

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

In Re the Guardianship of:) Cause N° 10-4-02570-4SEA
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)
 RICK J. LEAVITT) Memorandum Decision
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) (Clerk's Action Required)
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1.0 Background:

Caroline Kline Galland Home, through its' privately contracted attorney, Michelle Graunke, filed a Petition seeking guardianship over Rick J Leavitt. Mr. Leavitt has resided at Petitioner's assisted living facility since August 2008. According to the petition, he possesses no assets other than a nursing home trust account of \$955 and an income stream of \$1,118 per month from social security. He required a guardian because his attorney-in-fact was not responsive to requests for attention to Mr. Leavitt's needs, no other lay person was available to act as his attorney-in-fact and he lacks the funds to pay for a professional fiduciary to act in that capacity. A guardian ad litem, Keith Thomson, was appointed for Mr. Leavitt pursuant to RCW 11.88.090. The appointment was made at the expense of King County due to his lack of assets. An attorney was also appointed for Mr. Leavitt at county expense because Mr. Leavitt expressed an interest in having someone represent him. By the time of the hearing it appeared that Mr. Leavitt's daughter, Tiara Lee Leavitt, was willing and capable of serving as Mr. Leavitt's guardian. All parties agreed to entry of an order confirming her appointment rather than appointing a certified professional guardian. This was based on the GAL report and required medical report as well as Mr. Leavitt's response agreeing to the appointment.

This would have been a routine guardianship matter but for the request for payment of Petitioner's attorney fees and the necessary involvement of DSHS in that question. The Petitioner provided notice and copies of all pleadings to Greg Heartburg, Region 4, Home and Community Services at the DSHS office in Seattle by mail on May 12, 2010. While the proof of service does not indicate it, the court understands that Ms. Graunke also supplied Mr. Heartburg with a copy of her declaration regarding attorney fees and costs. In that declaration she sought court approval of fees in the amount of \$1,685.50 at her hourly rate of \$250 and her legal assistant's rate of \$125 plus costs in the amount of

\$55.15. Ms. Graunke briefly summarized the services provided and related those services to RPC 1.5. And she attached a copy of her time and billing statement showing the date and nature of services provided as well as the amount of time expended by her and her assistant and the amount of money she sought for each daily entry. The State appeared and submitted a pleading entitled DSHS Objection to Payment of Private Petitioner's Attorney Fees From DSHS Client Participation dated June 17, 2010 and filed June 21, 2010. By the time of the hearing Ms. Graunke's fee request had risen to \$1,740.65. She broke that down into allocation of her fees to establish the guardianship since June 16, 2010 at \$384.00 and for fees related to pleadings filed by DSHS in the amount of \$1225.00. This last amount the attorney seeks from DSHS for her legal services necessitated by the State's Objection. The court proceeded to hear argument on the fees question from the Petitioner through her attorneys, DSHS representative Jennifer Boharski, AAG, and the GAL and now issues this memorandum decision.

2.0 Does the court have proper jurisdiction over the parties and subject matter?

2.1 The Petitioner argued at the hearing that DSHS was not a proper party to the dispute over fees and should be excluded. A "Party" is defined in 11.96A.030 as one "...who has an interest in the subject of the particular proceedings and whose name and address are known or are reasonably ascertainable by the petitioner." RCW 11.92.180 states that

Where the incapacitated person is a department of social and health service 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 service 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.

Apparently the Petitioner seeks to have the court conclude that timing controls the application of this statute: that since the guardianship was not yet established, no provision of RCW 11.92 comes into play and, therefore, DSHS is not entitled to party status in this matter. But, practically speaking, the Petitioner seeks compensation from DSHS for services provided before the order was entered but out of the DSHS set aside that is specifically limited by this statute. The Petitioner was required to serve DSHS with notice that it was seeking an order from the court that would affect the State's financial circumstances. Here DSHS was served and made an actual appearance without timely objection. The court acquired in personam through the notice provided to DSHS as well as through the appearance of the Department. Given the statute, no motion for intervention was required.

2.2 DSHS also challenged the court's subject matter jurisdiction based on the Administrative Procedures Act, RCW 34.05. Clearly this court has subject matter jurisdiction over these proceedings and is not constrained to leave these questions to the Administrative Procedure Act and state administrative laws.

This is because WAC 388-79-030 states that "...the superior court may allow administrative costs in an amount set out in an order." And further, the WACs state that "...should the court determine after consideration of the facts and law that fees and costs in excess of the amount allowed in WAC 388-79-030 are just and reasonable and should be allowed, then the department will adjust the client's current participation to reflect the amount allowed upon receipt by the department of the court order setting the monthly amounts." No mention is made in WAC 388-79 of a claim or appeal to be made by the client exclusively using the Washington State APA. This coupled with RCW 11.92.180 requiring notice to DSHS clearly demonstrates that the court has subject matter jurisdiction over the question of appropriate set aside of Medicaid funds to pay certain fees and costs. The State also argues that it possesses special administrative expertise such that the court should defer to its determinations on the question of guardianship fees. The superior court has as much if not more expertise in the arena of guardianship attorney fees and need not defer to DSHS on that question. The superior court, therefore, has subject matter jurisdiction over the question of reasonableness of fees and the application of WACs to this set of facts.

