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No. 84676-1

**SUPREME COURT OF
THE STATE OF WASHINGTON**

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

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

v.

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

Respondent.

STATE OF WASHINGTON
10 OCT 20 11 41:29 AM
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10/20/10

STATEMENT OF GROUNDS FOR DIRECT REVIEW

**Michael L. Johnson, Hardman & Johnson
93 S. Jackson St. # 55940
Seattle, WA 98104-2818
(206) 623-3030 - FAX (888) 279-5527
WSBA #28172
October 20, 2010**

ORIGINAL

**FILED AS
ATTACHMENT TO EMAIL**

I. NATURE OF CASE, DECISION, & IDENTITY OF PARTIES

Mary Jane McNamara, through her duly appointed Guardians of the Person and Estate, James R. Hardman, J.D., C.P.G. and Alice L. Hardman, M.S.W., C.P.G., seek direct review of the Order Denying Revision entered by the King County Superior Court on May 28, 2010 ("Order") in the Guardianship of Mary Jane McNamara, No. 06-4-02645-1 SEA. Appellants also include five other residents of Fircrest School whose cases are consolidated under that number. A copy of the Notice of Appeal from the Order is attached as *Appendix A*. (A copy of the Order is attached to the Notice of Appeal.) The underlying Order by Commissioner Watness -- affirmed on revision in all respects -- is also attached as *Appendix B*.

The State of Washington, Department of Social and Health Services (DSHS) is an adverse party appearing in the guardianship case.

II. SUMMARY OF ARGUMENT.

DSHS filed papers in a guardianship case objecting to advocacy by Mary Jane's guardians on the basis of its financial interest in her social security benefit as well as its disagreement with the content of guardian's advocacy. DSHS uses a statutory regime intended to protect incapacitated persons to limit the guardian's advocacy and increasing its own self-

interest.

Mary Jane's guardians did an exemplary job in advocating for Mary Jane's civil rights yet faced an unconstitutional application of limits on guardian and attorney fees. State and federal law contemplate Mary Jane's best interests as the rule to apply, and require guardians (and their counsel) to act accordingly. The labor of a guardian or counsel should not be used to subsidize the General Fund.

III. ISSUES PRESENTED FOR REVIEW.

The following issues are ready for review under RAP 4.2.

ISSUE 1: May courts apply a rule of guardian compensation requiring a "direct" benefit to the person to the exclusion of all other rules of compensation, and if so, under what circumstances?

ISSUE 2: May courts apply a rule of attorney compensation because of unique issues, or because a party is not the prevailing party, to the exclusion of RCW 11.96A.150, and if so, under what circumstances, and should attorney fees be awarded on appeal?

ISSUE 3: Is the superior court's order a violation of Art. I, sec. 4 of the Washington Constitution and First and Fourteenth Amendments of the United States Constitution?

ISSUE 4: Is the limitation of guardian and/or attorney fees as applied in this case an unconstitutional violation of the separation of powers as applied?

The Guardians reserve the right to assign error and identify issues in its Appellant's Brief pursuant to RAP 10.3(a)(3). Without limiting the reservation, the Guardians identify the following associated issues:

1. Whether *Guardianship of Lamb* is newly published law such that the Guardians are entitled to supplement the record in a motion for reconsideration?

2. Should attorney fees be awarded on appeal?

IV. GROUNDS FOR DIRECT REVIEW.

A. FACTS.

The Petitioners are court-appointed certified professional guardians (CPGs) of the person and estate of Mary Jane and 5 other residents of Fircrest School (collectively called McNamara). The Guardians represents and promotes the civil rights and best interests of Mary Jane McNamara. She is a person with profound or severe developmental disability and within that category constitutes a miniscule percentage (1-3%) of those developmentally disabled who are intellectually disabled. She is developmentally an infant in an adult body. She is a resident of Fircrest School in Shoreline, Washington.

Guardians are decision-makers and advocates, not caregivers. The Guardians engage in advocacy at the Fircrest School level and direct advocacy at legislative officials, executive officials, and community organizations. See Petition for Review, *Guardianship of Lamb*, No. 84379-1 (review granted August 5, 2010). *Appendix C*.

DSHS opposes the Guardians' exercise of these advocacy efforts

and the content of the advocacy. They challenge the compensation of the Guardians as well as the content of the advocacy. DSHS is now litigating or appearing in 10 different cases involving the Guardians.¹

At the heart of the issue is McNamara's civil rights. DSHS does not want these rights exercised, applies the current compensation statutes and regulations to stifle advocacy, to create a burden of litigation on indigent Medicaid recipients, to prevent the exercise of not only her right to petition but also to in effect require guardian and counsel to subsidize the General Fund.

