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

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**No. 64144-1-I**

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**In the Matter of the  
GUARDIANSHIP OF JANETTE KNUTSON**

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**DAVID KNUTSON and SUSAN HALL, Guardians  
Appellants**

v.

**STATE OF WASHINGTON,  
Department of Social and Health Services  
Respondent.**

2010 MAR -1 PM 3:51  
FILED  
CLERK OF COURT  
JANETTE KNUTSON

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**GUARDIANS' REPLY BRIEF**

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March 1, 2010**

ORIGINAL

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The Guardians respectfully submit this Reply Brief.

In this case, the trial court abused its discretion in part because it ordered a payment of a debt that has never established or liquidated and ordered the payment of Janette Knutson's social security funds to the State's General Fund. The trial court also abused its discretion by hearing the DSHS petition after the time period for reconsideration, appeal, or a motion to vacate had long passed.

The Guardian agrees that a court having jurisdiction acts as superior guardian, and the guardian is an officer of the court. *DSHS Response Brief*, at 14; *Seattle-First National Bank v. Bromers*, 89 Wn.2d 190, 570 P.2d 1035 (1977). However, guardianship cases sound in equity and are characterized by equitable principles or standards which apply. One of those principles describes the unique relationship between the guardian and the court. The trial court as superior guardian reviews the actions of the guardian with a general deference to the guardian's course of action. *In re Rohne*, 157 Wash. 62, 74, 288 P. 269 (1930). In addition, guardianship cases have unique stages of procedure.

#### **I. Stages of Guardianship Procedure.**

DSHS raises various counter-statements about the relationship of third parties within guardian proceedings, applicability of available procedures, and finality of orders. *DSHS Response Brief*, at 9-20. In

order to fully understand these issues, and how DSHS' financial claim fits within them, it is necessary to summarize the course of a guardianship case and see how DSHS perfects a claim for financial responsibility.

Appointment - Chapter 11.88 RCW.

The first stage of procedure is the appointment process. A Petition of Guardianship is filed alleging incapacity and asking for appointment of a guardian. RCW 11.88.030. A Notice of Guardianship Proceeding is also filed and is served with the Petition. RCW 11.88.030(4). A guardian ad litem is appointed to make a report on the capacity of the alleged incapacitated person (AIP) and the suitability of the proposed guardian. RCW 11.88.090. A hearing is generally held within 60 days from the filing of the Petition. RCW 11.88.030(5). The AIP is entitled to counsel and a jury trial. RCW 11.88.045. The Court enters findings of fact and conclusions of law which includes appointment of a guardian. RCW 11.88.095. The powers or authority of a guardian may be limited in any manner the court believes appropriate. RCW 11.88.010(2). A guardian files an Oath of Guardian, and files a bond, which may be waived if assets are under \$ 3,000.00. RCW 11.88.100. Finally, letters of guardianship are issued by the Clerk's Office reflecting any limitations on the powers of the guardian of the person and/or estate. RCW 11.88.100.

During this stage of the proceedings, standing is conferred on "any

person” to file the petition. RCW 11.88.030(1). Any person may move during this stage of proceedings for protective relief to address emergencies or prevent harm or exploitation of the AIP. RCW 11.88.045(5). Any person with information bearing on the incapacity of the AIP is heard by the court.

Once appointed, a guardian exercises the civil rights of the incapacitated person (IP). RCW 11.88.005. An order appointing a guardian is a final order for purposes of appeal because it adjusts the rights of the IP vis-a-vis the powers of the guardian to exercise them.<sup>1</sup>

Modification - Chapter 11.88 RCW.

At any time, the trial court has the power to modify or terminate the guardianship appointment at any time. RCW 11.88.120. A new stage of proceedings is begun, and the powers of the guardian of the person or estate conferred in the original appointing order are modified or terminated -- usually based on changes in ability or other changing circumstances -- and a guardian may be replaced because of death.