3.0 Are requested attorney fees to establish guardianship reasonable?

3.1. Turning to the question of whether the fees should be compensated, the court must first determine whether the attorney fees sought are reasonable pursuant to relevant statutes and case law. That depends in guardianship cases on whether the services benefitted the guardianship in some clearly defined manner. There must be a substantial benefit to the estate before fees can be approved. It is inappropriate to assess fees against estate when litigation could result in no substantial benefit to estate. *Matter of Estate of Niehenke*, 117 Wash.2d 631, 818 P.2d 1324 (1991). Any benefit conferred on an estate by the actions of a party must be *substantial* before the court will award fees *Estate of Morris*, 89 Wn. App. 431, 949 P.2d 401 (1998). *Allard v. Pacific Nat'l Bank*, 99 Wash.2d 394, 406-07, 663 P.2d 104 (1983). Relevant factors include whether: litigation is indispensable to the proper trust administration; issues presented are neither immaterial nor trifling; conduct of the parties or counsel is not vexatious or litigious; and there has been no unnecessary delay or expense. A number of factors apply including the following: amount and nature of the services rendered, time required in performing them, diligence with which they have been executed, value of the estate, novelty and difficulty of the legal questions involved, skill and training required in handling them, good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance. *Matter of Estate of Larson*, 103 Wash.2d 517, at 522, 694 P.2d 1051 (1985); *In Re Guardianship of Hallauer*, 44 Wash. App. 795, 723 P.2d 1161 (1986). The court may also consider similar factors set out in the Rules of Professional Conduct at RPC 1.5(a)(1)-(8) including:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly and the terms of a fee agreement between the lawyer and the client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment

will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

And excessive hours may properly be reduced either by compensating fewer hours than were requested, or by reducing the requested hourly rate, depending on the trial court's assessment of other facts and circumstances." *Hallauer, supra* at 800. And what fees are reasonable involves more than simply multiplying the number of hours spent on a given case times a specific rate. *Hallauer supra* at 800.

3.2. 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. Given the lack of any significant estate belonging to Mr. Leavitt, compensation at counsel's regular hourly rate is prohibitive. Therefore, some equitable reduction is necessary.

Furthermore, certain criteria should not be used in awarding fees. For instance, estate attorney fees expended to defend the fee request are disallowed because the attorney, and not the estate, is a real party in interest. *Larson* at 532-533. Ms. Graunke did properly document the time and costs she incurred in prosecuting the guardianship petition. She has also separated out the time she spent litigating this fee issue. In view of case law denying payment of fees from the estate to justify and prove entitlement to fees, the Petitioner, and not Mr. Leavitt, should bear that cost. While it might be argued that DSHS should separately be responsible for the fees to litigate this issue, the fact is that this issue is a good faith dispute over the applicability of public assistance laws. As such it is not equitable to assess those fees against the state pursuant to RCW 11.96A.150. The court is also not aware of any other legal basis on which to award fees against DSHS for the cost of litigating the fee issues.

4.0 Who should be responsible for the fees incurred to establish guardianship?

4.1. Here the issue is whether and to what extent Mr. Leavitt's social security income should be allocated to payment of Petitioner's fees before those funds are paid to DSHS to offset public assistance Mr. Leavitt is receiving. RCW 11.96A.150 permits the court to award fees as between the parties and from the estate as it deems necessary in the proper exercise of its jurisdiction but that is not the end of the inquiry because federal and state laws come to play when dealing with Medicaid clients. Mr. Leavitt has been a DSHS client Medicaid recipient since 2001. He is currently receiving \$54,926.16 in public benefits from DSHS paid toward the cost of his skilled nursing care totaling \$67,654.80. The balance comes from his social security income of \$1118.00 per month after he retains \$57.28 for personal expenses. By operation of federal and state law his income is required to be paid to DSHS to partially offset the cost of these benefits. However, pursuant to federal law and state regulations, certain charges may be paid out of his social security income before it is turned over to DSHS.

