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(Consolidated Cases)

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**SUPREME COURT OF
THE STATE OF WASHINGTON**

**In the Matter of the
GUARDIANSHIP OF MARY JANE McNAMARA**

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

v.

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

Respondent.

APPELLANTS' REPLY BRIEF

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May 16, 2011**

ORIGINAL

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I. Introduction

The Department of Social and Health Services (DSHS) confuses representative with individual capacity. DSHS describes the Appellants throughout the briefs as “The Hardmans”. “The Hardmans” are not husband and wife, and are not parties in their individual capacity, but as representative parties. CR 17(a) (“[A] guardian...may sue in his own name without joining with him the party in whose benefit the action is brought.”); see also RAP 3.2(d). Mr. Hardman is “of counsel” to the firm and does not receive any portion of the attorney fees for himself. Mr. Johnson does not receive any portion of the Guardians’ fees for himself. They promote the point of view of incapacitated persons (IPs) pursuant to professional standards. Compensation is a secondary consideration.

DSHS belittles the interests of the IP. From the IPs’ point of view, their medical care and home are dependent on the Legislature’s decisions as the “board of directors” of Fircrest School. The Legislature decides service reductions, plans eviction, and determines conditions of discharge. The IPs’ interests are in jeopardy each time Legislature convenes and a year round effort to educate legislators is necessary. Guardians are needed to speak for the IPs and to their legitimate best interests expressed. The Guardians’ decision to advocate is a professional one. Protecting the IPs’

civil rights through advocacy is necessary and provides a direct benefit to them.

The IPs also have an interest in how their federal benefit is allocated. Not surprisingly, DSHS denigrates this interest. From an IPs point of view, a reasonable allocation of income to protect one's interests related to service reduction, eviction, and conditions of discharge confers a direct benefit, while a donation to the General Fund provides no such benefit.

The Guardians' interest in fees is secondary. From the IPs' point of view guardian and counsel are the only means available to advance the IPs' interests in home, health and property described above and therefore confer a direct benefit.

II. Standard of Review.

DSHS alleges an abuse of discretion standard of review. *DSHS Response Br.*, at 20. The Guardians generally agree that the standard of review is abuse of discretion by the superior court on the court commissioner's record, with two observations. First, trial courts defer to the expertise of a guardian. "The court will generally heed the suggestions of the guardian and will pay much attention to his views as to the best course to pursue.

This being true, the responsibility rests the more heavily upon the guardian to exercise his judgment wisely..." *In re Rohne's Guardianship*, 172 Wash. 62, 74, 288 P.2d 269 (1930). Second, though the court is the superior guardian, "[u]ltimately, it is the court's duty to protect the ward's interests." *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (2001).

In a peculiar development, the trial courts in both *Lamb* and *McNamara*, and the Court of Appeals in *Lamb*, failed to exercise any deference to the Guardians' discretion or expertise, and failed to explain how the interests of the IP were protected. From the IPs' view point, their interests are not protected by disregarding their Guardians' expertise with no explanation how silencing their Guardians promotes their interests in home and property.

III. The Guardians Have Discretion to Advocate.

The Guardians have a duty to advocate the IPs view point to legislative and executive branch officials based on state law, including RCW 11.92.043(4), other applicable law, and Certified Professional Guardianship Board Standards of Practice. DSHS argues there is no such authority to advocate and public policy does not support it. Substantially

the same arguments were made on cross-appeal regarding advocacy in community groups.

The trial court in *Lamb* determined there was no discretion to advocate to legislative and executive officials. The Court of Appeals in Division I in *Lamb* and the trial court in *McNamara* did not squarely address the issue of whether or not advocacy was within the scope of a guardian's discretion. See generally *Guardianship of Lamb*, 154 Wn.App. 536, 228 P.2d 32 (2009), review granted 169 Wn.2d 1010 (2010).

The Guardians exercise the IP's right to petition under Art. I, § 4 of the Washington Constitution by engaging in advocacy. DSHS argues the right to petition is not implicated. The ACLU filed an brief as amicus curiae. The *Lamb* court said the guardians failed to cite relevant case law regarding the Constitutional right to petition and rejected the claim.

With allegations scattered throughout, DSHS personalizes attacks on the Guardians, accusing the Guardians' activities are a product of personal bias, self-interest, their individual political philosophy, or vindication of their own personal rights. See, e.g., *DSHS Response*, at 9, 32. The Guardians rebutted all these attacks in detail. CP 246-52; 253-58; 281-89.

