

What Services Should Your Guardianship Practice Provide?

By Christopher J. Fast, CPG

On October 21, 2009, a Jefferson County Superior Court ruled against a Clallam County guardianship agency. Many Washington guardians have feared such a ruling might be entered against their own practices since 2005 and took appropriate measures. Here is why you may want to start looking at exactly which services you should and shouldn't be providing through your guardianship practice and how you are advertising those services.

Background: In 2005 the Washington Court of Appeals handed down a surprising and somewhat bizarre decision in the matter of *Cummings v. Guardianship Services of Seattle*.

At the time, the decision sent shock waves through the professional guardianship community, as people scrambled to understand the implications for their practice and for their licensing requirements. The part of the appellate court's ruling that is of importance to professional guardians is the Court of Appeals' concurrence with the plaintiff's assertion that the guardian is a "home care agency." The decision states that a "home care agency is defined as "a person administering or providing home care services directly or through a contract arrangement to individuals in places of temporary or permanent residence. . . . (6) "Home care services" means nonmedical services and assistance provided to ill,

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Education Committee Update

By Glenda Voller, CPG & Mimi Hudson, CPG

The WAPG Education Committee presented a Fall Training on November 10, 2009 at the Seatac Airport Hilton. This was an all day session offering 6 CLE credits: 2 credits for GOE, 2 for GOP, 1 General and 1 Ethics credits.

This training was a success by most measures. Seventy-one CPGs attended, 35 of which were WAPG members. Those 35 saved \$50.00 on their registration. We encourage the other 36 of you to consider joining WAPG and getting your dues back through savings on future trainings.

Think about it. Seventy-one CPGs out of approximately 268 CPGs statewide. That's about 25% attendance. We are aware that many CPGs are located a great distance away from the Seattle-Tacoma area training location. If you were at the training, and you felt it was helpful, please tell other CPGs you know about it and encourage them to attend. If you did not attend this training, please consider coming in May 2010. WAPG will continue to offer two trainings per year, one in the spring and one in the fall, and together the spring and fall trainings will fulfill all the continuing education credits needed to keep your certification current.

Our next training will be in May 2010. The exact date will be sent via email when it is confirmed. This publication will also announce upcoming trainings.

Leesa Camerota, CPG, is the WAPG education event coordinator. If you have questions about events or suggestions for future training topics, please contact her at leesa@capitolguardian.com.

Arbitration Agreements Are Back

By Christopher J. Fast, CPG

A number of years ago, many guardians noticed a trend at nursing homes. The nursing homes, particularly facilities that are part of a larger chain with corporate offices outside of the state of Washington, were slipping arbitration agreements into the half inch of new resident admission paperwork, or worse, were making the resident's admission to the facility contingent on signing the arbitration agreement. This trend was not limited to corporate nursing facilities. We've all signed scores, possibly hundreds, of arbitration agreements. Drop your car off for some body work, buy a ski area pass, purchase a warranty for your new dishwasher. The fine print will undoubtedly reveal an arbitration agreement on a large number of every-day contracts you sign. It's a veritable fad in the legal world.

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disabled, or vulnerable individuals that enable them to remain in their residences. Home care services include . . . {p}ersonal care such as assistance with dressing, feeding and personal hygiene to facilitate self-care; . . . housekeeping, shopping, meal planning and preparation . . . "Person" means any individual, business, firm, partnership, corporation, company, association, . . . public or private agency or organization . . . that employs or contracts with two or more individuals." And pursuant to RCW 70.127, a home care agency must be licensed by the state.

Huh? I thought I just needed to be certified. Now I need to be licensed as a nursing home too? Thankfully, no. The decision is off the mark, and here is why.

