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**IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

No. 62711-2-I

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

GUARDIANS' REPLY TO DSHS RESPONSE BRIEF AND RESPONSE TO OPENING BRIEF ON CROSS-APPEAL

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ORIGINAL

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I. REPLY TO DSHS RESPONSE BRIEF.

A. Ripeness.

DSHS, in its Response Brief (DSHS Resp. Br.) fails to take seriously and fails to respond to the issues raised in the Guardians' Opening Brief (G's Op. Br.). The issues on appeal are those set forth in the Statement of Issues. All issues arose from an Opposition filed by DSHS in the guardianship court opposing guardian fees, its Motion to Revise, and its Response to the Guardians' Motion for Reconsideration.

DSHS's entire appearance in this matter is premised on an alleged interest in limiting guardian fees so that it may collect more of Sandy's and Rebecca's monies and put them into the general fund. Its appearance in this matter is entirely fiscal, as it makes no argument -- nor could it -- that Sandy's and Rebecca's best interests are served by limiting fees by limiting guardian activities. Its appearance in this matter is tainted with a conflict of interest, as it makes no argument -- nor could it -- that it is here with anything but its own fiscal interest at stake, and that its fiscal interest should supersede not only that of Sandy and Rebecca, and of that of the Guardians to make a living, but also that of the superior court. "*[A] court is limited* to awarding guardian fees and costs in no greater an amount than is made available under the cap set by DSHS." DSHS Resp. Br. at 27 (emphasis added).

Be that as it may, in its Motion to Revise the central focus of DSHS is on its own fiscal interest. Indeed, it casts the entire argument in its brief in the context of the Guardians' fee request, as if there is something wrong with requesting fees for guardianship services, or as if to impugn the collection of fees by a guardian. It requires no authority to assert that a guardian's collection of fees for services performed is not a conflict of interest or inherently wrong. Indeed, DSHS' argument throughout is that the Guardians in this case must not be compensated as guardians. They should do it for free.

More to the point: DSHS seeks to exclude issues on appeal it has not addressed and briefed. DSHS Resp. Br., at 11-12 (only issue is whether guardians can receive advocacy fees, and whether there is adequate evidence to support an allowance of $ 75.00 per month for such fees) (Issue 1); DSHS Resp. Br., at 25-26) (state law issues regarding participation and validity of state regulations were not raised below) (Issue 2). Under a *de novo* review on the record, the appellant may raise issues that have a direct bearing on the issues raised below.

In its Motion to Revise, the central focus is on the source of the funds from which guardian fees are typically paid. DSHS alleged it possessed authority under both federal and state law to limit guardian fees, and alleged jeopardy to federal financial participation if these limits were

not observed. CP 208-11. Furthermore, in its Response to the Guardians' Motion for Reconsideration, DSHS alleged residents of intermediate care facilities for the mentally retarded (ICF/MR) -- and Sandy and Rebecca indisputably are such residents -- are financially liable to pay for their cost of care at Fircrest, and further alleged that the ostensible limit on guardian fees is premised on the existence of that financial liability. CP 269-71. Finally, DSHS joined the issues and argued for the applicability of Chapter 388-79, CP 273-75, and against the Guardians' right to petition, CP 277-79.

Perhaps it is problematic for DSHS that it did not brief many of the arguments raised on appeal -- by not briefing or addressing these issues in a direct fashion, DSHS concedes those issues or does not take them seriously. But it cannot be said that these issues were not raised below. RAP 2.5(a) does not apply.

The Administrative Procedures Act, Chapter 34.05 RCW, does not bar consideration of issues raised in the superior court. First, DSHS did not argue below that the APA barred consideration of the issues it was itself raising there. So it cannot make that argument now on appeal. RAP 2.5(a). Second, when a court is sitting in equity, it takes cognizance of all related issues. The court with jurisdiction over the guardianship proceedings enjoys all the powers of a court of general jurisdiction, and

may determine other issues arising during the course of administration of the guardianship. *In re Kelley,* 193 Wash. 109, 114, 74 P.2d 904 (1938). This is not limited to fee requests. Once equity jurisdiction is invoked, the court will retain jurisdiction for "all purposes". *Island County v. Calvin Philips & Co.*, 195 Wash. 265, 269, 80 P.2d 840 (1938). *Judd v. American Tel. & Tel. Co.,* 152 Wn.2d 195, 95 P.3d 337 (2004) does not apply here.

The Guardians' Report, the attached Advocacy Report, and the Declarations filed by the Guardian in each of the cases are supported by declaration. In addition, the Guardian provided an oral report to the guardianship court on revision. No witnesses testified. DSHS did not support any of its factual allegations below by declaration or other competent evidence. Issues 1 and 3 are ripe for review.

