was appointed as the guardian of the person and estate of Lamb. The order states that Lamb “shall not retain her right to vote.” Mr. Hardman was appointed co-guardian in 1997. In 2004, Lamb and four other of the Hardmans’ wards were relocated to Rainier RHC in Buckley, Washington. The Hardmans filed an action under the abuse of vulnerable adults statute, chapter 74.34 RCW, in King County Superior Court in 2006 and requested Lamb’s return to Fircrest. In 2007, Lamb was returned to Fircrest,² and the Hardmans obtained a financial settlement for her the next year.

On May 2, 2008, the Hardmans filed a triennial guardian’s report for Lamb. In their report, the Hardmans requested approval of their guardian fees for the prior reporting period. They also sought an allowance for the new three-year period of \$225 per month for guardian fees for routine services and \$150 per month for “special advocacy fees.” In support of their request for special advocacy fees, the Hardmans attached a 16-page document, titled “Advocacy Report of James R. Hardman,” listing various advocacy activities undertaken

² In the advocacy report, the Hardmans claim that “Lamb’s suffering appeared to cease the moment she returned. The transformation in her mood was stunning. She has been extraordinarily happy since returning to Fircrest.”

from January 2004 until February 2008.³ The report states that during this period the Hardmans worked with advocacy groups such as Friends of Fircrest, the Fircrest Human Rights Committee, and Action for RHCs to lobby state and local officials. Mr. Hardman also worked “within the Washington State Disabilities Issues caucuses . . . [and] the State Democratic convention as a delegate to advocate for the resolution of support for Fircrest and other State RHCs.” In June 2008, the Hardmans traveled to Washington D.C. to attend the annual Voice of the Retarded conference and lobby “every State of Washington Congressional office.” In addition to lobbying officials, the Hardmans opposed legislation proposed in 2007 that would have created a commission with authority to close RHCs and championed legislative initiatives, including:

 bills which would extend to RHC residents the rights . . . contained in RCW 70.129; incentives for Washington colleges to include courses concerning the treatment of people with developmental disabilities [DD]; background checks for all who care for people with DD; funding for RHCs; and, whistleblower protection for professionals who treat people [i]n RHCs.

The report further describes the Hardmans’ efforts to prevent certain types of development around the Fircrest area by attending land use meetings. Finally, the report describes the informational and public relations materials produced by the Hardmans, including a monthly newsletter and a PowerPoint presentation

³ The report also extensively discusses the Hardmans’ litigation efforts. The Hardmans are not seeking compensation for the time spent on litigation in this case.

about the challenges facing Fircrest residents. Though the report states that “[t]hese efforts are not easily segregated from one another,” it justifies the Hardmans’ request for a monthly allowance of \$150 for each ward by taking the total time spent on advocacy, approximately 80 hours, divided by the total number of the Hardmans’ wards at Fircrest, and multiplying that number by Mr. Hardmans’ hourly rate.

DSHS filed an objection to the Hardman’s request for the proposed fees on June 2, 2008. The Hardmans filed a response, a supplement to Lamb’s report, and declarations regarding fees for routine services and for “ongoing special advocacy activities.” In the declarations, the Hardmans increased their request for routine services to \$235 per month and explained that the advocacy fees were justified because

[m]oving medical and/or behaviorally fragile people is potentially hazardous to their health and well-being. Closing RHCs would necessitate such moves. My clients are medically and/or behaviorally fragile. Remaining where they are successful and in a medical facility where their great needs are met is essential. This has required great and determined effort, fostering allies, and using groups.

The Hardmans reiterated themes stated in their advocacy report—namely, that their advocacy efforts were necessary to combat the political threat posed by key DSHS officials, disability rights organizations, and real estate developers that favored closing Fircrest.

B. Rebecca Robins

Rebecca Robins is a 53-year-old woman suffering from "profound or severe mental retardation" since birth. Functioning at a level comparable to that of an 18-month-old, Robins has no speech abilities and has been diagnosed with autism, scoliosis, self-injurious behavior and aggression. She receives a monthly income of \$892 from a railroad retirement account.

Robins has resided in Fircrest since 1984. In 1985, the King County Superior Court deemed Robins an IP. Due to her "tantrum like behavior with repeated spitting and kicking," Dr. Miller recommended against community placement, reasoning that her behavior "would likely make it extremely difficult or almost impossible for her to be [in] a community group home setting." Ms. Hardman was appointed guardian of the person and estate of Robins in 1993, and Mr. Hardman was appointed co-guardian in 1998.

