

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

In Re the Guardianship of:

DAVID SCHMIDT,

No. 92-4-00722-1 SEA

KIRBY MOSER,

No. 92-4-01014-1 SEA

SUZANNE MACKENZIE,

No. 92-4-00732-8 SEA

RICHARD MILTON,

No. 89-4-00990-8 SEA

DANIEL WERLINGER,

No. 88-4-04043-2 SEA

MARY JANE MCNAMARA,

No. 06-4-02645-1 SEA

Incapacitated Persons.

WASHINGTON ASSOCIATION OF  
PROFESSIONAL GUARDIANS  
AMICUS BRIEF

COMES NOW the Washington Association of Professional Guardians and submits this Amicus Brief on the following three issues: (1) the Court's authority to make an independent determination on the question of reasonableness and necessity of guardian fees and costs and the fees and costs of the guardian's attorneys; (2) that "benefit" to the

1 incapacitated person is one factor that the Court may consider in determining the  
2 reasonableness and necessity of guardianship services, but that the absence of a direct tangible  
3 “benefit” does not preclude a determination that the guardianship services are reasonable and  
4 necessary; and (3) that, where “benefit” to the incapacitated person is relevant to assessing the  
5 reasonableness and necessity of guardianship services, the existence of a “benefit” is  
6 determined not by the outcome of the services but by the determined need for the services to  
7 be provided.

8 A. Even if the Incapacitated Person is a DSHS Client, the Superior Court Makes  
9 the Independent Determination What Guardianship Fees and Expenses are  
10 Reasonable and Should be Allowed, and the Department is Required to Abide  
11 the Court’s Determination.

12 Under Washington law, a guardian is an agent of the Superior Court, subject at all  
13 times to the Court’s direction and control. RCW 11.92.010. “In guardianship proceedings,  
14 the superior court has broad and exclusive jurisdiction over the administration of the estate of  
15 an incapacitated individual.” Guardianship of Wells, 150 Wn. App. 491, 494, \_\_ P.3d \_\_  
16 (2009); see also RCW 11.96A.040. And it is therefore the Superior Court’s prerogative and  
17 duty to assess and determine what fees and costs may be allowed a guardian in this state.<sup>1</sup> By  
18 statutory mandate, “A guardian or limited guardian *shall* be allowed such compensation for  
19 his or her services as guardian or limited guardian *as the court shall deem just and*  
20 *reasonable*. . . . In all cases, compensation of the guardian or limited guardian and his or her  
21 expenses including attorney’s fees *shall be fixed by the court*. . . .” RCW 11.92.180 (emphasis  
22 added).

23 Pursuant to TEDRA, the Superior Court has wide discretion to award guardianship  
24 fees, including reasonable attorneys’ fees, “to be paid in such amount and in such manner as

---

<sup>1</sup> The guardian’s attorneys’ fees are deemed a part of the guardianship administrative costs, pursuant to RCW 11.92.180.

1 the court determines to be equitable.” RCW 11.96A.150. In making its fee award, “the court  
2 may consider any and all factors that it deems to be relevant and appropriate, which factors  
3 may but need not include whether the litigation benefits the estate or trust involved.” RCW  
4 11.96A.150. The fee provisions of TEDRA apply to all guardianship proceedings. RCW  
5 11.96A.150(2) (“This section applies to all proceedings governed by this title, including but  
6 not limited to proceedings involving trusts, decedent's estates and properties, and  
7 guardianship matters. This section shall not be construed as being limited by any other  
8 specific statutory provision providing for the payment of costs, including RCW 11.68.070 and  
9 11.24.050, unless such statute specifically provides otherwise. This section shall apply to  
10 matters involving guardians and guardians ad litem and shall not be limited or controlled by  
11 the provisions of RCW 11.88.090(10).”)

12 Despite these statutory provisions, the Department has suggested that it is entitled to  
13 impose an arbitrary “cap” on guardian’s fees and expenses where the incapacitated person is a  
14 DSHS client. The Department relies on WAC 388-79-030 and the last sentence in RCW  
15 11.92.180, which states, “The amount of guardianship fees and additional compensation for  
16 administrative costs shall not exceed the amount allowed by the department of social and  
17 health services by rule.” However, as explained below, the Department’s own rules recognize  
18 that the Superior Court, not the Department, makes the ultimate determination what  
19 guardianship fees and costs are reasonable and necessary and whether and in what amount  
20 they should be awarded in a particular case.