The record shows Sandy and Rebecca receive social security benefits. They are Medicaid recipients. They reside at Fircrest, and DSHS puts their funds into the State's General Fund. They reside in Fircrest's ICF/MR. There are no additional facts necessary for decision in this Court with regard to Issue 2 and it is ripe for review.

The Guardians seek relief with respect to Issue 4 which is addressed at the end of this Brief.

Finally, the DSHS argument regarding award of guardian fees,

DSHS Resp. Br. at 11, needs clarification. The guardianship court authorized a monthly allowance of $ 175.00 for ordinary guardian services. Those fees are reviewed by the guardianship court at the time the next report is approved. Those fees are not an issue here. In the event the Court here approves fees, they would be approved as an allowance, and subject to review under the reasonable and necessary standard when the next guardians' report is approved.

B. Standard of Review.

The standard of review of the superior court's decision is *de novo* on the record. A guardianship case is reviewed on appeal to serve the best interests of the incapacitated person. G's Op. Br. at 5-6. DSHS responds by alleging that different standards of review apply to different issues. DSHS Resp. Br. at 12-13. The standard of review should be de novo on the record in this case. The term "scope of a guardian's legal authority" has a distinct meaning that does not apply in this case. Typically, this refers to a determination whether or not a guardian has a full or limited guardianship, and whether a particular power is contained in the order of appointment or should be modified and restored to the incapacitated person. The term "scope of authority" in such a case is distinguished from the instant case where there is no dispute that the Guardians in this case are full guardians of the person and full guardians

of the estate and there was no petition to modify the scope of the guardianship.

The guardianship court on revision did a very unusual thing, unsupported by any authority, regardless of whether it is error of law or abuse of discretion. It applied a uniform rule -- not based on this case's unique facts and circumstances. By determining certain guardianship activities are outside the scope of the Guardians' authority, the effect of the order was to prohibit guardianship activities directed at legislative and executive agencies. Such a uniform rule, however, lacks the flexibility inherently needed in guardianship cases. It should not be applied here. The rule may be suitable in 97% of the cases concerning the developmentally disabled. It may not. But making a blanket rule apply to all cases under all circumstances is wrong.

More importantly, even if one were to adopt such a uniform rule, this is not the appropriate case to do so, for this is a case where the necessity of advocacy is demonstrably necessary because of the severity of the disabilities, the unavailability of (and indeed, opposition from) advocacy organizations, and the nature of the interests sought to be preserved and protected by the Guardians.

When it comes to an award of guardianship fees, the guardianship court in the regular course examines a particular activity to see if it was

necessary, and then determines if the hourly rate and time incurred or other calculation of compensation is reasonable. This is not a question of scope of a guardian's authority, is not an issue of law, and typically is subject to an abuse of discretion standard.

First, in reviewing a guardian's activities, a guardianship court will first typically review each activity on a "line-by- line" basis and determine if a particular activity is necessary to protect the person's best interests or protect their estate. For example, had the guardianship court determined there was not a sufficient nexus between the advocacy activity and the best interests, then the court would make a finding that the particular activity was not necessary (and therefore not compensable).

In addition to finding whether particular activities are *necessary*, the guardianship court also determines whether or not the amount of time incurred and the hourly rate for that particular task is *reasonable*.

The guardianship court on revision did not engage in such an analysis and merely cut the fees by an arbitrary amount. The guardianship court did **not** decide in this case that the advocacy activities were not necessary; rather, it simply imposed a blanket prohibition: it created a uniform rule precluding the activities giving rise to fees. It reduced the remaining fee amount arbitrarily without analysis.

DSHS objected to the fee request contained in the Guardians' Report but never showed that a particular activity was not necessary, and has therefore waived any arguments to that effect. CP 211-12. DSHS' sole argument was that the Guardians "did not make an adequate showing in the record that the activities performed were reasonable and related to the immediate needs of the client." *Id.* However, the declarations filed by the Guardians were detailed and extensive. DSHS provides 100% of care to Sandy and Rebecca, who are in DSHS' physical custody. Guardianship activities necessarily include all the issues contained in those declarations. If Sandy and Rebecca were in private vendor care, these issues would not necessarily arise. DSHS did not contravert any of the facts contained in the Guardians' Reports or declarations.

Under these circumstances, the guardianship court on revision abused its discretion or erred as a matter of law, the order should be vacated, and the order of the guardianship court by commissioner should be reinstated *nunc pro tunc*.

