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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of the Guardianship of:

MARY JANE MCNAMARA,

An Incapacitated Person.

RESPONSE BRIEF

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I. INTRODUCTION

James and Alice Hardman are certified professional guardians who requested superior court approval to compensate themselves from the income of six separate residents of Fircrest, a state-run institution for the developmentally disabled. The superior court found that the Hardmans' collective advocacy on behalf of all persons residing at Fircrest provides no benefit to any of these six wards, and therefore did not support an award of compensation from the wards' assets. Days later, the Court of Appeals issued a then-unpublished ruling in a similar case involving the Hardmans. Claiming surprise, the Hardmans requested reconsideration and asked to supplement the record. Reconsideration was denied and the supplemental materials were stricken. The Hardmans claim that the supplemental materials were incorrectly stricken, and that had the superior court considered the stricken materials it would have found their advocacy activities beneficial and compensable.

II. ISSUES PRESENTED ¹

1. Does a superior court abuse its discretion by denying a motion for reconsideration on the basis of "surprise" under Civil Rule 59

¹ In their Statement of Grounds for Direct Review, the Hardmans presented two constitutional issues; one involving the right to petition, the other involving separation of powers. Statement of Grounds at 2. Those issues now appear to be abandoned. Opening Br. at 1-2. The Hardmans also elevate, from an "associated issue" to a question presented, the issue of new evidence offered on reconsideration. *Compare* Statement of Grounds at 2-3 *with* Opening Br. at 1-2.

where, after the court issues a memorandum decision but before that decision is reduced to an order, an unpublished appellate opinion involving the same parties is issued which further supports the court's memorandum decision?

2. Does a superior court abuse its discretion by refusing to supplement the record with previously-available evidence offered in support of a motion for reconsideration, where the motion for reconsideration is denied without opportunity for responsive documents from the opposing party?

3. Under RCW 11.92.180, a court-appointed guardian of an incapacitated adult "shall be allowed such compensation for his [or her] services as guardian . . . as the [superior] court shall deem just and reasonable." Does a superior court abuse its discretion by denying a guardian compensation for time spent on activities related to disabled persons generally, but which the court determines to be of no benefit to the incapacitated person in particular?

4. Under RCW 11.96A.150, does a superior court abuse its discretion by denying a court-appointed guardian's request that his attorney fees be paid by a third party, where the guardian incurs those fees litigating unsuccessfully for additional compensation from his ward's assets?

III. STATEMENT OF THE CASE ²

Mary Jane McNamara, Daniel Werlinger, David Schmidt, Kirby “Bruce” Moser, Suzanne MacKenzie, and Richard Milton are legally incapacitated adults who are subject to court-ordered guardianships. CP at 177, 1069, 1884, 1977, 2068, 2147. All are developmentally disabled; the Hardmans correctly describe their medical conditions in their Opening Brief, at 2-8. *See* CP at 304-305 (commissioner’s findings). James Hardman is guardian of the person and estate of Ms. McNamara. CP at 177. James and Alice Hardman are co-guardians of the person and estate of Mr. Werlinger, CP at 1112-13;³ Mr. Schmidt, CP at 1930; Mr. Moser, CP at 1986; Ms. MacKenzie, CP at 2073; and Mr. Milton, CP at 2149.⁴

All six wards are Medicaid recipients residing at Fircrest School, where they are in the care and custody of DSHS. CP at 190, 1077, 1897, 1995, 2080, 2156. Fircrest, located in Seattle, is one of five residential habilitation centers (RHCs, formerly known as “state residential schools”)

² References are to the Clerk’s Papers (CP) and the May 28, 2010, Verbatim Report of Proceedings before Judge Michael Hayden (VRP). Citations are to the reports and pleadings in *Guardianship of McNamara* except where significant differences exist among the six consolidated cases.

³ In 2005, the guardianship of Mr. Werlinger’s estate was limited. CP 1071-1072. While the Hardmans now carry letters of full guardianship, there is no record that the court ever found Mr. Werlinger to require a full guardianship of the estate.

⁴ Mr. Milton was found to require only a guardianship of the person in 1989. CP at 2148. While the Hardmans now carry letters of full guardianship, there is no record that the court ever found Mr. Milton to require a guardianship of the estate.

established by state law to serve persons with developmental disabilities. RCW 71A.20.020. “RHCs provide for those children and adults who are exceptional in their needs for care, treatment, and education by reason of developmental disabilities.” *Parsons v. Dep’t of Social & Health Servs.*, 129 Wn. App. 293, 296, 118 P.3d 930 (2005).⁵

A. Guardian Fees For Medicaid Recipients

State law provides that Fircrest residents “shall be liable for their per capita costs of care, support and treatment[.]” RCW 43.20B.415. Similarly, federal regulations provide that Medicaid will not reimburse a state for the portion of the cost of care that an institutionalized Medicaid recipient can afford to pay out of his or her own income, subject to a limited set of deductions. 42 C.F.R. §§ 435.725, 435.733, and 435.832. The monthly amount paid by a resident is customarily referred to as participation in cost of care, or simply “participation.” *See, e.g.* WAC 388-79-020; WAC 388-515-1505(8). Participation is calculated by subtracting any deductible expenses from the individual’s available

⁵ Individuals residing at RHCs receive habilitation training, 24-hour supervision, medical and nursing care, and various specialized services. Department of Social and Health Services, *Division of Developmental Disabilities – Services Provided*, at <http://www.dshs.wa.gov/ddd/services.shtml> (last updated February 7, 2011). Over 600 full-time employees serve Fircrest’s 210 residents. Washington State Office of Financial Management, *Feasibility Study for the Closure of State Institutional Facilities* (November 2009), at 3.18, available at http://www.ofm.wa.gov/facilities/report/part3_rh.pdf (last modified November 4, 2009). The cost per resident at Washington’s RHCs averages \$543.22 a day, or nearly \$200,000 per year. *Id.* at 3.20.

income. WAC 388-513-1380.⁶

Under Washington's Medicaid state plan, court-ordered guardian fees are an allowable deduction from an RHC resident's participation payments. CP at 236; *see* WAC 388-513-1380(4)(d). The legislature requires DSHS to place a cap on the guardian fees that can be taken as a deduction from participation, RCW 43.20B.460; and requires guardians to provide notice to DSHS in cases where the incapacitated person pays participation. RCW 11.92.180.