The Guardians should not be taken to task simply because the IPs' position is contrary to the political winds.

In particular, DSHS alleges that the Guardians' decision to advocate is unreasonable because they oppose integrated living environments and because the IPs will not likely suffer harm from an eviction. *DSHS Response Br.*, at 13, 32. These issues were decided by the trial court. In addition, the attacks are untrue. Many other statements in DSHS's briefs are similarly untrue or based on a serious lack of accurate information. For example, DSHS claims Fircrest School is in Seattle when in fact it is in Shoreline. *DSHS Response Br.*, at 3. Untrue personalized accusations against the Guardians are intended promote DSHS's interests at the expense of the interests of the IPs. DSHS "Swift boat" attacks on the Guardians are unwarranted.

Chapters 11.88 and 11.92 RCW constitute a comprehensive scheme intended to provide protection of IPs by a court-appointed decision-maker. Certified professional guardians are held to high ethical standards and a rigorous decision-making process, which in this case taps into expertise learned and used over the years. The Guardians did not act in a vacuum in this case. They rely on a court-approved personal care plan. They rely on a

professional decision-making process: objective facts and analysis, not subjective belief; on applicable law relating to the decision; on other rules, standards, or duties limiting discretion (which in turn may conflict with applicable law, among each other, or the interests of an IP); and with all those tools, they promote in this case the best interests of the IP.

The Certified Professional Guardian Board has enacted Standards of Practice requiring guardians to “ensure care”, “actively promote the health” of an IP, and “protect and preserve the estate” of the IP. *CPG Standards of Practice 402.7, 408.4, and 409.11* (eff. January 31, 2010).¹

From an IPs’ standpoint, how can too much advocacy be claimed?

DSHS first attacks the Guardians’ decision to advocate as unreasonable because the Guardians “opposed integrated living environments.” *DSHS Response Br.*, at 13. This issue was raised at the last minute, never decided by the trial court, and is not an issue here. Accusing the Guardians of uniformly opposing alternative placements when that is not true is a way to obscure the fact DSHS uniformly supports community placement even when it causes death or harm. The Guardians, on behalf of the IPs, *agree* with the de-institutionalization movement generally. It is likely

¹http://www.courts.wa.gov/committee/?fa=committee.child&child_id=69&committee_id=117 (retrieved May 16, 2011).

appropriate for up to 97-99% of the intellectually disabled. Skilled nursing or intermediate care facilities provide *intensive levels of care* based on actual need. There is no factual dispute in this case the IPs need the level of care they are receiving and are appropriately living and receiving services at Fircrest. That determination is made annually by care providers under the direct supervision of DSHS as well as from recent assessments conducted recently as a Legislative requirement and was never an issue in the trial court. The case of *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1991) states:

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings...

...

[T]he State may generally rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a plaintiff from the more restrictive setting.

Olmstead, 527 U.S. at 602. There is “no federal requirement that community-based treatment be imposed on patients who do not desire it.” *Id.* Indeed, community or “waiver” services in the community provide a *lower level* of care. It is the burden of DSHS to demonstrate on an

individualized basis that an alternative placement is in the “best interests” of a resident by providing equal or greater care. RCW 71A.20.050. From the IPs’ point of view, the burden of proof is appropriately placed on DSHS given the significance of service reductions, plans for eviction, or conditions of transfer to the IPs life, as well as the lack of funds available to pay independent experts. *But see* dictum in *Guardianship of Lamb*: “Nor have the [Guardians] presented any expert evidence in support of their opinion that maintaining Lamb and Robins at Fircrest would be in their best interests.” *Lamb*, 228 P.3d at 37. DSHS professionals have already decided placement is appropriate on an individualized basis and the Guardians concur. See generally *Sealed Health Care Records*. In contrast, the issue in the instant case is advocacy against efforts to eliminate an entire level of care, group eviction, and determine the conditions of group discharge. The Guardians’ decision to advocate is objectively reasonable.

DSHS also attacks the Guardians’ advocacy as unreasonable because no harm will occur if residents are evicted. *DSHS Resp.Br.*, at 32. Like the deinstitutionalization issue, this issue was raised at the last minute and was not decided by the trial court. In effect, DSHS is urging the Guardians and this Court to look the other way despite 6 deaths and injury to all 5 of the

Guardians' wards evicted in the 2004 "downsizing" of Fircrest School. Assessing potential risk because of awareness of actual death and injury and a failed post-discharge process in the past is objectively reasonable.