C. Guardianship Advocacy Activities.

Casting this appeal strictly in terms of guardian fees is too limited a view to take of the case. It does demonstrate that DSHS' primary

interest is financial. However, the guardianship court's role is not to protect DSHS' financial interests, but to protect the best interests of the Sandra Lamb and Rebecca Robins. Like the Court, the Guardians too seek to protect those interests. DSHS does not purport to represent the best interests of Sandy and Rebecca here.

1. Guardian Fees.

DSHS suggests that a concrete benefit must be provided to an incapacitated person in order for the guardianship court to award guardian fees. DSHS Resp. Br. at 13-14. Because the guardianship court sits in equity, however, it considers all the facts and circumstances in the case when awarding guardian fees. The DSHS argument is based solely on one factor. That factor is usually applied in connection to obtaining or preserving property. That factor could be present in this case but is not the sole factor. The usual standard is that fees must be necessary and reasonable. RCW 11.92.180. That statute does not require a concrete benefit. In summary, based on the facts of this case, no actual benefit must be shown. There should be some nexus between the guardians' activities and the best interests of Sandy and Rebecca when the fees are reviewed by the guardianship court. Any case law cited by DSHS is not on point or is superseded by RCW 11.96A.150.

2. Outside the "Scope of Appointment" ?

DSHS suggests that there are activities outside the scope of a guardian's authority. DSHS Resp. Br. at 14-16. All the case law appears to concern minors, and all appear to concern family guardians providing familial services in addition to guardian services. The cases are not analogous, and the Guardians have cited many statutes and CPG Standards of Practice discussing guardianship duties.

Further, the "scope of appointment" is not an issue here. An appointment either happens or it does not. Rather, it is the "scope of duties" under Washington statutes and CPG Standards of Practice which are the issue. Florida case law on family member guardians of minor children is not applicable to Washington's own statutes and CPG Standards of Practice or the facts in this case.

D. Guardians Should Receive Compensation for Advocating the "Best Interests" of Incapacitated Persons.

DSHS complains that the guardians may not be compensated for advocating in a ward's best interests when communicating with legislative officials or executive officials, DSHS Resp. Br. at 16-24. The advocacy of Sandy's and Rebecca's best interests in a governmental or public forum context is an exercise of civil and political rights that would not be exercised without a guardian (based on the facts and circumstances of this

case).

It is a fundamental, general principle of guardianship law that a guardian steps into the shoes of the incapacitated person and exercises their rights. DSHS fails to recognize this reality. For example, the Washington Supreme Court has declared that "once appointed, the guardian's duty is to use his best judgment in deciding whether or not to *assert the personal right of the incompetent* to refuse life sustaining treatment." *In re Colyer*, 99 Wn.2d 114, 660 P.2d 738 (1983). In the case of *In re Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984), the Supreme Court explicitly recognized the guardian's authority to exercise the personal right in the incapacitated person's best interests when discontinuing life support for a severely developmentally disabled patient who could not express his or her own preference. There is no merit for the contention that a guardian does not exercise the personal rights of Sandy or Rebecca, or that somehow they retain these rights because they were not taken away.

1. A Guardian's Activities May Include the Exercise of the Civil/Political Rights of an Incapacitated Person.

DSHS states that the CPG Standards impose no obligation on the Guardians. DSHS Resp. Br. at 17. DSHS offers no analysis supporting its contention.

DSHS states that RCW 11.92.043(4)'s language that a guardian of the person shall "assert the incapacitated person's rights and best interests" does not impose a duty to exercise civil/political rights. DSHS Resp. Br. at 17. DSHS again offers no cogent reasoning why the ordinary language of the statute should be ignored.

DSHS cites RCW 11.88.010(a)(1), providing for the appointment of a guardian, for the contention that there is no reference to civil or political rights in the statute. DSHS Resp. Br. at 18. DSHS fails, however, to substantively address any of the statutes referred to by the Guardians in their brief that do refer to civil and political rights.

DSHS says the loss of the right to vote as a political or civil right which is lost under certain circumstances by an incapacitated person. DSHS Resp. Br. at 18-19. The Guardians are not claiming the right to cast a ballot, or sign a referendum or initiative or recall petition on behalf of Sandy or Rebecca. The argument is not on point.

DSHS makes the statement that "rights retained by the ward cannot be exercised by the guardian." DSHS Resp. Br. at 19. DSHS also says that even if Sandy and Rebecca have lost their civil/political rights, the Guardians do not have the power to exercise them. DSHS Resp. Br. at 20. A guardian does exercise rights, however, as discussed above. Whether civil/political rights have been taken away or not, there is no possibility to

exercise them without and through a guardian.