On May 9, 2008, the Hardmans filed a biennial guardian report for Robins, seeking approval of their guardian fees for the prior reporting period and an allowance for the new three-year period of \$235 per month for guardian fees for routine services and \$150 per month for "special advocacy fees." In support of their request for "special advocacy fees," the Hardmans attached the same advocacy report that they had submitted for Lamb.

C. Joint Hearing and Appeal

On June 6, 2008, at a joint hearing for Lamb and Robins, the commissioner approved both reports and awarded an allowance of \$175 per month for guardian fees for routine services and \$150 per month for special advocacy activities. The commissioner found that Mr. Hardman's declaration regarding ongoing advocacy activities sufficiently stated the "causal connection between the advocacy work that's being done and the individual benefit that's being conferred." The commissioner required the Hardmans to "submit a report specifically reporting the time spent on advocacy and specifically relating the benefit conferred by that advocacy" on Lamb and Robins at the next accounting.

On June 16, 2008, DSHS filed a motion to revise the commissioner's orders. The Hardmans filed a response. Hearings were held in King County Superior Court on August 28 and September 5, 2008. In revising the orders and partially denying the Hardman's request for advocacy fees, the superior court differentiated between the advocacy activities described in the report:

- a. The political and lobbying activities undertaken by Guardians are outside the scope of their guardianship of Ms. Lamb. The Guardians' request for extraordinary fees for the next reporting period are denied to the extent that those fees relate to political and lobbying activities.
- b. Community outreach activities that are necessary to protect the best interests of Ms. Lamb are within the scope of the guardianship. Therefore, the Motion to Revise is denied and the Guardians' extraordinary fees claimed for the next reporting period are allowed to the extent that those fees relate to community outreach that is necessary to protect the best interests of Ms. Lamb.

The court finds that the fees for those activities currently amount to between \$50 and \$75 per month.

The Hardmans filed motions for reconsideration, which the court denied without explanation.

The Hardmans appealed the superior court's orders regarding their requests for special advocacy fees for Lamb and Robins, as well as the orders denying their motions for reconsideration. The appeals were consolidated by this court. DSHS cross-appealed the portions of the orders awarding an allowance for the Hardmans' community outreach activities.⁴

STANDARD OF REVIEW

A superior court's award of guardian fees and costs is reviewed for an abuse of discretion.⁵ An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds.⁶ The court necessarily abuses its discretion when its decision is based on an erroneous view of the law or involves application of an incorrect legal analysis.⁷ But if pure questions of law

⁴ The American Civil Liberties Union of Washington filed an amicus brief in support of the Hardmans. Disability Rights Washington filed an amicus brief in support of DSHS.

⁵ In re Guardianship of Spiecker, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966) (citing In re Estate of Leslie, 137 Wash. 20, 241 P. 301 (1925)).

⁶ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)).

⁷ Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

are presented, a de novo standard of review should be applied to those questions.⁸ Issues of statutory construction are also reviewed de novo.⁹

ANALYSIS

A. Compensation for the Hardmans' Advocacy Activities

The Hardmans contend that they are entitled to compensation for their advocacy activities as the personal guardians of Lamb and Robins.¹⁰ According to the Hardmans, the framework governing guardian compensation and expenses requires "some nexus between the guardians' activities and the best interests of [the wards]," but "no actual benefit must be shown." DSHS responds that a direct benefit to the ward must be shown for the court to award fees.

In Washington, a guardian is entitled to "such compensation for his or her services . . . as the court shall deem just and reasonable."¹¹ The court may also award "[a]dditional compensation . . . for other administrative costs, including services of an attorney."¹² "But [a] court may not award fees simply on the basis

⁸ See Ang v. Martin, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).

⁹ Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 137 Wn. App. 592, 598, 154 P.3d 287 (2007) (stating that agency rules are reviewed de novo as if they were statutes, but that the court gives "substantial weight to an agency's interpretation of statutes and regulations within its area of expertise").

¹⁰ Under RCW 11.92.043(4), a guardian of a ward's person is charged with the duty "to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, [and to] assert the incapacitated person's rights and best interests."

¹¹ RCW 11.92.180.

