

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,

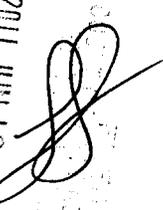
RESPONDENT

APPELLANT'S BRIEF

SUBMITTED BY:

Gregory J. Parker
WSBA No. 9368
4616 - 25TH Ave., N.E., MS 419
Seattle, WA 98105
(206) 729-2714
gpjd@earthlink.net

Michelle L. Graunke
WSBA No. 28840
719 Second Ave., Suite 104
Seattle, WA 98104
(206) 652-4310
michelle@michellegraunke.com

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I. INTRODUCTION

This appeal challenges an effort by the Department of Social and Health Services (“DSHS”) to restrict the presentation of guardianship proceedings on behalf of Medicaid qualified individuals who are DSHS clients. The legal issues under review present two fundamental questions: (1) whether individuals receiving Medicaid assistance in Washington State have either assigned their Social Security income to DSHS, or transferred for exclusive regulation by DSHS, all control over expenditures and deductions from income, and (2) whether DSHS can create a second, lower tier of economic citizenship that requires separate pleading requirements, mandatory petitioner funding of the proceeding, and DSHS administrative oversight and approval over presentation of guardianship matters filed on behalf of DSHS clients.

The appeal arrives in the context of a request for reimbursement of attorney fees and costs when the appellant Caroline Kline Galland Home (“Kline Galland”), a skilled nursing facility, filed a petition for guardianship on behalf of a resident, Mr. Rick Leavitt, who receives Medicaid benefits. Chapter 11.88 RCW, the Washington State guardianship statute, identifies the central role of private parties, i.e., any person or entity, to file for a guardianship on behalf of an alleged incapacitated person (“AIP”). A request for reimbursement of \$1,740.65 in

petitioner's attorney fees and costs sought to allocate the expense of the proceeding to the estate of Mr. Leavitt, who benefited from appointment of a guardian.

DSHS appeared and filed an Objection asserting that DSHS Medicaid regulations prohibit the award of petitioner's fees from the income of Mr. Leavitt. Comprehensive pleadings and briefs framed oral argument first presented to Commissioner Eric Watness, presiding over the daily King County Ex Parte/Guardianship calendar. A succinct statement of the dispute is reflected in the summary provided by Commissioner Watness in a Memorandum Decision (CP 100), which was later reduced to Order:

This would have been a routine guardianship matter but for the request for payment of petitioner's attorneys fees and the necessary involvement of DSHS in that question.

The Commissioner rejected the categorical prohibition of petitioner's fees sought by DSHS, and awarded \$700 based on DSHS regulations limiting administrative fees a guardian may be paid.¹ Although commendable as a compromise effort, the Commissioner's introduction of a DSHS regulatory limit over petitioner's legal fees establish *de facto* DSHS control over which, if any, DSHS client requires appointment of a guardian. It is an unprecedented expansion of DSHS authority over the

¹ A Motion for Revision argued before Superior Court Judge Jean Rietschel was denied, and the Commissioner's Order 'affirmed'.

personal lives, and constitutional rights of state citizens, improperly derived from a financial relationship related to Medicaid benefits.

Three aspects of this case make it more significant than simply a one thousand dollar differential in attorney fees. Foremost, the effort by DSHS to curtail guardianship appointments puts DSHS clients at risk. Dementia and other cognitive disorders preclude truly informed medical consent. Substitute decisions by a guardian ensure timely access to the full range of care services available both from a skilled nursing facility and other medical providers: decisions which often save downstream Medicaid costs through a more efficient and cost effective use of services. Second, qualification for Medicaid benefits does not include an assignment of income to DSHS, nor do federal Medicaid regulations provide DSHS exclusive authority to define maximum, post-eligibility deductions that determine a client's actual income available to pay and 'participate' toward the cost of care. In similar regard, federal regulations do not provide DSHS with the responsibility, nor authority, to enforce payment obligations related to client 'participation.' Thus, the Objection filed by DSHS is judicial action in the nature of a pre-emptive garnishment or attachment whereby DSHS wrongfully seeks to establish dominion over a client's Social Security income. Repeatedly, the U.S. Supreme Court has confirmed that Social Security 'anti-attachment' provisions bar state

action to seek reimbursement of Medicaid and other entitlement program costs. In addition, seminal opinions by both the Washington State and U.S. Supreme Court in a trilogy of cases associated with the guardianship of Danny Keffeler identify the broad discretion reserved to a Representative Payee (“Rep Payee”) appointed by the Social Security Administrator, to determine deductions for the personal need expenses of a beneficiary. Finally, the procedural posture conforms with an emerging doctrine of concurrent Superior Court jurisdiction whereby sovereign state authority over both the person and the estate of an AIP includes judicial oversight of Social Security benefits and expenditures.

Objections to DSHS’ standing, and an appearance without a motion to intervene, contested the statutory authority of DSHS to assert adverse interests and budgetary considerations into a guardianship proceeding mandated to determine relief that best serves the interest of an AIP. DSHS is neither a defined notice party nor a real party in interest in the Chapter 11.88 RCW, or pre-appointment, phase of a guardianship proceeding. Rather, Chapter 11.92 RCW provides DSHS with a narrowly defined post-appointment authority to regulate fees and administrative costs that a guardian may be paid for services provided a DSHS client.

II. ASSIGNMENTS OF ERROR

When an appeal is taken from an order denying revision of a court

commissioner's decision, the Court of Appeals reviews the Superior Court's decision, not the Commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). Kline Galland asserts that provisions of Judge Jean Rietschel's Order entered November 19, 2010 contain factual errors, are contrary to law, or constitute an abuse of discretion.

1. In part, Finding of Fact B is not supported by the record, specifically 'there does not appear to be an objection to the Department's appearance; and the Petitioner is seeking orders against the Department.'

2. Finding of Fact D, that '[t]he amount of money that the incapacitated person received as income is excessively small' is not supported by the record nor the standards of equitable considerations.

3. Finding of Fact E, that '[t]he commissioner's decision under the particular facts of this case was made under equitable considerations' and that '[t]he commissioner's decision to award \$700 in attorney's fees to the Petitioner in this case was reasonable' are not supported by revision standards requiring *de novo* determinations by the superior court judge.

4. In part, Conclusion of Law B is in error, in that '[p]ursuant to RCW 11.92.180, when the incapacitated person is a DSHS client residing in a nursing home, the amount of guardianship fees and additional

compensation for administrative costs shall not exceed the amount allowed by DSHS by rule.’ RCW 11.96A.150 is the statute that authorizes payment of petitioner’s attorney fees and costs, not RCW 11.92.180.

5. Conclusion of Law E that there is no error in the Department appearing in this matter is an error in law. DSHS does not have statutory subject matter jurisdiction to intervene in a guardianship proceeding.

6. Section III Order, Paragraph A, is in error. The Order entered by Judge Rietschel denying revision states: “[t]he commissioner’s order dated August 25, 2010 is hereby affirmed.” The Order ‘affirmed’ by reference, specifically ‘payment of \$700 for services to establish a guardianship pursuant to WAC 388-79-030’ presents an error in law.

7. Section III Order, Paragraph B, denying remand to the commissioner is in error. Appellant presented an offer of proof that agency action constitutes arbitrary and capricious action and challenged factual claims by DSHS that guardian fees and costs reduce the total resources available for other Medicaid qualified individuals.

8. Section III Order, Paragraph C, is in error. Payment of supplemental fees is required; Petitioner substantially prevailed as the categorical prohibition requested by DSHS was denied.

III. STATEMENT OF THE CASE

A Petition for Guardianship, CP 1-8, was filed on May 10, 2010, on

behalf of Mr. Leavitt by Caroline Kline Galland Home, a skilled nursing facility that had custodial control of Mr. Leavitt providing daily care and maintenance. The petition reflects the practical, and often medical, necessity that a custodial caregiver file for guardianship on behalf of a resident experiencing the steady decline of dementia or other health or financial difficulties. Mr. Leavitt is qualified for Medicaid assistance and is therefore a client of DSHS.

Following common practice, petitioner's counsel notified DSHS of the guardianship filing and request for payment of petitioner's fees from Mr. Leavitt's Social Security income. The Attorney General of Washington appeared on behalf of DSHS (CP 22) and filed a pleading, "DSHS Objection to Payment of Private Petitioner's Attorney Fees from DSHS Client Participation" (referenced herein as "Objection"), asserting that DSHS regulations prohibit reimbursement of attorney fees incurred by a private party who files for guardianship on behalf of DSHS clients. CP 34-37. The Department also referenced DSHS' authority under Chapter 11.92 RCW to regulate monthly guardian fees and periodic administrative costs, including attorney fees, incurred by a guardian. CP 39.

Responsive pleadings filed by Kline Galland contested DSHS' standing to appear and interfere with the guardianship process. CP 66-80. Substantive arguments were presented regarding the interpretation of

statutory and regulatory provisions and the respective boundaries of DSHS and the Superior Court's subject matter jurisdiction over guardianship and Medicaid issues. CP 66-80. Procedural concerns included whether the Department was properly before the Court absent a motion and hearing for intervention under Civil Rule 24. CP 76-77. Kline Galland also requested DSHS pay supplemental attorney fees incurred responding to the Objection. CP 80.

The guardianship matter was heard on July 7, 2010, by Commissioner Eric Watness, presiding over the daily Superior Court Ex Parte/Guardianship calendar for King County. 7/7/10 RP 1. At the July 7, 2010 hearing, there was a determination of incapacity and out-of-town family members were appointed as guardians for Mr. Leavitt. CP 86-99. Following argument regarding attorney fees, the Commissioner reserved an opinion on petitioner's request for reimbursement of fees and the DSHS Objection. 7/7/10 RP 43.

On July 21, 2010, Commissioner Watness issued a seven page Memorandum Decision which describes the practical concerns and legal analysis of the fee award disputed by DSHS. CP 100-016. The Memorandum was reduced to an Order entered on August 25, 2010. CP 112-117. Appellant prevailed on the primary issue as Commissioner Watness rejected the argument by DSHS that payment of petitioner's fees

was prohibited by WAC 388-513-1380. CP 115. Rather, the Commissioner ruled that petitioner's fees were subject to DSHS regulation under Chapter 11.92 RCW and ordered payment of \$700 in fees pursuant to WAC 388-79-030. CP 115, 117.