DSHS cites case law regarding waiver of Constitutional rights. DSHS Resp. Br. at 20. However, a prohibition on the waiver of Constitutional rights bolsters the Guardians' argument that the Guardians must in fact promote civil/political rights.

DSHS cites the example of a particular bill the Guardians supported before the legislature. DSHS Resp. Br. at 20. Because health care is provided at Fircrest, and Sandy and Rebecca receive their health care at Fircrest, supporting the bill advances their best interests by ensuring there are enough professionals trained to provide treatment to them at Fircrest. Sandy and Rebecca's best interests necessary include issues related to their care. Had the bill sought training of professionals for correctional facilities, for example, then DSHS might have a point.

2. Public Policy Supports Guardian Exercise of Civil/Political Rights Under the Facts of this Case.

DSHS says generally that public policy does not support guardian exercise of civil/political rights. Resp. Br. at 21-24. However, DSHS makes too strong an argument. The Guardians have always maintained that the exercise of civil/political rights is confined to the unique facts and circumstances of this case. Under the guardianship court's supervision such advocacy is permissible here. The "parade of horribles" predicted

by DSHS is simply not going to happen.

Public policy is served by having *someone* advocate on behalf of Sandy and Rebecca in a setting where the care is in greater jeopardy without such advocacy. Though public policy may not be best served by arguing a political policy, this case does not involve that notion.

A guardian is in a natural position to advocate the best interests of an incapacitated person in any forum where those best interests are in jeopardy, even (and perhaps especially) government and community forums where governmental decisions directly affect the health care, services, and treatment of an incapacitated person. When DSHS says the Guardians are "engaging in politics", or "political activism," there is a suggestion that such activities are bad. Nonetheless, the Guardians are actually voicing the best interests of the incapacitated persons where decisions concerning their health and well-being are decided. Advocacy for a client's best interests in any forum is traditional for lawyers and is exercised by guardians. All lawyers and guardians are "officers of the court". It is DSHS that is proposing a radical limitation on advocacy on behalf of others.

DSHS makes the slippery slope argument that guardian fees would have no limits on them. DSHS Resp. Br. at 22. Indeed, this is their major concern. But there is no infinite fee potential. Fees are limited by the

courts and by the small amount of income received. More troubling is that DSHS seeks to curtail the speaking of incapacitated persons' best interests out loud in forums where those interests are at stake, by removing the ability of a guardian to use resources available for that purpose.

DSHS suggests that "political ventures" (whatever they are) are far from meeting with success. DSHS Resp. Br. at 22. However, guardians routinely devote efforts on an incapacitated person's behalf where there is no certainty of success. Chances of success are rarely, and perhaps never, known at the outset of any endeavor. Like this case. One can enhance the odds of damage to an incapacitated person's best interests by not participating in a process where his or her best interests are at stake.

The record amply demonstrates the incapacitated persons in this case are in a unique situation. Their best interests are not within the common knowledge of legislators. Their care and best interests fall within a medical specialty. Care issues must be communicated to legislative decision-makers so that legislation implementing the Constitutional duty of care is consistent with their best interests. Imagine if your own medical decisions were the duty of the legislature and DSHS does not want you to speak to them about it because the legislature is political in nature. Sandy's and Rebecca's medical best interests in this case are effectuated through a political process and it is necessary to speak to those making

medical and health care decisions.

The record also amply reflects the political activity of major advocacy groups and DSHS officials. The Guardians represent a real "pebble in the shoe" with respect to these groups and officials, but those groups and officials do not have as their goal, or their duty, the best interests of Sandy and Rebecca.

DSHS suggests there is a separation of powers concern. DSHS Resp. Br. at 23-24. The guardianship court routinely authorizes guardians to litigate without taking a position on the merits of that litigation. Similarly, the guardianship court need not endorse any particular policy position in the legislature. In a role before government and public forums, the Guardians do not represent the superior court, they represent the best interests of their wards -- such a role is more like an ombudsman than a judicial officer. But if DSHS were to have its way, the best interests of the IPs would be silenced.

E. Guardian Fees are Not Included as Income when Calculating Participation in Cost of Care - 20 CFR § 1103(f) is Controlling.

DSHS contends generally that guardian fees generally and guardian fees for advocacy activities specifically are not a valid deduction when calculating the post-eligibility federal match. DSHS Resp. Br. at 23-38.

DSHS contentions regarding the APA and RAP 2.5(a) have been addressed elsewhere.

DSHS states that the Guardians claims are "spurious and supported by citations to irrelevant authority. DSHS Resp. Br., at 30. However, how are the claims false, and what is the proper authority? DSHS does not explain further.