B. ANALYSIS.

This case involves fundamental and urgent issues of broad public import which requires prompt and ultimate determination. RAP 4.2(a)(4).

The Court has already found that substantially the same issues raised are subject to review as matters of substantial public interest under RAP 13.4(b)(4). Those same reasons apply here. See *Petition for Review, Lamb*, No. 84379-1. In addition, direct review should be granted for at

¹ In a case recently in Pierce County, DSHS appeared before the court without filing any papers or any appearance, announced it was disinterested in the outcome but had "concerns", provided legal argument which the court accepted over the objections of counsel, with the ultimate result being Mr. Hardman's removal as guardian. The court determined that Mr. Hardman's appointment as representative payee required prior court approval and was self-serving, even though there was no finding of misuse of funds. There is no rule requiring court approval. This will be appealed. This is the 10th case in which DSHS is litigating against indigent Medicaid recipient, albeit with very questionable procedures.

least the following reasons it is preferable in terms of judicial economy as well as cost burdens on indigent appellants to grant direct review and then consolidate all the cases, and direct review avoids piecemeal appeals of substantially the same issues through multiple tracks or tiers of appeal which will cause undue delay when they could all be determined together.

Further, *Lamb* was decided by the Court of Appeals on alternative grounds and the instant case is the first with a record developed with *Lamb* in mind. *Lamb* is newly published law stating a “direct” benefit must be shown for a guardianship of the person. See *Guardianship of Lamb*, 154 Wn.App. 536, 228 P.3d 32 (2009). Though there was briefing on the issue of benefit, there was never an opportunity for briefing the alternative ground of a “direct” benefit. That briefing will be included in the Supplemental Brief to be filed in *Lamb* shortly. Also, the instant case was decided based on *Lamb*. The earliest opportunity to brief and develop a record on the newly published law in this case was at the motion for reconsideration stage in the superior court. Developed within a short 10-day timeline, the trial court record in this case is the first developed with *Lamb* in mind given that time constraint. All issues are ready for direct review for these reasons.

Issues 1 and 2 are ready for direct review as discussed above.

Issue 3 is also ready for direct review because the right to petition

is a fundamental right of paramount importance to all our citizens, and should be of no lesser significance for all of those of our citizens who are profoundly and severely intellectually disabled. Some view a guardianship as taking away rights; others like the guardians view guardianship as a comprehensive statutory scheme intended to promote, protect, and advance an incapacitated person's civil rights, not take them away. The right to petition was briefed in the Court of Appeals in *Lamb*. See Guardians' Opening Brief at 38-48. *Appendix D*. See also Brief of Amicus Curiae American Civil Liberties Union of Washington. For those reasons, the case is ready for direct review.

Issue 4 is also ready for direct review for the same reasons as Issues 1 and 2. Issue 4 was also briefed before the Court of Appeals in *Lamb*. See Guardians' Opening Brief at 32-38. *Appendix E*.

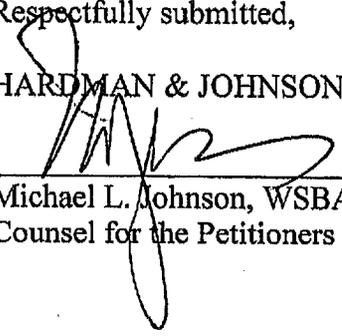
IV. CONCLUSION.

For the reasons above, these issues are ready for review under RAP 4.2.

October 20, 2010

Respectfully submitted,

HARDMAN & JOHNSON



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

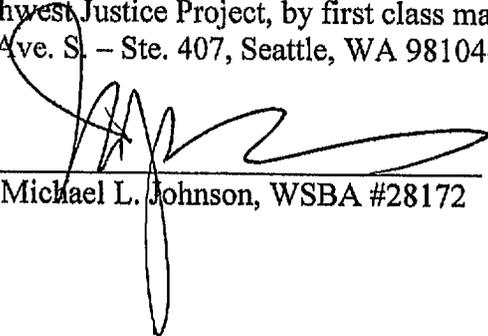
CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a copy of the foregoing Statement of Grounds for Direct Review to be served on:

Jonathon Bashford, counsel for the State of Washington, by cc: e-mail service by agreement, and

Deborah Perluss, Northwest Justice Project, by first class mail, postage prepaid, to 401 – 2nd Ave. S. – Ste. 407, Seattle, WA 98104-3811.