Most professional guardians have at some point hired in-home care givers, personal assistants, or companion care workers who provide some or all of the above-described services. And most of us will continue to hire these individual to care for our wards. Guardians are, after all, mandated under RCW 11.88.005 to maintain their wards in the least restrictive setting and to balance the care needs and personal preferences of the incapacitated person with each individual ward's financial reality. Further, all guardians are aware of the conflict of interest between the care giver and the care manager. It is inappropriate for a nursing home to become its resident's guardian for the very same reason that it is inappropriate for a guardian to become its ward's care giver.

What struck many guardians in 2005 when they heard about this decision, that is, after the initial panic, was a sense that the appellate judges who wrote the decision were a little unclear on what it is that guardians do. Verily, guardianship cases rarely make it out of the Ex Parte Department, let alone all the way to the Court of Appeals. The idea that any guardian who was or may in the future hire care givers to care for a ward would have to become the equivalent of a licensed adult family home owner is ludicrous.

Nevertheless, many guardians chose caution and took a few steps to decrease the likelihood of getting sued if something horrible happened to one of their wards. If they hadn't already, many guardians switched from hiring and managing individual care givers directly to paying a licensed in-home care agency to staff and manage the incapacitated person's home care.

What if it is more appropriate to continue directly employing the existing care givers? The guardian should set up an employment relationship such that there is no confusion about the employee-employer relationship. The guardian must establish through clear documentation that the care workers are not employees of the guardian/guardianship agency, and the payroll

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Most guardians correctly noted that a guardian does not have the power to waive an incapacitated person's right of access to the justice system. Only the court with jurisdiction over the guardianship can waive such a right, and then only for good cause shown. But what about elderly nursing home residents without a court-appointed guardian?

In 2006, Joyce Pashley Stockwell, the director of DSHS Aging and Disability Services Administration (ADSA), a state agency with regulatory powers over licensed skilled nursing and residential care facilities, stepped in and issued a memorandum to facilities titled "ADSA NH #2006-008," also known as the "Dear Administrator" letter. The memorandum listed the relevant federal laws and Washington statutes and clearly directs:

- 1) The facility may not present arbitration agreements to residents at the time of admission;
- 2) The facility may not ask or require the resident to sign an agreement that waives the rights to "a jury trial, attorney's fees and costs, and other rights;"
- 3) The resident must understand what he/she is signing and the full potential impact of the agreement.

The memo goes on to list the questions that DSHS will likely ask of any facility it finds is providing arbitration agreements to its residents. With a shot across the bow like that, it would seem like the end of the story.

This guardian's recent experience and anecdotal evidence from other guardians suggests that some nursing homes are once again acting in violation of points #1 and #2 above. The Puget Sound area nursing home that presented an arbitration agreement to this guardian is owned by an out-of-state corporation. This guardian politely declined to sign the agreement and provided the apparently green admissions worker with a copy of ADSA NH #2006-008, advising her to fax a copy to her corporate legal office. Perhaps this will help out some vulnerable individuals who do not have the benefit of a professional guardian's oversight.

The ADSA letter is available at:

<http://www.aasa.dshs.wa.gov/professional/letters/nh/2006/06-008.htm>

The WAPG Newsletter

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Defining a Guardian's Worth

by Carrie Shirk, CPG

Do you ever feel like a hamster on a wheel? How many times have you started what seemingly was a thirty minute to one hour project only to realize mid-way it would take many hours or even a day to accurately complete? Do you feel like the hamster when you deal with DSHS on your Medicaid and COPES cases? If you have never felt this way then you must have all private pay clients.

So starts the process of defining a guardian's worth. What is YOUR time worth? With your training and knowledge, how do you value your time? We know what we can bill for our private pay cases. What is our time worth for DSHS cases? Should it be less? Often our State pay cases are more work than our private pay cases. However, what we hear from the State is that they don't recognize a "rate" for guardians. Their only rate is \$175 a month. Realistic?

