

66436-1

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Case No. 66436-1-1

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

**CAROLINE KLINE GALLAND HOME,**

**APPELLANT**

**V.**

**DSHS,**

**RESPONDENT**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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**APPELLANT REPLY BRIEF**

**SUBMITTED BY**

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Administrator. The crux of the dispute is framed by the argument presented by DSHS that its broad authority to administer Washington State Medicaid program includes specific authority to determine on a case by case basis whether it will allow a deduction for petitioner's attorney fees for any particular DSHS client. This position by DSHS is explicit in the department's response to the observation by Kline Galland that DSHS has presented shifting legal theories and inconsistent interpretations of the Medicaid regulations under review.

The most recent interpretation advanced by DSHS is set forth in the Response Brief on page 29 in footnote 11, which reads in its entirety as follows:

<sup>11</sup> DSHS argued at the superior court commissioner level that a guardianship petitioner's attorney fees under RCW 11.96A.150 do not qualify as a deduction from Medicaid participation. CP at 38-40. DSHS now agrees that fees awarded under RCW 11.96A.150 may, where directly related to establishing a guardianship, constitute "guardianship fees and administrative costs" pursuant to WAC 388-513-1380. However, DSHS maintains that it, not the guardianship court, is responsible for determining whether or not attorney fees are directly related to establishing a guardianship, and therefore deductible, in any particular case. *See* discussion *infra* at 23-28.

Appellant's initial brief reviewed both federal and state statutory schemes which establish special protections which attach to Social Security benefits and their application to the personal needs of the

beneficiary before their application to pay for costs of care. In substantial regard, this reply brief identifies doctrines involving separation of powers as a double edged sword and aspects of superior court authority over both the guardianship proceeding and ongoing oversight over the administration of the estate and person by the appointed guardian.

## **II. DSHS STATEMENT OF ISSUES**

The Statement of Issues presented by DSHS in paragraph 4 implies that Kline Galland has challenged the validity of an agency rule. Kline Galland has challenged discretionary agency action associated with an appearance and Objection filed in a guardianship proceeding for a DSHS client without a statement of statutory authority that establishes agency standing

## **III. DSHS STATEMENT OF THE CASE**

DSHS intersperses argument with its statement of the case. This is most apparent on pages 9 and 10 of the Response Brief where DSHS characterizes the use of the Social Security benefits for personal needs by a DSHS client as a Medicaid subsidy. The underlying rationale advanced by DSHS across virtually every aspect of the Response Brief asserts that once a person qualifies for Medicaid assistance that DSHS owns that person and owns their resources. Thus, DSHS has stated in its Footnote 11 construct that DSHS has exclusive jurisdiction to determine whether a

guardian is needed in any particular case and whether Medicaid resources are available to ‘subsidize’ the costs of a judicial proceeding associated with protection of a person’s constitutional rights as a citizen. There is no Medicaid subsidy as DSHS client have an absolute ownership interest in their Title II social security benefits.<sup>1</sup>

#### IV. ARGUMENT

A state is not required to participate in Medicaid, but once it chooses to do so, it must create a plan that conforms to the requirements of the Medicaid statute and the federal Medicaid regulations." *Department of Health Servs. v. Secretary of Health & Human Servs.*, 823 F.2d 323, 325 (9th Cir.1987); *Melvin Peura v. Mala, State of Alaska*, 977 F.2d 484, 485-486 (9th Cir. 1992). Washington State has acquired from the Administrator of the Medicaid program confirmation that cost and expenses associated with the state’s statutory scheme for guardianship matters involving its citizens are properly characterized as a personal needs expense that qualifies for deduction prior to the calculation of participation. The effort by DSHS to insert a layer of agency

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Appellant Brief at 44, footnote 10 references an agency obligation to acquire federal waivers or state law amendments pursuant to former RCW43.20A.860. This provision was repealed by section 121(6) Second Engrossed Second Substitute House Bill 1738, Chapter 15, Laws of 2011, 62nd Legislature, 2011 1st Special Session.

administrative review to determine, which if any DSHS clients, should receive a Medicaid subsidy to pay for the costs of the proceeding and ongoing administration of the guardianship usurps the primary authority of the superior court to determine whether appointment of a guardian is in the best interests of any particular citizen.

**A. STANDARD OF REVIEW IS DE NOVO**

Review of an agency interpretation of federal law is de novo under an "error of law" standard. *Samantha A. v. Department Of Social And Health Services*, No. 84325-2, Supreme Court of Washington, May 26, 2011; *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000)).