¹² RCW 11.92.180.

of work performed. Rather, the court must determine the need for the work done and whether it benefited the guardianship.”¹³

In re Guardianship of McKean¹⁴ demonstrates this required showing of a direct benefit. In that case, the trial court appointed guardians to protect two minor daughters’ assets in relation to their father’s dissolution proceedings.¹⁵ The court later authorized payments of the guardians’ fees and costs, as well as attorney fees, from the daughters’ guardianship assets.¹⁶ On appeal, the father argued that the court abused its discretion in ordering the award of fees.¹⁷ In upholding the award, Division Two emphasized that the guardian had shown a direct benefit to the guardianship. Specifically, the work performed by the guardian had brought to light the daughters’ assets and interests, a task that had eluded two previous guardians ad litem and the judge in the dissolution proceedings.¹⁸

In this case, the Hardmans have not shown that their advocacy activities directly benefit Lamb and Robins. Essentially, the Hardmans claim that the direct benefit derived from their advocacy activities is the prevention of their wards’ removal from Fircrest. But the Hardmans’ advocacy activities do not provide this

¹³ In re Guardianship of McKean, 136 Wn. App. 906, 918, 151 P.3d 223 (2007) (citation omitted).

¹⁴ 136 Wn. App. 906, 151 P.3d 223 (2007).

¹⁵ McKean, 136 Wn. App. at 909-11.

¹⁶ McKean, 136 Wn. App. at 917-18.

¹⁷ McKean, 136 Wn. App. at 917-18.

¹⁸ McKean, 136 Wn. App. at 919.

benefit since none of the perceived threats to Fircrest, as described in the reports, would have necessarily led to its closure and forced Lamb and Robins to relocate. Nor have the Hardmans presented any expert evidence in support of their opinion that maintaining Lamb and Robins at Fircrest would be in their best interests.¹⁹ Their reports only discuss the potential benefit conferred upon a class of IPs under the Hardmans' care. Accordingly, we affirm the superior court's decision denying an allowance for the Hardmans' political and lobbying activities, but on grounds that the Hardmans have not sufficiently shown that these activities directly benefit Lamb and Robins.

On DSHS's cross-appeal, we reverse the court's award of a monthly allowance of \$75 for the Hardmans' community outreach activities on the same grounds. Even if the Hardmans had demonstrated a direct benefit from their community outreach activities, the court's order contains insufficient findings supporting the amount of the award to permit appellate review.²⁰ The order provides neither the court's rationale for differentiating between political and community outreach activities nor the factual basis for determining the amount of the allowance for community outreach activities.

¹⁹ Because the Hardmans fail to establish that their advocacy activities directly benefit Lamb and Robins, we need not address whether these activities qualify as "extraordinary services" under WAC 388-79-050.

²⁰ Estrada v. McNulty, 98 Wn. App. 717, 723-24, 988 P.2d 492 (1999).

The Hardmans assert several alternative grounds in support of their requests for advocacy fees. None of these has merit.

First, the Hardmans raise a preemption argument, claiming that the state guardianship statutes conflict with certain provisions of the Medicaid Act—namely, 42 U.S.C. § 1396p(a)(1) and (b)(1).²¹ Because these provisions generally prohibit DSHS from imposing liens and seeking adjustments or recoveries from an individual's property and because the exceptions to these statutes do not apply here, the Hardmans assert that "state statutes and regulations imposing financial liability are inoperative to the extent they are inconsistent."²²

"Where Congress has not expressly preempted or entirely displaced state regulation in a specific field, as with the Medicaid Act, 'state law is preempted to the extent that it actually conflicts with federal law.'²³ A conflict between state

²¹ The anti-lien provision contained in § 1396p(a)(1) provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan" and lists two exceptions that do not apply here. The anti-recovery provision contained in § 1396p(b)(1) provides that "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except [under circumstances that are not pertinent to this case]."

²² The Hardmans explain that "imposing financial liability" means "the extent a Medicaid recipient . . . is required to apply his or her social security benefit to pay towards his cost of care." The Hardmans later inconsistently argue that "federal law permits, but does not impose, financial liability on Medicaid recipients."

²³ Lankford v. Sherman, 451 F.3d 496, 510 (8th Cir. 2006) (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)).

and federal law arises where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁴

Contrary to the Hardmans' position, no conflict exists between state statutes “imposing financial liability” and the Medicaid Act because federal regulations implementing the Act require that “an agency must reduce its payment to an institution, for services provided to an individual,” by the amount of the individual's income that remains after certain deductions have been made, such as a personal needs allowance.²⁵ These regulations apply to state agencies and prohibit them from paying any amounts that are the responsibility of the patient.²⁶ Thus, under both federal and state regulations, RHC residents are required to apply their income, minus certain allowances, to the cost of their care. There is no conflict preemption.