Kline Galland filed a Motion for Revision which was heard by Judge Jean Rietschel. CP 120-126. In pleadings on revision, DSHS shifted its argument and supported the \$700 award stating: "... , because Commissioner Watness correctly applied the limitations on payment of costs for establishing a Title 11 guardianship for a Medicaid client." CP 137. Following oral argument, Judge Rietschel ruled that the Order issued by the Commissioner was 'affirmed' and issued separate Findings of Fact and Conclusions of Law. CP 341-344.

Financial circumstances surrounding Mr. Leavitt support his qualification for Medicaid assistance. Mr. Leavitt's program enrollment determines the amount the Department will pay for care after appropriate contributions by him to pay for his own care and maintenance, i.e., his 'participation.' In round numbers, Mr. Leavitt receives \$1,118 monthly in Social Security income and retains a minimum of \$57 as a personal needs allowance, which leaves \$1,061 for additional personal need deductions and contributions toward care. CP 43. DSHS may estimate monthly income, but DSHS must reconcile the estimated income with the actual

personal need deductions in any month, and adjust disbursements to the caregiver accordingly. Typically, Mr. Leavitt paid \$12,729 annually to Kline Galland of the \$67,655 charged for his care and maintenance, with the balance paid from the Medicaid program. CP 35.

The case is also framed by the offer of proof presented in pleadings before Judge Rietschel, which requested remand to the Commissioner to challenge the factual basis of agency budgetary arguments and uniform regional interpretation of agency regulations. CP 306, 322-323.

IV. ARGUMENT

This appeal seeks a definitive statement as to the statutory authority of a care provider as a ‘person or entity’ to file for guardianship on behalf of DSHS clients pursuant to RCW 11.88.030 and receive reimbursement of fees and costs. The role of petitioner's counsel to prosecute a guardianship matter and the jurisdiction of a state court over the estate, and therefore Social Security benefits, of a citizen are central themes.

A. STANDARD OF REVIEW.

On a revision motion, a trial court reviews a commissioner's ruling *de novo* based on the evidence and issues presented to the Commissioner. RCW 26.12.215; RCW 2.24.050; *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). When an appeal is taken from an order denying revision of a court commissioner's decision, the Court of

Appeals reviews the Superior Court's decision, not the Commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). Where the Superior Court makes independent findings and conclusions, the order on revision supersedes the Commissioner's ruling. *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). Accordingly, "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). On appeal, the Court reviews challenged findings of fact for substantial evidence and the conclusions of law *de novo*. *See, Dodd*, 120 Wn. App. at 643.

B. AS THE CUSTODIAL CARE GIVER WITH DAILY INTERACTIONS, KLINE GALLAND IS IDEAL 'PRIVATE PARTY' TO FILE GUARDIANSHIP PETITION FOR RESIDENT EXHIBITING INCAPACITIES.

Core aspects of the statutory scheme surrounding presentation of a guardianship petition provide authority for every person or entity, as a 'private party' to bring before the Court the circumstances of any individual allegedly manifesting incapacity. Because a petition is filed on behalf of an Alleged Incapacitated Person (AIP), the Court has the discretion, and common practice, to order payment for the costs and fees of the proceeding from the estate or income of the AIP. In the initial Objection and argument before Commissioner Watness, DSHS asserted that state Medicaid regulations do not authorize compensation to a private petitioner for payment of attorney fees. CP 36; 7/7/10 RP 18. As a

categorical prohibition, this would mandate external funding for a guardianship irrespective of whether the ‘private petitioner’ is a family member, a skilled nursing facility, adult family home, a certified professional guardian (CPG), or a friend or neighbor concerned about questionable home based care or exploitation: all are private parties subject to the prohibition requested by DSHS. The Commissioner rejected this proposition in the Memorandum Decision (CP 104-105), stating that:

. . . if no petitioner will be allowed fees, it is conceivable that no one would ever file a petition for guardianship over a DSHS client, much less any other person. A vulnerable person will effectively be denied the protection of the courts.

Rather, the Commissioner adopted a \$700 limit identified in DSHS regulations to ‘pay for the establishment of a guardianship.’

1. RCW 11.96A.150 establishes equitable authority of the Superior Court to order payment of attorneys’ fees, to any party and from any party in a guardianship proceeding.

The single standard for potential reimbursement of petitioner’s fees and costs that applies to every citizen is defined by the fee provision of the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.150, which applies to all proceedings governed by the title, including proceedings involving guardianship matters:

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or

(c) . . . The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

This appeal seeks a ruling that the Court's authority to reimburse petitioner's fees and costs is solely determined by TEDRA provisions.²

2. DSHS must pick one legal argument: Petitioner's fee payment is 'prohibited' or 'regulated.'

In its original Objection, DSHS' argument supporting the requested relief stated that payment of petitioner's fees was prohibited.

Nothing in chapter 388-79 WAC or the related laws and regulations allows court-ordered attorneys fees owed by the client to be deducted from participation, unless those attorney's fees were incurred by the client's court-appointed guardian.

CP 39.

Commissioner Watness rejected this result from a practical perspective, but nonetheless sought to retain some level of DSHS control over client expenses. The Memorandum Decision states:

The more logical result here is to expect DSHS to permit the petitioner to receive up to \$700 from Mr. Leavitt's Social Security income to offset the legal costs of prosecuting a guardianship petition on his behalf consistent with the Washington Administrative Code provision for such compensation. That, in the end, clearly serves Mr. Leavitt's best interests which is ultimately

² See also, RCW 11.88.030, which provides that no liability shall attach to a petitioner who files a guardianship petition in good faith and upon reasonable basis.

the real issue here.

CP 105. The Motion for Revision filed by Kline Galland challenged this analysis which creates an improper agency regulatory constraint on the Court's discretion over the proper award of petitioner's attorney's fees.

The ongoing search by DSHS for a statutory justification for its position is explicit in the argument presented by DSHS in its Response to Motion for Revision of Commissioner's Ruling, CP 137, where the relief requested shifts and adopts the \$700 limit for petitioner's fees:

The Department respectfully requests that the nursing home's motion for revision be denied, because Commissioner Watness correctly applied the limitation on payment of costs for establishing a title 11 guardianship for a Medicaid client.

The limitation on fees introduced by Commissioner Watness awarded attorney's fees of \$700 pursuant to WAC 388-79-030. CP 117. This order was affirmed by Judge Rietschel in denying the Motion for Revision. CP 336. DSHS has not asserted error with the Commissioner's ruling rejecting a categorical prohibition of petitioner's attorney's fees.

Irrespective of which legal theory DSHS presents, it establishes a guardianship scheme with two tiers of economic citizenship. In the first tier, all of petitioner's fees and costs may be paid from the estate of the AIP pursuant to RCW 11.96A.150. In the second tier, which is comprised exclusively of DSHS clients, a private party must subsidize all, or a significant portion of, petitioner's attorney's fees, to present a petition on

behalf of a DSHS client. This subsidy will be determined by the amount remaining after the \$700 available to "establish" the guardianship is split between the guardian's attorney³ and petitioner's attorney.

3. Attorney General cannot transfer residual Chapter 11.88 RCW Jurisdiction to DSHS.

The single state agency with explicit Chapter 11.88 jurisdiction is the Attorney General for Washington. Even here, the authority is residual as state action to file for a guardianship on behalf of a citizen is contingent on no private party being available. Specifically, RCW 11.88.030(2)(a) states:

The attorney general may petition for the appointment of a guardian or limited guardian in any case in which there is cause to believe that a guardianship is necessary and no private party is able and willing to petition.

Contrast the authority reserved for the Attorney General under RCW 11.88.030(2) with a companion area where the legislature has defined an explicit statutory role for DSHS to act as a petitioner. Specifically, RCW 74.34.150, concerned with Abuse of a Vulnerable Adult, states:

The department of social and health services, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of

³ The empty chair in this matter is that of the Certified Professional Guardian, which is a person or entity regulated by Supreme Court General Rule 23 to provide services and charge fees for guardianship services provided to three or more persons. Prohibited from engaging in the practice of law, a CPG typically will retain the services of an attorney for both pre and post-appointment legal services associated with establishing a new guardianship, including review of the proposed order of appointment, an appearance at the hearing and preparing and obtaining approval of the Personal Care Plan, Inventory of assets, and Budget, as mandated by statute.

and with the consent of any vulnerable adult.

A critical distinction within RCW 74.34 is the authority for DSHS to directly petition for relief in the form of protective orders under RCW 74.34.130: orders that restrict the activities of a respondent/abuser. By contrast, the scope of RCW 11.88 seeks appointment of a guardian which includes restrictions on the constitutional rights of a citizen: here, agency jurisdiction is reserved to the Attorney General. From a policy and historical perspective, inherent conflicts, including the difficulty of balancing budgetary pressures against the individual needs of citizens, underlies a scheme whereby DSHS has no statutory mandate to initiate or participate in a Chapter 11.88 RCW guardianship proceeding.⁴

C. CHAPTER 11.92 RCW AUTHORITY FOR DSHS TO REGULATE GUARDIAN FEES AND COSTS DOES NOT INCLUDE AUTHORITY TO REGULATE CHAPTER 11.88 RCW PETITIONER FEES AND COSTS.

The statutory scheme for guardianship matters has two distinct phases. The first phase under Chapter 11.88 RCW involves all aspects of the proceeding. It begins with an allegation of incapacity in a petition and appointment of a guardian ad litem (GAL) who is directed to review with the AIP personal and constitutional rights affected by a guardianship and commission a medical report; all parts of an investigation to produce a

⁴ RCW 11.88.030 does require DSHS to establish the curriculum and training materials for Guardian ad Litem certification.

report with recommendations that best serve the interests of the AIP. At a hearing, or after a trial, there is a determination of incapacity and, if warranted, appointment of a guardian or limited guardian.

Appointment of a guardian commences the second phase, where administration of the estate and the person's affairs are managed pursuant to Chapter 11.92 RCW. Within ninety days the guardian must present a Personal Care Plan, Inventory, and Budget, which establish the parameters of the guardianship, subject to ongoing Superior Court oversight over the guardian's activities through periodic reports, court approval of major transactions, or in response to a review requested by an interested party.

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

DSHS is authorized pursuant to RCW 43.20B.460 to issue regulations establishing compensation limits paid by DSHS clients to a guardian:

The department of social and health services shall establish by rule the maximum amount of guardianship fees and additional compensation for administrative costs that may be allowed by the court as compensation for a guardian or limited guardian of an incapacitated person who is a department of social and health services client

The statute makes no reference to agency authority to regulate petitioner's fees. In similar regard, DSHS authority to limit the compensation paid to a guardian or limited guardian is contained in RCW 11.92.180:

A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian as the court shall deem just and reasonable. . . . Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian or limited guardian. . . . Where the incapacitated person is a department of social and health services client . . . then the department shall be entitled to notice of proceedings as described in RCW 11.92.150. The amount of guardianship fees and additional compensation for administrative costs shall not exceed the amount allowed by the department of social and health services by rule.