The court “grants such relief as may be just and in the best

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<sup>1</sup> A person is deemed incapacitated and need of a guardian of the person when the individual has a substantial risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or personal safety. A person is incapacitated and need of a guardian of the estate when the individual is at significant risk of financial harm based upon the demonstrated inability to adequately manage property or financial affairs. RCW 11.88.010(1)(a), (b).

interests of the [IP].” RCW 11.88.120. “Any person” may apply to the court for an order to show cause, or just send a letter to the Clerk of Court.<sup>2</sup> RCW 11.88.120(2).

The statute is clearly concerned with modifying the powers or status of a guardian vis-à-vis the IP, and any person has standing to bring matters to the attention of the court at any time concerning those powers.

The rights of third parties or state agencies asserting financial interests of their own against the guardian of the estate are not within the scope of this statute. DSHS does not claim standing as a petitioner under this statute and no one else has petitioned to modify the guardianship or remove a guardian, but presumably the orders are final ones subject to appeal because they adjust the civil rights as between the guardian and the IP.

#### Periodic Reporting - Chapter 11.92 RCW.

After a guardian is appointed and powers conferred, the administration of the guardianship begins. Administration simply means court supervision of the IP’s estate and the person. Because guardians

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<sup>2</sup> In King County, an attorney typically files and presents in the Ex Parte Department a motion and order to show cause why the guardianship should not be modified or why the guardian should not be removed. A petition to modify or remove is also filed with supporting declarations. A show cause hearing is then ordered by the court requiring the guardian to appear or else the relief sought by the petition may be entered. The show cause hearing on the petition is held, and an order on show cause or order granting or denying relief is the result.

exercise rights of IPs (both personal and financial), they owe duties to the IP. Those duties include filing reports with the court on the status of the person and an accounting of the estate.<sup>3</sup> The Guardian in this case is both guardian of the person and the estate.

A guardian of the person does not provide direct care and is instead is a decision-maker and advocate acting on behalf of the IP. RCW 11.92.043; RCW 11.92.043(4).<sup>4</sup>

A guardian of the estate is required to file an Inventory within 90 days, and to file reports annually, biennially, or triennially on the income, expenses, and assets of the guardianship. See RCW 11.92.040(1), (2), (3). It is the duty of the guardian of the estate to protect the assets of the estate. RCW 11.92.040(4). The guardian of the estate is responsible for defending litigation when litigation is commenced against the IP. RCW 11.92.060.<sup>5</sup>

The purpose of accounting and reporting by the guardian of the

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<sup>3</sup> A guardian's individual capacity is in contrast to his or her fiduciary capacity.

<sup>4</sup> The guardian of the person is responsible for coordinating and managing care to meet the physical, mental, emotional, and social needs of the incapacitated person. This includes physical health and safety, nutrition, housing, and medical care.

A guardian of the person is required to file a Personal Care Plan within 90 days of appointment and file status reports annually, or at the time of the accounting of the guardian of the estate. RCW 11.92.043(1). The Personal Care Plan includes an assessment of needs and the ability to perform activities of daily living, and the guardian's specific plan for meeting the incapacitated person's identified and emerging personal care needs. RCW 11.92.043(1).

<sup>5</sup> In this case, DSHS commenced litigation against the IP in the guardianship case and did not initiate a separate legal action. The Guardian requested and was granted permission to appeal in this case.

estate is to settle the rights *between the guardian and IP*, not the guardianship estate and third parties or state agencies. Orders approving periodic reporting and accounting are not final orders as between the guardian and the IP unless and until an intermediate account is approved pursuant to RCW 11.92.050, or a final account is approved pursuant to RCW 11.92.053. Both those statutes specifically state the procedural result in the ordinary course of proceeding is a final order subject to appeal.

However, as to third parties, the disclosure requirements in the statute are quite extensive. RCW 11.92.040(2). They provide constructive notice by filing with the court such that persons may contest the accounting or report. Interested parties who claim an interest in these stages of proceedings may request advance notice of proceedings. RCW 11.92.150. DSHS is especially entitled to receive all paperwork filed with the Court at this stage of the proceedings when there is also a request for guardian and attorney fees. Notice is provided precisely because of its financial interest in the social security benefits. See generally Chapter 388-79 WAC.

DSHS was a notice party to the 2008 Order. It is conceded that DSHS was given notice of the 2008 Order and did not appear to contest the accounting or the report or the Proposed Order which authorized -- but

did not require -- the guardian to donate social security funds to advocacy organizations.