21 The Department’s rules pertaining to guardianship fees for clients of the Department  
22 are set forth at WAC 388-79. The rules require that guardians provide to the regional  
23 administrator of the Department notice of all guardianship proceedings involving DSHS  
24 clients, specifically including “all documents filed with the court and with formal notice

1 clearly identifying the amount [of guardianship fees] requested.” WAC 388-79-050 (1), (7).  
2 The specific rule on which the Department relies to support imposing a “cap” on guardianship  
3 fees states:

4 *The superior court may allow guardianship fees and*  
5 *administrative costs in an amount set out in an order. For*  
6 *orders entered after June 15, 1998, where the order establishes*  
7 *or continues a legal guardianship for a department client, and*  
8 *requires a future review or accounting; then unless otherwise*  
9 *modified by the process described in WAC 388-79-040:*

10 (1) The amount of guardianship fees shall not exceed one  
11 hundred seventy-five dollars per month;

12 (2) The amount of administrative costs directly related to  
13 establishing a guardianship for a department client shall not  
14 exceed seven hundred dollars; and

15 (3) The amount of administrative costs shall not exceed a  
16 total of six hundred dollars during any three-year period.

17 WAC 388-79-030 (emphasis added). Thus, while the rule sets forth certain “maximum”  
18 guardianship fees and expenses, those amounts are expressly subject to modification by WAC  
19 388-79-040 and WAC 388-79-050, which applies to guardianship proceedings after  
20 September 1, 2003. Each of those regulations, in turn, brings the inquiry full circle by  
21 requiring the Department to abide by the Court’s order determining on the particular facts of  
22 the case what is the amount of “just and reasonable” fees that should be allowed in the  
23 guardianship proceeding, even if the amount so ordered exceeds the arbitrary “maximums” set  
24 forth in WAC 388-79-030.

In this regard, WAC 388-79-050(4) (c) provides: “Should the court determine after  
consideration of the facts and law that fees and costs in excess of the amounts allowed in  
WAC 388-79-030 are just and reasonable and should be allowed, then the department will  
adjust the client's current participation to reflect the amounts allowed upon receipt by the

1 department of the court order setting the monthly amounts.”<sup>2</sup> The Department receives notice  
2 of the Court proceedings and all guardianship fee petitions involving DSHS clients, and can  
3 appear and contest the reasonableness or necessity of guardianship fees at the hearing to  
4 approve those fees. As the Commissioner’s memorandum decision properly notes in setting  
5 out the “Applicable Law”:

6 Therefore the APA is not the exclusive remedy for review of  
7 guardian fee determinations. Furthermore, since the State has  
8 an interest in the application of public funds to guardians’ fees  
and costs, the State has standing to appear in this proceeding to  
contest any fees that might be in excess of the WAC standards.

9 If the Department fails to appear at the Court hearing to contest the guardian’s fees and costs,  
10 it cannot later complain that the Court’s award was excessive.

11 B. In Determining the Reasonableness of Guardianship Fees, the Court May, But  
12 Need Not, Consider Whether the Services Provided a Tangible “Benefit” to the  
13 Incapacitated Person’s Estate.

14 It was error for the Commissioner to conclude that the fees and costs of administration  
15 of a guardianship can only be approved if the court determines that a tangible benefit was  
16 conferred on the guardianship estate. The Superior Court may consider any and all factors  
17 that it deems to be relevant and appropriate to the determination of whether the services  
18 performed by the guardian were reasonable and necessary. RCW 11.96A.150. One factor  
19 that the Court *may* consider in this analysis is whether the services of the guardian benefited  
20 the incapacitated person. However, whether or not a benefit was conferred by the services  
21 provided is not the sole and exclusive factor to be considered by the Court.

22 <sup>2</sup> Similarly, WAC 388-79-040(3)(b), applicable to proceedings after June 15, 1998 but before September 1,  
23 2003, provides: “Should the court determine after consideration of the facts, law and evidence of the case, that  
24 fees and costs higher than normally allowed in WAC 388-79-030 are just and reasonable and should be allowed  
then the award letter or document setting the department client's participation shall be adjusted to reflect that  
amount upon receipt by the department of the court order setting a monthly amount.”