Again, the scope of DSHS' authority to regulate guardian fees and administrative costs incurred by the guardian relates to the administration of the estate within RCW 11.92, or post-appointment.

2. Jurisdictional scope of WAC cannot exceed enabling statute.

Regulations pursuant to RCW 43.20B.460 were established under WAC 388-79. The sections relevant to the matter before the Court include WAC 388-79-030 defining maximum fees and costs of a guardian:

The superior court may allow guardianship fees and administrative costs in an amount set out in an order. . . . :

- (1) The amount of guardianship fees shall not exceed one hundred seventy-five dollars per month;
- (2) The amount of administrative costs directly related to establishing a guardianship for a department client shall not exceed seven hundred dollars; and (3) . . .

The definitions section, WAC 388-79-020, clarifies the scope of 'costs':

"Administrative costs" or "costs" means necessary costs paid by the

guardian including attorney fees.”

Neither the statute, nor regulation, provide DSHS authority over petitioner’s fees. The issue of statutory construction and regulatory interpretation before the Court is whether the phrase in WAC 388-79-030(2) “. . . establishing a guardianship for a department client shall not exceed seven hundred dollars” applies not only to the administrative costs and attorney fees incurred by the guardian under Chapter 92, but also reaches back into Chapter 88 and constrains the Court’s authority under RCW 11.88 and RCW 11.96A.150. Well settled principles of administrative law prohibit agency efforts to improperly extend the scope of statutory authority:

Administrative rules which have the effect of extending or conflicting in any manner with the agency's enabling act do not represent a valid exercise of authorized power, but constitute an attempt by the administrative body to legislate.

State v. Munso, 23 Wn. App. 522, 1979; *see also*, *State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940).

3. Dictates of statutory construction require that a statute be read in context with other relevant provisions in the same chapter.

“The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs* 154 Wn 2d 596, 600, 115

P.3d 281 (2005). "Statutory provisions must be read in their entirety and construed together, not piecemeal." *ITT Rayonier v. Dalman*, 122Wn2d, 801 807, 863 P2d 64 (1993). The party requesting fees in Chapter 88 is a petitioner; DSHS has Chapter 92 authority to regulate fees paid to a guardian. In Chapter 88, the AIP is a citizen of the state; there is no Chapter 88 reference to AIP status as a 'DSHS client' as occurs in Chapter 92. A statute must be read in conjunction with other relevant provisions in the same chapter of the RCW. *See, Boastion v. Food Express, Inc.*, 159 Wn.2d 700, 711, 153 P.3d 846 (2007).

D. DSHS ONLY BECOMES A STATUTORY PARTY OF INTEREST FOLLOWING APPOINTMENT OF A GUARDIAN.

Judicial creation of DSHS standing under TEDRA provisions presents budgetary considerations that are irrelevant and adverse to the best interests of DSHS clients.

1. RCW 11.92.150 requires Chapter 92 notice to DSHS.

The authority to regulate guardian fees and administrative costs under RCW 43.20B.460 is perfectly aligned with the guardian fee limits of RCW 11.92.180 and notice provisions of RCW 11.92.150. Specifically, pursuant to RCW 11.92.150, DSHS is a statutory notice party "at any time after the issuance of letters of guardianship." Even then, DSHS must make an election whereby DSHS, and other interested parties, become a statutory party. RCW 11.92.150, states that DSHS, as the 'applicant'

. . . may serve upon the guardian or limited guardian, or upon the attorney for the guardian or limited guardian, and file with the clerk of the court where the guardianship. . . is pending, a written request stating the specific actions of which the applicant requests advance notice.

Conversely, notice obligations assigned the petitioner under RCW 11.88.030(4)(a) and RCW 11.88.040(1)-(4) do not include notice obligations that reference DSHS.

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 absence of a specific statement of agency jurisdiction in the Objection and failure to move for permissive intervention under Civil Rule 24 were grounds supporting petitioner's request that the Objection be stricken. CP 67.

2. Civil litigants cannot establish state agency subject matter jurisdiction through notice of a proceeding.

The brief submitted by DSHS in response to the Motion for Revision (CP 137-303) spends an inordinate amount of time casting aspersions as to the motivation of Kline Galland and petitioner's counsel in presenting the guardianship petition and delayed substitution of family members for the CPG originally considered for appointment. CP 144-145. It also asserts that the appearance by DSHS was "invited error," based on the notice provided by petitioner's attorney, and thus arguments based on standing

and jurisdiction were waived. CP 152-153. However, no level of notice by a civil litigant can create agency jurisdiction. Agency subject matter jurisdiction only exists and authorized agency action can only occur to the extent defined by statute. This principle of administrative law is well established as reflected in *Washington Independent Telephone Association v. WUTC*, 110 Wn. App. 147, (2002).

An agency may not act beyond its legislative grant of authority, even when doing so is more logical or more convenient. An agency act that exceeds the agency's lawful authority is invalid despite its practical necessity or appropriateness.

3. Plenary Powers under TEDRA do not establish standing and notice requirements for DSHS.

In the Memorandum Decision, Commissioner Watness first introduced attenuated standing based on the comprehensive definition of ‘parties’ under TEDRA provision, RCW 11.96A.030. CP 101. TEDRA is intended to gather all parties with interests in an estate or trust dispute into a single forum for efficient resolution. However, participation as a party under RCW 11.96A.030 is a two-part test. It involves the definition of a party, but also requires that a party have a defined interest in the trust or estate under review, as required by RCW 11.96A.020(1)(a). In the analysis establishing standing pursuant to TEDRA, Commissioner Watness misconstrued the flow of funds, stating that federal and state law required direct payments by Mr. Leavitt to DSHS. CP 116 (Conclusion of Law 10).

In fact, the use of Mr. Leavitt's income to participate in payment toward his costs of care (other than a personal needs allowance) is paid directly to Kline Galland; no funds are paid to DSHS, nor has DSHS identified any statutory or regulatory obligation requiring such payments.

It would be one thing to establish a judicially constructed notice requirement permitting DSHS party status when the Department is seeking to protect the interests of its clients. It is another to establish a judicial rule that DSHS must be provided notice of all guardianship filings so that it can wrongfully assert dominion over client funds and prohibit the use of funds for client access to the judicial system.

E. DSHS CANNOT AMEND CHAPTER 11.88 RCW TO ESTABLISH CONDITIONS PRECEDENT FOR PRIVATE PARTY PETITIONS.

Repeatedly, in the pleadings and argument DSHS asserts that payment of petitioner's fees is unwarranted because the nursing facility had other options. There is no legislative mandate whereby DSHS can establish conditions precedent to filing by a private party that apply exclusively to DSHS clients. At CP 160, DSHS argues that:

. . . the nursing home is attempting to create new law, open the door to a new revenue source to fund its attorney fees. The nursing home was not required to file this petition for guardianship. The nursing home was not without other options. The nursing home could well have done a bit of investigation and contacted the family members ultimately appointed and requested that they petition for guardianship, but chose not to do so. The nursing home could have

contacted the Department to petition for the guardianship of Mr. Leavitt, a department Medicaid client. The nursing home could have contacted a certified professional guardian to petition for guardianship, resulting in the CPG's attorney being eligible for the \$700 instead of the nursing home.

Moreover, DSHS tends to gloss over the limitations of agency statutory jurisdiction with an expansive representation of DSHS activities on behalf of its clients.

MS. BOHARSKI: Your Honor, just one -- it is not -- it cannot be said that if Caroline Kline Galland had not petitioned for guardianship that no one else would have. The Department stands ready, willing, and able to file guardianships for people who need guardians. We do it every week.

COMMISSIONER WATNESS: Are you ready to take on every case where there are no funds available to pay for petitioner's legal fees?

MS. BOHARSKI: We would ask the Court to entertain the idea that the Department should be given the opportunity to control its own budget vis-à-vis these legal fees. Now, we had a case just like this last fall that, on revision, Judge Gonzales reversed the Commissioner and said, "There is a state agency available to do this," and that was the reason. And there is a state agency that files guardianships. So we would prevail upon the Court to allow the Department to control its own budgets instead of allowing the opening of this door that will go into the ozone unquestionably.

7/7/10 RP 40-41.⁵

⁵ The revision before Judge Gonzalez was filed under King County Cause No 09-04-04224-9. The result highlights DSHS shifting and arbitrary legal arguments across this area. Similar to the current case, a private party was appointed guardian without the assistance of counsel; therefore Commissioner Bradburn-Johnson awarded \$700 in payment of petitioner's fees. However, DSHS moved for revision seeking denial of all

These arguments touch on multiple flaws in the interpretation of the statutory scheme for a guardianship which encompass a DSHS client. First, referral to DSHS is not an option. The Attorney General cannot transfer its statutory jurisdiction so that DSHS is the agency with RCW 11.88 authority to file new petitions. Second, referral to the DSHS Division of Adult Protective Services (APS) is not effective as the relief afforded by RCW 74.34.130 provides for protective orders directed against the second-party abuser as the respondent. Third, the exchange identifies economic considerations which are the driving factors in the initiative by DSHS to forestall appointment of guardians for DSHS clients. The Declaration of David Armes filed with the Objection makes this same budgetary argument:

Since fees incurred by parties other than the guardian are not allowed in the department's rules, we have no means to regulate or budget for those costs when we forecast our caseload expenditures and request funding from the Governor and state legislature to operate programs for long-term care Medicaid recipients. Allowance of unregulated costs would reduce our ability to provide services that are allowed in our rules and state plan.

CP 47. Of course, guardianship expenses are subject to the same actuarial analysis and projections as most other program costs, so it is really a matter of the 'means to regulate the costs' that has importance.

fees and prevailed, because "a state agency may have been available to file a

However, there was no aspect of the original guardianship petition filed by Kline Galland that sought payment from a DSHS budget. The progression of age, and inexorable slide into dementia for many DSHS clients, is determined by personal circumstance. Reimbursement of a petitioner's fees and costs from the income or estate of the AIP fulfills a personal need from personal funds. Agency budgetary interests are irrelevant.

1. DSHS agency officer has no authority to suspend validly promulgated regulations.

While the primary orientation of the DSHS Objection was framed as a prohibition on petitioner's fees and cost, a separate underlying motivation for the pattern of DSHS objections across this area is to curtail deductions for guardian fees and costs as well. This goal is explicit in the Declaration of Jerald Ulrich attached to the initial Objection:

4. No guardian, or limited guardian, may be compensated at county or state expense. RCW 11.92.180. When a guardian is appointed, all guardianship fees and costs can be paid only by reducing the ward's participation. The deduction of guardianship fees and administrative costs from the client's (participation), effectively increases Medicaid related costs, and reduces the ability of the department to provide the full benefit of its programs to all who need them.