Income Eligibility & Post-Eligibility

The Guardians, after discussing the standard of income eligibility and categorically needy (CN) status, G's Op. Br., at 15-17, demonstrated that guardian fees paid from social security income are not considered income under Medicaid rules, G's Op. Br., at 18-21.

DSHS maintains that Medicaid "benefits are determined" in a two-step process. DSHS Resp. Br., at 31. Without agreeing with DSHS' terminology, the two step process for an eligibility determination is income eligibility and resource eligibility. DSHS discusses resource eligibility which is not relevant here. *Id.* DSHS does not dispute the income standard for eligibility, or the CN status of Sandy and Rebecca under the Medicaid program. *Id.*

The Guardians demonstrated that the medically needy (MN) "spend down" regulations do not apply and are not relevant. G's Op. Br., 20-21. DSHS does not disagree. DSHS Resp. Br., at 31. Nonetheless,

DSHS complains in a footnote that the Guardians "confuse" the distinction between participation, income eligibility, and resource eligibility. DSHS Resp. Br., at 31, fn 16. This footnote has no merit.

The Guardians set forth the individual income eligibility standards, G's Op. Br. at 15-17, and subsequently discussed the post-eligibility regulations in a different context, demonstrating the latter regulation applies to States, not individuals, G's Op. Br., at 25-26. DSHS nevertheless complains in a footnote that the Guardians are conflating the income eligibility and post-eligibility regulations. DSHS Resp. Br. at 31, fn 15. The comment has no merit, and in any event DSHS failed to respond to the Guardians' argument.

The Federal Match

The Guardians demonstrated that the post-eligibility regulations apply to the States and not to individuals. G's Op. Br. at 25-26. DSHS does not squarely address the Guardians' citation of law on the issue. Indeed, DSHS suggests application of 42 C.F.R. § 435.725 is a second step in "determining benefits". DSHS Resp. Br. at 31-32. It is true that the federal match, or federal financial participation, is calculated according to 42 C.F.R. § 435.725. DSHS is implicitly arguing that its calculation of FFP is binding on the recipient, and counts all social security income in the calculation. *Id.* So it is DSHS that is conflating

eligibility of the recipient with its own eligibility for FFP under 42 C.F.R. § 435.725.

'Not Income" vs. Deduction from Income

The disagreement over income in this case can be reduced to the following argument. DSHS states that all income is payable to the State unless it is a deduction from income. DSHS Resp. Br., at 33. DSHS also states guardian fees cannot be charged against income because there is no federal regulation or state regulation contemplating a deduction from income. DSHS Resp. Br., at 24-25. DSHS thus makes a novel argument that no guardian fees can ever be deducted from participation in cost of care. If DSHS is to prevail on this point, however, it must address the applicability of federal regulations defining and creating exceptions to income, something it has failed to do.

The Guardians first demonstrated that the SSI program financial eligibility rules apply. G's Op. Br., at 16. DSHS does not cite any contrary authority. The Guardians second demonstrated that the definition of income and defined exceptions from income in 20 CFR 416.1100 et seq are controlling, and that guardian fees are not income for purposes of determining total income. G's Op. Br. at 18-20. DSHS did not cite any opposing authority.

DSHS suggests that federal statutes and federal regulations are

consistent with each other, DSHS Resp. Br. at 33, but has not spelled out which ones they are talking about. Though guardian fees are not expressly mentioned in federal regulations as a deduction from income, DSHS Resp. Br. at 24-25, 34, they are an exception to income and there is no limit on deductions for guardian fees set forth in federal regulations.

The exceptions from income in 20 C.F.R. § 416.1103, and in particular 1103(f), are controlling, and guardian fee awards by the courts are not considered as income available to Sandy and Rebecca. It is well-settled law in the Ninth Circuit:

> In determining eligibility for benefits under the SSI program, the Secretary properly *excludes from the calculation of income* the value of loans that must be repaid. For this purpose, loans include valid and enforceable agreements to repay the value of goods and services transferred in kind.

Ceguerra v. Secretary of Health & Human Services, 933 F.2d 735, 742 (1991) (emphasis added).

Guardian fees paid from the social security benefit are not considered income and are not part of "total income" within the meaning of calculations under 42 C.F.R. § 435.725. Guardian fees are not deductions from income. DSHS errs when it calculates income as including guardian fees because that portion of the social security benefit is a repayment of a loan of guardianship services. The court orders in this

case include consistent language stating the amount of guardian or attorney fees shall not be deemed available income for purposes of calculating participation in cost of care.