DSHS limits the guardian fees deduction to \$175 per month for "usual and customary" guardianship services. WAC 388-79-030(1), -050(4). Such usual and customary services include managing the ward's financial affairs, making health care decisions, visiting and maintaining contact with the ward, communicating with the ward's service providers, and preparing accountings for the court. WAC 388-79-050(4)(b)(ii). Fees in excess of the \$175 cap may be deducted for "extraordinary" services such as unusually complicated property transactions or emergent medical needs requiring guardian involvement. WAC 388-79-050(4)(b)(iii).

⁶ Ms. McNamara's income totals \$1202 per month from federal Social Security Disability Insurance (SSDI) and Veterans Administration (VA) benefits. CP at 189. Mr. Werlinger receives \$855 per month of SSDI. CP at 1076. Mr. Schmidt receives \$599 of SSDI. CP at 1896. Mr. Moser receives \$736 of SSDI. CP at 1994. Ms. MacKenzie receives \$678 of SSDI. CP at 2079. Mr. Milton receives SSDI and VA benefits totaling \$1544. CP at 2155. Both SSDI and VA benefits are considered available income for the purpose of calculating participation in cost of care. WAC 388-475-0600 (definition of income), 388-513-1340 (SSDI and VA benefits not excluded from calculation of participation).

B. The Hardmans' Guardianship And Advocacy Activities

The Hardmans provide a number of customary guardianship services to each of their wards. CP at 202, 1089, 1909, 2007, 2092, 2168. For instance, with regard to Ms. McNamara they state that they “visit the Incapacitated Person. . . attend annual or special Plan meetings. . . review the medical records. . . monitor care. . . consult with caregivers. . . approve or disapprove medical recommendations; maintain responsibility for the residence place; and supervise expenditures”. CP at 202. The Hardmans loosely track the time spent on such activities each month, separately for each of their wards. CP at 212-216, 1099-1103, 1919-1923, 2017-2020, 2102-2106, 2178-2181. Most months they spend two hours providing those services, usually by visiting Fircrest on two different dates; sometimes they spend additional hours providing those services. *See id.* The superior court awarded the Hardmans compensation for providing such customary guardianship activities. CP at 301-302, 308-309. The Hardmans do not appear to challenge the adequacy of that compensation on appeal.

The Hardmans also spend time engaged in what they term “advocacy activities.” CP at 202. Counsel for the Hardmans has characterized the activities as including “legislative advocacy,” “executive advocacy,” and “community advocacy.” VRP at 6. During the three-year

reporting period at issue the Hardmans state that they engaged in the following activities for which they seek payment from the wards' income:

- provided "advocacy to restore and/or preserve funding levels at [RHCs] generally," CP at 284;
- brought issues related to RHCs "to the attention of every state legislator" and "all our federal legislators," CP at 197-198;
- "made political candidates aware of Fircrest resident (client) needs," CP at 198;
- "pressed candidates" for Shoreline City Council "to commit to protecting Fircrest residents," CP at 195;
- "brought Fircrest issues to the attention of area churches and local Rotary," CP at 196;
- "lobb[ied] local police and fire and city emergency staff on Fircrest dynamics," CP at 196;
- "lobb[ied] nationally for RHC preservation and services," CP at 197;
- "worked with the Shoreline City Council and Mayor on land use and Growth Management Act issues concerning Fircrest," CP at 195;
- acted as "representative stakeholder for Fircrest residents in the Geidt Public Health Lab Risk and Safety Assessment," CP at 195,

see CP at 286; and,

- “financially support[ed] Friends of Fircrest, Friends of Rainier, Action DD, VOR, and the Washington Disabilities Issues Caucus . . . which politically supports RHCs,” CP at 197.

See generally CP at 296-297 (commissioner’s findings). These advocacy activities are done “in collective form” on behalf of all of the Hardmans’ wards. CP at 283-284. None of the advocacy was provided specifically for any of the six individuals in this appeal. CP at 297.

Additionally, James Hardman reports taking on a community leadership role:

James Hardman chairs Friends of Fircrest meetings held once a month, and participates as a member of Friends of Rainier [RHC], Action DD, VOR, Washington State Democrats Disabilities Issues Caucus (WSDIC), WAPG [Washington Association of Professional Guardians], and the Fircrest Human Rights Committee in public advocacy, legislative organizing, coordinating with allied organizations such as Action DD, parent/guardian organizations from the RHCs, WSDIC, consultants, lawyers, and unions concerned with the interests of the Incapacitated Person.

CP at 192. He also chairs the WSDIC legislation committee. CP at 197.

The Hardmans maintain that, because of the dangers they perceive to disabled persons living in integrated community settings, “the RHC is the least restrictive environment” for all of their wards. CP at 198-199.

James Hardman has also stated that these six wards in particular receive

better treatment at Fircrest than they could in a non-institutional setting. *E.g.*, CP at 256. The Hardmans explain the political philosophy behind their advocacy as follows: “Unfavorable political decisions threaten the health, well being, and lives of our clients. . . . Well intentioned anti-RHC advocates are a real threat to our clients, and they are publically funded and have paid staff misinforming critical decision makers.” CP at 198. James Hardman alleges that DSHS is “ideologically opposed to congregate care” for the disabled and is “hiding . . . information” about harm to individuals who move from segregated institutions into integrated community settings. CP at 285. The Hardmans believe that through advocacy they are “preventing . . . evictions rather than . . . litigating for damages caused by evictions.” CP at 194.