The 2008 Order did not adjust rights as between the IP and the Guardian. Rather, the 2008 Order concluded the rights (after notice and opportunity to be heard) as between DSHS and the guardianship estate and was a final order at that stage of the proceedings. *In re Kruse's Estate*, 52 Wn.2d 342 (1958). The only appropriate remedy to alter or amend the that judgment was a motion for reconsideration under CR 59, appeal, or a motion to vacate. DSHS is bound by the Order until the commencement of another stage of proceedings.

Petition for Maintenance - RCW 11.92.043(6).

Guardianships afford another stage of procedure to ensure payment of support and maintenance to providers. The statute specifically provides a third party with standing to file and serve a petition for order of maintenance. In particular, the agency having custody of the IP may file and serve a petition for an order of maintenance seeking an order that the guardian of the estate pay maintenance and support. RCW 11.92.040(6). See also RCW 11.92.140 (court may authorize guardian to act or apply funds so long as they are not "required for the [IP's] own maintenance and

support”).<sup>6</sup>

DSHS ostensibly has standing under this statute to the extent it can prove the payment will be expended for care and maintenance. The Guardian relies on the specific language providing, in relevant part, that the court may enter an order “directing the guardian . . . of the estate . . . to apply an amount . . . as the court may direct, *to be expended in the care, maintenance, and education of the [IP] and of his or her dependents.*” RCW 11.92.040(6) (emphasis added). As explained in the Opening Brief, the funds, as a factual matter, are “not expended” in the care, maintenance, and education of the IP. They are not paid to Fircrest School, the Medicaid provider, but rather to the State General Fund, where there is no benefit to the IP.

The courts are not collection agencies for the State’s General Fund. *Discipline of Hammermeister*, 139 Wn.2d 211, 234 (1999) (Talmadge, J. concurring, “A judge’s primary function is the administration of justice, not the collection of fines.”). Funds diverted to the General Fund by court

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<sup>6</sup> RCW 11.92.140 affirms the court’s powers to authorize guardians to engage in estate planning, including but not limited to gifting, the creation of special needs trusts, and medically needy spend down of assets so as to qualify for Medicaid.

The Guardian rejects the DSHS effort to denigrate the guardian’s donation of the IP’s social security funds to advocacy organizations by characterizing them as mere gifts or donations to charity. The Guardian named specific advocacy organizations in the Order which are directly related to the IP’s residential placement.

order have no discernable benefit at all to the IP (much less a direct one).<sup>7</sup> The Medicaid program is not intended to put the State on general relief at the expense of the poorest recipients.<sup>8</sup>

Claim for Financial Responsibility - RCW 11.92.035.

As a holder of a financial claim, DSHS may present claims to the guardian of the estate for payment or may bring a civil action. RCW 11.92.035(1). This procedure is the one most closely matching the facts in this case. DSHS perfects its claim by serving the guardian by summons or certified mail a notice and finding, whereupon financial responsibility is established after the passage of a specific time period absent some objection. RCW 43.20B.410-.455. Once established, financial responsibility is prospective only. RCW 43.20B.440. Increases in charges must be established in the same manner. RCW 43.20B.435. Guardians are entitled to a statement of costs. RCW 43.20B.410-.455.

A guardian of the estate is not individually responsible for payment of expenses or liabilities of the estate (except under circumstances not relevant here). RCW 11.92.035(1). Claims -- including financial claims like those advanced here -- are payable from the guardianship estate. *Id.*

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<sup>7</sup> It is hard to imagine a nursing home provider coming to court and asking that charges it has assessed but not collected be paid directly to the General Fund.

<sup>8</sup> DSHS, as State Medicaid Agency, cannot condition eligibility for services upon payment of financial responsibility. 42 U.S.C. § 1396a(a)(17)(d).

Still, this claims procedure was never followed. Any claim for financial responsibility remains unliquidated and not established. Yet under these circumstances the trial court granted the relief sought by DSHS which in substance compels the Guardian to pay social security benefits to the State General Fund.<sup>9</sup>

In conclusion, the trial court abused its discretion in part because it ordered a payment of a debt that has never established or liquidated.