**B. DSHS HAS NOT IDENTIFIED STATUTORY AUTHORITY TO INTERVENE IN GUARDIANSHIP PROCEEDING.**

A primary argument presented by Kline Galland remains that state agencies are creatures of statute and that DSHS must identify the specific statutory authority to appear and participate in a guardianship proceeding. Again, following appointment a guardian is required to provide notice to DSHS pursuant to RCW 11.92.150, that the guardian has scheduled a hearing seeking court approval for payment of guardian fees and administrative costs from the income or estate of a DSHS client. Pursuant to RCW 11.92.180 and the WAC 388-79-020, *Definitions*, and WAC 388-

79-030 Maximum Fee Provisions, the court is authorized to order payments not to exceed \$175 per month for guardian fees, and payment of administrative costs incurred by the guardian not to exceed \$700 for the establishment of the guardianship, and up to \$600 in additional administrative costs over an ensuing three year period. These are but threshold authorizations. Should the guardian confront a complex medical situation, convoluted property transactions or perhaps aspects of abuse warranting litigation and protective orders under the Vulnerable Adult statute, then extraordinary fees and administrative costs associated with establishing or administering the guardianship may be submitted for payment. WAC 388-79-050 (b) (i), (ii) and (iii) identify a minimum of thirteen factors that DSHS will apply to review the request for additional fees and administrative costs. At a hearing, WAC 388-79-050(c) states that the court shall review the facts and law to determine whether excess fees and costs are just and reasonable. DSHS is then directed to reduce the client's participation amount in accordance with the order approving the fees and costs allowed.

**1. DSHS has a narrowly defined authority to regulate compensation paid by a DSHS client for guardian fees and administrative costs.**

Where the legislature sought to assign a role for DSHS it provided statutory authority, specifically, RCW 11.92.180 and the corresponding

notice provision, RCW 11.92.150. The statutory standing of DSHS as a real party in interest commences only following appointment of a guardian and the administration of the guardianship within chapter 11.92 RCW.

Under a theory of standing based on a broad authority to administer the state's Medicaid program advanced in the Response Brief submitted by DSHS, consider the situation where a Medicaid qualified individual, thus a DSHS client, appears in family court with a property settlement agreement that includes an allocation of pension income as an offset for social security benefits retained by the beneficiary/DSHS client. Although the pension income is no longer available to pay for participation, DSHS does not have standing to appear and challenge the property settlement agreement because the transfer of the pension is 'effectively' a Medicaid 'subsidy' and thus subject to review and approval by DSHS. The analogy with the matter before the court is accurate. Both the allocation of the pension and an order identifying petitioner's attorney fees as a proper obligation of the estate may well reduce funds available to contribute toward participation. However, the broad authority assigned DSHS (now the Health Care Authority) to administer the Medicaid program does not include carte blanche standing to appear in every judicial proceeding involving a DSHS client to improperly assert dominion over their client's estate and introduce agency budgetary considerations that are wholly

a hearing will determine fees and excess fees that will be applied as a deduction from participation. WAC 388-79-050(c), reads in its entirety,

(c) Should the court determine after consideration of the facts and law that fees and costs in excess of the amounts allowed in WAC 388-79-030 are just and reasonable and should be allowed, then the department will adjust the client's current participation to reflect the amounts allowed upon receipt by the department of the court order setting the monthly amounts.

The rule making authority assigned to DSHS has resulted in threshold approvals established in WAC 388-79-030 for monthly guardian fees not to exceed \$175, and administrative costs, incurred by the guardian, which may not exceed \$700 to establish the guardianship and an addition \$600 in costs over the ensuing three year period. There is no aspect of the statutory scheme which directs that petitioner's attorney fees, as authorized pursuant to RCW 11.96A.150, should be subject to a cumulative limit of \$700 that will applied to fee requests submitted both by counsel retained by the guardian and counsel retained by petitioner. The definitions promulgated within WAC 388-79-020 define 'administrative costs' as expenses incurred by the guardian. There is no reference or linkage to the court's separate determinations of appropriate fees pursuant to RCW 11.96A.150, nor is there any linkage or reference to DSHS authority to regulate or constrain the court's award of fees and costs submitted by petitioner's counsel.

**1. Appellant has not challenged validity of DSHS regulation.**

The argument developed by DSHS Response Brief at pages 23-28 describes the agency's perspective on its exclusive role to independently determine whether proposed fees provide a direct benefit in a guardianship proceeding for a DSHS client, limitations on the equitable powers of a guardianship court and arguments that Kline Galland must exclusively seek relief available through a claim initially processed under the Administrative Procedures Act (APA), chapter 34.05 RCW.

Appellant's initial brief acknowledged that DSHS has specific statutory authority whereby DSHS properly promulgated regulations which limit monthly guardian fees and administrative costs incurred by the guardian. However these regulations have no application, nor do they serve as any constraint over superior court jurisdiction to award reimbursement of petitioner's attorney fees from the estate or income of an incapacitated person, irrespective of whether the individual is a DSHS client or not.