The Hardmans specifically point out recent closures of the Fircrest pool, cafeteria, and infirmary as the kinds of “political decisions” they seek to prevent. CP at 196, 281-284. For instance, James Hardman spent five hours helping a television news crew prepare a report on the pool closure. CP at 282. However, preventing RHC facility closure “is a primary focus of [the Hardmans’] guardianship activity.” CP at 281. “Preserving this option [RHC services] requires continual vigilance and best efforts.” CP at 199. They contend that, “[w]ith assistance from . . . allied groups [they] have defeated legislative attempts to close Fircrest”

and “aided the protection of [their] clients from potential threats” from local development projects. CP at 197.

The Hardmans do not keep timesheets or other contemporaneous records of their general advocacy as they do with individual guardianship services. They report that they spend “in excess of 20 hours per week” on those activities. CP at 197.⁷

C. Procedural History

1. The Hardmans’ Fee Requests

Under Title 11, the guardian of an indigent ward must provide a report to the appointing court at least every thirty-six months. RCW 11.92.040(3). In October 2009, the Hardmans filed separate triennial reports in King County Superior Court for each of these now-consolidated cases. CP at 187-218, 1074-1107, 1894-1924, 1992-2021, 2077-2107, 2153-2182. They provided notice to DSHS as required by RCW 11.92.150 and .180. CP at 221.

Each of the six reports contains an identical eight-page section generally describing the Hardmans’ advocacy activities and political goals as listed above; as well as describing litigation undertaken by the Hardmans on behalf of some of their wards not at issue in this case. *See*

⁷ The Hardmans report the same 20-plus hours per week both in *Guardianship of McNamara* where James Hardman is sole guardian, and in the other five cases where Alice Hardman is co-guardian.

CP at 192-200. And in each case the Hardmans filed an essentially identical "Verified Petition for (1) Order Approving Guardians' Report, Care Plan, and (2) Approving and Directing Payment of Fees." CP at 180-186.

The Hardmans requested that the court approve as "reasonable and necessary" the fees and costs they had advanced themselves over the previous three years. CP at 181. During that period the court had authorized them to collect an allowance of \$175 per month from Ms. McNamara's income. CP at 181, 191. From each of the other five wards, they had collected \$325 per month. CP at 1078, 1898, 1996, 2081, 2157. In total, the Hardmans requested that the court approve fees of \$65,171.67 as reasonable and necessary.

They also requested the authority to advance themselves an allowance of \$400 per month out of each ward's income for the subsequent three-year reporting period. CP at 182. Any amounts advanced would be "subject to future Court review and approval" at the end of the reporting period. CP at 182.

The Hardmans proposed an order that included the following paragraph:

The foregoing fees shall be paid by Fircrest School as representative payee of [the ward]'s social security benefits. DSHS shall deduct these fees from [the ward]'s

benefits prior to any transmittal of any benefits to the DSHS Office of Financial Recovery. DSHS shall adjust the participation in cost of care accordingly.

CP at 242. The Hardmans also asked the court to find “that DSHS has been properly served with notice and [] has not appeared, or [] has appeared and had the full opportunity to litigate this matter.” CP at 242.⁸

2. DSHS Objection

DSHS objected to the Hardmans’ fee request, arguing first that the request impermissibly exceeded the \$175 per month limit set in WAC 388-79-030, CP at 224-231; and second, that the Hardmans were seeking compensation primarily for activities that fall outside of a guardian’s normal activities, namely political lobbying and community organizing. CP at 231-232. The Department specifically objected that the Hardmans had failed to show how their “advocacy” had benefitted their wards, and that the wards “cannot be charged for the Hardmans’ activities unless they are both necessary and beneficial.” CP at 232.

In support of its objection, DSHS provided sworn declarations of Department staff. Quality assurance manager Martha Gluck noted that people with profound developmental disabilities and/or severe medical problems can be, and are, served in community settings. CP at 274. She

⁸ Citations are to the order entered November 13, 2009, in which these proposed paragraphs were “reserved” for determination at a later date. CP at 242; *see also* CP at 1113 (proposed order in *Guardianship of Werlinger* marked by handwritten amendments). The bare proposed order is not in the record.

explained that while guardian fees are readily available for clients who are institutionalized in an RHC, individuals living in community residential programs can rarely afford to pay guardian fees because their income goes to their living expenses; and recounted two times that James Hardman opposed integrated living environments and ultimately withdrew as guardian for individuals living in the community after unsuccessful efforts to have his fees paid before the ward's living expenses. CP at 274-276.

Fircrest's nursing home administrator Shirley Pilkey explained that a development project opposed by the Hardmans would allow DSHS to construct a modern nursing home facility on the Fircrest campus to replace the current facilities, built in 1964. CP at 271. She explained that neither the Geidt Public Health Lab next to Fircrest, nor the closure of the Fircrest infirmary posed a danger to residents. CP at 271. She provided details about how often each of the five nursing home residents used the now-closed pool at Fircrest. CP at 270 (McNamara), 1940 (Schmidt), 2027 (Moser), 2117 (MacKenzie), 2213 (Milton).⁹ Ms. Pilkey explained that DSHS had made no attempt to move any of those five individuals out of the RHC within the prior three years. CP at 271, 1941, 2028, 2118, 2214. And she opined that none of them would suffer permanent harm from being moved from Fircrest; and that in fact Ms. McNamara, Mr. Schmidt,

⁹ Mr. Werlinger does not reside in the nursing facility portion of Fircrest.

and Ms. MacKenzie have previously been relocated to Fircrest, or between wards at Fircrest, without harm. CP at 272, 1942, 2029, 2119, 2215.

Physician Dr. Anthony Okos opined based on his medical training and his observations of Ms. McNamara and Mr. Milton that, due to their level of cognition, “it would be difficult to substantiate” that they could even perceive a change to their environments; and relocation would have minimal if any impact on their condition. CP at 280, 2206. He opined based on his medical training and his observations of Mr. Werlinger and Mr. Moser that both would experience “no or minimal negative effects” if they were relocated from Fircrest. CP at 1111, 2031.