The Hardmans next argue that state guardianship statutes abridge the superior court's powers to award guardian fees, citing Blanchard v. Golden Age Brewing Co.²⁷ There, the legislature enacted a law barring courts from issuing

²⁴ Lankford, 451 F.3d at 510 (quoting Pac. Gas & Elec. Co., 461 U.S. at 204); see also Hankins v. Finnel, 964 F.2d 853, 861 (8th Cir.1992).

²⁵ See 42 C.F.R. §§ 435.725, 435.733, 435.832, and 436.832.

²⁶ See Florence Nightingale Nursing Home v. Perales, 782 F.2d 26, 29 (2d Cir. 1986) (stating that 42 C.F.R. §§ 435.725 and 435.832 “are consistent with the statutory plan that Medicaid funds not be paid to reimburse those costs that patients with resources of their own can afford”).

²⁷ 188 Wash. 396, 63 P.2d 397 (1936).

injunctions in labor disputes except under limited circumstances. Noting that “[t]he writ of injunction is the principal, and the most important, process issued by courts of equity, it being frequently spoken of as the ‘strong arm of equity,’”²⁸ our Supreme Court held that the statute was unconstitutional because “[t]he legislature cannot indirectly control the action of the court by directing what steps must be taken in the progress of a judicial inquiry, for that is a judicial function.”²⁹ Because a state court’s authority to award guardian fees from the income of Medicare beneficiaries is not comparable to the court’s equitable power to issue injunctions, Blanchard is inapposite.

Finally, the Hardmans and amicus ACLU argue that the superior court’s orders deprive Lamb and Robins of their rights to petition the government under the state and federal constitutions. But they fail to cite any relevant case law establishing that a guardian may exercise political rights of an IP, such as the right to petition, in the IP’s best interests when the IP cannot express his or her

²⁸ Blanchard, 188 Wash. at 415.

²⁹ Blanchard, 188 Wash. at 418.

preferences. Instead, the cases they cite primarily involve the right to refuse life-sustaining treatment.³⁰

B. Attorney Fees

The Hardmans request an award of attorney fees on appeal under RAP 18.1 and RCW 11.96A.150.³¹ Because they have not prevailed on appeal, we decline their request. Given the unique issues in this case, we also deny the Hardmans' request for fees below.³²

CONCLUSION

The Hardmans fail to establish that the advocacy activities listed in their report provide a direct benefit to their wards. We therefore affirm the superior court's decision denying an allowance for the Hardmans' political and lobbying

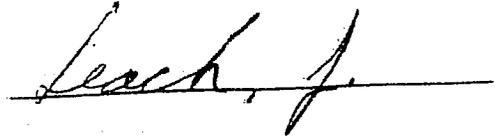
³⁰ In re Guardianship of Ingram, 102 Wn.2d 827, 829, 689 P.2d 1363 (1984) (reversing a trial court order imposing surgery to treat malignant cancer of the larynx when the IP expressed a preference for radiation treatment); In re Welfare of Colyer, 99 Wn.2d 114, 123, 660 P.2d 738 (1983) (holding there were "no compelling state interests opposing the removal of life sustaining mechanisms from [a patient in a chronic vegetative state] that outweighed her right to refuse such treatment"); In re Guardianship of Hamlin, 102 Wn.2d 810, 815, 689 P.2d 1372 (1984) (concluding that cardiopulmonary resuscitation could be withheld from irreversibly comatose patient).

³¹ The commissioner approved \$10,000 for litigation expenses associated with the appeal.

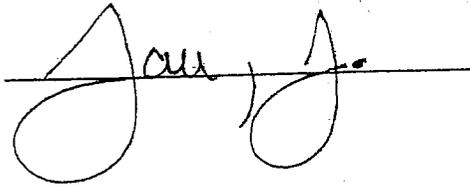
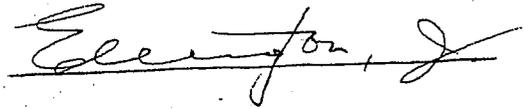
³² In re Estate of D'Agosto, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (noting case law in which attorney fees were denied where difficult or novel issues were presented).

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activities, though on different grounds,³³ and reverse its decision awarding a monthly allowance of \$75 for community outreach activities.

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WE CONCUR:

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³³ Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 876, 154 P.3d 891 (2007).