October 25, 2010



Michael L. Johnson, WSBA #28172

Appendix A

FILED

2010 JUN 25 AM 11:20

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In the Matter of the Guardianship of
MARY JANE McNAMARA,
An Incapacitated Person.

) No. 06-4-02645-1 SEA
)
) NOTICE OF APPEAL TO
) SUPREME COURT
)
) Consolidated with
) No. 92-4-00722-1 SEA
) No. 92-4-01014-1 SEA
) No. 92-4-00732-8 SEA
) No. 89-4-00990-8 SEA
) No. 88-4-04043-2 SEA

Mary Jane McNamara, by her Guardians James R. Hardman, J.D., C.P.G. and Alice L. Hardman, M.S.W., C.P.G., seeks review by the designated appellate court of the following:

1. Order on Revision entered on May 28, 2010.

2. Issues related to that Order.

A copy of the Order is attached.

Respectfully submitted,

HARDMAN & JOHNSON

Michael L. Johnson, WSBA # 28172

June 25, 2010

NOTICE OF APPEAL - 1

ORIGINAL

APP A
HARDMAN & JOHNSON
93 S. JACKSON ST. #55940
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PH: (206) 623-3030 FAX: (888) 279-5527

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Name and Address of Counsel for Party Seeking Review:

Hardman & Johnson
Michael L. Johnson
93 S. Jackson St. #55940
Seattle, WA 98104-2818
206-623-3030
888-279-5527 (fax)

Name and Address of Counsel for Respondent:

Office of Attorney General
Jonathon Bashford, Assistant Attorney General
7141 Cleanwater Dr. SW
P.O. Box 40124
Olympia, WA 98504-0124
360-586-6565

FILED
KING COUNTY, WASHINGTON

MAY 28 2010

SUPERIOR COURT CLERK
JUYA GHANAJE
DEPUTY

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

In the Guardianship of:
MARY JANE McNAMARA,
An Incapacitated Person.

NO. 06-4-02645-1 SEA

(Consolidated with Nos. 92-4-00722-1 SEA,
92-4-01014-1 SEA, 92-4-00732-8 SEA,
89-4-00990-8 SEA, 88-4-04043-2 SEA)

In the Guardianship of:
DAVID SCHMIDT

ORDER ON REVISION

In the Guardianship of:
KIRBY MOSER

In the Guardianship of:
SUZANNE MACKENZIE

In the Guardianship of:
RICHARD MILTON

In the Guardianship of:
DANIEL WERLINGER

THIS MATTER came before the Court on the consolidated motions of Guardians James Hardman and Alice Hardman for revision of Commissioner Watness's Order Approving

RESPONSE TO MOTION FOR
REVISION

ORIGINAL

1

ATTORNEY GENERAL OF WASHINGTON
7141 Clearwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

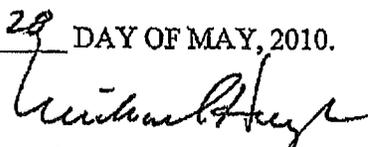
1 Guardian Fees entered January 29, 2010; Order Granting Motion to Strike entered February 26,
2 2010; and Order Denying Motion for Reconsideration entered February 26, 2010.

3 The court considered the submissions of both parties, as well as the friend-of-court
4 brief filed by Washington Association of Professional Guardians; heard oral argument from
5 Michael L. Johnson, counsel for the Guardian, and Jonathon Bashford, Assistant Attorney
6 General for DSHS; and reviewed the record available before the Commissioner, and is fully
7 advised in the matter.

8
9 **IT IS HEREBY ORDERED:**

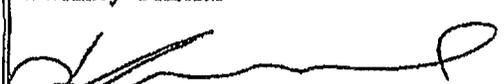
10 The Guardians' Motions to Revise are DENIED in each of the consolidated cases and the
11 Commissioner's rulings are AFFIRMED in all respects.

12
13 DATED AND SIGNED THE 20 DAY OF MAY, 2010.