The Hardmans replied to the DSHS objection. CP at 246-252. They offered two documents further detailing and defending their advocacy activities as discussed above at pages 6-10: a “Declaration of James Hardman Regarding Best Interests,” CP at 253-258; and a “Second Declaration of James Hardman Regarding Best Interests.” CP at 281-289.

3. Commissioner’s Memorandum Opinion

The Hardmans’ triennial reports were each approved, with the issue of fees reserved. CP at 241-243. A joint hearing for all six cases was held on November 13, 2009, before Commissioner Eric Watness of the King County Superior Court Ex Parte Department. CP at 301; *see* CP at 302. On December 18, 2009, Commissioner Watness issued a

memorandum decision containing findings of fact and conclusions of law.

CP at 292-298. He found that:

[N]one of the [Hardmans'] advocacy services were provided specifically for any of these particular clients. None of the clients involved in these motions faced eviction proceedings, none of them were shown to have made significant use of the closed pool or the cafeteria and, even if they had used those facilities, no detriment was shown to their care plan by the closures. . . . Even where it is argued that the work of the guardian serves a collateral benefit to the client, there is little if any effect those services have made on the welfare of these residents of Fircrest. . . . **There is no benefit realized by these clients from the general advocacy activities of the Guardian.**

CP at 297 (emphasis added).

The commissioner concluded, citing to WAC chapter 388-79, that guardian fees of \$175 per month should be approved in each case. CP at 297-298.¹⁰ He denied the Hardmans' request for additional attorney fees because the Hardmans had incurred those fees to establish compensation for themselves rather than to benefit the ward. CP at 298.

4. Decision In Guardianship Of Lamb

Three days later, on December 21, 2009, the Court of Appeals, Division One released its then-unpublished decision in *Guardianship of Lamb*, 154 Wn. App. 536, 228 P.3d 32 (2009), *review granted*, 169 Wn.2d 1010 (Aug. 5, 2010) (No. 84379-1). *See Guardianship of Lamb*, 153 Wn.

¹⁰ In the case of Ms. McNamara, the court thus granted the Hardmans' petition for \$175 per month in fees for the prior reporting period. CP at 181.

App. 1036 (2009) (notation of unreported decision). *Lamb* also involved the Hardmans' request that they be compensated from the income of individual Fircrest residents for their advocacy activities. 154 Wn. App. at 544-545. The court held that the Hardmans were not entitled to such compensation for political advocacy because they had "not shown that their advocacy activities directly benefit" the individual wards. *Id.* at 546. The court also held that the record was insufficient to support the superior court's order compensating the Hardmans for community outreach activities as part of their general advocacy. *Id.*

The Court of Appeals granted motions to publish *Lamb* on February 17, 2010.

5. Reconsideration And Motion To Strike

On January 29, 2010, Commissioner Watness's findings of fact and conclusions of law from the memorandum decision were incorporated into an Order Approving Guardian Fees in each of the six cases. CP at 301-309. Each order approved \$175 per month of fees for the prior accounting period, and authorized the Hardmans to collect an allowance of \$175 per month in each of the consolidated cases for the next three years. CP at 301-302.

The Hardmans filed a motion for reconsideration, asking that the court "find, based on additional evidence and briefing, that the Guardians

have demonstrated they conferred a direct or substantial benefit on the Incapacitated Person in [each] case or are implementing care plan [sic] of the Incapacitated Person.” CP at 344.

Along with their motion, the Hardmans filed a brief in support, CP at 329-342, and new declarations and exhibits. The new evidence in each case comprised a new exhibit attached to the motion itself, CP at 357-361; a 6-page declaration of James Hardman with 10 new exhibits totaling 533 pages, CP at 373-914;¹¹ a 1-page declaration of counsel Michael Johnson with 3 new exhibits totaling 59 pages, CP at 915-977; a 7-page joint declaration of three professional guardians with no connection to this case with 3 new exhibits totaling 6 pages, CP at 313-328; and 10 to 20 pages of sealed health records for each individual. CP at 362-372, 1862-1881, 1960-1976, 2052-2061, 2136-2146, 2233-2243.

DSHS moved to strike the newly submitted materials as untimely and irrelevant. CP at 978-986.

The commissioner denied reconsideration, without providing DSHS an opportunity to respond on the merits to the Hardmans' motion or evidence. CP at 999; *see* King County LCR 59(b) (“No response to a

¹¹ Except in the case of Mr. Werlinger where a different Exhibit D was substituted and the exhibits to Mr. Hardman's declaration totaled 722 pages. CP at 1131-1961.

motion for reconsideration shall be filed unless requested by the court.”). The court struck all of the materials listed above as untimely. CP at 996-998.¹²

6. Revision And Appeal

The Hardmans sought revision of the commissioner’s orders. CP at 1000-1024. The six cases were consolidated under *Guardianship of McNamara*. CP at 1025-1026. The superior court denied the motion for revision, and affirmed the commissioner’s rulings “in all respects.” CP at 1061-1062.

The Hardmans timely appealed and petitioned for direct review.

IV. ARGUMENT

The Hardmans make no argument that the superior court erred in denying their request for fees based upon the evidence in the record as of the date of the initial commissioner’s order. Their argument thus relies on the evidence offered with their motion for reconsideration. The superior court did not abuse its discretion in striking that evidence as untimely under CR 59, nor in finding, based on the evidence actually before the court, that the Hardmans’ advocacy activities provide no identifiable benefit to any of these six individuals.

¹² Citation is to the order to strike in *McNamara*. The orders in the other five cases have been requested as a supplemental designation of clerk’s papers.