I advocate hard for my clients. I do not believe in the "cookie-cutter" approach to case management. I never know what time and effort will be required for a professional, caring effort until I have a chance to review client histories and medical backgrounds. Then the day-to-day issues always change, don't they? I realize DSHS fears that someone might "milk" the system, but I think few professionals would risk their careers by padding hours or efforts; after all, the proof is in the quality of care and reporting. We guardians want the best for our clients.

I have one particular client that I go round and round with the State over his issues. If it isn't making sure the award letters are correct then it's fighting over having his OTC meds reimbursed, then it's time for his annual accounting. He is my only client for whom I must prepare a yearly accounting due to his issues and all the time involved, time that we, in our minds, call extraordinary, but don't call them that in your reports. Be sure you say, "reasonable and necessary."

This one client though is higher functioning, quite demanding and high maintenance. I began my journey with Mr. Happiness, (that is my personal nickname for him, because he is anything but happy), in January 2007, when I was appointed his private pay limited guardian. By March a full guardianship was granted. When I went to court with my initial reports, I requested \$3,800 in addition to the private pay fees I received through March when I became his full guardian. Some of the extraordinary duties I performed were: responding to his arrest; filing indigence papers; getting him set up in a motel after his eviction; arranging for 3 meals a day; attending an emergency hearing with AG's office, his attorney, and APS; completing the Medicaid application; moving his belongings to a nursing home; and attending his bankruptcy class for him. Everything but the bankruptcy took place in a one-week period.

You are saying to yourself "been there done that." These are just a few of the fun things that were required of me. His family was no help because of his anger management issues, and he has no friends. When I filed my declaration of fees I also prepared a long detailed declaration, blow by blow, of what was required of me. In my declaration of fees and costs I indicated that I billed \$65 per hour. I did receive the \$3,800 and it was approved by DSHS at my \$65 per hour rate.

The fun continued in 2008. I dealt with finalizing his divorce, his behavioral issues, and a move to an assisted living facility. His case manager and I felt he could thrive in an ALF, and in the nursing home he was very depressed. There was freedom at the ALF, more activities, and the other residents were at a higher cognitive level. He was still high maintenance with a lot of work performed since the 2007 accounting but I only asked for \$891 this round. Though I billed many hours every month, I only asked for fees for prep work for the yearly documents and fees to see my client through his divorce. DSHS did not balk at that.

In 2009 I asked for \$3,346. They countered with \$1,500 and we settled on \$2,462. I requested two separate amounts totaling the \$3,346. One portion was for substantial time in dealing with my client's issues and one for the prep work for reports. I again prepared the detailed declaration explaining what I felt my time was worth and what I could be paid on private pay cases. Basically it came down to this: I could have received \$6,500 for the time I worked for this client in the period of a year on a private pay case. I received over the year the standard \$175 X 12 for \$2,100 so I asked for an additional \$2,540. They countered with \$1,746. For document preparation for this one-year period I requested \$806.58. They countered with \$716.21. All said and done it still worked out to about \$52/hour. I was told when discussing a value that DSHS did not recognize a "rate" for guardians for "extraordinary" work. Their word, not mine.

Interestingly, while preparing my declaration supporting my request for reasonable and necessary fees, I contacted the LTC facility where my client previously resided, and then I contacted his current ALF. Both have skilled nursing however the skilled nursing at the ALF is limited to day time hours. The ALF is definitely a more pleasant place to live and my client is

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system is set up to pay directly from the guardianship estate. The employment contract with the care givers should reflect the fact that it is the incapacitated person, through his/her guardian, who is the employer. As a rule, any guardian managing in-home care providers should obtain legal counsel from an attorney specializing in employment law regarding the employment contract and Washington employment law generally, but in particular about the guardian-ward-employee relationship.

Fast forward to 2009. The off-the-mark appellate decision has finally been cited by a superior court judge in a ruling against a guardianship agency. The case in question is *Hale et al v. Bridge Builders, Ltd. et al.* The *Opinion and Order on Motion for Reconsideration* signed by Judge Verser of Jefferson County Superior Court on October 21, 2009, cites *Cummings* as his case law.