DSHS also attacks the Guardians for advocating against service reductions, in particular the swimming pool closure, for safety of residents with respect to the Health Lab, and proposed land uses affecting the residents. *DSHS Response Br.*, at 13. From the point of view of the IP, it is beneficial to determine the effect of the storage of radioactive and biological materials so close to one's home, and to determine how land use and traffic patterns may affect one's community. The swimming pool closure is also an example of how different therapies can be foreclosed by service reductions. Though not every resident may not use every therapy, it is beneficial to have a wide range of therapies available to the IPs in event they are needed in the future. Land use issues concern traffic patterns in close physical proximity to the IPs' homes. Advocacy regarding service reductions, land use issues, and storage of biological and radioactive contaminants is objectively reasonable.

The Guardians are entitled to deference. Advocacy to protect the IPs' interests in home, health and property is objectively reasonable, promotes

those interests, and thus provides actual value and a direct benefit to the IPs. If protection of home, health and property does not provide a direct benefit, then there is no need for guardian protection.

The trial courts did not properly extend deference to the Guardians' discretion. The Guardians' exercise of discretion is objectively reasonable and promotes the IPs home, health and property. The trial courts provided no explanation how a lack of advocacy advances the IPs' interests and seemingly deferred to DSHS on the issue of payments into the General Fund. The trial courts should be reversed.

IV. Entitlement to Guardian Compensation Generally.

The Guardians are entitled to compensation because advocacy was necessary. Extending the benefit test to require a "direct" benefit, and extending the "direct benefit" test to guardianships of the person is not warranted. It is equitable to allocate costs and share expenses among a discrete group. Incidental benefit to others is not relevant. DSHS disagrees and argues the Guardians' decisions to advocate must provide an "actual" and "special" benefit to each IP. The *Lamb* court determined a "direct" benefit must be shown and that the record before the Court did not demonstrate a benefit.

DSHS argues it is appropriate to extend the law to provide for a “benefit” rule in guardianship cases and a “direct benefit” rule in guardianships of the person, and that the rule should be applied exclusively. *McNamara Response Brief*, at 29-32. The “benefit” rule has always been a sufficient but not a necessary condition for compensation. The cases cited by DSHS and relied on by the Court of Appeals are all concerned with estates. DSHS fails to provide any reasonable basis why the legal standard should be extended, elevated, and made the exclusive rule.

Furthermore, overly stringent compensation rules conflict with the increasing demands in the Standards of Practice promulgated by the Certified Professional Guardian Board cited earlier. Demanding more expertise from the Guardians necessarily means advocacy efforts are more likely. Denying compensation to the Guardians for advocacy imposes an inequitable burden on the IPs who will have no guardians at all if their own property cannot be used for advocacy.

V. Entitlement to Attorney Compensation - RCW 11.96A.150

Pursuant to RCW 11.96A.150, the IPs are entitled to compensation for attorneys pursuant RCW 11.96A.150. Withholding compensation because

of novel or unique issues is not an exclusive factor in RCW 11.96A.150. DSHS disagrees and maintains compensation should be withheld because of unique issues. The Court of Appeals agreed with DSHS and denied attorney compensation in the trial court. The Court of Appeals also denied attorney compensation on appeal because the IPs were not the prevailing parties.

DSHS now argues that attorney fees were incurred in the Guardians' individual rather than representative capacity and promoted their own self-interest rather than the IPs' interests. *DSHS Response Br.*, at 34-37. The DSHS seemingly argues that all guardians are inherently self-serving because they request compensation and that the desire for money -- rather than the IPs best interests -- is always a reason to deny compensation. However, there is no legal support for that cynical premise. The long-standing legal rule is that Guardians are equitably entitled to compensation for counsel as a *consequence* of the services they have provided in their representative capacity. In this case, compensation necessarily includes the objectively reasonable decision to promote the IPs best interests through advocacy.

In addition, the IP's estate is typically the source of payment of attorney fees under RCW 11.96A.150. No one characterizes a petition for payment of fees as a collection action.

VI. Payment of Compensation

A. Who Decides?

The Guardians argue statutes limiting guardian and attorney compensation for Medicaid clients are an unconstitutional violation of separation of powers, or alternatively that advocacy is "extraordinary" under Chapter 388-79 WAC. DSHS disagreed. The Court of Appeals agreed with DSHS. The Washington Association of Professional Guardians (WAPG) filed a brief addressing issues concerning Chapter 388-79.