CP 42-45. DSHS does not have the authority to suspend statutory mandates and validly promulgated regulations that authorize payment of

guardianship." In the current matter DSHS asserts \$700 is allowed by regulation.

fees and costs to a guardian. Thus, the initiative to control all new guardianship filings for DSHS clients also seeks to expropriate the Social Security income of DSHS clients and thereby increase the resources available to other Medicaid qualified individuals. As discussed below, across a series of cases the United States Supreme Court has ruled that Social Security benefits are properly applied to the personal needs of the beneficiary and cannot be attached or garnished by a state seeking to recoup Medicaid or other entitlement program costs. (*See below*, Section F.)

2. Regulation of certified professional guardian is judicial administrative function, not subject to DSHS regulation.

Another DSHS condition precedent without merit is any requirement that a nursing home contact a certified professional guardian (CPG”) to petition, resulting in the ‘CPG's attorney being eligible for the \$700 instead of the nursing home.’ Foremost, absent an independent relationship with the AIP, the CPG has no personal knowledge to factually assert an alleged incapacity. A CPG filing a petition based on representations from nursing facility staff is in fact an agent for the facility. Second, a CPG in the role of a petitioner, ‘self-petitioning’ for appointment as the guardian, has an independent claim for reimbursement of petitioner’s attorney fees and is not subject to the future fee limitations

as the guardian under RCW 11.92.180 and the \$700 limit of WAC 388-79-030. Finally, any attempt by DSHS to regulate CPG fees as a petitioner is an unauthorized extension of agency authority into a judicial function. Supreme Court General Rule 23 establishes a judicial administrative board, the Certified Professional Guardians Board, to certify and regulate CPGs as an ‘officer of the court.’ DSHS has no authority to define fee limits for a CPG serving as a guardianship petitioner for a DSHS client.

3. DSHS Clients remain citizens of Washington State entitled to all judicial protections of guardianship proceeding.

The practical difficulties, even the expense, of preserving the personal and constitutional rights of every incapacitated person have equal application to DSHS clients. The effort by DSHS to manage budgets seeks to repeal fundamental protections within the guardianship statute. Specifically, DSHS argued:

What-if, instead of this being a straightforward, uncomplicated, very easy guardianship in which the Alleged Incapacitated Person actually wanted a guardian, Mr. Leavitt was opposed to the guardianship and demanded his right to a jury trial, provided under RCW 11.88.045 (3). .Petitioner's argument that they should be allowed to invade the Medicaid or the department budget without restriction in this manner could mean \$20,000 in attorney’s fees, if not more, to be incurred and then be the responsibility of the Department to pay. This proposition is ludicrous.

CP 161.

Two aspects of this argument are extreme. Foremost, if the DSHS

client requests a jury trial to determine incapacity, such a trial is a statutory right. *See*, RCW 11.88.045(3). DSHS does not have the authority to assert that a trial by jury is only appropriate for first tier citizens and is not available to a second tier of citizens involving DSHS clients. Second, the representation by DSHS that \$20,000 in legal fees would be the responsibility of DSHS to pay is factually and legally incorrect. Petitioner properly requested reimbursement of fees from the estate of the AIP. There is no statutory obligation that DSHS pay petitioner's fees for DSHS clients.⁶ There is no deep-pocket subject to abusive access associated with petitioner's request for reimbursement of legal fees from the AIP's estate.

F. GUARDIANSHIP COURT AUTHORITY IS SOVEREIGN AND CONCURRENT OVER SOCIAL SECURITY BENEFITS OF AIP.

Title III, 20 CFR Part 404. Federal Old-Age, Survivors and Disability Insurance (OASDI) contains the regulatory provisions that required Mr. Leavitt and his employer to make contributions into the Social Security Insurance Trust. Benefit levels are determined by contributions over a lifetime and as trustee, the Administrator has identified procedures and qualifications for the withdrawal of funds. However, as a trust,

⁶ Arguably, DSHS would not even have the obligation to reimburse the Attorney General's legal services revolving fund pursuant to RCW 43.10.150, because the Attorney General has an independent statutory obligation to file for a guardianship pursuant to RCW 11.88.030(2)(a) unrelated to the status of a needy citizen as a DSHS client.

ownership of the beneficial interest and any entitlement resides with the beneficiary.

While Social Security benefits are generally paid directly to the beneficiary, the Administrator may instead distribute the check "for a beneficiary's use and benefit" to another individual or entity known as the beneficiary's "Representative Payee." Subpart U. Representative Payment (§§404.2001-404.2065) describes the process and authority for the appointment of a Rep Payee and includes guidance on the appropriate allocation of funds between personal needs and the cost of care. 42 U.S.C. §§405(j)(1)(A), 1383(a)(2)(A)(ii)(I). The Rep Payee is appointed by the Social Security Administration, and is subject to monitoring by the federal agency. 42 U.S.C. §§405(j)(1)-(3), 1383(a)(2)(A)-(C); *see*, 20 C.F.R. §§404.2001, 404.2010, 416.601-610.

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

Across a trilogy of opinions related to the guardianship of Danny Keffeler, the Washington State Supreme Court and, on *certiorari* review, the U.S. Supreme Court clarified certain principles and statutory provisions which directly relate to the discretion afforded a Rep Payee to expend Social Security funds on behalf of a beneficiary. In addition, the Court ruled that Social Security income 'anti-attachment' provisions

which preclude judicial action by a state agency to recoup funds dispersed under various entitlement programs did not constrain the discretionary expenses by a state Rep Payee. The definitive ruling issued by the U.S. Supreme Court, in *Washington State Department of Social and Health Services, et al., v. Guardianship Estate of Danny Keffeler, et al.*, 537 U.S. 371 (2003), 123 S. Ct. 1017, 154 L.Ed.2d 972, 71 USLW 4110 (2003), (referenced herein as *Keffeler II*), held that DSHS, in its separate role as the Rep Payee for foster children in the class action, could reimburse itself for state foster care costs without violating the anti-attachment provisions of 42 U.S.C. §407(a) that protect Social Security benefits. The analysis by the Washington State Supreme Court in *Guardianship Estate of Keffeler v. State Dept. of Social and Health Services*, 145 Wn.2d 1, 32 P.3d 267 (2001,) (herein, *Keffeler I*), that DSHS reimbursements were ‘creditor-like’ activities using a judicial process in violation of 42 U.S.C. §407(a), was rejected by the U.S. Supreme Court, and the decision was reversed.

The broad discretion afforded a Rep Payee to expend Social Security and Supplemental Security Income (SSI) in the best interests of a beneficiary was approved by both courts. In *Keffeler I*, the Washington State Supreme Court identified a wide variety of discretionary expenses by the DSHS Trust Fund Unit, as the Rep Payee. Following a review of the accounting practice whereby DSHS processed reimbursement for foster

care costs with payments from the Foster Care Trust Fund, the U.S.

Supreme Court noted with approval personal needs deductions:

The department occasionally departs from this practice, in the exercise of its discretion to use the Social Security funds "for extra items or special needs" ranging from orthodontics, educational expenses, and computers, through athletic equipment and holiday presents. 145 Wash. 2d, at 12, 32 P. 3d, at 272. And there have also been exceptional instances in which the department has foregone reimbursement for foster care to conserve a child's resources for expenses anticipated on impending emancipation.

Id., *Keffeler I* at 378-379 (cites in original).

As developed below, the process whereby DSHS identifies deductions and calculates estimated participation must also include expenses paid by a Rep Payee and expenses approved for payment by the Superior Court.

2. Pre-emptive garnishment by DSHS to control Social Security income of DSHS client is barred by anti-attachment provision 42 U.S.C. §407(a).

The prohibition on the state to pursue judicial process and seek reimbursement from Social Security benefits for the costs of care and maintenance provided through other state programs is prohibited by 42 U.S.C. §407(a). Efforts by the state to seek reimbursement for a beneficiary's care and maintenance through an action directed at a bank account was rejected in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973). Separate judicial actions by a state seeking to attach Social Security benefits were also rejected in *Bennett v. Arkansas*, 485 U.S. 395

(1988). These cases were cited with approval in *Keffeler II* when the U.S.

Supreme Court reversed the Washington State Supreme Court:

. . . In each case, we held that the plain language of §407(a) barred the State's legal action, and refused to find an implied exception to the antiattachment provision for a State simply because it provides for the care and maintenance of a beneficiary. *See, Philpott, supra*, at 416; *Bennett, supra*, at 397.

Id., *Keffeler I* at 388 (cites in original).

In the action before this Court, DSHS, through judicial process, seeks to establish a pre-emptive garnishment, asserting the authority to regulate all expenditures of the Social Security income of DSHS clients. The Department seeks to garnish or attach the Social Security benefits of DSHS clients and direct that they be exclusively used to pay for costs of care. The DSHS Objection is barred by 42 U.S.C. §407(a).

3. Principles of federalism support primacy of Superior Court jurisdiction in guardianship matters.

The scope of discretionary expenses and reach of state court jurisdiction was developed further by Division I of the Court of Appeals in a recent opinion, *In the Matter of the Guardianship of Janette Knutson*, Case No 64144-1-1, Published Opinion filed March 28, 2011, Division I. In *Knutson*, the Court affirmed a trial court revision that reversed a commissioner's ruling providing preemptory approval for payment of all future excess income for advocacy donations, because there was no

provision for contribution towards the cost of care or maintenance.⁷ The Court nonetheless approved prior discretionary expenditures by the guardian for advocacy. The Court also considered the extent of state court jurisdiction over the respective actions of a Rep Payee, appointed by the Social Security Commissioner, and the activities of a court appointed guardian, when the separate authorities were shared by a single person. Initially positing a need for compliance with Insurance Trust regulations established by the Commissioner, the Court confirmed state court jurisdiction to review and direct payment of Social Security benefits:

We hold that while 42 U.S.C. section 407(a) prohibits a court from directing the representative payee to pay Social Security benefits, it does not prevent the superior court under the guardianship statute from overseeing the estate of an incapacitated person and directing the guardian to pay for the care and maintenance of the ward.

Guardianship of Janette Knutson, Case No. 64144-1-1, Slip Opinion at 15.