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December 6, 2000

Bernard Friedman
Department of Social and Health Services
P.O. Box 45010
Olympia, WA 98504

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Dear Mr. Friedman:

Thank you for taking the time to meet with us on Friday afternoon to discuss risk management as regards clients of DSHS who may or should have legal guardians. We understand that your primary interest in these areas is "loss prevention and risk management", that is the evaluation and control of situations in which the Department is exposed to claims for damages arising out of its alleged negligence. We also believe you have a personal interest, as do the other employees of the Department at all levels, in ensuring that quality care is provided to the individuals served by the Department. We believe that the active use of guardians who act in partnership with the Department rather than in conflict with it will significantly reduce the Department's exposure to risk of liability. The involvement of guardians will not only reduce the circumstances where the Department is at risk, but will also reduce the total cost of potential damages that might be awarded in the event liability is ultimately assessed against the Department.

This letter includes a basic description of the risk as we perceive it, an explication of how guardianship could relieve this risk, how guardians are monitored, and the two basic arguments typically used by the Department when trying to restrict or control the actions of guardians. We hope it will be of assistance to you

RISK TO THE DEPARTMENT AND TAXPAYERS:

The Department finds itself in a situation where many clients have brought suit against the state. Typically, the underlying reason for the litigation has been that the Department lacks the staff to closely follow their clients in long term care facilities or in other community programs, such as those provided in private homes, employment or day activities. This creates risk to the Department's clients, to the Department and ultimately to the taxpayer.

For clients who have had legal guardians appointed, this risk to the Department is significantly reduced.

Under Washington State law, Guardians are delegated responsibility directly by the Court, are subject to the requirements of the Guardianship statute and are held accountable if they do not meet these responsibilities. Under RCW Chapters 11.88 and 11.92, and specifically

Appendix B

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11.92.040, 043 and under case law, guardians have extensive obligations to attend to the needs and interests of incapacitated persons. A guardian is accountable if harm comes to a ward that the guardian ought to have prevented. Professional Guardians are held to the Washington State Standards of Practice as established by the Certified Professional Guardian Board. All guardians must report the status of their wards to the court at regular intervals. The court takes these reports seriously, reviews them carefully and requires active follow-up on any questionable situations.

HOW DO GUARDIANS ADVOCATE FOR/PROTECT/ENHANCE LIVES—AND REDUCE RISK?

Guardians are given specific means to protect/enhance the lives of their wards. Guardians are appointed by the Superior Court to oversee the development and implementation of care plans. Guardians monitor the care plan through visits with the individual, discussing the client's needs with the client and with a variety of medical and other care providers, providing management required by substantial changes and/or crisis, and making such decisions as are delegated in the Court Order. For clients who have guardians, the guardians take on considerable liability for each individual and are well equipped to do so. Guardianship caseloads are dramatically lower than the Department's case-managers' caseloads.

HOW GUARDIANSHIP IS MONITORED BY THE COURTS

Guardians are monitored closely by Superior Courts on a County level. Each County Superior Court has an assigned Judge or Commissioner who reviews the reports of each professional or individual guardian as they are received. There has been active communication between and among the Judges and Commissioners and the scrutiny of the Court has increased with the advent of universal standards, volunteer monitoring boards and standardized, regular and careful review. If a Guardian fails to provide good monitoring and oversight, the Guardian will not long receive referrals and is very likely to be removed from the case.

Under case law and practice, the court views itself as the "superior guardian." Guardians are required by the Court to engage in "meaningful in-person contact" with their clients on a regular basis. Further, basic Washington State Standards of Practice as approved by the Certified Professional Guardian Board, require accurate, complete and timely reporting to the Court. These Standards of Practice are enforceable through the disciplinary process created through the Supreme Court's OAC Professional Guardian Certification Board.

An appointed guardian has tools not available to DSHS caseworkers. A guardian is to "stand in the shoes" of their ward and has the legal obligation to see that their ward's rights are protected in a way that no other advocate can. Guardians are usually represented by counsel and can report problems to the court or initiate other actions such as protective orders, legal separations and the like. DSHS workers must go through a more arduous process to achieve assistance from an assistant attorney general. A standard practice for guardians in difficult situations is to make a report to the guardianship court seeking additional directions or authority.

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Ordinarily, the Department does not need to be involved in these actions, unless there is an Adult Protective Services worker already involved. Most guardians are family members. Professional Guardians tend to be appointed either when there is no family or, more commonly, when there are dysfunctions within the family. Professional Guardians thus tend to gain experience dealing with problem situations, thus adding another level of protection to the Department and the State.