B. "Reasonableness" in Amount is Not Before this Court.

The issue of the reasonableness of fees is not properly before the Court because it was not raised before the trial court and therefore is raised for the first time on appeal.

DSHS's only argument in the trial court was its objection to fees based on a lack of discretion to engage in advocacy. No objection was made in the .

trial court to the reasonableness of the fees, i.e., the amount of the monthly fee amount. DSHS first made objection to the billing method in a reply brief in the Court of Appeals in *Lamb. Reply Brief of DSHS on Cross-Appeal*, at 11-12 (objecting to *pro rata* billing). The Court of Appeals did not decide or address the issue. The Guardians discussed the billing methodology in the *Guardians' Opening Br.*, at 22-24.

Billing is individualized when possible. When billing is allocated based on shared issues -- concerning reductions of service at Fircrest, proposed eviction legislation, and conditions of transfer, a reasonable monthly approximation, with a significant reduction of time from it, used. This method was approved by then court commissioner Prochnau. The gist of the Guardians' argument is the un-workability of allocating fractional periods of time for each task among all the IPs, and a reasonable approximation of total monthly time with a significant discount from \$500 per month per IP to \$150 per month per IP is not an abuse of discretion.

DSHS also alleges that Guardians compensation is unreasonable *in toto*. *DSHS Response Br.*, at 11-12. This issue is raised for the first time on appeal but a clarification of the court procedure is in order.

The Guardians received prior court approval to receive for \$325 per month advance allowance (which included \$150 for advocacy). At the time of approval of the Guardians' Report, the Guardians asked for approval of those fees for the past reporting period based on the Guardians' Service Report, the Guardians' Report, and the declarations regarding advocacy. Those fees are not an issue here.

The Guardians then asked for an increase of \$75 per month per IP to an increase to a total of \$400 per month per IP for the advance allowance. The trial court approved the Guardians' Report but reserved the issue of the advance fee request for later hearing.

At the later hearing, the trial court considered the reserved issue and denied the request for the \$400 monthly allowance. Had the allowance been granted, the Guardians would have received the monthly amount as an advance which would have been subject to court approval when the next Guardians' Report was approved.

This is a regular course of proceeding. The language in the Proposed Orders was typical of that used in the past. DSHS was served notice, appeared and objected to the fee request.

C. How Should the Social Security Benefit Allocated?

DSHS maintains generally that the allocation of the social security between cost of care and other uses is controlled by RCW 11.92.180 and Chapter 388-79 as well as federal regulations. *DSHS Response Br.*, at 4-5 and generally.

The social security benefit or other federal benefit is the property of the IP, is not state funds, and is not federal Medicaid funds. It appears the trial court in Lamb may have relied on the contrary impression. DSHS calls it “participation” and has a financial claim for cost of care against those benefits which it satisfies by taking the IPs funds from the resident trust account and delivering it to Office of Financial Recovery for deposit into the General Fund.

Allocation of the social security benefit pursuant to RCW 11.92.180 and Chapter 388-79 does not apply in this case. DSHS did not establish liability under RCW 43.20B.410 et seq.; violated rules prohibiting collection, RCW 71A.20.100 and WAC 388-835-0350; and applied the collected funds in a manner which benefits the General Fund but not the IP. *James v. Harris*, 499 F.Supp. 594 (M.D.Ala.), aff’d sub nom *James v.*

Schweicker, 650 F.2d 814 (5th Cir.1981); 42 U.S.C. § 405(j)(9). In addition, IPs are entitled to Medicaid services at Fircrest regardless of payment, and payment cannot be a condition of continuing eligibility. Further, in order to maintain eligibility for Medicaid, DSHS may permissibly take amounts over \$2,000.00, and is entitled to recover from the IPs' probate estates upon death.

From the IPs standpoint, their interests are better served in having their funds expended for continuing the guardianship rather than making a donation to the General Fund. The relative health of the General Fund is an improper consideration. For all those reasons, it would be inequitable to conclude that the IPs are "required" to participate in cost of care within the meaning of RCW 11.92.180 and Chapter 388-79.

Since RCW 11.92.180 and Chapter 388-79 do not apply to determine the allocation, it is determined under the default rule. RCW 11.92.035(2) provides preference shall be given to expenses of guardianship administration. Thus, if guardian and counsel fees remain unpaid, they take priority over costs of care.