## **II. Social Security Act & Cash Benefits: Titles II, XVI and XIX.**

### Social Security Act, Title II (OASDI).

Title II provides for Old Age, Survivor's & Disability Insurance (OASDI) in 42 U.S.C. §§ 401 et seq. It is a categorical entitlement with the purpose to provide funds for support <sup>of those</sup> who have ceased working and who earned the entitlement by making contributions. *Social Security Bd. v. Nierotko*, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946). Janette Knutson receives Title II social security benefits. Residents of RHCs are

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<sup>9</sup> The trial court's order adjusts the interests of the guardianship estate and those of DSHS in two distinct ways.

First, it alters the relationship between the Guardian of the Person and DSHS as State Medicaid Agency by prohibiting the use of social security funds for advocacy organizations by eliminating effective advocacy for the IP and immunizing the State from advocacy with which DSHS has a fundamental disagreement. That point is not pressed here.

Second, it alters the relationship between the Guardian of the Estate and Fircrest School as Medicaid provider by ordering the payment of the social security benefits to be paid (not to the provider, but rather) to the General Fund. It does not serve the best interests of the IP to permit DSHS with a self-serving conflict of interest to obtain an order directing payment of funds from social security benefits.

entitled to a Title II social security check as a disabled child of a worker who is a parent who is retired, disabled or deceased.<sup>10</sup>

Social Security Act, Title XVI (SSI). Title XVI provides for Supplemental Security Income (SSI), 42 U.S.C. § 1381. SSI is a “needs based” entitlement. Its purpose is to assure a minimum level of income for people who are 65 or older, blind, or disabled and who do not have sufficient income or resources to maintain a standard of living at the established federal minimum income level. 20 C.F.R. § 416.110. Janette does not receive Title XVI cash benefits because they are reduced by the amount of the Title II benefits.<sup>11</sup>

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<sup>10</sup> The parent must be entitled to OASDI, 42 U.S.C. § 402(d)(1), the child’s disability must have started before age 19, 42 U.S.C. § 402(d)(1)(B)(ii), and, the child must have been dependent on parents, 42 U.S.C. § 402(d)(1)(C). The entitlement is generally based on a requirement of “40 quarters” of employment by a parent. 42 U.S.C. § 414(a)(2).

<sup>11</sup> Residents are entitled to cash benefits if they are an “eligible individual”. 42 U.S.C. § 1382(c)(1). An “eligible individual” must meet all requirements under Title XVI, 20 C.F.R. § 416.120(c)(13). Inmates of “public institutions” are ineligible. 42 U.S.C. § 1382(e)(1)(A). Residents of nursing facilities or intermediate care facilities for the mentally retarded (ICF/MR) that are receiving more than 50% Medicaid matching funds are an exception to this ineligibility. 42 U.S.C. § 1382(e)(1)(B). The cash benefit amount is adjusted annually by the SSA and posted on their website [www.ssa.gov/OACT/COLA/SSIamts.html](http://www.ssa.gov/OACT/COLA/SSIamts.html); 42 U.S.C. § 1382f. However, residents of medical care facilities (including NF and ICF/MR) where more than 50% Medicaid matching funds are applied to cost of care are subject to reduced SSI cash benefits of only \$360 per year, or \$30.00 per month. 42 U.S.C. § 1382(e)(1)(B)(i); 20 C.F.R. § 416.414(a). This cash benefit may be increased by state supplementary payment. 42 U.S.C. § 1382e. Some residents of NF and ICF/MR receive these SSI reduced cash benefits only.

SSI cash benefit recipients must apply for other public cash benefits listed in 42 U.S.C. § 1382a(a)(2)(B), which include OASDI, VA, railroad retirement, and earned income tax credits, 42 U.S.C. § 1382(e)(2). Income from these other cash benefits -- including Title II -- causes a further SSI cash benefit reduction to the extent the income is non-excluded income under income and resource eligibility rules. 42 U.S.C. §

Social Security Act - Title XIX (Medicaid).