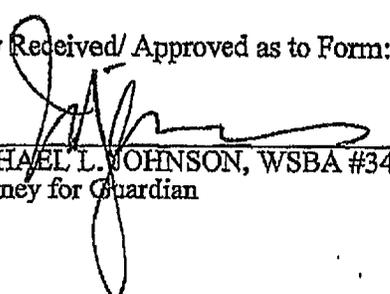
14 
15 _____
16 HON. MICHAEL HAYDEN

17 Presented by:

18 ROBERT M. MCKENNA
19 Attorney General

20 
21 JONATHON BASHFORD, WSBA #39299
22 Assistant Attorney General
23 Attorneys for Department of Social and Health Services

24 Copy Received/ Approved as to Form:

25 
26 MICHAEL L. JOHNSON, WSBA #34498
Attorney for Guardian

Appendix B

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DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY WASHINGTON

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

In the Guardianship of:
MARY JANE McNAMARA,

An Incapacitated Person.

NO. 06-4-02645-1 SEA

ORDER APPROVING
GUARDIAN FEES

This matter came before the Court on the Guardian's Petition for Order Approving and Directing Payment of Fees, and on an Objection to Guardians' [sic] Fee Request filed by the Department of Social and Health Services (DSHS). The Guardian's triennial report and accounting was approved on October 29, 2009, with the question of Guardian's fees and costs reserved. The Court considered arguments and documents submitted by both parties, as well as oral arguments presented by counsel on November 13, 2009.

On December 18, 2009, the Court issued the attached Memorandum Decision in this and five other related cases. In accordance with findings of fact, legal analysis, and conclusions of law contained in that Memorandum, **IT IS HEREBY ORDERED:**

1. Notice has been properly provided to persons and agencies entitled to notice of this presentation.
2. Guardian fees of \$6,346.67 (\$175.00 per month) for the reporting period of June 23, 2006, through June 30, 2009, are approved for payment from the assets of the guardianship

ORDER APPROVING
GUARDIAN FEES

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

APP B

1 estate as just, reasonable, necessary, and consistent with RCW 11.92.180 and chapter 388-79
2 WAC. ~~To the extent that the Guardian has advanced himself funds from the guardianship~~
3 ~~estate in excess of that amount, such funds shall be returned to the guardianship estate.~~ *MS*

4 3. The Guardian is authorized to collect \$175.00 per month as an advance allowance
5 toward fees and expenses for the current reporting period beginning July 1, 2009, to be paid
6 from MARY JANE MCNAMARA's monthly income. All sums so paid shall be subject to
7 Court approval at the next regular accounting, with no prejudice to the award of additional
8 compensation to the extent that Guardian provides "extraordinary" guardianship services under
9 WAC 388-79-050 that are necessary and directly beneficial to the ward.

10 4. DSHS shall confirm the Guardian's advance allowance by adjusting MARY JANE
11 MCNAMARA's participation in the cost of care accordingly, to the extent allowed by
12 applicable laws and regulations.

13 DATED AND SIGNED THE 29 DAY OF JANUARY, 2010.

14
15
16 ~~COURT COMMISSIONER ERIC BEATNESS~~
17 *ERIC BEATNESS*

17 Presented by:

18 ROBERT M. MCKENNA
19 Attorney General

20 *[Signature]*
21 JONATHON BASHFORD, Assistant Attorney General, WSBA #39299
22 Attorneys for Department of Social and Health Services

23 Copy Received/ ~~Approved as to Form:~~

24 *[Signature]*
25 MICHAEL L. JOHNSON, WSBA #34498
Attorney for Guardians

JAN 29 2010
COURT COMMISSIONER

RECEIVED

DEC 22 2009

**OFFICE OF THE ATTORNEY GENERAL
SOCIAL & HEALTH SERVICES DIV**

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Guardianship of)

DAVID SCHMIDT)
_____)

92-4-00722-1 SEA

KIRBY MOSER)
_____)

92-4-01014-1SEA

SUZANNE MACKENZIE)
_____)

92-4-00732-8SEA

RICHARD MILTON)
_____)

89-4-00990-8SEA

DANIEL WERLINGER)
_____)

88-4-04043-2SEA

MARY JANE MCNAMARA)
_____)

06-4-02645-1SEA

MEMORANDUM DECISION

The above referenced guardianship proceedings concern a common question of law as applied to the individual facts. The matters were not consolidated formally but were considered together because the

proceedings also involved the same parties to the issues presented here. In a nutshell the issue is whether a guardian for residents of Fircrest are entitled to an award of fees and costs out of these individual client's public entitlement funds for general advocacy services performed by the guardian that are beyond the usual and customary services and arguably did not directly benefit the individual client but which were intended to benefit all persons who are similarly situated with the client?