The scope of state court jurisdiction was also before the Court in the final opinion of our trilogy, *Keffeler III, Guardianship Estate of Keffeler v.*

⁷ DSHS standing in *Knutson* and *Keffeler* are distinguished from the current matter. In *Knutson*, the ward was a disabled individual who resided at Fircrest, which is a state run institution. Therefore, DSHS sought review as the custodial care provider, and the real party in interest, asserting claims under RCW 11.92.060 regarding a guardian's duty to pay for care and maintenance services. In *Keffeler*, DSHS provided benefits under the state's foster care program and sought relief under the support recovery provisions of Chapter 74.20A RCW. The challenge to DSHS' standing before this Court contests the

State of Washington, DSHS, 151 Wn.2d 331, 88 P.3d 949 (2004), wherein the State Supreme Court returned and reviewed equal protection and due process claims not addressed in *Keffeler I*. The Court rejected equal protection claims based on the potential for disparate outcomes where a private party, versus a state agency, was appointed by the Commissioner to serve as the Rep Payee. In this regard, the Court ruled that any disparities associated with payments by DSHS as the Rep Payee involved claims regarding a misuse of funds which were subject to the review process established by the Commissioner. *Id. Keffeler III* at 342. *See*, 42 U.S.C. §§405(j)(3)(D), 1383(a)(2)(C)(iv).

In the analysis of due process claims, the Court identified a balancing test and reviewed the type and scope of notice issued to the beneficiary. The Court held that independent notice by a state agency seeking appointment as the Rep Payee was not required, apart from the federal agency notice of certification of payment identifying DSHS as the Rep Payee designated for appointment by the Administrator. *Id. Keffeler III* at 343-345; 42 U.S.C. §§405(j)(2)(E)(i)-(iii), 1383(a)(2)(B)(xii)(2000). However, implicit in the application of a balancing test is the Court's recognition of the central role of the juvenile court to serve as the guardian

Department's claim of exclusive authority to regulate all expenditures of Social Security income of Medicaid qualified individuals.

of the child, citing *State ex rel. Richey v. Superior Court*, 59 Wash. 2d 872, 876, 371 P.2d 51 (1962). *Id.*, *Keffeler III* at 346. Thus, the state court has jurisdiction to protect the beneficial interest of the child in the federal entitlement; the Court simply determined that on balance the federal notice of the proposed designation of DSHS as Rep Payee was adequate process.

In broad terms, the current matter involves a determination of the Court's jurisdiction at the opposite end of the age spectrum, where allegations of incapacity or dependency are generally associated with cognitive impairments related to the aging process. The doctrine identified in *Keffeler III* and *Knutson* remain the same: state court authority over a state appointed guardian's administration of the estate includes concurrent jurisdiction over the estate and Social Security benefits of a state citizen suffering from a debilitating incapacity. Core doctrines of federalism support the sovereign and primary authority of a state government to oversee the affairs of its citizens. Personal rights affected within a guardianship matter reflect state control similar to other aspects of citizenship, including certification of birth, adoption, majority, marriage, dissolution, power of attorney, testamentary bequeaths, and certification of death, to name but a few. The Tenth Amendment to the U.S. Constitution confirms the limits of federal government powers and reserves to the states rights of sovereignty. Thus, while the Social Security Administrator

may issue regulations that prescribe certain uses for Insurance Trust funds, ownership of the entitlement resides with the individual.⁸ Once a guardianship petition is filed based on residency within the county and an allegation of incapacity, the Court acquires *in persona* jurisdiction over the person and estate of the AIP. Upon a determination of incapacity and appointment of a guardian, the Court retains RCW 11.92.010 jurisdiction and control over the guardianship. Specifically, the Court has a duty as the "superior guardian of the ward" to ensure that the guardianship is at all times administered in a manner that is both legal and in the best interests of the incapacitated person. *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).

Deference assigned the role of a legal guardian subject to state court oversight is also reflected in Social Security regulations. 20 CFR §404.2021 establish categories and a preferences scheme for appointment of a Rep Payee:

. . .The preferences are: (a) . . . (1) A legal guardian, spouse (or other relative) who has custody of the beneficiary or who

⁸ The record on appeal includes no reference to the application and appointment of Kline Galland as the Rep Payee for its resident Mr. Leavitt. Arguably, the dual roles of a Rep Payee serving as the petitioner in a guardianship proceeding would invoke the deference afforded discretionary expenses by a Rep Payee approved in *Keffeler II*. However, a remand and ruling based on dual status would be cumbersome and problematic. A ruling that only a Rep Payee may commence and be reimbursed for legal expenses in a guardianship proceeding distorts the Court's jurisdiction over the estate of the AIP and scope of the state guardianship statute.

demonstrates strong concern for the personal welfare of the beneficiary;. . .

G. DEDUCTIONS FROM PARTICIPATION DEFINED BY FEDERAL REGULATIONS SUPERSEDE CONFLICTING DSHS REGULATIONS.

DSHS is the state agency responsible for administration of the Medicaid program in Washington State. In a variety of pleadings, DSHS argued that agency obligations to calculate a client's participation create subject matter jurisdiction to intervene in a guardianship matter filed on behalf of a DSHS client. Specifically, WAC 388-513-1380 is the state regulatory provision cited by DSHS prohibiting payment of petitioner's attorney's fees from the Social Security income of Mr. Leavitt.

The fatal flaw in the argument presented by DSHS is the assertion that DSHS has exclusive authority to establish by regulation all permissible deductions from participation. Rather, a thorough analysis of statutory and regulatory provisions, and judicial precedents, point to directives that authorize expenditures and deductions based on the discretion retained by a Rep Payee, or a court appointed guardian with superior court oversight.

1. Social Security Administration guidance states personal need expenditures are proper deduction prior to contribution toward cost of care.

A review of the narrative guidance provided by the Administrator identifies personal need payments that precede contributions for care. 20 CFR §404.2040, Use of Benefit Payments, states as follows:

(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.

Example: An institutionalized beneficiary is entitled to a monthly Social Security benefit of \$320. The institution charges \$700 a month for room and board. . . .

The payee takes his brother to town and buys him a pair of shoes for \$29. He also takes the beneficiary to see a movie which costs \$3. When they return to the institution, the payee gives his brother \$3 to be used at the canteen.

Although the payee normally withholds only \$25 a month from Social Security benefit for the beneficiary's personal needs, this month the payee deducted the above expenditures and paid the institution \$10 less than he usually pays.

The above expenditures represent what we would consider to be proper expenditures for current maintenance.

(Emphasis added.)

2. Medicaid regulations identify 'personal needs' as income deduction prior to contribution toward cost of care.

Similar to Social Security provisions, 42 CFR §435.725(c), the specific Medicaid regulation regarding deductions prior to contribution, identifies 'personal needs' as a category of permissible expenses, while subsection (e)(3) clarifies that the calculation of participation by an agency is for use as an estimate which must be reconciled with actual income following expense deductions.

- i) 42 CFR §435.725(c) neither explicitly authorizes nor prohibits guardianship expenses prior to participation.

The federal Medicaid definition for allowable deductions prior to participation identifies a category, defined as 'other personal needs', it does not establish an exclusive list of specific deductions:

(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. This protected personal needs allowance must be at least--

(i) \$30 a month for an aged, blind, or disabled individual, including a child applying for Medicaid on the basis of blindness or disability;. . .

42 CFR §435.725(c) (emphasis added).

- ii) 42 CFR §435.725(e) requires DSHS to reconcile estimates of deductions from total income with actual income available to participate towards the cost of care.

Further review of the federal enabling provision, 42 CFR 435.725(e), clarifies the role assigned an agency, here DSHS, to calculate deductions for personal needs. Specifically, DSHS has the limited authority to produce an estimate of income available for participation, which the Department must reconcile with actual income received:

(1) Option. In determining the amount of an individual's income to

be used to reduce the agency's payment to the institution, the agency may use total income received or it may project total monthly income for a prospective period not to exceed 6 months.

(2) Basis for projection. The agency must base the projection on income received in the preceding period, not to exceed 6 months, and on income expected to be received.

(3) Adjustments. At the end of the prospective period specified in paragraph (e)(1) of this section, or when any significant change occurs, the agency must reconcile estimates with income received.

42 CFR 435.725(e)(1)-(3) (emphasis added).

Thus, the request that petitioner's attorney fees be paid from Social Security income prior to contribution toward participation is properly understood as notification that a significant change would occur over the two months required to reimburse petitioner's fees and costs.⁹ The calculation of actual income available, versus total income, required by 42 CFR 435.725(e)(2), includes deductions anticipated by WAC 388-513-1380, additional expenditures by the Rep Payee, and court ordered payments for petitioner's attorney fees.

iii) DSHS does not have authority to convert federal 'minimum' personal needs allowance into a WAC 388-513-1380 'maximum' personal needs allowance.

In order to prevail on this appeal, DSHS must establish 1) that it has

⁹ Mr. Leavitt's monthly Social Security income of \$1,118.00, less a personal needs allowance of \$57.28, would provide an income stream of \$2,121.44 over two months for reimbursement of the initial \$1,740.65 of fees and costs incurred by petitioner.

exclusive authority to define permissible deductions from income applied to participation and 2) that WAC 388-513-1380 contains an exclusive list of deductions. This is exactly the argument initially presented when DSHS asserted that payment of petitioner's attorney's fees was prohibited:

Because a private party's attorney's fees are not an allowable deduction from participation under WAC 388-513-1380, DSHS cannot allow Mr. Leavitt to divert his income for that purpose without misusing Medicaid funds and jeopardizing state Medicaid funding. *See*, 42 C.F.R §435.725(c); Declaration of David Armes (attached).

CP 38; *see also*, CP 46-47.

If DSHS reads only its own regulations, it might have a belief that it has exclusive control over deductions. However, federal regulations supersede state regulations. DSHS' administration of the state Medicaid program requires compliance with federal standards. *See*, RCW 74.04.055. The federal statute, 42 CFR §435.725(c), that authorizes expenditures for a category of 'personal needs,' cannot be constrained by a more restrictive definition of personal needs established in the Washington Administrative Code. Medicaid rule-making authority by the Department is limited by the federal enabling regulations of 42 CFR, Public Health, or 20 CFR, the Social Security Insurance Trust, which provide for discretion by a Rep Payee to determine and pay for personal needs. Agency jurisdiction only exists and authorized agency action can only occur to the extent defined

by statute. See, *Washington Independent Telephone Association v. WUTC*, 110 Wn. App. 147, (2002).

iv) Federal waiver approves category of guardianship-related expenses.