1 In the captioned actions, the Commissioner appears to have confused the standard for  
2 approval of attorneys' fees set out in Allard v. First Interstate Bank, 112 Wn.2d 145, 768 P.2d  
3 998, 773 P.2d 420 (1989), with the analogous but distinct standard for approval of guardian  
4 compensation.<sup>3</sup> To the extent that is the case, the Commissioner was in error. First, attorney  
5 fee awards in litigation are distinct because they are in contravention of the usual, well  
6 established "American rule" that each party to litigation bears his or her own attorneys' fees.  
7 E.g., Seattle v. McCready, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997) ("Washington  
8 courts traditionally follow the American rule in not awarding attorney fees as costs absent a  
9 contract, statute, or recognized equitable exception.") Moreover, where attorney fee  
10 "shifting" is authorized, it applies to the fees of the "prevailing party" in the case, such that  
11 the result obtained is necessarily and obviously a factor that must be considered in assessing  
12 the reasonableness of the fees. Cf., e.g., Guillen v. Contreras, 147 Wn. App. 326, 335, 195  
13 P.3d 90 (2008) (disallowing fees where statute required claimant to "substantially" prevail);  
14 McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 289, 951 P.2d 798 (1998) (remanding  
15 for redetermination of attorneys' fee because equitable doctrine pursuant to which fees had  
16 been awarded was a "narrow exception" to the American Rule and authorized attorney fees  
17 only for the first stage of litigation to decide the issue of insurance coverage and not to the  
18 subsequent arbitration to establish the amount of damages).

19 Second, the Allard line of cases incorporates the rules of professional conduct  
20 governing Washington State attorneys, RPC 1.5, which are inapplicable to the conduct of  
21 non-attorney guardians performing non-legal services on behalf of their clients. See Allard,

---

22 <sup>3</sup> Attorneys' fees in a guardianship proceeding are deemed administrative costs under RCW 11.92.180 and WAC  
23 388-79-020. The guardianship Court customarily reviews and approves such attorneys' fees as part of the  
24 administrative costs of the guardianship at the same time as it reviews and approves the guardians' fees. That  
the guardian's and its attorneys' fees are reviewed together, however, does not mean that the guardian's fees are  
thereby subject to review under the same standards as attorneys' fees.

1 112 Wn.2d at 149-150 (approving the trial court’s reliance on the factors in RPC 1.5(a) in  
2 making its attorney fee award). Those rules of professional responsibility guide legal  
3 professionals in the performance of their duties, and are designed in light of “[t]he legal  
4 profession’s relative autonomy [which] carries with it special responsibilities for self-  
5 government.” Washington Rules of Professional Conduct, Preamble ¶ 12. By virtue of its  
6 largely self-governing professional status, “[t]he [legal] profession has a responsibility to  
7 ensure that its regulations are conceived in the public interest and not in furtherance of  
8 parochial or self-interested concerns of the bar.” Id. The relationship between court-  
9 appointed guardians and their wards, in contrast, is at all times under the Court’s supervision  
10 and direction. RCW 11.92.010. The Court should not, therefore, condition guardians’  
11 compensation on the basis of professional responsibility rules designed for a wholly different  
12 purpose.

13 Third, even with regard to attorneys’ fees that are subject to scrutiny under RPC 1.5, a  
14 statutory fee award must take into account the purpose of the underlying statute and whether  
15 limiting fees would tend to undermine the legislative goals of the statutory scheme. E.g.  
16 Martinez v. Tacoma, 81 Wn. App. 228, 243-44, 914 P.2d 86, review denied, 130 Wn.2d 1010  
17 (1996) (trial court abused discretion in limiting attorneys’ fees awardable in civil rights  
18 litigation, because limiting award based on degree of success would undermine the legislative  
19 purposes of enabling vigorous enforcement of the Law Against Discrimination and making it  
20 financially feasible to litigate discrimination claims). Thus, in civil rights cases, it is an abuse  
21 of discretion for the Court to rely on a claimant’s limited success as a basis for limiting fees.  
22 Id. at 241 (“While the degree of success might arguably be an appropriate factor in some  
23 types of cases not involving the Law Against Discrimination, under the facts of this case the  
24 trial court’s heavy reliance on this factor was an abuse of discretion.” (internal citation

1 omitted); see also Steele v. Lundgren, 96 Wn. App. 773, 784 (1999) (“However, although it  
2 may be appropriate for a court to consider the amount of the judgment in comparison to the  
3 fee requested, in cases involving the law against discrimination, heavy reliance on the degree  
4 of success may constitute an abuse of discretion.”)