The Guardian, James Hardman along with Alice Hardman as co-guardian in two matters, submitted his triennial Guardianship Report and Petition for Approval of Fees to the Court. He provided notice to DSHS of the request for additional fees. The Washington Attorney General appeared on behalf of that agency in opposition. The Court considered the Guardians Petition for Approval of its triennial Report and Approval of Fees, the State's Objection to Guardians' Fee Request and supporting Declarations and the Reply and Amended Reply of the Guardian. The Court also heard from the parties in oral argument and took the matter under advice. While the Guardian's Report was approved without objection, the Court reserved ruling on the Guardian's fee request. It is that issue that is addressed here.

FACTUAL SUMMARY

From the foregoing the Court has learned the following:

David Schmidt is a 69 year old client of DSHS residing at Fircrest since 1964. His guardian is James Hardman. Mr. Schmidt suffers from profound mental retardation, major motor seizure disorder and atypical bipolar illness and is financially supported by state entitlements. He requires 24 hour supervision with ongoing health and medical and health services as well as access to psychiatric and psychological services. These services are augmented by leisure and recreation services, a structured environment and education and social opportunities that are afforded at Fircrest. As a result of the services provided as state expense, a portion of his care is paid out of the public assistance benefits available to Mr. Schmidt with certain limitations being imposed on the fees of his guardian and the guardian's attorney pursuant to WAC 388-79. James Hardman was appointed as Mr. Schmidt's guardian on March 31, 1992 and has submitted his report for the three year period from April 1, 2006 through March 31, 2009. In his application he seeks approval of guardian's fees in the amount of \$325 per month as an exception to the WAC for past serves and \$400 per month for future services.

Kirby Moser is a 52 year old resident of Fircrest with developmental disability with a medical diagnosis of profound mental retardation. He suffers from cerebral palsy, spastic quadriplegia, limited vision and dysphasia. James Hardman is Mr. Moser's guardian and has billed \$325 per month for services incurred and now seeks \$400 as a set aside form Mr. Moser's participation to pay for guardian fees.

Suzanne MacKenzies' Guardians of Person and Estate are James Hardman and Alice Hardman. They were appointed on April 13, 1992 and have presented their Triennial report for the period from April 1, 2006 through March 31, 2009. In that report they indicate that Ms. MacKenzie is a 69 year old Fircrest

resident receiving Skilled Nursing services. She suffers from multiple disabilities with a medical diagnosis of profound mental retardation/developmentally disabled. She has microencephaly, osteopenia, self-injurious behaviors and major motor seizures. They report that she is non-verbal, blind and non-ambulatory. The guardians seek approval of past fees in the amount of \$325 per month and also request an increase of monthly fees to \$400 set aside from Ms. MacKenzie's public entitlement for future fees based on an hourly rate of \$112.50.

Richard Milton is a Fircrest resident who has James Hardman and Alice Hardman as his Co-guardians of person and estate. They were appointed on April 17, 1999. They have filed their guardians report for the period from April 1, 2006 to March 31, 2009. In that report they indicate that Mr. Milton is a Fircrest resident receiving skilled nursing services. Mr. Milton is 51 years of age and suffers from profound mental retardation. His multiple disabilities include microcephaly, major motor seizures, cerebral palsy, spastic quadriplegia, dysphasia, optic atrophy, and thorocolumbar scoliosis. He is non-verbal and non-ambulatory. The guardians have reported payments for their fees at \$325 per month for the past period and are seeking an increase to \$400 per month.

Daniel Werlinger is a Fircrest resident. Alice Hardman was appointed as his guardian on November 10, 1988 and James Hardman was added as co-guardian May 16, 2005. Mr. Werlinger is 64 years old and suffers from multiple disabilities including those with quadriplegic rigidity, dysphasia and no teeth. He is non-verbal as well. His diagnosis is profound mental retardation/developmentally disabled. The guardians report payments for their services of \$325 per month for the past period and are seeking \$400 per month for future services.

Finally, Mary Jane McNamara, age 47, was appointed a guardian in Kitsap county but venue was transferred and on June 23, 2006 Mr. Hardman was appointed successor guardian here in King County. Ms. McNamara requires skilled nursing facility care and resides at Fircrest with social security and VA benefits funding her care. According to the Guardian's report she is non-verbal and non-ambulatory. She suffers hearing loss and is diagnosed profound or severe mental retardation/developmentally disabled. According to her care plan Ms. McNamara has not used the pool which was closed in early 2009 and because she is tube fed she rarely if ever has visited the cafeteria that was recently closed.