Guardianship-related expenses are not referenced in the federal regulations, as a required, optional, or prohibited deduction from participation. However, the Washington State Medicaid Plan, submitted to the Center for Medicare and Medicaid Services, 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. The relevant section of the State Medicaid Plan, specifically Attachment 2.6-A, pg 9, reads as follows:

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

The bulk of the language in this waiver closely mirrors WAC 388-79 regulating guardian fees and administrative costs; however, the preamble uses the disjunctive to describe the scope of the waiver, i.e., 'guardianship and/or attorney service' as a personal need. In this regard, there is no logical distinction between attorney services incurred by a guardian pursuant to RCW 11.92.180 and/or the services of an attorney incurred by

a private party petitioner under RCW 11.88.030.¹⁰

H. MULTIPLE STANDARDS SUPPORT PAYMENT OF PETITIONER’S INITIAL AND SUPPLEMENTAL ATTORNEY FEES

Apart from the intervention by DSHS, the guardianship matter in this case was routine, as are the requested fees for reimbursement:

In this matter no party, including the State of Washington, has raised any issues with the overall reasonableness of the requested fees related to presenting the guardianship petition or the resulting benefit conferred on Mr. Leavitt from taking that action. The Petition was appropriate and necessary and the fees incurred to prosecute it were well within those fees generally sought in other routine cases

Memorandum Decision, CP 103.¹¹

Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *see*, RAP 10.3(g). As regards the initial fees and costs, both the Commissioner and Judge Rietschel referred to Mr. Leavitt’s income as ‘excessively small’, which was the basis for an equitable reduction in fees. RCW 11.96A.150 grants the Superior Court discretion to award attorney fees, thus on appeal the standard review for such fee awards is abuse of discretion. *See, In re*

¹⁰ CMS approval of guardianship expenses as a category is the critical component of the waiver, not the specific language. Thus, it is doubtful a reference to ‘nursing facility residents’ deliberately excludes other categories of DSHS clients utilizing home bound or adult family home residential services, nor should legal services by petitioner, constitute a violation of the waiver. Moreover, DSHS has a statutory obligation to acquire appropriate waivers. RCW 43.20A.860.

¹¹ Finding reduced to Order, CP 116, and affirmed on revision, CP 343.

Guardianship of Spiecker, 69 Wn.2d 32, 34-35, 416 P.2d 465 (1966). However, discretion based on an error of law is not subject to deference. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The Rules of Professional Conduct identify nine factors to be used in determining the reasonableness of attorney's fees; the ability to pay is not one of them. Thus, while Mr. Leavitt's income may be excessively small relative to his total costs of care, a Social Security income of \$1,118 per month is quite adequate to pay for access to the judicial system. As noted, petitioner's request for reimbursement would be fully paid within two months.

1. Petitioner's counsel has professional obligations as officer of the Court.

Although not previously cited, lurking in the wings is an assertion that attorney fees requested by petitioner are superfluous because participation by petitioner's counsel is not required. This proposition is introduced by the decision *In the Matter of the Guardianship of Joseph R. Matthews*, 156 Wn. App. 201, 232 P.3d 1140 (2010). In an opinion startling in its ramifications, Division II of the Court of Appeals asserted that once a guardianship petition is filed the services of the Guardian ad Litem ("GAL") effectively substitute for legal obligations associated with a

petitioner. Specifically, the Court in *Matthews* stated:

A guardianship petitioner's duties and responsibilities in these proceedings are extremely limited The guardianship petitioner's role is essentially to alert the trial court of the potential need and reasons for a guardianship of an incapacitated person and to respond to any inquiries from the trial court. . . . Once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends.

Id., *Matthews*, at 201, 210, and 211.

This *dicta* is problematic in multiple regards. Foremost, a private party incurs potential liability under RCW 11.88.030 should there be a finding that the petition was filed in bad faith. An expectation that petitioner's counsel drop out directly after filing, begs a question of malpractice upon a finding of petitioner liability. Second, the statutory role assigned the GAL is that of an independent investigator directed to interview parties, commission a medical report, and prepare a report with recommendations as to the best interests of the AIP. *See*, RCW 11.88.090(f)(5)(a)-(g). Shifting the GAL role to that of an advocate seeking to implement the report's 'recommendations' massively distorts the function of the GAL to provide a balanced presentation of competing factors that underlie the investigation. Third, qualification standards required of individuals to serve on a county GAL Registry do not mandate a license to practice law. *See*, RCW 11.88.090 (4)(a). Enrollment standards also reflect the training and talents that a healthcare or social worker might provide in assessing

capacity and the personal needs of the AIP. Imposing a duty on a GAL with a health care background to independently prosecute a guardianship proceeding is an undue burden.

In the current matter, the full scope of professional services provided by petitioner's counsel is directly before the Court. A verity on appeal is that the time expended and rate of compensation were appropriate and consistent with industry standards.¹² A review of the legal services provided by an officer of the Court on behalf of the AIP would serve to dispel some of the confusion generated by the *dicta* in *Matthews*.

2. RCW 11.96A.150 includes authority to order payment of supplemental attorneys' fees and fees on appeal.

Supplemental fees and costs incurred by petitioner related to the DSHS Objection do not inure, and should not be charged, to Mr. Leavitt's estate. Supplemental fees and costs incurred by petitioner, solely relate to the agency actions when the Department voluntarily invoked the jurisdiction of the Court with its Objection. An effort by an agency to improperly extend its statutory jurisdiction, later determined to be inappropriate, does not rescind the Court's jurisdiction over DSHS, including TEDRA authority, to award fees and costs at the trial level and on appeal.

¹² Scope of legal services is described in Declaration of Fees submitted by petitioner's counsel, CP 28-33.

3. Payment by DSHS of supplemental fees to prevailing party required by ‘Equal Access to Justice Act’.

An additional standard for an award of attorney fees when contesting agency action is RCW 4.84.340 through 4.84.360¹³, which state that a qualified party who substantially prevails contesting state agency action is entitled to attorney fees. Judicial review of agency action is appropriate pursuant to RCW 34.05.510, 526, and 530, and RCW 34.05.570(4).

The Objection filed by DSHS asserted that Medicaid regulations prohibited payment of private party attorney fees in their totality. This relief was rejected, and \$700 in fees was awarded and affirmed on revision. DSHS has not sought review of these rulings as an error in law. Under the standards identified in RCW 4.84.350, petitioner substantially prevailed and is entitled to supplemental fees and fees on appeal for payment by DSHS. *See also*, RAP 18.1.

I. REMAND TO THE COMMISSIONER TO DEVELOP A FACTUAL RECORD REGARDING ARBITRARY AND CAPRICIOUS AGENCY ACTION IS ALTERNATIVE RELIEF.

A motion for revision of a court commissioner’s order presents the Superior Court Judge with the obligation to conduct a *de novo* assessment of the matter referred. *See* , RCW 2.24.050. The scope of review was

¹³ An award of fees to private parties is necessary in order to provide balance with the overwhelming resources available to a state agency, see Legislative Findings RCW

further clarified by the Court in *Perez v. Garcia*, 148 Wn. App. 131 (2009) and *In re Moody*, 137 Wn.2d 979 (1999), which state that if the judge determines that additional factual findings are required, remand to the commissioner is appropriate to develop a factual record. The Motion for Revision identifies the scope of factual issues to develop establishing arbitrary and capricious agency action across regional offices and alternative budgetary considerations, including whether timely medical and other decisions by a guardian foster a more effective use of Medicaid resources. CP 125-126. A holding that DSHS lacks standing to appear and assert dominion over client funds renders this relief moot.

V. CONCLUSION

Superior Court oversight of the affairs and best interests of all citizens, including those receiving Medicaid benefits, includes jurisdiction over Social Security income sufficient to authorize payments that provide a beneficiary access to the judicial system. The relief requested by Kline Galland is a ruling that the Objection filed by DSHS was not properly before the lower court due to a lack of agency standing and should have been stricken from consideration. Appellant requests that the amount of \$1,740.56 be ordered for payment from Mr. Leavitt's estate or Social

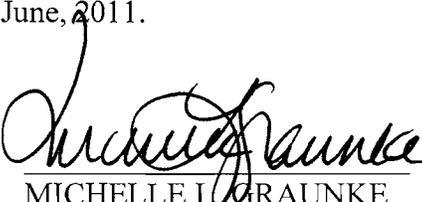
4.84.340 – Definitions. Access to the courts and appropriate guardianship services for all DSHS clients are the central themes presented for resolution on this appeal.

Security income, as discretionary reductions of the trial court were tainted by budgetary considerations improperly introduced by DSHS. Remand to the Superior Court is appropriate to determine the amount of supplemental attorney's fees and costs for payment by DSHS for legal services incurred by Kline Galland related to the Objection and Motion for Revision. Finally, Appellant requests that attorney's fees and costs on appeal be ordered for payment by DSHS.

This appeal reviewed the statutory structure of the state's guardianship program as it relates to Medicaid qualified individuals. Although couched as an attorney fee dispute, at its core, Kline Galland seeks a ruling that the dignity and preservation of personal rights for the aged, infirm, and disabled, does not warrant creation of a separate economic tier whereby DSHS clients are denied the use of personal funds to access the courts and full scope of benefits available under the guardianship statute.

Respectfully submitted this 10th day of June, 2011.


GREGORY J. PARKER
Attorney for Appellant
WSBA No. 9368


MICHELLE L. GRAUNKE
Attorney for Appellant
WSBA No. 28840

VI. APPENDIX

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RCW 11.96A.150 Costs — Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

RCW 43.20B.460 Guardianship fees and additional costs for incapacitated clients paying part of costs — Maximum amount — Rules.

The department of social and health services shall establish by rule the maximum amount of guardianship fees and additional compensation for administrative costs that may be allowed by the court as compensation for a guardian or limited guardian of an incapacitated person who is a department of social and health services client residing in a nursing facility or in a residential or home setting and is required by the department of social and health services to contribute a portion of their income towards the cost of residential or supportive services.

[1994 c 68 § 2.]

RCW 11.92.150 Request for special notice of proceedings.

At any time after the issuance of letters of guardianship in the estate of any person and/or incapacitated person, any person interested in the estate, or in the incapacitated person, or any relative of the incapacitated person, or any authorized representative of any agency, bureau, or department of the United States government from or through which any compensation, insurance, pension or other benefit is being paid, or is payable, may serve upon the guardian or limited guardian, or upon the attorney for the guardian or limited guardian, and file with the clerk of the court where the guardianship or limited guardianship of the person and/or estate is pending, a written request stating the specific actions of which the applicant requests advance notice. Where the notice does not specify matters for which notice is requested, the guardian or limited guardian shall provide copies of all documents filed with the court and advance notice of his or her application for court approval of any action in the guardianship.