The Hardmans' remaining arguments are incorrect. While the superior court was clearly aware of the Court of Appeals decision in *Lamb*, none of the court's orders relied upon it. Because the Hardmans did not show that their activities provided any benefit to their individual wards, the court did not need to address whether the benefit was direct or indirect. A guardian has no right to compensation for activities that provide no benefit to the ward.

A. Standard Of Review

The superior court has the authority to review the records of the case and a commissioner's findings of fact and conclusions of law. Wash. Const., art. IV, § 23; RCW 2.24.050; *State v. Smith*, 117 Wn.2d 263, 276, 814 P.2d 652 (1991). On a motion to revise a commissioner's ruling not based on live testimony, the superior court's review of the record is de novo. *In re Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). The superior court judge's review is generally "limited to the evidence and issues presented to the commissioner." *Id.* The order on revision supersedes the commissioner's ruling, so "the appeal is from the superior court's decision, not the commissioner's." *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004) (internal quotation marks omitted).

The management of the guardianship of an incapacitated person is largely left to the discretion of the superior court. *See* RCW 11.92.010 (guardians “shall at all times be under the general direction and control of the court making the appointment”). The proper standard of review in a guardianship case is thus abuse of discretion. *In re Guardianship of Spiecker*, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966); *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-388, 48 P.3d 1029 (2002). A court’s rulings on motions to strike or for reconsideration are also reviewed for abuse of discretion. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968); *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010).

“Under [the abuse of discretion] standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. If the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (internal citations omitted).

B. Arguments Incorporated By Reference Are Waived

The Hardmans in their Opening Brief attempt to present their argument largely by incorporating portions of their briefing to the superior

court. Respondents and the Court are left to stitch together the 30-page Opening Brief with 26 pages cut variously from the Hardmans' Petition for Approval of Guardian Report (CP at 183), Amended Reply to DSHS Objection (CP at 246-252), Motion for Reconsideration (CP at 345-346), Brief in Support of Motion for Reconsideration (CP at 329-331, 336), Response to Motion to Strike (CP at 989-993), and Motion to Revise (CP at 1002-1008); plus 17 additional pages lifted from the Opening Brief in an entirely separate case, *In re Guardianship of Lamb*, No. 84379-1 (at 6-13) and the *Lamb* Supplemental Brief (at 7-15).

This Court should disregard these arguments incorporated by reference. An appellant's opening brief "should contain . . . [t]he argument in support of the issues presented for review, together with citations to legal authority." RAP 10.3(a)(6). Washington courts "have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived." *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008); *see U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111-112, 949 P.2d 1337 (1997); *State v. Kalakosky*, 121 Wn.2d 525, 540 n. 18, 852 P.2d 1064 (1993); Accordingly, the Department respectfully requests that the Court disregard

the Hardmans' arguments that are incorporated solely by reference to other pleadings.

C. The Hardmans Rely Primarily On Evidence That Was Properly Stricken From The Record

In their Opening Brief, the Hardmans' citations to the record for support of their various factual assertions are overwhelmingly references to evidence stricken by the superior court commissioner. *E.g.*, Opening Br. at 18 (eight citations to stricken materials), 20 (five citations to stricken materials), 23 (five citations to stricken materials). The Hardmans' arguments should be disregarded to the extent they are based on proposed evidence that was stricken from the record.

The Hardmans do not contend that the evidence properly in the record is sufficient to support their request for fees of \$400 per month; nor did they so argue below. *See* CP at 343-372 (motion for reconsideration); CP at 329-342 (memorandum in support of motion); CP at 1005-1008 (motion to revise). Even if they mean to do so, the superior court did not abuse its discretion by finding based on the record that the Hardmans' advocacy provides no benefit to Ms. McNamara or any of the other five wards.

1. The Hardmans Waive Their Argument That The Order Striking Untimely Exhibits Was In Error

The Hardmans provide no argument in their Opening Brief to this Court as to why their untimely exhibits should not have been stricken. Opening Br. at 21-22. They instead attempt to incorporate portions of their briefing to the superior court. *Id.* at 22 (“For argument, see *Response to Motion to Strike . . . and Motion to Revise*”). As discussed above, this argument is waived and the Court should decline to address it.

2. The Superior Court Did Not Abuse Its Discretion By Striking As Untimely The Hardmans’ Supplemental Evidence

Even if the Court were to reach this issue, the superior court did not abuse its discretion when it struck the Hardmans’ late exhibits as untimely. Those exhibits were offered after the hearing on November 13, 2009; after the commissioner issued his memorandum decision on December 18, 2009; and after that decision was entered as an order of the court on January 29, 2010. The additional evidence was untimely unless the Hardmans were entitled to a new hearing under CR 59. They were not, as discussed below at pages 24-27.

3. The Excluded Evidence Would Not Have Materially Altered The Court’s Decision

The Hardmans fail to establish that the new evidence would have altered the superior court’s decision. The new evidence is identical in all

six cases, with the exception of Mr. Werlinger's case where a guidance document from the federal Centers for Medicare and Medicaid Services was offered in place of a printout of certain federal regulations. CP at 417-457 (Declaration of James Hardman, exhibit D, in *McNamara*), 1131-1861. The new documents overwhelmingly comprise law or legal argument rather than factual evidence.