5 Pertinent here, “[t]he legislative intent of the guardianship statute is ‘to protect the  
6 liberty and autonomy of all people of this state, and to enable them to exercise their rights  
7 under the law to the maximum extent, consistent with the capacity of each person.’”  
8 Guardianship of Beecher, 130 Wn. App. 66, 73, 121 P.3d 743 (2005). As such a guardian has  
9 an affirmative, statutory *duty* “. . . to care for and maintain the incapacitated person in the  
10 setting least restrictive to the incapacitated person's freedom and appropriate to the  
11 incapacitated person's personal care needs, [and to] assert the incapacitated person's rights and  
12 best interests . . . .” RCW 11.92.043(4). That the guardian does not succeed in efforts to  
13 assert the incapacitated person’s rights does not make the assertion of those rights any less  
14 “necessary” and does not preclude reasonable compensation to the guardian. The guardian  
15 has a duty to protect the rights of its ward, and when the guardian undertakes that duty the  
16 statute makes clear that “[a] guardian or limited guardian *shall* be allowed such compensation  
17 for his or her services as guardian or limited guardian *as the court shall deem just and*  
18 *reasonable*. . . . RCW 11.92.180 (emphasis added).

19 C. Where a “Benefit” Analysis Does Apply, the Ultimate Success or Failure of  
20 the Guardian’s Efforts is Not Determinative.

21 Finally, in assessing a guardian’s fees, it must again be kept in mind that the guardian  
22 is at all times an agent of the superior court and can only perform those services that are  
23 authorized by statute or by order of the Court. RCW 11.92.010. A Court authorizes a  
24 guardian to perform services when it is shown that the services are necessary and in the best  
interests of the incapacitated person. And where such necessary services are then performed

1 by the guardian, the guardian is entitled to reasonable compensation, even if the guardian's  
2 efforts on behalf of the incapacitated person are ultimately unsuccessful.

3 For example, a Court might authorize and direct a guardian to apply for Social  
4 Security disability benefits for an incapacitated person recovering from a stroke. An  
5 application for disability benefits protects the best interests of the incapacitated person and,  
6 thereby, confers a benefit on that incapacitated person regardless of whether or not the  
7 application is approved. Cf. Guardianship of McKean, 136 Wn. App. 906, 919, 151 P.3d 223  
8 (2007) ("GSSS did not have to prove that it prevailed in every legal battle with Michael to  
9 show a benefit to the guardianship.") The same result applies even if the guardian has not  
10 obtained instruction and direction from the Court prior to taking action on behalf of the  
11 incapacitated person; the guardian remains entitled to a reasonable compensation even for  
12 efforts that ultimately prove unsuccessful, if his or her actions were within the guardian's  
13 statutory powers and duties and necessary and in the best interests of the incapacitated person.

14 This result comports with the statutory mandate of RCW 11.92.180 that a guardian  
15 "shall" receive reasonable compensation for services performed. The test is whether the  
16 services performed were "necessary," not whether they were "successful." The Department's  
17 own regulations make this clear. Thus, WAC 388-79-020 defines "administrative costs" as  
18 "necessary costs paid by the guardian including attorney fees" and defines "guardianship  
19 fees" or "fees" as "necessary fees charged by a guardian for services rendered on behalf of a  
20 client." And WAC 388-79-050(4)(c) then applies those definitions to requires that the  
21 Department adjust a client's participation to comport with the Court's determination whether  
22 "fees and costs" "are just and reasonable and should be allowed" irrespective of the arbitrary  
23 "caps" set out at WAC 388-79-030.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

CONCLUSION

It is the intent of the Washington Association of Professional Guardians that this amicus brief assist the Court with crafting correct and accurate conclusions of law. The Association takes no position on the application of the law to the specific facts before the Court. In every case, the Superior Court for the State of Washington is charged with the power and responsibility of determining whether or not services provided by a guardian and its attorneys are just and reasonable. The Department recognizes and concedes this power to the Court in its own regulations. See WAC 388-79-050 (4) (d).

It is proper for the Superior Court to be the decision maker as to what guardianship services were just and reasonable, because a guardian is at all times an agent of the Superior Court. A guardian can only carry out those actions that are expressly authorized by the order of the Court or by statute. In evaluating whether guardianship services are just and reasonable, the Court must make a determination as to whether the services provided and costs incurred were necessary. If the services provided and costs incurred are found to be necessary to meet the best interest of the incapacitated person, then the services and related fees and costs should be approved by the Court.

The Association respectfully requests that the Court enter conclusions of law consistent with this amicus brief.

Respectfully submitted this 3<sup>rd</sup> day of May 2010,

AIKEN, ST. LOUIS & SILJEG, P.S.

By \_\_\_\_\_  
Richard L. Furman Jr., WSBA #31101  
Attorneys for WAPG  
[furman@aiken.com](mailto:furman@aiken.com)