Judge Verser found that Bridge Builders violated RCW 70.127 because the services which they provide and which they previously advertised in their promotional materials (wisely, their website has been taken down as of this writing) go beyond care management services offered by all full-service guardianship agencies that I am familiar with.

Bridge Builders was offering services ranging from daily medication reminder calls to assistance with bill paying, personal shopping, stocking the refrigerator, pet walking, computer tech help, and delivering hot meals, to name a few. Judge Verser concludes, "The services provided by Bridge Builders appear to be more than 'case management service.' After careful consideration, the court concludes that there is a genuine issue of material fact as to whether Bridge Builders is an agency required to be licensed under chapter 70.127 RCW."

While many good arguments exist for the efficiencies created by the consolidation of services with one service provider, the guardian must always be mindful of the difference between managing the care and performing the care. This is a good reminder to all of us to take a critical look at the services we provide to our clients, how we advertise our services, and most importantly, how those services may be perceived by others. Even though, the *Hale* case involved power-of-attorney relationships not supervised by the court, I will bet that Bridge Builders will have to count on increased court scrutiny of its guardianship cases in the future.

Defining a Guardian's Worth

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thriving there. The State is saving \$1,900 per month by my client residing in an ALF opposed to his former LTC facility. I thought the value I was providing the State was a good argument for having additional fees paid to me by the State. They do not always see it that way.

Speaking of value. There is a huge disparity in state reimbursement rates between AFH's and LTC facilities. Here is an example. One client just became COPES eligible; I paid \$3,500 when she was private pay, and that really was a bargain. The State assessed her and came up with a whopping \$1,900 per month (\$63/day) of which \$1,221.21 is what I pay to the home. The balance of \$679 comes from the State. It appears to me that if you are not completely bedridden your AFH is not going to receive more than about \$63 per day. Another AFH owner has two bedridden residents. One was assessed out at \$146/day and another was low-balled at \$78/day. DSHS makes no adjustment for anger management problems, behavioral issues, dementia/Alzheimer's issues, sun downing, etc. If they can walk, even if barely, and say a few words, they are assessed at a low rate.

This issue with my client is not over. I want my client's AFH to be paid what they are worth. Due to time constraints I was unable to determine what an LTC would receive for this client. In our area I suspect it would be \$5,000-\$6,000. To be able to adequately care for our clients, adult family homes need to be able to receive fees that are more commensurate with long term care facilities. Receiving a third to half of what nursing homes receive is not adequate.

Finally, how do we make DSHS understand compensation for our services? I mentioned many additional duties I performed for my client in 2007-08. The time we spend driving to and from a client's residence, client time, preparing reports (Oh, the reports!), reviewing medical and facility reports, staff consultations, and care conferences -- all must be factored into the worth of a guardian. One thing is very clear to me at this point in my career. Correctly defining worth will be the cornerstone to retaining professional, motivated guardians as well as good adult family homes. For our clients to thrive, quality time is required and we all realize that is not limited to 8-5. Each client/resident is unique with their own special requirements, and they deserve minimum level of care. DSHS needs to recognize a rate for guardians. A decent rate. How long before adult family homes and guardians stop accepting Medicaid/COPES clients. Many already are saying no. Can you blame them? We all have to put food on our own tables.

Carrie L. Shirk is a sole practitioner guardian in the Wenatchee area. Most of her clients lead a more settled life than Mr. Happiness.

WAPG invites you to get involved!

Is there a topic of particular concern that you would like to do something about? Join the WAPG committee handling the issue. Go to www.wapg.org to find the contact info for the committee chair(s). Is there no committee handling that issue? Contact Scott Malavotte (425-883-1181 or mal.assoc@verizon.net) or Michael L. Johnson (206-623-3030 or hardmanjohnson@gmail.com) to start your own committee.