**2. APA provides for direct judicial review when discretionary agency action exceeds agency authority or is arbitrary and capricious.**

As discussed in Appellant's Brief, the judicial review of agency action requested by Kline Galland is presented pursuant to RCW 34.05.570 (4)(c) which provides judicial relief for discretionary agency action that either is

(ii) outside the scope of the agency jurisdiction under or is (iii). arbitrary and capricious. The statutory scheme of the guardianship provisions of chapter 11.88 RCW assign encourage private parties such as a care provider like Caroline Kline Galland Home to bring before the court individuals exhibiting aspect of incapacity, who would benefit from appointment of a guardian. The efforts to intervene by DSHS and assert direct control over the personal resources of DSHS clients has no statutory foundation.

**D. STANDARD OF REVIEW AND SHIFTING LEGAL THEORIES DO NOT SUPPORT DEFERENCE TO DSHS INTERPRETATION OF RELEVANT AUTHORITY.**

In significant regard, Kline Galland agrees with the analysis presented by DSHS in its Response Brief at 41-44 which describes the inherent conflict when a skilled nursing facility, which has been appointed as the Rep Payee, is confronted by a Faustian choice to apply funds either for payments toward the cost of care or presentation of guardianship petition requesting appointment of a guardian. with the ability to provide informed medical consent along with other personal care, residency and financial decisions. Moreover, as DSHS correctly noted judicial decision from other jurisdictions are all over the map in the approval or rejection of interpretations whether guardian fees should properly be allowed as a personal needs deduction, a medical necessity deduction or denied. See

citation summary in Response Brief at 8. However Washington's State Medicaid Plan confirms that guardianship expenses are properly characterized as a personal needs expense. The significant question is whether DSHS can assert a constrained interpretation of the deduction which strips the superior court of an essential function to equitably allocate fees and costs from any party and to any party across every economic strata of Washington state, as permitted pursuant to RCW 11.96A.150.

**1. Personal need expenses determined by Representative Payee and judicial review.**

Kline Galland also agrees with the analysis by DSHS that under the current state of judicial rulings that an award of petitioner's attorney fees by the guardianship court primarily has the utility of protecting the interests of the AIP through the court's discretionary and equitable review of the hourly rate, hours of service and scope of work performed by petitioner's counsel on behalf of a DSHS client. In those situations where Social Security payments are the exclusive resource available for payment of fees, a Rep Payee retains the discretion to make payments against the court order obligation as the anti-attachment provision of 42 USC §407(a) would preclude reducing the order to judgment for collection through attachment, garnishment or other judicial proceedings.

**2. Federal standards properly define the ownership interest of a beneficiary in a Social Security entitlement.**

An analysis of federal statutory and regulatory provisions, and judicial precedents point to specific directives that authorize expenditures and deductions based on the discretion retained by Representative Payee, or a court appointed guardian with superior court oversight. Federal standards provide the proper definition of ownership interest in Social Security benefits: specifically (Underline added.)

*20 CFR § 404.2040. Use of benefit payments*

*(b) Institutional care. If a beneficiary is receiving care in a Federal, State, or private institution because of mental or physical incapacity, current maintenance includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution.*

Medicaid regulations provide for a corresponding personal needs priority. The federal Medicaid definition for an allowable deduction for personal needs is expansive in sub section 42 CFR 435.725(c)(1),(underline added).

*(c) Required deductions. In reducing its payment to the institution, the agency must deduct the following amounts, in the following order, from the individual's total income, as determined under paragraph (e) of this section. . . .*

*(1) Personal needs allowance. A personal needs allowance that is reasonable in amount for clothing and other personal needs of*

*the individual while in the institution. . . .*

The permissible deduction is for a category defined as “other personal needs;” it is not a specific list of permissible deductions.

The expansive scope of permissible expenditures as a personal needs allowance is also apparent in the Washington State Medicaid plan which establishes Federal approval to deduct both guardianship and attorney service expenses as a Personal Needs Allowance. Published for public access at [hrsa.dshs.wa.gov/medicaidsp](https://hrsa.dshs.wa.gov/medicaidsp). The relevant section of the State Medicaid Plan, specifically Attachment 2.6-A, pg 9, in the paragraph entitled ‘Personal Need Allowance – Nursing Facility Residents With Higher Needs’, reads as follows:

*A personal needs allowance (PNA) is allowed for nursing facility residents who require guardianship and/or attorney service.*