APPLICABLE LAW

Before fees and costs of administration of the guardianship can be approved, the court must determine what benefit was conferred on the estate. Authorities make it clear that whatever benefit was conferred must also be substantial. Without finding a benefit, the court is not permitted to award fees. *Matter of Estate of Niehenke*, 117 Wash.2d 631, 818 P.2d 1324 (1991). *Estate of Morris*, 89 Wn. App. 431, 949 P.2d 401 (1998). And the court must consider the result was obtained and apply certain factors. *Allard v. Pacific Nat'l Bank*, 99 Wash.2d 394, 406-07, 663 P.2d 104 (1983). Relevant factors include whether litigation is indispensable to the proper trust administration; issues presented are neither immaterial nor trifling; conduct of the parties or counsel is not vexatious or litigious; and there has been no unnecessary delay or expense. *Allard, supra*. Additional authorities have set out specific factors

necessary for determining attorney fees. *Matter of Estate of Larson*, 103 Wash.2d 517, at 522, 694 P.2d 1051 (1985); *In Re Guardianship of Hallauer*, 44 Wash. App. 795, 723 P.2d 1161 (1986). The factors include the amount and nature of the services rendered, time required in performing them, diligence with which they have been executed, value of the estate, novelty and difficulty of the legal questions involved, skill and training required in handling them, good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance. And such authorities have similarly referred to the Rules of Professional Conduct at RPC 1.5(a)(1)-(8) for guidance in setting fees. Those include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly and the terms of a fee agreement between the lawyer and the client;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved in the matter on which legal services are rendered and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

It is also said that the Court cannot grant attorneys fees incurred to establish and collect fees because the beneficiary of those services is the attorney, not the estate that is involved in the controversy. *Larson* at 532-533.

As the state points out in each of these cases, the client is required to contribute a portion of his or her entitlement to the costs of care. This, in turn reduces the burden to the state. The law prohibits the state from paying the guardian's fees but pursuant to RCW 11.92.180 and WAC 388-79-030 the amount of \$175 of the client's monthly funds can be "set-aside" to pay for usual and customary guardian's fees. WAC 388-79-050. And "extraordinary fees" provided by the guardian can be additionally compensated on a further showing. Usual and customary services include acting as representative payee, managing the client's finances, preserving or disposing of property, making health care decisions, visiting the client, accessing public assistance benefits, communicating with service providers and preparing court reports. See WAC 388-79-050(4)(b)(ii). These are viewed as the essential core duties of a guardian.

However, where there are extraordinary services, the guardian can be compensated at a higher rate. Examples of extraordinary services include such things as unusually complicated property transactions, substantial interactions with adult protective services or criminal justice agencies, extensive medical services or emergency hospitalizations and litigation other than awarding fees and costs. WAC 388-79-050(4)(b)(iii).

In addition, legal services, as distinguished from guardian services, are capped by WAC at \$600 for every three year period. WAC 388-79-030.

The purpose of these rules is to make sure that Medicaid funding is not jeopardized by fees that are in excess of the funding rules. The State asserts that it expends \$150000 per year for the care of each resident and that the majority of income from federal public entitlements should be used to offset some of that expense. By a reading of the statute and WACs it is clear that the Department is entitled to make a determination of the appropriate characterization of services as usual and customary or extraordinary.

However, the Court has the power to make its own judgment on those issues. WAC 388-79-050(4)(c). It is the court's duty to insure that guardians are adequately compensated such that they will not simply withdraw and decline to provide services to those most in need of protection. In service of that duty the Washington Code permits the Court to "...determine after consideration of the facts and law that fees' and costs in excess of the amount allowed in WAC 388-79-030 are just and reasonable. The state asserts that the only remedy for the review of administrative action concerning the set aside is a review under the APA. But RCW 11.92.180 and the WACs permit the court to make an independent judgment on the question. Therefore the APA is not the exclusive remedy for review of guardian fee determinations. Furthermore, since the State has an interest in the application of public funds to guardians' fees and costs, the State has standing to appear in this proceeding to contest any fees that might be in excess of the WAC standards.