None of the proffered documents contains evidence of the kind that the superior court properly looked for: evidence that the Hardmans' advocacy provides a necessary benefit to Ms. McNamara and the other wards that entitles the Hardmans to compensation. In fact, the court commissioner, after reviewing the newly offered evidence and before striking it from the record, remarked that the new evidence would not have changed his finding that the Hardmans' advocacy provides no benefit to the wards. *See* VRP at 27 (counsel reporting that statement by the commissioner to the superior court judge, without objection).¹³

D. The Court Of Appeals Decision In *Lamb* Does Not Constitute Surprise Entitling The Hardmans To Reconsideration

A trial court order may be vacated and reconsideration granted if the moving party shows "[a]ccident or surprise which ordinary prudence

¹³ The Verbatim Report of Proceedings (VRP) does not include record of the commissioner's oral rulings.

could not have guarded against”. CR 59(a)(3).¹⁴ Ignorance of the law is not “surprise” warranting reconsideration. 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 38.11 at 23 (2009). Where a party relies at trial on evidence that it mistakenly believes to be sufficient, the party’s later realization that the evidence is insufficient is not “surprise” even where the mistaken belief is allegedly the result of statements by the trial judge. *Henry v. Yost*, 88 Wash. 93, 98, 152 P. 714 (1915); *Henry v. Chicago, M. & P. S. Ry. Co.*, 84 Wash. 633, 650-651, 147 P. 425 (1915); 2 *Washington Court Rules Annotated*, 794 note 69 (2010-2011); *see also Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (realization that previously submitted evidence was legally insufficient does not qualify additional evidence as newly discovered under CR 59(a)(4)).

The Hardmans seemingly argue that the decision in *Lamb* constitutes “surprise” under CR 59. *See* VRP at 34. It does not.

1. The Court Commissioner Could Not Have Relied On *Lamb*

The Hardmans argue that reconsideration should have been granted because the commissioner “relied on *Lamb* in the Memorandum

¹⁴ Newly discovered evidence is also a basis for reconsideration. CR 59(a)(4). The Hardmans have not argued that their untimely evidence could not have been discovered and produced on or before the hearing on November 13, 2009; most if not all of the evidence was on its face available prior to that date.

Decision.” Opening Br. at 21. But the December 18, 2009 memorandum opinion does not reference *Lamb*. See CP 303-309. Nor could it, since the unreported decision in *Lamb* was not released until three days later. 153 Wn. App. 1036 (notation of unreported decision).¹⁵

The Hardmans argue that the superior court should not have applied a “direct benefit” test in this case. Opening Br. at 21; see *Lamb*, 154 Wn. App. at 546. But the superior court in this case denied the Hardmans’ request for advocacy fees on the basis that the Hardmans’ advocacy provided “no benefit” whatsoever. CP at 308. The superior court also held that the Hardmans provide no extraordinary guardianship services, and are therefore limited to fees of \$175 per month under WAC 388-79-030. CP at 308-309. Despite the Hardmans’ efforts to equate this case with *Lamb*, there was no need for the court in this case to reach the issue addressed in *Lamb* of direct versus indirect benefit because the court found no benefit at all.

Rather, the memorandum decision relied on law existing prior to *Lamb*. When *Lamb* was released, it was entirely consistent with the

¹⁵ On revision, Judge Hayden was of course aware of the published *Lamb* decision. *E.g.*, VRP at 7 (the court stating “it seems to me that you’re asking this court to approve the same kind of fees that Division One rejected in Guardianship of Lamb”), at 21 (“right now I can’t get any better guidance than the Court of Appeals has told me for your client. These specific items are not covered.”).

court's decision. A court does not err by denying reconsideration when newly announced case law is in accord with the court's decision.

2. Lamb Did Not Overturn Any Precedent Relied Upon By The Hardmans

An intervening change of law may in some circumstances constitute surprise. *Allen v. Chambers*, 18 Wash. 341, 347-350, 51 P. 478 (1897). In *Allen*, the moving party omitted certain evidence at trial in reliance on specific Supreme Court precedent stating that such testimony was immaterial. *Id.* at 347. After the matter was taken under consideration by the superior court, the Supreme Court announced a new decision that apparently altered that rule entirely. *Id.* at 348-349. The superior court relied on the new case in reaching its decision. *Id.* at 347. Under those circumstances, the Court found surprise entitling the party to a new trial. *Id.* at 349.

The Hardmans have not shown any similar, explicit change in the law. The Court of Appeals followed existing precedent in deciding *Lamb*. 154 Wn. App. at 545-546 (citing *In re Guardianship of McKean*, 136 Wn. App. 906, 151 P.3d 223 (2007)). As discussed below at pages 27-29, the rule that a guardian cannot be compensated for non-beneficial activities is well established. Because *Lamb* did not overturn an on-point precedent as in *Allen*, the Hardmans are essentially arguing that they were surprised

that the Court of Appeals did not agree with their contrary legal theory. This case is thus less like *Allen*, in which the Supreme Court overturned existing precedent; and more like *Yost* and *Chicago*, in which a party was “surprised” by the court’s application of existing law.

The Hardmans claim of surprise is particularly unpersuasive in this case because the Department has consistently argued that they must show a benefit to their wards in order to receive compensation. Thus, while the Hardmans argued for a different interpretation of the legal precedents, they were on notice that existing law might require them to prove benefit to the individual. *E.g.*, CP at 224 (DSHS citations to case law), 232 (argument that Hardmans must show that their activities “are both necessary and beneficial” to each individual ward). Ordinary prudence would lead a party to meet such arguments with adequate evidence. Further, the Hardmans alleged in their original triennial report that their advocacy activities “are directly connected to the provision of care and treatment and services.” CP at 193. Having alleged a direct connection, they could hardly claim “surprise” if the court required them to prove it. *Friedman v. Manley*, 21 Wash. 43, 56 P. 832 (1899) (surprise cannot be claimed where the pleadings state the issues).

3. If The Superior Court Erred In Denying An Opportunity To Produce New Evidence On

**Reconsideration In Light Of *Lamb*, This Case Should
Be Remanded To Allow For Responsive Evidence**

King County local rules do not allow a response to a motion for reconsideration unless called for by the court. King County LCR 59(b). The court will not grant reconsideration without first calling for a response. *Id.* In this case, the superior court commissioner denied reconsideration without requesting any DSHS response to the motion. DSHS was therefore never given an opportunity to respond to the additional materials offered by the Hardmans and stricken from the record. VRP at 28. And because the materials had been stricken, the superior court did not consider them on revision. VRP at 13-14; *see In re Marriage of Goodell*, 130 Wn. App. 381, 389, 122 P.3d 929 (2005) (error for superior court to consider additional evidence on revision). If the superior court erred in excluding the additional evidence, the proper remedy is remand to the superior court commissioner to accept the new evidence and allow DSHS to offer any responsive evidence.