In support of the restrictions on payment of petitioner’s attorney fees DSHS references a Ninth Circuit opinion, *Peura by Herman V. Mala*, 977 F.2d 484 (9<sup>th</sup> Cir. 1992) where the court upheld post-eligibility calculations where the deduction for child support payments was less than the full amount of support payments ordered by the state court. See Response Brief at 35-37. However, the discussion by DSHS fails to mention that the limitation on the child support deduction was based on Alaska state agency consultations with the United States Department of

Health and Human Services and a determination that Peura's child support obligations undisputedly fell within the definition of a 'categorically needy' subgroup and a specific 42 C.F.R. § 435.725(c)(3) limitation that adopted maximum need standards for families of the same size. *Peura, infra* at 486 and *footnote 2* at 492. The specific statutory limitations of Peura are quite different from the specific list of deductions in Washington's regulations and Medicaid State Plan, where DSHAS notes "CMS's approval of those deductions, implies that there are no deductions allowed beyond those that are specified." Response Brief at 35 (underline added). Recollect that the reference to specific sums identified in the State Medicaid Plan of \$175 per month in guardian fees, and administrative costs of \$700 to establish a guardianship and \$600 over the ensuing three years, mirror the language and amounts that are subject to direct review and adjustment by the superior court pursuant to WAC 388-79-050(c). Thus CMS approval of the State Medicaid Plan which characterizes 'guardian and/or attorney services' as a personal needs allowance is properly interpreted as a categorical approval of the deduction not just the specific dollar amounts referenced.

Review of an agency interpretation of federal law is de novo under an "error of law" standard. *Samantha A. v. Department Of Social And Health Services*, No. 84325-2, Supreme Court of Washington, May 26, 2011;

*Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000)). The independent statutory authority of the superior court to award attorney fees pursuant to RCW 11.96A.150 is not subject to DSHS regulatory oversight. Moreover it is an inappropriate extension of DSHS authority too either negotiate with CMS, or now assert an interpretation of the State Medicaid Plan that removes from the equitable and statutory jurisdiction of the superior court. Federal standards as fully developed in Appellant's Brief have identified common definitions of personal need expenditures across regulations and guidance statements prepared by the administrators of federal social security and Medicaid programs. An interpretation of the State Medicaid Plan definition of a personal needs allowance must be consistent and incorporate the federal definitions.

**E. MULTIPLE STANDARDS SUPPORT PAYMENT OF PETITIONER'S INITIAL AND SUPPLEMENTAL ATTORNEY FEES**

Appellant's argument and request for attorney fees at both the trial level and on appeal is reiterated from Appellant's Brief.

**V. CONCLUSION**

The independent statutory authority of the superior court to award attorney fees pursuant to RCW 11.96A.150 is not subject to DSHS

regulatory oversight. Nor can DSHS enter into an understanding with the Center for Medicare and Medicaid Services fundamental ownership rights in the beneficial interest of Social Security resources such that DSHS has of DSHS clients in social security benefits such that access to the judicial system and equitable powers of a guardianship court was wholly dependent on the largess of an outside party. DSHS had no statutory authority to appear and assert that an agency rule regulating administrative costs incurred by the guardian to establishes a cumulative limit of \$700 that must be split between counsel retained by the guardian and counsel retained by the petitioner for services associated with establishing a guardianship.

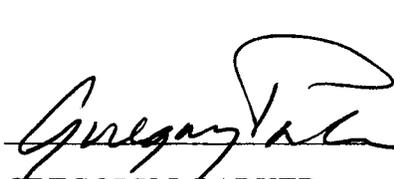
Again, at its core Kline Galland Home seeks a ruling that the dignity and preservation of personal rights for the aged, infirm, and disabled, who happen to be clients of DSHS, does not warrant creation of a separate economic tier which restricts access to the full scope of the guardianship statute. Moreover, Superior Court oversight of the affairs and best interests of all citizens, including those receiving Medicaid benefits, also includes jurisdiction over the Social Security income sufficient for the Court to authorize payments that provide a beneficiary access to the judicial system.

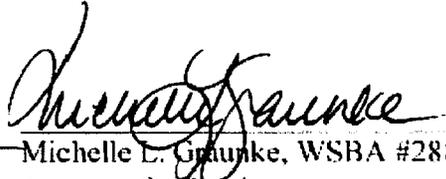
Respectfully submitted this 12<sup>th</sup> day of September, 2011.

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Again, at its core Kline Galland Home seeks a ruling that the dignity and preservation of personal rights for the aged, infirm, and disabled, who happen to be clients of DSHS, does not warrant creation of a separate economic tier which restricts access to the full scope of the guardianship statute. Moreover, Superior Court oversight of the affairs and best interests of all citizens, including those receiving Medicaid benefits, also includes jurisdiction over the Social Security income sufficient for the Court to authorize payments that provide a beneficiary access to the judicial system.

Respectfully submitted this 12<sup>th</sup> day of September, 2011.

  
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