DSHS maintains that Medicaid funding is jeopardized by the payment of guardian fees as a deduction. DSHS Resp. Br., at 34-35. However, the application of 1103(f) urged here does not concern a deduction and creates no jeopardy. Considering guardian fees as "not available" to the recipient is not only beneficial to Sandy and Rebecca because guardianship protection is provided, but beneficial to the State as well. For purposes of calculating FFP, the total costs for cost of care will be reduced by a smaller amount, resulting in a higher federal match.[1] It is cost-effective for DSHS to have guardians. Because guardians monitor how services are provided in Fircrest, the State's risk of legal liability for harm to residents which might be caused is reduced.

DSHS cites case law which is not on point. The case of *Timm v. Montana Dept. of Pub. Health & Human Services,* 343 Mont. 11, 13, 184 P.3d 994, 997 (2008), DSHS Resp. Br., at 31-32, does not address availability of income under 1103(f) and is concerned instead with the issue of payment of nursing home debts incurred prior to Medicaid

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[1] Indeed, under the new stimulus package, FFP increases by 5% from about 52% to about 57%. These are approximate figures.

eligibility. There was no question of whether or not an exception to income applied. None of the facts or issues in *Timm* are relevant to this case.

Similarly, the case of *Florence Nightingale Nursing Home v. Perales*, 782 F.2d 26, 29 (2nd Cir.1986), merely recognizes the same proposition that the Guardians have asserted: federal law permits, but does not impose, financial liability on Medicaid recipients. The case is entirely consistent with the Guardians' analysis that guardian fees are not included in income before the deductions in 42 C.F.R. § 435.725 are calculated.

The case that is closer on point is *Rudow v. Comm'r of the Div. of Med. Assistance,* 429 Mass. 218, 707 N.E. 339 (1999). In that case, 1103(f) was not considered, but the question was whether guardian fees were deductible under 42 C.F.R. § 435.725 was answered in the affirmative. A relevant fact was that the incapacitated persons were incapable of consenting to medical treatment. Sandy and Rebecca similarly are incapable of performing the activities of the guardians in this case, and all those guardianship activities are intimately interwoven with the State's custody and provision of 100% of their care.

DSHS relies in part on letters from the Health Care Financing Administration's (HCFA's) declaring a policy position on the issue.

DSHS Resp. Br. at 34-35, 39. However, in addition to issues of authenticity, the lack of a complete document, and staleness, the *Rudow* court rejected a similar policy position taken by HCVA, stating that it was not bound by a "policy position particularly where, as here, we conclude that the position conflicts with the controlling Federal statutory scheme." *Rudow,* 707 N.E.2d at 346.

There are no factual disputes regarding the calculation of participation of cost of care. DSHS has admitted how they perform the calculation, and it is as a deduction. DSHS Resp. Br., at 33. Nor is there any factual dispute that the Guardians' provision of guardian services consists of a loan of services.

The Medicaid Program

The Guardians set forth the legal framework for the Medicaid program, including mention of the role of the Medicaid State Plan. G's Op. Br. at 21-22. DSHS responds that States must maintain State Plans; that the Medicaid State Plan provides for limited deductions for guardian fees; and, that the State Plan provides a basis for state regulations. DSHS Resp. Br. at 34. The Court should reject this argument. DSHS has not demonstrated that guardianship services or fees are subject to regulation under a State Medicaid Plan. DSHS has not provided authority for the proposition that a State Medicaid Plan in conflict with 1103(f) can provide

the sole basis for a state regulation. Nor has DSHS provided any authority that financial liability for cost of care is subject to regulation under the State Medicaid Plan. In any event, the limitations on fees in CP 281 do not apply because by its own terms it applies to nursing facilities, not ICF/MR.

The Guardians also showed that federal Medicaid law is construed in the best interests of Sandy and Rebecca. G's Op. Br. 22-23. DSHS does not provide any authority to the contrary.

The Guardians showed that federal Medicaid law is not a source of law for establishment of financial liability for participation in cost of care, and indeed prohibits liens or encumbrances on property of Sandy and Rebecca. G's Op. Br. 23-26. DSHS did not address any of the arguments based on 1396p(a), 1396p(b) and 42 C.F.R. § 433.36, has not urged a different interpretation, nor has it claimed an exception to the applicability of these statutes or regulations.

There is no state statutory authority that imposes financial liability on Sandy and Rebecca for participation in cost of care because the statutes do not apply. G's Op. Br., at 26-30. DSHS did not substantively address these arguments, has not urged a different interpretation, has not claimed any other state statute as a source of law for imposing financial liability, and has not addressed the myriad state statutes which prohibit dipping into

resident trust accounts of ICF/MR residents.