E. A Guardian May Not Charge Fees For Unnecessary Or Unbeneficial Activities

Under RCW 11.92.180 a guardian generally “shall” be allowed just and reasonable compensation.¹⁶ But a guardian can only be

¹⁶ The guardian “shall not be compensated at county or state expense.” RCW 11.92.180. A guardian thus cannot be paid other than from available private assets, even if those assets are insufficient to provide reasonable compensation to the guardian.

compensated for necessary and beneficial services. *Lamb*, 154 Wn. App. at 545; *In re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007) (“the court must determine the need for the work done and whether it benefited the guardianship.”). *Lamb* and *McKean* are extensions of Supreme Court precedent related to compensation of court-appointed fiduciaries in probate cases. See *In re Estate of Larson*, 103 Wn.2d 517, 523-524, 530-532, 694 P.2d 1051 (1985) (plurality) (probate attorney has burden to show that hours charged to estate were necessary); *id.* at 534 (C.J. Williams, concurring in result) (agreeing with plurality that “the time required, not the time expended, is a factor in the determination of the reasonableness of attorney fees”).

An advisory opinion of the Certified Professional Guardian (CPG) Board supports the use of the *Larson* standard for determining appropriate guardian fees. The CPG Board was established by the Washington Supreme Court to certify professional guardians as required by RCW 11.88.008; GR 23(a); and to adopt “minimum standards of practice” for professional guardians. GR 23(c)(2)(ii). Among its powers is the authority to issue “ethics advisory opinions to inform and advise Certified Professional Guardians. . . of their ethical obligations.” GR 23(h). In an ethics opinion pre-dating *Lamb* and *McKean*, the CPG Board cited only two sources of law applicable to guardian compensation:

RCW 11.92.180 and *Larson*. CPG Board, Ethics Advisory Opinion #2002-0001 (May 12, 2003).¹⁷ The Board noted that the standards for guardian compensation require “a connection between the amount charged and the work **required**,” and “maintenance of a close correlation between services provided, costs of those services and **benefit** to the estate”. *Id.* (emphases added).

Larson, *Lamb* and *McKean* follow substantial and long-standing law involving the fair compensation of guardians and similar court appointees. *See, e.g., In re Guardianship of Ivarsson*, 60 Wn.2d 733, 739, 375 P.2d 509 (1962) (court must appraise the value of the guardian’s services); *In re Kelley’s Estate*, 193 Wash. 109, 74 P.2d 904 (1938) (affirming that derelict guardian was not entitled to fees, but finding that he was entitled to compensation for certain costs incurred in benefit to the ward); *In re Montgomery’s Estate*, 140 Wash. 51, 53, 248 P. 64 (1926) (guardian not allowed compensation beyond value of services provided); *In re Estate of Morris*, 89 Wn. App. 431, 436, 949 P.2d 401 (1998) (personal representative’s costs should not be compensated “in the absence of finding a substantial benefit to the estate”); *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986) (guardian can

¹⁷ Available online at the CPG Board website, http://www.courts.wa.gov/committee/?fa=committee.display&item_id=640&committee_id=127 (last visited April 13, 2011).

recover cost of attorney fees only for work necessary to bring claims benefitting the estate).

The guardian has the burden of providing adequate evidence to support a request for fees and costs. *Disque v. McCann*, 58 Wn.2d 65, 69, 360 P.2d 583 (1961). In this case, the commissioner reasonably determined that the Hardmans failed to show any benefit to these particular wards from their advocacy activities. There was no evidence that any of these six individuals had faced a possible move out of Fircrest in the previous three years. *E.g.*, CP at 271. And even if they were to be relocated, there was adequate evidence in the record that relocation would not be harmful to these individuals. *E.g.*, CP at 274 (persons with similar disabilities are successfully served in integrated community settings), 272 (nursing home administrator opinion that no harm would result), 280 (physician opinion that no harm would result); *see supra* at pages 12-14. Because the Hardmans cannot charge their wards for unnecessary or unbeneficial activities, the court was within its discretion to limit their fees to \$175 per month.¹⁸

¹⁸ Notably, the Hardmans requested only \$175 per month as compensation for services provided to Ms. McNamara during the prior reporting period. CP at 181. They provide no explanation for why such fees were reasonable compensation for the services provided to Ms. McNamara, but not reasonable compensation for the identical services provided to the other five individuals.

F. DSHS Is Properly Involved In This Case

The Hardmans make a variety of arguments against DSHS involvement in this case, none of which has merit. Opening Br. at 27-30.

1. DSHS Has Standing

The Hardmans assert that “DSHS did not carry the burden of showing they have standing.” Opening Br. at 28. They fail to provide any argument except by incorporation. Moreover, DSHS clearly has standing because the Hardmans petitioned for a court order to which the Department would purportedly be subject. CP at 242 (proposed order that “DSHS shall adjust the participation in cost of care accordingly” and that DSHS “had a full opportunity to litigate this matter”).

DSHS also has a duty as the state Medicaid agency to ensure that Washington remains in compliance with its Medicaid obligations. The Hardmans’ attempts to thwart DSHS regulations implementing those obligations provide an independent basis for standing. RCW 11.92.150 and .180 require a guardian to provide notice to DSHS prior to filing an accounting in cases such as this, precisely because of the potential implications of guardian fee payments from the assets of Medicaid recipients. *See* CP at 237 (letter from federal Medicaid agency citing Washington for improperly allowing guardian fees to be deducted from the cost of care of Medicaid recipients). The Hardmans argue for an

absurd situation in which DSHS is given notice that the guardians seek a court order requiring the Department to make adjustments to participation; and yet cannot register an objection with the court to correct any misrepresentations of facts or law.