The Medicaid program, 42 U.S.C. § § 1396 et seq, provides medical assistance based on need. Its purpose is to pay the costs of medical care for persons (including those with disability) whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. § 1396. The Medicaid program does not provide for cash benefits, only medical assistance.

**III. Applicability of 42 U.S.C. § 407(a).**

First, DSHS argues there is an exception to 42 U.S.C. § 407(a) that applies when the representative payee is also the guardian of the estate either because the representative payee is also the guardian of the estate, or because the trial court order is directed to the guardian and not the representative payee, or because the trial court order is not payment of a debt. *DSHS Response Brief*, at 20-29.

None of those arguments create an exception to 42 U.S.C. § 407(a). Analysis is whether or not the process used is “other legal process.” DSHS characterizes its process as used as “a motion to show cause” and a “motion to direct payment”. *DSHS Response Brief*, at 9.

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1382(e)(1)(B); 42 U.S.C. § 1382(c)(1); 20 C.F.R. § 416.420; POMS § SI 00810.300(C)(1), <http://policy.ssa.gov/poms.nsf/partlist!OpenView>.

Title II cash benefits will necessarily exceed \$ 360.00 per year or \$ 30.00. For Janette, or any resident, the entitlement to Title II cash benefits usually reduces SSI cash benefits to Zero.

There is no more compelling example of legal process than an order the effect of which is to pass control of property of one person (Janette Knutson) to another (the State General Fund). If anything, it is tantamount to a prejudgment attachment because the debt is not liquidated or proven.

Appointing a guardian of the estate and court administration of the estate does not create any independent duties over the expenditure of social security funds by the guardian as representative payee, nor does it transform those funds into non-social security funds.<sup>12</sup> Similarly, directing the order to the guardian of the estate rather than the representative payee, or effectively ordering the funds be paid into the General Fund pursuant to RCW 11.92.040(6), does not transform the funds into non-social security benefits.

Second, DSHS in effect argues an exception to 42 U.S.C. § 407(a) exists because of federal Medicaid law or because the IP owes financial responsibility to Fircrest School as Medicaid provider or because of Medicaid requirements imposed on DSHS as State Medicaid Agency. *DSHS Brief in Response*, at 29-33.

Third, DSHS in effect argues an exception to 42 U.S.C. § 407(a) exists by virtue of the Social Security Act's appointment and control of

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<sup>12</sup> This case is and should be limited on its facts to a private representative payee of social security benefits who is also appointed full guardian of the estate with no other substantial assets in the guardianship estate.

representative payees and its determination a representative payee is misusing funds. *DSHS Brief in Response*, at 22-24, 33-35.

However, no federal Medicaid statute, and no other part of 42 U.S.C. § 407, expressly creates an exception to 42 U.S.C. § 407(a), so there is no implication such an exception is created. 42 U.S.C. § 407(b).

There is no exception to 42 U.S.C. § 407(a) here. The order is “legal process” precisely because it orders the payment of social security benefits into the General Fund in a much more expansive manner than a garnishment, attachment, levy or execution which would require either proof of debt or a judgment prior to employing legal process.

DSHS states that 42 U.S.C. § 407(a) does not treat government entities differently from other persons. *DSHS Response Brief*, at 21. However, courts have treated 42 U.S.C. § 407(a) differently when States are the representative payee. *Washington State Dept. of Soc. & Health Svcs. v. Keffleler*, 537 U.S. 371, 123 S.Ct. 1017 (2003) is relevant here only for its emphasis on analysis of “legal process” and its statement of the general rule as set forth in the Opening Brief.<sup>13</sup> With regard to the

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<sup>13</sup> DSHS is not representative payee in this case and there are state law limitations when DSHS is both a Medicaid provider and representative payee. As a Medicaid provider, Fircrest School is required under federal law to follow state law. State regulations prohibit payment of charges for Medicaid services from resident trust account funds maintained by the State. WAC 388-835-0350. When a guardian of the estate is appointed, state law prohibits the expenditure of financial responsibility from such resident trust account. RCW 71A.20.100.

order of payment, this case only raises the question whether the court order is legal process because it orders the payment of social security benefits to the State General Fund.