ARGUMENTS USED BY THE DEPARTMENT WHEN JUSTIFYING THE DESIRE TO CONTROL THE ACTIONS OF GUARDIANS.

Typically the Department attempts to control or restrict the activities of guardians by attempting to limit the fees that can be charged in any particular case. The primary attempts at regulation are based upon the last sentence of RCW 11.92.180 and WAC388.79 and are used when the guardianship ward is a recipient of Social Security benefits that are usually contributed by the ward towards their cost of care ('participation') in a long-term care living situation. By limiting fees to an arbitrary amount that has no relation to the actual work necessary in a particular case the Department usurps the function of the Court to review and approve the fees on a case-by case basis. From a risk management perspective this approach is counter productive. The most work intense cases are those in which the client has the greatest needs and hence those in which the Department's exposure is greatest. As you correctly noted the money "saved" by the fee limitation pales in comparison to the increase of risk to the Department if the wards problems are not resolved. The longer the wards "situation" goes unaddressed, the greater the Department's ultimate liability.

The Department has attempted to support the fee limitation based upon an alleged direction from the Social Security Administration's HCFA. To the best of our knowledge, the last written statement made by HCFA about this was in 1993, and that statement tends to be mis-characterized by Department staff. We can provide additional documentation about this if necessary. HCFA has not taken the position that legitimate Guardianship fees cannot be paid from SSDI benefits.

There have been, of course, instances of Professional Guardians charging fees and providing poor or no service. In these cases, the Department has the usual and available alternative of reporting the matter to the Court or to the Certification Board or appearing at the court hearing to challenge the fees. Further, the Department has, by their own WAC, the right to review any guardianship fee over \$175 per month. Since the Certified Professional Guardian Board has been functioning, some issues have been resolved through the process of review and supervision by the courts.

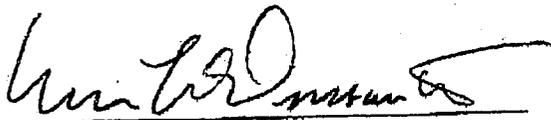
The current arrangement does require that Department staff second-guess the court review process by reviewing the fee requests of Professional Guardians, and, when necessary, participating in the routine judicial process that exists for review of fees. We cannot offer an alternative to this although we suggest that it is unnecessary. The courts are quite capable of reviewing the services and fees of guardians, and have in fact been doing so for over one

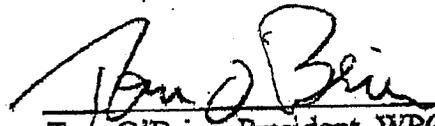
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hundred years. However, we have observed that much of the time the Department's specific objection is not to the actual activities of the guardian. More often, it is simply thought by Department staff that the fee number itself is too high, without reference to services. Alternatively we often receive the sincerely held but mistaken argument that Professional Guardians merely duplicate service provided by the Department. Were the latter to be the case, the Department would not be in need of your assistance. The legal functions of the guardian and the Departments case-managers are distinctly different. Failure to understand those differences has and will continue to expose the Department to unnecessary risks of liability. Working in partnership with the guardians could and would diffuse difficult situations before they degenerate into major problems, litigation and settlements or verdicts against the Department.

One unrelated issue we would like to address has to do with the Departments role in end-of life decision making. We would like to express our relief that the Department has chosen to back off from attempting to control the end of life decision-making, leaving this role to the duly appointed legal surrogates. This decision will, in itself, protect the state from some lawsuits. Further, we are relieved to see the Department taking a proactive look at the overall trend toward lawsuits and the role of Court appointed guardians in alleviating state risk. A similar approach to the general involvement of guardians in Department related cases would be salutary. If the Department were able to withdraw from its position of attempting to limit the time and delineating the duties that guardians can spend on problem cases, leaving the work of legal protection to the Court and its appointed legal surrogates, we feel that much risk would be alleviated. We can assure you that the professional guardianship community stands ready and willing to work with the Department to ensure that problem situations are resolved long before they degenerate into difficult liability issues for the Department.

Sincerely,


William L.E. Dussault, Attorney at Law


Tom O'Brien, President, WPGA

CC: John Jardine, Elizabeth Lindley

ATTACHMENTS

RCW 11.92

OAC Standards of Practice and Discipline Regulations

Professional Guardian Training Manual

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