The request for special written notice shall designate the name, address and post office address of the person upon whom the notice is to be served and no service shall be required under this section and RCW 11.92.160 as now or hereafter amended other than in accordance with the designation unless and until a new designation has been made.

When any account, report, petition, or proceeding is filed in the estate of which special written notice is requested, the court shall fix a time for hearing which shall allow at least ten days for service of the notice before the hearing; and notice of the hearing shall be served upon the person designated in the written request at least ten days before the date fixed for the hearing. The service may be made by leaving a copy with the person designated, or that person's authorized representative, or by mailing through the United States mail, with postage prepaid to the person and place designated.

[1990 c 122 § 33; 1985 c 30 § 11. Prior: 1984 c 149 § 14; 1975 1st ex.s. c 95 § 30; 1969 c 18 § 1; 1965 c 145 § 11.92.150; prior: 1925 ex.s. c 104 § 1; RRS § 1586-1.]

Notes:

Effective date -- 1990 c 122: See note following RCW 11.88.005.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

RCW 11.92.180 Compensation and expenses of guardian or limited guardian — Attorney's fees — Department of social and health services clients paying part of costs — Rules.

A guardian or limited guardian shall be allowed such compensation for his or her services as guardian or limited guardian as the court shall deem just and reasonable. Guardians and limited guardians shall not be compensated at county or state expense. Additional compensation may be allowed for other administrative costs, including services of an attorney and for other services not provided by the guardian or limited guardian. Where a guardian or limited guardian is an attorney, the guardian or limited guardian shall separately account for time for which compensation is requested for services as a guardian or limited guardian as contrasted to time for which compensation for legal services provided to the guardianship is requested. In all cases, compensation of the guardian or limited guardian and his or her expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or limited guardian or his or her attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian or limited guardian and for attorney's fees for services already performed. If the court finds that the guardian or limited guardian has failed to discharge his or her duties as such in any respect, it may deny the guardian any compensation whatsoever or may reduce the compensation which would otherwise be allowed. Where the incapacitated person is a department of social and health services client residing in a nursing facility or in a residential or home setting and is required by the department of social and health services to contribute a portion of their income towards the cost of residential or supportive services then the department shall be entitled to notice of proceedings as described in RCW 11.92.150. The amount of guardianship fees and additional compensation for administrative costs shall not exceed the amount allowed by the department of social and health services by rule.

[1995 c 297 § 8; 1994 c 68 § 1; 1991 c 289 § 12; 1990 c 122 § 36; 1975 1st ex.s. c 95 § 33; 1965 c 145 § 11.92.180. Prior: 1917 c 156 § 216; RRS § 1586; prior: Code 1881 § 1627; 1855 p 19 § 25.]

Notes:

Rules of court: SPR 98.12W.

Effective date -- 1990 c 122: See note following RCW 11.88.005.

WAC 388-513-1380 Determining a client's financial participation in the cost of care for long-term care (LTC) services.

This rule describes how the department allocates income and excess resources when determining participation in the cost of care (the post-eligibility process). The department applies rules described in WAC 388-513-1315 to define which income and resources must be used in this process.

(1) For a client receiving institutional or hospice services in a medical institution, the department applies all subsections of this rule.

(2) For a client receiving waiver services at home or in an alternate living facility, the department applies only those subsections of this rule that are cited in the rules for those programs.

(3) For a client receiving hospice services at home, or in an alternate living facility, the department applies rules used for the community options program entry system (COPES) for hospice applicants with income under the medicaid special income level (SIL) (300% of the federal benefit rate (FBR)), if the client is not otherwise eligible for another noninstitutional categorically needy medicaid program. (Note: For hospice applicants with income over the medicaid SIL, medically needy medicaid rules apply.)

(4) The department allocates nonexcluded income in the following order and the combined total of (4)(a), (b), (c), and (d) cannot exceed the medically needy income level (MNIL):

(a) A personal needs allowance (PNA) of:

(i) Seventy dollars for the following clients who live in a state veteran's home and receive a needs based veteran's pension in excess of ninety dollars:

(A) A veteran without a spouse or dependent child.

(B) A veteran's surviving spouse with no dependent children.

(ii) The difference between one hundred sixty dollars and the needs based veteran's pension amount for persons specified in subsection (4)(a)(i) of this section who receive a veteran's pension less than ninety dollars.

(iii) One hundred sixty dollars for a client living in a state veterans' home who does not receive a needs based veteran's pension;

(iv) Forty-one dollars and sixty-two cents for all clients in a medical institution receiving general assistance.

(v) Effective July 1, 2007 through June 30, 2008 fifty-five dollars and forty-five cents for all other clients in a medical institution. Effective July 1, 2008 this PNA increases to fifty-seven dollars and twenty-eight cents.

(vi) Current PNA and long-term care standards can be found at <http://www1.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCstandardspna.shtml>.

- (b) Mandatory federal, state, or local income taxes owed by the client.
- (c) Wages for a client who:
 - (i) Is related to the Supplemental Security Income (SSI) program as described in WAC 388-475-0050(1); and
 - (ii) Receives the wages as part of a department-approved training or rehabilitative program designed to prepare the client for a less restrictive placement. When determining this deduction employment expenses are not deducted.
- (d) Guardianship fees and administrative costs including any attorney fees paid by the guardian, after June 15, 1998, only as allowed by chapter 388-79 WAC.
- (5) The department allocates nonexcluded income after deducting amounts described in subsection (4) in the following order:
 - (a) Income garnished for child support or withheld according to a child support order in the month of garnishment (for current and back support):
 - (i) For the time period covered by the PNA; and
 - (ii) Is not counted as the dependent member's income when determining the family allocation amount.
 - (b) A monthly maintenance needs allowance for the community spouse not to exceed, effective January 1, 2008, two thousand six hundred ten dollars, unless a greater amount is allocated as described in subsection (7) of this section. The community spouse maintenance allowance is increased each January based on the consumer price index increase (from September to September, <http://www.bls.gov/cpi/>). Starting January 1, 2008 and each year thereafter the community spouse maintenance allocation can be found in the long-term care standards chart at <http://www1.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCstandardspna.shtml>. The monthly maintenance needs allowance:
 - (i) Consists of a combined total of both:
 - (A) One hundred fifty percent of the two person federal poverty level. This standard increases annually on July 1st (<http://aspe.os.dhhs.gov/poverty/>); and
 - (B) Excess shelter expenses as described under subsection (6) of this section.
 - (ii) Is reduced by the community spouse's gross countable income; and
 - (iii) Is allowed only to the extent the client's income is made available to the community spouse.
 - (c) A monthly maintenance needs amount for each minor or dependent child,

dependent parent or dependent sibling of the community spouse or institutionalized person who:

(i) Resides with the community spouse:

(A) In an amount equal to one-third of one hundred fifty percent of the two person federal poverty level less the dependent family member's income. This standard increases annually on July 1st (<http://aspe.os.dhhs.gov/poverty/>).

(ii) Does not reside with the community spouse or institutionalized person, in an amount equal to the MNIL for the number of dependent family members in the home less the dependent family member's income.

(iii) Child support received from a noncustodial parent is the child's income.

(d) Medical expenses incurred by the institutional client and not used to reduce excess resources. Allowable medical expenses and reducing excess resources are described in WAC 388-513-1350.

(e) Maintenance of the home of a single institutionalized client or institutionalized couple:

(i) Up to one hundred percent of the one-person federal poverty level per month;

(ii) Limited to a six-month period;

(iii) When a physician has certified that the client is likely to return to the home within the six-month period; and

(iv) When social services staff documents the need for the income exemption.

(6) For the purposes of this section, "excess shelter expenses" means the actual expenses under subsection (6)(b) less the standard shelter allocation under subsection (6)(a). For the purposes of this rule:

(a) The standard shelter allocation is based on thirty percent of one hundred fifty percent of the two person federal poverty level. This standard increases annually on July 1st (<http://aspe.os.dhhs.gov/poverty/>); and

(b) Shelter expenses are the actual required maintenance expenses for the community spouse's principal residence for:

(i) Rent;

(ii) Mortgage;

(iii) Taxes and insurance;

(iv) Any maintenance care for a condominium or cooperative; and

(v) The food stamp standard utility allowance for four persons, provided the utilities are not included in the maintenance charges for a condominium or cooperative.

(7) The amount allocated to the community spouse may be greater than the amount in subsection (6)(b) only when:

(a) A court enters an order against the client for the support of the community spouse; or

(b) A hearings officer determines a greater amount is needed because of exceptional circumstances resulting in extreme financial duress.

(8) A client who is admitted to a medical facility for ninety days or less and continues to receive full SSI benefits is not required to use the SSI income in the cost of care for medical services. Income allocations are allowed as described in this section from non-SSI income.

(9) Standards described in this section for long-term care can be found at: <http://www1.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCstandardspna.shtml>. [Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530, and Deficit Reduction Act of 2005, 42 C.F.R. Section 435.09-07-037, § 388-513-1380, filed 3/10/09, effective 4/10/09. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, and 74.09.530. 08-13-072, § 388-513-1380, filed 6/16/08, effective 7/17/08. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530, and 2006 c 372. 07-19-126, § 388-513-1380, filed 9/19/07, effective 10/20/07; 07-01-072, § 388-513-1380, filed 12/18/06, effective 1/18/07. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530 and 2005 c 518 § 207 and Sec. 1924 Social Security Act (42 U.S.C. 1396r-5). 06-07-144, § 388-513-1380, filed 3/21/06, effective 4/21/06. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 42 U.S.C. 9902(2). 05-07-033, § 388-513-1380, filed 3/9/05, effective 4/9/05. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.575; 2003 1st sp.s. c 28, and section 1924 of the Social Security Act (42 U.S.C. 1396R-5). 04-04-072, § 388-513-1380, filed 2/2/04, effective 3/4/04. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500 and Section 1924 (42 U.S.C. 1396R-5). 01-18-055, § 388-513-1380, filed 8/30/01, effective 9/30/01. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, and Section 1924(g) of the Social Security Act. 00-17-058, § 388-513-1380, filed 8/9/00, effective 9/9/00. Statutory Authority: RCW 72.36.160, 74.04.050, 74.04.057, 74.08.090, 74.09.500 and Section 1924(g) of the Social Security Act, Section 4715 of the BBA of 1997 (Public Law 105-33, HR 2015). 99-11-017, § 388-513-1380, filed 5/10/99, effective 6/10/99. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 43.20B.460, 11.92.180, and Section 1924 (42 USC 396r-5). 98-08-077, § 388-513-1380, filed 3/31/98, effective 4/1/98. Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.530 and Social Security Act, Federal Register, March 10, 1997, pgs. 10856 - 10859, 42 U.S.C. 1396 (a)(l)(m). 97-16-008, § 388-513-1380, filed 7/24/97, effective 7/24/97. Statutory Authority: RCW 74.08.090 and Title

XIX State Agency Letter 95-44, 96-09-033 (Order 3963), § 388-513-1380, filed 4/10/96, effective 5/11/96. Statutory Authority: RCW 74.08.090. 95-11-045 (Order 3848), § 388-513-1380, filed 5/10/95, effective 6/10/95. Statutory Authority: RCW 74.08.090 and Title XIX State Agency Letter 94-49, notice of increase in SSI level. 95-05-022 (Order 3832), § 388-513-1380, filed 2/8/95, effective 3/11/95. Statutory Authority: RCW 74.08.090. 94-10-065 (Order 3732), § 388-513-1380, filed 5/3/94, effective 6/3/94. Formerly WAC 388-95-360.]