2. DSHS Does Not Seek To Collect Any Alleged Debt In This Case

The Hardmans assert that DSHS has not properly commenced a debt collection action against these wards. Opening Br. at 28-29. This case is not a collection action initiated by DSHS under RCW 11.92.035. Rather, the Hardmans initiated proceedings to collect funds from the incapacitated persons under RCW 11.92.180. Whether, and how much, the Department may collect for cost of care from these individuals is a separate question from how much the Hardmans may collect in guardian fees. Any disagreement about the amounts DSHS calculates for cost of care for these individuals may be reviewed only under the Administrative Procedure Act, not by petition to the guardianship court. RCW 34.05.510.¹⁹

¹⁹ Although in this case DSHS did not petition the guardianship court for the costs of care, it indisputably has the statutory authority to do so. RCW 11.92.040(6) provides that a person or department “having the care and custody of an incapacitated person, may apply to the court for an order directing the guardian... of the estate to pay... an amount... to be expended in the care, maintenance, and education of the incapacitated person[.]” As the department having care and custody of Fircrest residents, DSHS has standing to bring a motion under RCW 11.92.040(6). *Guardianship of Knutson*, No. 64144-1-I, slip op. at 9-11 (Wash. Ct. App., Mar. 28, 2011).

3. WAC Chapter 388-79 Applies To This Case

Finally, the Hardmans seem to argue that the superior court erred in concluding that the guardian fee limitations of WAC 388-79-030 apply in this case because these wards do not pay any cost of care. Opening Br. at 29. But it was the Hardmans themselves who provided DSHS the notice required under RCW 11.92.180, CP at 221; and requested that DSHS be ordered to reduce the wards' cost of care payments. CP at 242. DSHS invited the Hardmans to delete any reference to DSHS from their proposed order. CP at 231. The Hardmans refused. Having insisted on a court order requiring DSHS to reduce its calculation of the cost of care, they should be judicially estopped from arguing now that no cost of care exists. *E.g., Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008).

Even if the limitation in WAC 388-79-030 did not apply here, the Hardmans provide no argument that the superior court abused its discretion in compensating them at a rate of \$175 per month for the regular guardianship services they actually provided to each individual. Any error was thus harmless.

In any event, WAC Chapter 388-79 applies to every case in which "the incapacitated person is a [DSHS] client residing in a nursing facility or in a residential or home setting and is required by [DSHS] to contribute

a portion of their income towards the cost of residential or supportive services.” RCW 11.92.180; *see* WAC 388-79-010. All RHC residents are required to contribute available income toward their costs of care. *Lamb*, 154 Wn. App. at 548, *review granted on other grounds*, 169 Wn.2d 1010; *see* 42 C.F.R. §§ 435.725, 435.733, and 435.832; *Maryland Dept. of Health v. Medicare & Medicaid Srvs.*, 542 F.3d 424, 427 fn.3, 430 (4th Cir. 2008); *Florence Nightingale Nursing Home v. Perales*, 782 F.2d 26, 29 (2d Cir. 1986). Because all RHC residents are required to participate in their cost of care for the purposes of RCW 11.92.180 regardless of the actual charges that may be collectable in any particular case, the superior court did not need to take evidence regarding these specific residents’ cost of care in order to determine that WAC 388-79-030 applied.

G. Attorney Fees

In a guardianship case, the superior court may “in its discretion” order attorney fees “to be awarded to any party . . . [f]rom any party to the proceedings . . . in such amount and in such manner as the court determines to be equitable.” RCW 11.96A.150(1). One factor that may be relevant to the equity of awarding fees is “whether the litigation benefits the estate” involved. *Id.* The superior court properly denied the Hardmans’ request that DSHS be required to pay their attorney fees.

The Hardmans characterize this case as “[d]efending against DSHS’s financial claim” such that they have a “duty to defend” their wards’ interests. Opening Br. at 24-25. It bears reminding that the Hardmans in effect brought a collection action against their wards for fees they claim to have earned. The Department’s position that the wards should be paying less money to the Hardmans can hardly be said to place DSHS in a position antagonistic to those wards. Moreover, it was the Hardmans who involved DSHS in this matter by seeking a court order to which DSHS would purportedly be subject, and refusing to amend that proposed order to remove the reference to DSHS.

A guardian may not be reimbursed by his ward for attorney fees incurred to vindicate his own rights. *Porter v. Porter*, 107 Wn.2d 43, 57, 726 P.2d 459 (1986). Here, by seeking payment of fees from their wards to themselves, the Hardmans seek to benefit themselves at their wards’ expense. Given that the Hardmans have vigorously fought for their own right to collect against the limited estates of their wards, the equities do not support anyone other than the Hardmans themselves bearing the costs of their unsuccessful litigation at any level.

V. CONCLUSION

The Hardmans do not make a colorable argument that their late filed evidence should have been considered, or that if it had they would

have prevailed in superior court. Given the record before it, the superior court did not err in declining to consider the untimely evidence or in finding that the Hardmans' advocacy provides no benefit to any of these six individuals. Because a guardian may be compensated only for the value of his services, unbeneficial activities by the guardian may not be

compensated from the ward's estate. The superior court's orders compensating the Hardmans at a rate of \$175 per month should be upheld.

RESPECTFULLY SUBMITTED this 13th day of April, 2011.

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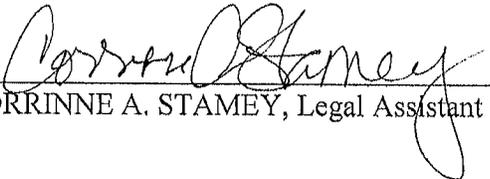
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the **RESPONSE BRIEF** on the following by E-mail/pdf and by US Mail via Consolidated Mail Service:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of April, 2011, at Tumwater, Washington.


CORRINNE A. STAMEY, Legal Assistant