ANALYSIS

The Issue presented given these facts and principles of law is this: does the Guardian adequately demonstrate that advocacy in a general sense is compensable as a set aside out of Medicaid funds available to the individual client and did the guardian in each case provide such a benefit to the ward in particular?

The guardian seeks a fee future award out of the income of each client in the amount of \$400 per month. In support of that request he explains the work he performs as a guardian in his advocacy role. The guardian has expended advocacy efforts in such areas as patient transfer to other facilities, patient abuse litigation, opposition to facility closure, zoning, planning and Growth Management Act issues, participation in a Risk and Safety Assessment, mobilization of local agencies, opposition to closure of a pool and cafeteria and efforts to protect and maximize financial resources for his clients. In particular the Guardian has stated in its report that it has participated in chairing Friends of Fircrest meetings as well as acting as a member of Friends of Rainier, Action DD, VOR, Washington State Democrats

Disabilities Issues Caucus (WSDIC), WAPG, 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 concerning the interests of the incapacitated person. The guardian's activities are directed toward the preservation of clients' homes, care staff and professional staff who are familiar with the client's needs. These needs are documented in each of the guardian's reports. It is these generalized services provided by the guardian that, he asserts, constitutes the benefit conferred on the clients justifying the fee request.

Here the guardian is seeking compensation for advocacy services that have generally benefited all of the guardian's clients. As is clear from the Petition by the Guardian and the Declarations of DSHS in Response, none of the 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. Mary McNamara never used the pool while Suzanne McKenzie may have used it sometime at least 9 months before it closed, Kirby Moser used it 9 times, and David Schmidt rarely, if ever, used it. Richard Milton used the pool 7 times in the last year the pool was open. The effect of the closure of the pool on these clients was not demonstrated here. Before the cafeteria was closed there is little or no evidence that Mary Jane McNamara, Suzanne McKenzie, Kirby Moser, David Schmidt or Richard Milton ever used that facility. A few are not ambulatory and have been tube fed. There are vending machines available for the residents who are able to access them. Finally, no actual impairment of the clients' needs was shown by this action. Daniel Werlinger was moved during the reporting period but no evidence was offered to show that his move was detrimental in any way given that he has made the transition successfully. And any efforts to oppose closure of those facilities were unsuccessful. Finally, a review of the billing statements in each case fails to reveal any advocacy activity taken on behalf of any particular client.

As noted in the case authorities, there must be a benefit conferred on the ward in a guardianship proceeding before the Court is permitted to compensate the Guardian. Furthermore, that benefit must be substantial. Here there is no direct connection between the services provided by the guardian and the benefit to the client. 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. And the guardian acknowledges that he was unsuccessful in a number of his advocacy projects.

CONCLUSION AND DECISION

There is no benefit realized by these clients from the general advocacy activities of the Guardian. An order allowing such fees will operate as an assessment or tax on all clients to fund advocacy activities of the Guardian whether or not those services actually provide a benefit to anyone let alone the individuals involved in this case. That result is not contemplated by WAC 388-79 and is not permitted by case law governing the award of fees and costs in a guardianship. Accordingly, the Motion to Approve fees of the guardian at the rate of \$400 per month is denied. The fees permitted by the Washington Administrative

Code at the rate of \$175 per month should be approved. However, no evidence exists that the Guardian will provide extraordinary services for any of these clients in the future. Nonetheless, where the Guardian provides actual services that do not fall within the definition of "usual and customary" services provided in WAC 388-79-050 and are in fact "extraordinary services," he shall be permitted to seek reimbursement in excess of the limit set by regulation and this decision. Finally, the request for additional compensation for fees incurred to establish the right to fees is denied because such legal services benefit counsel, not the ward.

The Washington State Attorney General's Office shall prepare and present an Order consistent with this memorandum decision.

Respectfully submitted this 18th Day of December 2009.



Eric B. Watness
Court Commissioner

OFFICE RECEPTIONIST, CLERK

To: Michael Johnson
Cc: Bashford, Jonathon (ATG); Chafin, Cheryl (ATG)
Subject: RE: Guardianship of McNamara, No. ~~84676-1~~ 84746-1

Rec'd 10/20/10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Michael Johnson [mailto:hardmanjohnson@gmail.com]
Sent: Wednesday, October 20, 2010 4:29 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Bashford, Jonathon (ATG); Chafin, Cheryl (ATG)
Subject: Guardianship of McNamara, No. 84676-1

Statement of Grounds for Direct Review

Please note Appendices C through E though referenced in the Statement are not included because of page limitations.

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