"Extraordinary Services" under WAC 388-79

DSHS alleges that when the Guardians advocate for the best interests of Sandy and Rebecca, this is not an extraordinary service under the WAC. DSHS Resp. Br., at 35-36. Contrary to the assertions of DSHS, there is ample evidence on the record demonstrating that when the Guardians were engaging in advocacy of Sandy's and Rebecca's best interests, they related directly to specific and ongoing legislative, administrative or other actions at the state or community level affecting their medical and health care and treatment.

DSHS suggests that awarding guardian fees for these activities would operate as a permanent exemption. DSHS Resp. Br. at 36. The temporal existence of guardian activities is irrelevant to the argument. 1103(f) is controlling, and no exemption from extraordinary services is created in this case.

Abridgement of Superior Court Powers

DSHS asserts that it has the power to limit court awarded fees, and that that power does not abridge the power of the superior court. DSHS Resp. Br. at 26-29, 37-39. The Guardians disagree that WAC 388-79 can limit fees in the first instance to $ 175.00 per month, and disagree further that DSHS can put limits on fees for extraordinary services.

The award of guardian fees is a traditional equitable function of the superior court so of course the powers of the court are implicated. There is no transformation of an equitable right into a legal right, there is a limit placed on the equitable right to fees historically reviewed by the superior court. The holding of *Blanchard v. Golden Age Brewing Co.,* 188 Wash. 396, 63 P.2d 397 (1936) is not limited to remedy of injunction, but stands for the broader rule regarding abridgement of powers of the court. The Medicaid State Plan does not set limits on the fees in this case. The award of guardian fees by the court complies with federal regulations because such fees are not considered income for Medicaid eligibility and post-eligibility purposes, as discussed earlier.

F. The Constitutional Right to Petition.

DSHS says limiting fees does not implicate the right to petition. DSHS Resp. Br. at 39-41. That contention sidesteps the issue. The Guardians' have been prohibited in their fiduciary capacity from advocating the best interests of Sandy and Rebecca in particular public forums by declaring that the Guardians are outside their authority as guardian in doing so. By declaring that Guardians may not act in a guardian capacity when exercising the civil/political rights of Sandy and Rebecca, the court below has deprived Sandy and Rebecca of the exercise of those rights through a guardian.

The civil/political right of Sandy and Rebecca that is exercised by the Guardians is the communication of the best interests of the wards who cannot speak for themselves to legislative and executive officials or to community forums. The record amply demonstrates that Sandy and Rebecca are incapable of communicating their own best interests and cannot exercise the right on their own.

"[P]utting the decision as to what views shall be voiced largely into the hands of each of us [is based on] ... the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect policy." *Cohen v. California*, 403 U.S. 15 (1971). An unchecked freedom of speech is grounded in "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15 (1971).

"If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533 (1989). The viewpoint expressed in this case -- the best interests of Sandy and Rebecca -- is a lone voice in the wilderness. Indeed, it appears to be popular to silence the viewpoint of the a segment of the developmentally disabled community in order to achieve some perceived benefit to other segments

of the developmentally disabled community, or to avoid accountability for potential harm DSHS may cause while these residents are in their custody. These reasons, however, are not sufficient to justify silencing the content of the speech, i.e. facts concerning the health, care, medical treatment, and well-being of the Appellants, which for some reason DSHS wishes to silence. Without the articulation of speech concerning these issues, the viewpoints of these individuals will never be heard until it is too late. And the expression of their viewpoints in no way interferes in the marketplace of ideas by undermining the participation of others in the democratic process. There are no negative effects of expressing the speech in this case that carries with it responsibilities; it is speech pure and simple. It is speech that says, "Please hear me. Please don't hurt me."

Residents of RHCs are a discrete community with a distinct identity. As such, these residents should be able to express their distinct identities. Free speech and expression of viewpoints experienced by this community has value because it contributes not to some abstract thing, but instead to a continuity of community, including a social and family life, at Fircrest School. The viewpoint experienced by this community is not well known publicly. The viewpoint arises from the conditions arising in and experienced in the RHC community among peers, staff, family, and visitors while in state custody and in the context of medical treatment,

health, etc. These experiences are unique to this community and are distinct from the developmentally disabled community as a whole.

The significance of the speech expressing the viewpoint experienced by this community must be evaluated not in terms of what other viewpoints dictate (such as focusing on the "brick and mortar" aspect of the residential setting) but rather in the context of real world experienced by the residents in their everyday life; how the viewpoint promotes their human dignity, and how the viewpoint expresses an unpopular minority viewpoint. In other words, the significance of the speech should be evaluated in the context of the best interests of the individuals experiencing the viewpoint.