#### **IV. Attorney Fees.**

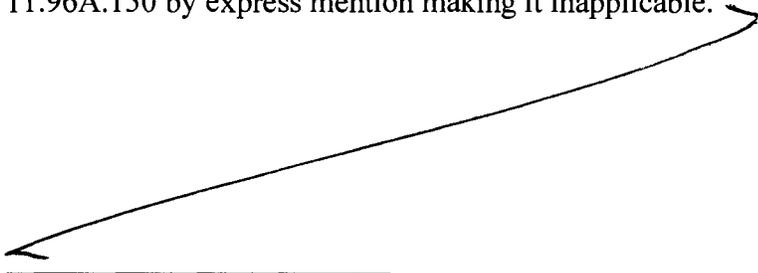
DSHS asserts attorney fees should not be awarded to the Guardians. *DSHS Response Brief*, at 35-36. However, the applicability of 42 U.S.C. § 407(a) is clear in the context presented here and case law is settled. Most of the unsettled case law development concerns the dual role of a state agency provider (creditor) and representative payee (creditor). None of that law is implicated here. This case concerns the straight forward application of 42 U.S.C. § 407(a) to a court ordered payment of social security funds to the State General Fund to pay an unliquidated and unproven debt.

DSHS asserted novel exceptions to 42 U.S.C. § 407(a) which caused the Guardian to incur significant attorney fees and costs associated with this case. DSHS also asserted an extremely broad rule that it may come in at any time to amend a prior court order, even when it was given notice and did not appear to object. Accordingly, the Guardian seeks attorney fees and costs below and on appeal pursuant to RCW 11.96A.150(1) be paid directly from DSHS.

As discussed earlier, the Guardian has a duty to defend against

claims against the estate. Because the guardian acts on behalf of the IP as if the IP, liabilities and claims, as well as compensation of guardians and attorneys are ordinarily paid from the estate of the IP. RCW 11.92.035(1); RCW 11.96A.150.

Furthermore, preference for payment is given to guardian fees, attorney fees, and costs for defending against the claim. RCW 11.92.035(1). The attorneys fees and expenses which DSHS has caused to be incurred by the Guardian far exceed the amount of any claim it could possibly recover, and it would be unfair to charge the estate and not DSHS for the fees and costs incurred by the Guardian.<sup>14</sup> RCW 11.96A.150. The rule in *Estate of D'Agosto*, 134 Wn.App. 390, 139 P.3d 1125 (2006) applies only when attorney fees are sought from the guardianship estate, not when the fees are sought to be paid by the opposing party pursuant to RCW 11.96A.150, but if applied here it militates in favor of an award of fees to the Guardian. No other statute limits the effect of RCW 11.96A.150 by express mention making it inapplicable.



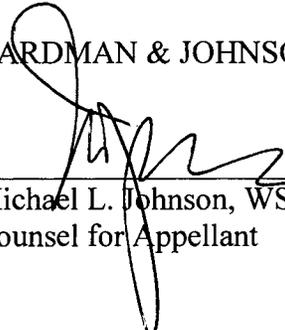
<sup>14</sup> Given DSHS' inclination for litigation, and the limited funds available in the estate to defend against its claim, incurred attorney fees and costs in this matter will exceed the value of the guardianship estate indefinitely.

The Appellants request the relief requested in the Opening Brief  
and here.

March 1, 2010

Respectfully submitted,

HARDMAN & JOHNSON



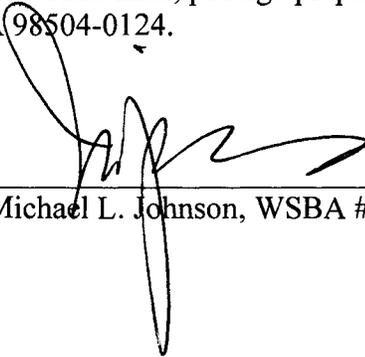
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Michael L. Johnson, WSBA # 28172  
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing Reply  
Brief on Jonathon Bashford, Assistant Attorney General, by email/PDF  
pursuant to agreement and by first class mail, postage prepaid addressed to  
P.O. Box 40124, Olympia, WA 98504-0124.

March 1, 2010



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