VII. Technical Arguments

DSHS's Response Brief devotes considerable time and space to technical or procedural arguments regarding the procedural facts, the effect of *Lamb*, and its Motion to Strike, sprinkled throughout the brief.

DSHS objects to arguments incorporated by reference. *DSHS Response Br.*, at 20-22. Counsel apologizes for any inconvenience to the Court or the parties. There was no intention to exceed page limits, cause inconvenience, or waive any arguments. There is little or no prejudice because the number of pages involved is minimal.

DSHS also defends its Motion to Strike to ensure the IPs' record is not heard by the Court. *DSHS Response Br.*, at 22-28. The Court should reject this argument. Prejudice to the IPs' interests far outweigh any prejudice to DSHS. The IPs are entitled to their record for the following reasons.

First, the trial court relied on the *Lamb* opinion on the hearing on the Motion to Revise. DSHS seems confused about this. The trial court also relied on *Lamb* when affirming the Motion to Strike, stating it was not a new standard for purposes of the surprise exception under CR 59 because the Court of Appeals did not declare it was a new standard.

The court commissioner's oral opinion is not in the record. The court commissioner may have relied on *Lamb* for his memorandum opinion if it was available online. Though it is true the court commissioner stated he would have denied the Motion for Reconsideration even if he had considered the stricken materials, *DSHS Resp.Br.*, at 15, he also stated he was relying on *Lamb* in denying the Motion for Reconsideration on the record which did not include the stricken materials. In his memorandum decision, the court commissioner cited examples of cases where a direct benefit was not apparent.

Second, though DSHS was not given an opportunity to respond in writing to the Motion for Reconsideration, DSHS tactically noted the hearing on the Motion to Strike for the same day, and a joint hearing was held. DSHS was heard orally on the Motion for Reconsideration. DSHS submitted last minute *Declarations of Gluck, Okos and Pilkey* as a response to the Motion to Reconsider, not the Motion to Strike. DSHS decided to forego filing any additional declarations in support of the Motion for Reconsideration. Any prejudice to DSHS for its inability to respond with a written response is harmless.

Third, the issue concerning the Motion to Strike was not waived. The issue is in the Notice of Appeal and the Opening Brief. The issue is well-known to DSHS.

Finally, the IPs will suffer irretrievable prejudice without their own record. The Court of Appeals plainly changed the law in *Lamb* by elevating the benefit required and making it the exclusive rule. The IPs are entitled to a chance to meet the requirements of the new rule. Because of the intervening *Lamb* case, it was impossible include materials on “direct benefit” in the instant case until the Motion for Reconsideration stage. The IPs timely filed the extensive materials within the 10-day deadline for the Motion for Reconsideration. Striking them under these circumstances is unduly prejudicial to the interests of the IPs.

Contrary to assertions by DSHS, the materials submitted in support of the Motion for Reconsideration are relevant. They show the objective reasonableness of the Guardians’ advocacy. They show the advocacy promotes the IPs interests. To the extent materials are considered “legal” materials, see *DSHS Response Br.*, at 24, they show the Guardians considered applicable law. To the extent they are factual materials, they show the the objective facts considered. There no good reason to exclude

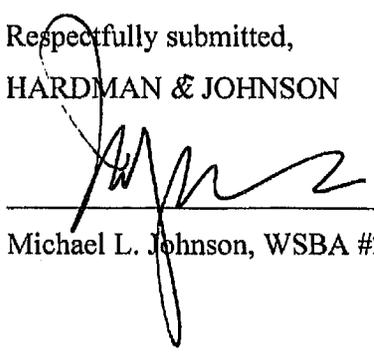
any of these materials. They show how advocacy promotes the IPs' interests in home and health, including facts surrounding reductions of service, plans for eviction, and conditions of discharge.

DSHS argues it has standing. *DSHS Response Br.*, at 33. DSHS does not have general jurisdiction to supervise guardians. All else being equal, however, the Guardians concede that DSHS has standing under RCW 11.92.040(6) to bring petitions for court orders compelling payment of cost of care, but that it did not follow that procedure in the instant case.

The trial courts abused discretion because the Guardians' decision to advocate was objectively reasonable. Further, the trial courts failed to analyze how advocacy promotes the IPs' interests in their home, health and property.

May 16, 2011

Respectfully submitted,
HARDMAN & JOHNSON



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