4.2 Approval of attorney fees as a set-aside from Mr. Leavitt's social security income: It is DSHS's argument that attorney fees incurred by a petitioner for guardianship such as those sought by Ms. Graunke, are not encompassed within the stated exceptions. More particularly DSHS asserts that Petitioner's fees are not "fees" or "costs" as defined in WAC 388-79-020. It argues that all of a client's income must be paid toward the cost of care with the difference being paid by the State through Medicaid. There are some exceptions, however, that allow for some expenses to be incurred and paid out of his income before computing the amount to be paid toward the costs of care. When these exceptions apply, the State simply reduces the client's participation thereby increasing the overall contribution by the State to the cost of Mr. Leavitt's care. Applicable permitted deductions appear in WAC 388-513-1380 and include a small personal needs allowance (here Mr. Leavitt's \$57.00 per month). Other permissible deductions not relevant here include spousal and family maintenance, medical expenses not covered by Medicaid, SSI payments in certain circumstances and some costs of maintaining a home. The WAC also permits the deduction of "Guardianship fees and administrative costs including any attorney fees paid by the guardian....only as allowed by chapter 388-79 WAC." These fees and costs are further discussed in WAC 388-79-020 to include "necessary costs paid by a guardian including attorney fees." Those fees, in turn, are further limited to \$700 for "costs directly related to establishing a guardianship" by operation of WAC 388-79-030. Other post-appointment fees are permitted by the WAC limited to \$175 per month for guardian's routine fees and up to \$600 for any three year period for guardian's attorney fees for estate administration.

4.3 It is argued by the State that the guardian may pay up to \$700 to its own attorney to establish a guardianship, but the appointed guardian cannot pay to another Petitioner its attorney fees to establish the guardianship. DSHS apparently argues that because these costs are paid by a guardian who has not yet been appointed, the pre-appointment fees of the petitioner's attorney can never be paid. Specifically, DSHS argued that "Nothing in chapter WAC 388-79 or the related laws and regulations allows court-ordered attorney fees owed by the client to be deducted from participation, unless those fees were incurred by the client's court-appointed guardian." See DSHS Objection to Payment of Private Petitioner's Attorney Fees for DSHS Client Participation, filed 6/21/10, P.6, Lines 18-21.

26

If that is, in fact, what DSHS asserts, there is a complete disconnect between the WACs and reality. Nothing in the WACs specifically limits the guardian to payment of its own attorney fees. What makes sense is to read the WAC and relevant statutes and case law in a manner that renders meaning and effect to the words in the context of guardianship proceedings. The court does not see, and DSHS has not explained, what other costs "related directly to establishing a guardianship" there would be other than Petitioner's fees. The Guardian Ad Litem and Mr. Leavitt's attorney were appointed at county expense, the petitioner's attorney presumably created the proposed order, a medical report was obtained often provided without fee or paid for by the court, and the guardian had no authority prior to appointment to pay any fees and costs. Any other possible fees would be incurred for administration, not establishment, of the guardianship after appointment. Furthermore, the court in every guardianship proceeding enters an order after the guardianship is established allocating and approving the amount and source of payment of the petitioner's fees. And as pointed out by the Guardian Ad Litem in argument, 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. Logically, there can be no conclusion other than that the \$700 specified for establishing guardianship over a DSHS Medicaid client should be available to the petitioner, no matter who that is, to pay the petitioner's fees. And those fees should be paid out of the income of the client pursuant to WAC 388-79-030.

4.4 DSHS argues that it should not be required to set aside any funds to establish guardianship because every DSHS Medicaid client will be receiving this benefit thereby subjecting the state budget to significant costs. However, DSHS did not submit any background information about the rule-making process that led to the allowance of \$700 to be paid toward costs of establishing guardianship. The Attorney General's Office possesses the authority to file a guardianship petition in any case where there is cause to believe a guardianship is necessary and no private party is able and willing to petition. RCW 11.88.030(2). If no petitioner is willing to file because DSHS will not allow the set-aside of \$700 toward the Petitioner's fees, will DSHS file all needed petitions in every such case? That is not an issue that was answered here but, should the Department decline to file and also refuses as well to compensate any private petitioner who is not seeking self-appointment, the loser will be the Medicaid client who will have no access whatsoever to the courts. 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 the real issue here.

5.0 Conclusion: Petitioner's attorney incurred reasonable fees to successfully accomplish a necessary order appointing a guardian for Rick J. Leavitt. Fees Ms. Graunke has incurred to litigate her right to compensation inure to the attorney's benefit, not Mr. Leavitt's. Therefore, time allocated to litigation of the fee question should not be paid out of his state. Mr. Leavitt has no estate other than an income

stream from social security. By operation of law his income with certain exceptions must be paid to DSHS to offset these Medicaid benefits. One exception is a one-time payment of \$700 for attorney fees and costs to establish guardianship. Here, Petitioners attorney should be paid \$700 for her services to establish guardianship for Mr. Leavitt as a set-aside from his social security benefits before funds are allocated to offset the cost of his care. WAC 388-79-030. Petitioner's attorney shall present an Order consistent with this memorandum decision.

Respectfully entered this 21st day of July, 2010.

Eric B. Watness
Court Commissioner
King County Superior Court

28

Agenda Item 3

Office of Public Guardianship