In the factual context set by this case, only the Guardian can express this viewpoint to legislators, executive officials, and other members of the developmentally disabled community.

G. Attorney Fees.

The Guardians requested that DSHS pay attorney fees and costs on appeal pursuant to RCW 11.96A.150. G's Op. Br. at 48-49. DSHS objects on only one basis: novel issues are presented. DSHS Br. at 41-42.

However, RCW 11.96A.150 does not limit a court to any single factor. As with other issues involving guardianship, an award on attorney fees on appeal should be based on all the surrounding facts and

circumstances.

This case is a Medicaid case. Sandy and Rebecca do not have income from which they can pay attorney fees. They cannot speak for themselves. They are not assisted by disabilities rights organizations or advocacy organizations. The issues raised on appeal are intimately interwoven with DSHS' role in Sandy's and Rebecca's care and financial matters. DSHS has physical custody of these individuals, and DSHS provides 100% of care. For these reasons, it is highly unlikely litigation will occur between these individuals and persons other than DSHS. In other words, it is highly likely if litigation results, it will be with DSHS.

Furthermore, it is DSHS that filed the initial litigation in this matter opposing the guardians' activities and fees. It is DSHS that raised all the issues that were addressed by the Guardian. If this case presents unique factual circumstances and legal questions of first impression, DSHS Resp. Br. at 42. Not only did DSHS raise those issues, they forced Medicaid recipients with little income to respond. They are novel arguments of their own making and should not excuse DSHS from an attorney fee award payment pursuant to RCW 11.96A.150.

Guardianships are different from other matters, as the court bears the responsibility of protecting the person and estate of an incapacitated person. *In re Guardianship of Hallauer*, 44 Wn.App. 795, 797, 800 P.2d

1161 (1986) (emphasis added). In this case, the guardian takes positions which are intended to protect the person and estate of Sandy and Rebecca. The Guardians did not invite these issues, but is forced to respond to them. In contrast, DSHS takes positions intended to diminish the power of guardians, to advance its own financial interest, and in opposition to the Constitutional rights of persons in their custody. DSHS should be treated on appeal the same as any other party who appears in proceedings governed by RCW 11.96A.150.[2] Under these circumstances, the Guardians should be awarded attorney fees and costs on appeal pursuant to RCW 11.96A.150.

The Guardians also requested that attorney fees relating to the Opposition filed by DSHS as well as responding to the Motion to Revise, reserved for consideration by the guardianship court, be remanded. G's Op. Br. at 48. DSHS objects. DSHS Resp. Br. at 42. The objection should be rejected fort the same reasons discussed above relating to attorney fees on appeal.

The issue of attorney fees was reserved and not joined in the trial court, but the case is also on appeal. The issue of attorney fees was

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[2] If DSHS were a third party individual in this case, because it is tainted with self-interest, it might be considered an officious intermeddler such that the full amount of the Guardians' attorney fees and costs would be charged.

reserved and not joined in the trial court, but the case is also on appeal. This is simply a request for technical relief to preserve and clarify the Guardians' right to request fees incurred in the trial court to the extent the reserved issue is currently before this court here. This Court's ruling on the award of attorney fees on appeal may provide guidance to the guardianship court on the reserved fee issue and therefore reduce unnecessary re-litigation of issues concerning RCW 11.96A.150 in that court.

II. RESPONSE TO ARGUMENT ON CROSS-APPEAL.

DSHS contends that public policy does not support the inclusion of community outreach activities within guardianship duties. DSHS Resp. Br. at 45-46. The Guardians incorporate by reference the arguments made under Section D, above, as if fully written here. In addition, the Guardians note that group activities make vindication of Sandy's and Rebecca's best interests more likely to be successful.

DSHS says that guardian fees are not a valid deduction from participation in cost of care. DSHS Resp. Br. at 47-48. The Guardians refer to the arguments in Reply, above, concerning those issues, and include them here by reference.

DSHS finally says that there is no evidence that community outreach is necessary and beneficial. DSHS Resp. Br. at 48-49. The

Guardians refer to the arguments in Reply, above, concerning those issues, and include them here by reference.

III. RELIEF SOUGHT.

The Guardians respectfully request that this honorable Court grant the relief sought in the Opening Brief.

April 24, 2009

Respectfully submitted,

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Counsel for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2009, I caused a copy of the foregoing Brief 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.

April 24, 2009

Michael L. Johnson, WSBA #28172

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