Code Of Federal Regulations

Title 20. Employees' Benefits

Chapter III. SOCIAL SECURITY ADMINISTRATION

Part 404. FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

Subpart U. REPRESENTATIVE PAYMENT

Current through 4/1/2010

§ 404.2040. Use of benefit payments

(a) *Current maintenance.* (1) We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

Example: An aged beneficiary is entitled to a monthly Social Security benefit of \$400. Her son, who is her payee, disburses her benefits in the following manner:

Rent and utilities	\$200
Medical	25
Food	60
Clothing (coat)	55
Savings	30
Miscellaneous	30

The above expenditures would represent proper disbursements on behalf of the beneficiary.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, if a beneficiary is a member of an Aid to Families With Dependent Children (AFDC) assistance unit, we do not consider it inappropriate for a representative payee to make the benefit payments available to the AFDC assistance unit.

(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.

Example: An institutionalized beneficiary is entitled to a monthly Social Security benefit of \$320. The institution charges \$700 a month for room and board. The beneficiary's brother, who is the payee, learns the beneficiary needs new shoes and does not have any funds to purchase miscellaneous items at the institution's canteen. The payee takes his brother to town and buys him a pair of shoes for \$29. He also takes the beneficiary to see a movie which costs \$3. When they return to the institution, the payee gives his brother \$3 to be used at the canteen.

Although the payee normally withholds only \$25 a month from Social Security benefit for the beneficiary's personal needs, this month the payee deducted the above expenditures and paid the institution \$10 less than he usually pays.

The above expenditures represent what we would consider to be proper expenditures for current maintenance.

(c) *Support of legal dependents.* If the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent spouse, child, and/or parent.

Example: A disabled beneficiary receives a Veterans Administration (VA) benefit of \$325 and a Social Security benefit of \$525. The beneficiary resides in a VA hospital and his VA benefits are sufficient to provide for all of his needs; *i.e.*, cost of care and personal needs. The beneficiary's legal dependents-his wife and two children-have a total income of \$250 per month in Social Security benefits. However, they have expenses of approximately \$450 per month.

Because the VA benefits are sufficient to meet the beneficiary's needs, it would be appropriate to use part of his Social Security benefits to support his dependents.

(d) *Claims of creditors.* A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met.

Example: A retroactive Social Security check in the amount of \$1,640, representing benefits due for July 1980 through January 1981, was issued on behalf of the beneficiary to the beneficiary's aunt who is the representative payee. The check was certified in February 1981.

The nursing home, where the beneficiary resides, submitted a bill for \$1,139 to the payee for maintenance expenses the beneficiary incurred during the period from June 1980 through November 1980. (Maintenance charges for December 1980 through February 1981 had previously been paid.)

Because the benefits were not required for the beneficiary's current maintenance, the payee had previously saved over \$500 for the beneficiary and the beneficiary had no foreseeable needs which would require large disbursements, the expenditure for the maintenance charges would be consistent with our guidelines.

History. 47 FR 30472, July 14, 1982, as amended at 54 FR 35483, Aug. 28, 1989

Subpart H. SPECIFIC POST-ELIGIBILITY FINANCIAL REQUIREMENTS FOR THE CATEGORICALLY NEEDY (§§ 435.700 - 435.735) - [Combined]

§ 435.700. Scope

§ 435.725. Post-eligibility treatment of income of institutionalized individuals in SSI States: Application of patient income to the cost of care

§ 435.726. Post-eligibility treatment of income of individuals receiving home and community-based services furnished under a waiver: Application of patient income to the cost of care

§ 435.733. Post-eligibility treatment of income of institutionalized individuals in States using more restrictive requirements than SSI: Application of patient income to the cost of care

§ 435.735. Post-eligibility treatment of income and resources of individuals receiving home and community-based services furnished under a waiver: Application of patient income to the cost of care

Code Of Federal Regulations

Title 42. Public Health

Chapter IV. CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Subchapter C. MEDICAL ASSISTANCE PROGRAMS

Part 435. ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

Subpart H. SPECIFIC POST-ELIGIBILITY FINANCIAL REQUIREMENTS FOR THE CATEGORICALLY NEEDY

Current through October 1, 2010

§ 435.725. Post-eligibility treatment of income of institutionalized individuals in SSI States: Application of patient income to the cost of care

(a) *Basic rules.* (1) The agency must reduce its payment to an institution, for services provided to an individual specified in paragraph (b) of this section, by the amount that

remains after deducting the amounts specified in paragraphs (c) and (d) of this section, from the individual's total income,

(2) The individual's income must be determined in accordance with paragraph (e) of this section.

(3) Medical expenses must be determined in accordance with paragraph (f) of this section.

(b) *Applicability.* This section applies to the following individuals in medical institutions and intermediate care facilities.

(1) Individuals receiving cash assistance under SSI or AFDC who are eligible for Medicaid under §435.110 or §435.120.

(2) Individuals who would be eligible for AFDC, SSI, or an optional State supplement except for their institutional status and who are eligible for Medicaid under §435.211.

(3) Aged, blind, and disabled individuals who are eligible for Medicaid, under §435.231, under a higher income standard than the standard used in determining eligibility for SSI or optional State supplements.

(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. Income that was disregarded in determining eligibility must be considered in this process.

(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. This protected personal needs allowance must be at least-

(i) \$30 a month for an aged, blind, or disabled individual, including a child applying for Medicaid on the basis of blindness or disability;

(ii) \$60 a month for an institutionalized couple if both spouses are aged, blind, or disabled and their income is considered available to each other in determining eligibility; and

(iii) For other individuals, a reasonable amount set by the agency, based on a reasonable difference in their personal needs from those of the aged, blind, and disabled.

(2) *Maintenance needs of spouse.* For an individual with only a spouse at home, an additional amount for the maintenance needs of the spouse. This amount must be based on a reasonable assessment of need but must not exceed the highest of-

(i) The amount of the income standard used to determine eligibility for SSI for an individual living in his own home, if the agency provides Medicaid only to individuals receiving SSI;

(ii) The amount of the highest income standard, in the appropriate category of age, blindness, or disability, used to determine eligibility for an optional

State supplement for an individual in his own home, if the agency provides Medicaid to optional State supplement recipients under §435.230; or

(iii) The amount of the medically needy income standard for one person established under §435.811, if the agency provides Medicaid under the medically needy coverage option.

(3) *Maintenance needs of family.* For an individual with a family at home, an additional amount for the maintenance needs of the family. This amount must-

(i) Be based on a reasonable assessment of their financial need;

(ii) Be adjusted for the number of family members living in the home; and

(iii) Not exceed the higher of the need standard for a family of the same size used to determine eligibility under the State's approved AFDC plan or the medically needy income standard established under §435.811, if the agency provides Medicaid under the medically needy coverage option for a family of the same size.

(4) *Expenses not subject to third party payment.* Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including-

(i) Medicare and other health insurance premiums, deductibles, or coinsurance charges; and

(ii) Necessary medical or remedial care recognized under State law but not covered under the State's Medicaid plan, subject to reasonable limits the agency may establish on amounts of these expenses.

(5) *Continued SSI and SSP benefits.* The full amount of SSI and SSP benefits that the individual continues to receive under sections 1611(e)(1) (E) and (G) of the Act.

(d) *Optional deduction: Allowance for home maintenance.* For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if-

(1) The amount is deducted for not more than a 6-month period; and

(2) A physician has certified that either of the individuals is likely to return to the home within that period.

(3) For single individuals and couples, an amount (in addition to the personal needs allowance) for maintenance of the individual's or couple's home if-

(i) The amount is deducted for not more than a 6-month period; and

(ii) A physician has certified that either of the individuals is likely to return to the home within that period.

(e) *Determination of income -(1) Option.* In determining the amount of an individual's income to be used to reduce the agency's payment to the institution, the agency may use total income received, or it may project monthly income for a prospective period not to exceed 6 months.

(2) *Basis for projection.* The agency must base the projection on income received in the preceding period, not to exceed 6 months, and on income expected to be received.

(3) *Adjustments.* At the end of the prospective period specified in paragraph (e)(1) of this section, or when any significant change occurs, the agency must reconcile estimates with income received.

(f) *Determination of medical expenses* -(1) *Option.* In determining the amount of medical expenses to be deducted from an individual's income, the agency may deduct incurred medical expenses, or it may project medical expenses for a prospective period not to exceed 6 months.

(2) *Basis for projection.* The agency must base the estimate on medical expenses incurred in the preceding period, not to exceed 6 months, and on medical expenses expected to be incurred.

(3) *Adjustments.* At the end of the prospective period specified in paragraph (f) (1) of this section, or when any significant change occurs, the agency must reconcile estimates with incurred medical expenses.

History. 43 FR 45204, Sept. 29, 1978, as amended at 45 FR 24884, Apr. 11, 1980; 48 FR 5735, Feb. 8, 1983; 53 FR 3595, Feb. 8, 1988; 55 FR 33705, Aug. 17, 1990; 56 FR 8850, 8854, Mar. 1, 1991; 58 FR 4932, Jan. 19, 1993

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COURT OF APPEALS – DIVISION I FOR WASHINGTON STATE

CAROLINE KLINE GALLAND HOME,

Appellant,

v.

DSHS,

Respondent.

Case No. 66436-1-I

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On June 10, 2011, I emailed a copy of Appellant's Brief (with Appendix) to the individual at the following email address:

Jennifer A. Boharski
Office of the Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
Email: SHSSeaEF@atg.wa.gov

Signed at Seattle, Washington on June 10, 2011.


Michelle L. Graunke, WSBA No. 28840

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